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Neglected Realities: How the Oversight of Systemic Racism Hindered the Efficacy of Section 7AA in Enhancing Outcomes for Tamariki Māori within Oranga Tamariki's Care

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Abstract

This paper delves into the connection between policy implementation, systemic racism and the outcomes of tamaiki Māori within Oranga Tamariki's care. The focus centres around s 7AA, a policy introduced to improve outcomes for Māori but failed due to the omission to consider systemic racism. Through an in-depth exploration of historical contexts, policy frameworks, sociocultural dynamics and case analysis, the paper highlights how the failure to address systemic racism resulted in the failure of the section to achieve its purpose.

Policies, especially those concerning marginalised groups, must appreciate the effects of systemic racism and actively negate these effects. The system requires culturally sensitive and equity-driven approaches to policy formation and implementation to rectify the deeply entrenched disparities within state care. The paper's case analysis provides examples of systemic racism guiding decisions within the courts. The cases reveal how biases against Māori customs result in the assumption that Western societal preferences and laws should be given more weight in the decision-making process. These cases provide a reminder of the urgency for systemic reform.

Ultimately, the essay underscores the pressing need for policies that are not only well-intentioned but also attuned to the systemic barriers that can undermine their transformative potential, especially within the context of marginalised communities like tamariki Māori in Oranga Tamariki's care.

Keywords

Oranga Tamariki, Section 7AA, Systemic Racism, Child Protection System, State Care.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7979 words.

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I Introduction

In pursuit of improving outcomes for tamariki Māori in state care, the New Zealand Government passed s 7AA of the Oranga Tamariki Act.[1] The section was designed to enhance outcomes for tamariki Māori and included important Māori cultural values in the Act.[2] However, this paper argues that s 7AA failed to consider systemic racism, resulting in the section's failure. The complexities of New Zealand's history and the impact of systemic racism on society shed light on the failure of the section. In order for significant change to occur, systemic racism must be actively negated. This report critically evaluates the failure of s 7AA, identifying the omission to address systemic racism as the root cause of the failure. Due to omission, the section failed to improve the outcomes for tamariki Māori in state care.

Initially, an analysis will be made of the history of state care in New Zealand and the reforms made to improve the outcomes for Māori. The analysis includes the Puao-Te-Ata-Tu report, [3] the Expert Panel report[4] and the Waitangi Tribunal report (Wai 2915).[5] Despite decades of legislation, the disparity has remained persistent and systemic racism has remained unaddressed.

Subsequently, an investigation will be made into s 7AA, the intended purposes and how these purposes have not been fulfilled. The section has the potential to produce substantive change, placing obligations on the Chief Executive of Oranga Tamariki. A reduction of the disparity and the improvement of outcomes for tamariki Māori are at the heart of these obligations. On deeper investigation, it becomes clear that the obligations do not require enough to achieve the intended purpose.

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[1] Oranga Tamariki Act 1989, s 7AA.

[2] Oranga Tamariki Ministry for Children "Section 7AA background" (16 September 2022) < https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/section-7aa/our-background/>.

[3] Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare *Puao-Te-Ata-Tu (Day break)* (New Zealand Government, September 1988).

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

[5] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021).

The report analyses systemic racism in New Zealand, the impacts on Oranga Tamariki and views on how to amend the problem. New Zealand's dark history of colonisation, insertion of British laws, the breakdown of Māori customs and te tiriti o Waitangi / the Treaty of Waitangi closely tie to systemic racism.[6] Decades of oppressive legislation have provided a system that suppresses Māori customary preferences, forcing Māori to adhere to British laws and societal preferences.[7] The system has facilitated a structure in which Oranga Tamariki inserts British laws and societal preferences into the care of tamariki Māori.

Furthermore, the report contextualises s 7AA within research regarding systematic racism. Links will be drawn between the academic research and the argument that the section's failure results from the omission to consider systemic racism. Systemic racism contributes to the disproportionate outcomes for tamariki Māori; therefore, the assumption results in failing legislation such as s 7AA.

Concurrently, two cases will be analysed to demonstrate the Court's interpretation of s 7AA. The cases to be analysed are *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*[8] and *McHugh v McHugh.*[9] The cases provide insight into the practical failings of the section. Judgments from both cases indicate the ability for starkly different weighting to be placed on the importance of s 7AA.

Finally, this report concludes by formulating recommendations for the future. Acknowledgment is made of the fact that more than legislation will be required to alleviate the impacts of systemic racism, as this is not solely a legal issue. However, legislation has a role in mending the issue. A system must be created that acknowledges the impacts of systemic racism and has the purpose of reducing the impacts. The report emphasises the importance of implementing substantial change to the system alongside legislative amendments, as substantive change will require more than the addition of a singular section into an Act.

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[6] Maria Haenga-Collins and Keith Tudor "Racism in New Zealand" (2021) 21(4) J Couns Psychol 40 at 41-42.

[7] At 44-45.

[8] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ* [2021] NZFC 9089, [2021] NZFLR 1.

[9] *McHugh v McHugh* [2022] NZHC 1174, [2022] NZFLR 168.

II History of State Care Legislation in New Zealand

State care in New Zealand has a long history tracing back to state-established industrial schools in the 1860s.[10] While acknowledging this lengthy history of state care in New Zealand, this report focuses on the significance of the Puao-Te-Ata-Tu report as the starting point. The report investigated the disproportionate number of Māori in the New Zealand welfare system and proposed 13 recommendations to fix the issue.[11] Puao-Te-Ata-Tu determined that the underpinning of the failure of state care in New Zealand was colonisation, racism and structural inequity. It delineated three forms of racism: personal, cultural and institutional.[12] Among these, institutional racism was deemed the most insidious, demonstrated by its impacts, including the automatic benefits gained by the dominant culture in New Zealand's social and administrative institutions.[13] Monoculturalism fuelled institutional racism, which upheld the majority culture and ignored the minority.[14] Consequently, New Zealand's institutions reflect a Pakeha culture, leading to a system that inadvertently places a bias on Māori culture. The bias is reflected in all aspects of society, including legislation.

Puao-Te-Ata-Tu was the beginning of a line of failed attempts to improve outcomes for Māori in state care. The Crown introduced the Children, Young Persons, and Their Families Act 1989 based on the report's recommendations. The Act aimed to improve the wellbeing of Māori, emphasised by s 13, which outlined that the primary caregivers for tamariki are whanau, iwi and hapu, subsequently stating that where intervention was required, priority should be placed with whanau, iwi or hapu members.[15] Notably, the Act included whanau, hapu, and iwi in the definitions of family duties in an effort to integrate Māori culture into the system.[16] Despite the Act's good intentions, it ultimately failed to meet the needs of vulnerable children.

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[10] Abuse in Care: Royal Commission of Inquiry "The journey for people in State care" <https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/from-redress-to-puretumu-4/1-1-introduction-2/1-1-introduction-5/>.

[11] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break)*, above n 3.

[12] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break)*, above n 3, at 77-78.

[13] At 78.

[14] At 78.

[15] Emily Keddell "Cultural Identity and the Children, Young Persons, and Their Families Act 1989: Ideology, Policy and Practice" (2007) 32 Soc policy j NZ 49 at 49.

[16] at 51.

Multiple reviews and reforms followed the failure of the Children, Young Persons, and Their Families Act. These resulted in an overhaul of the system between 2015 and 2017. In July 2015, an expert panel released an interim report reviewing the operation of the child protection system and outlined a future framework.[17] The panel observed that the existing system did not meet the needs of vulnerable children.[18] The panel described the system as "fragmented, lacks accountability, and is not well-established around a common purpose".[19] The panel advocated for future frameworks to address the issue of Māori overrepresentation. A package of reforms was outlined, all with the objective of improving the child protection system. As a result, the Government established the stand-alone government department Oranga Tamariki, which became operational on 1 April 2017.[20] The reform package included a two-phase approach, with phase two renaming the Children, Young Persons and Their Families Act to the Oranga Tamariki Act 1989.[21] Majority of the amendments made to the Act came into force on 1 July 2019.[22] The amendments included s 7AA to recognise the practical commitments to te tiriti, o Waitangi / the Treaty of Waitangi.[23] Presently, New Zealand's systems overseeing child protection is governed by the Oranga Tamariki Act 1989.

III Section 7AA of the Oranga Tamariki Act 1989

Section 7AA of the Oranga Tamariki Act 1989 was introduced through s 14 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017. As subsequently articulated by Oranga Tamariki, the Act's primary purpose was to improve the outcomes for

[17] Modernising Child, Youth and Family Expert Panel, Modernising Child, Youth and Family *Expert Panel Final Report: Investing in New Zealand's Children and their Families*, above n 4, at 5.

[18] At 6.

[19] At 7.

[20] Ministry of Social Development "New children's agency established – the Ministry for Vulnerable Children, Oranga Tamariki" < https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/new-childrens-agency-established.html>.

[21] Ministry of Social Development "Phase two legislation reform: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017" < https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/new-childrens-agency-established.html>.

[22] Ministry of Social Development "Phase two legislation reform: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017" < https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/investing-in-children/new-childrens-agency-established.html>.

[23] Oranga Tamariki Act 1989, s 7AA(1).

tamariki and rangatahi Māori in state care.[24] Section 7AA places obligations on the Chief Executive to ensure their actions comply with the obligations under the treaty of Waitangi / te tiriti o Waitangi. Under s 7AA(2), the Chief Executive must ensure that:[25]

> (a) the policies and practices of the department that impact on the wellbeing of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:
> (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

Section 7AA(3) permits the formation of strategic partnerships.[26] Section 7AA(4) requires the Chief Executive to respond to partnership invitations.[27] Finally, s 7AA(5) requires that the Chief Executive annually produce public reports on the measures taken to fulfil the obligations under s 7AA.[28]

To ensure compliance with the obligations under s 7AA(2)(a)-(b), Oranga Tamariki introduced a set of quality assurance standards.[29] The standards include upholding and protecting Māori rights and interests; hearing and acting on Māori voices; ensuring equity by reducing disparities; considering mana tamaiti, whakapapa, and whanaungatanga; and valuing the Māori evidence base.[30]

A Section 7AA(2)

[24] Oranga Tamariki "Section 7AA background" (16 September 2022) <https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/section-7aa/our-background/>.

[25] Oranga Tamariki Act 1989, s 7AA(2).

[26] Oranga Tamariki Act 1989, s 7AA(3).

[27] Section 7AA(4).

[28] Section 7AA(5).

[29] Oranga Tamariki Ministry for Children *Section 7AA Quality Assurance Standards* (September 2021).

[30] At 4-6.

The wording of s 7AA indicates the purpose of the section is to improve the outcomes for Māori in state care. A deeper investigation of the wording indicates that the section falls short of effecting substantive change. Section 7AA(2)(a) merely articulates that policies and practices must have the "objective of reducing disparities", yet the section does not require the fulfilment of this objective.[31] Consequently, the section does not require the Chief Executive to actively diminish disparities. Rather, it focuses on acknowledging the existence of these disparities and creating policies and practices with the objective of reducing them. While it could be argued that an objective to reduce the disparity will result in a reduction, this assumption is proved wrong by the Waitangi Tribunal inquiry into Oranga Tamariki.[32]

Following an urgent inquiry, the Waitangi Tribunal released a report addressing the disproportionate number of Māori tamariki in Oranga Tamariki's care.[33] In 2020, Māori comprised 75 per cent of the children in Oranga Tamariki's care.[34] The statistics starkly contrast the earlier figures, 54.7 per cent in 2013 and 61.2 per cent in 2017.[35] The steady increase indicates that the mere 'objective' to reduce disparities is not enough to action any change.

Section 7AA(2)(b) inserts the words ‘mana tamaiti’, ‘whakapapa’ and ‘whanaungatanga’ into the act. Section 2 defines mana tamaiti, whakapapa and whanaungatanga:[36]

> mana tamaiti (tamariki) 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

[31] Oranga Tamariki Act 1989, s 7AA(2)(a).

[32] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5.

[33] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 1.

[34] At 48.

[35] At 46.

[36] Oranga Tamariki Act 1989, s 2.

> whakapapa, in relation to a person, means 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
>
> whanaungatanga, in relation to a person, means: (a) the purposeful carrying out of responsibilities based on obligations to whakapapa, (b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met, (c) the wider kinship ties that need to be protected

As a result, Oranga Tamariki created mana tamaiti objectives to satisfy the obligations under s 7AA(2)(b). The objectives are as follows:[37]

> (1) to support participation, (2) to support, strengthen and assist whanau, (3) preference of whanau placement, (4) support connections to whanau, hapu and iwi, and (5) support transitions home and into the community.

In the Wai2915 report, the claimants put forth two critical points of contention concerning the subsection. Firstly, the subsection merely requires the Chief Executive to 'have regard to' mana tamiti, whakapapa and whanaungatanga rather than acting according to these principles.[38] Secondly, the subsection has selected a few Māori values instead of requiring the Chief Executive to act in accordance with the Māori worldview as a whole.[39]

Addressing the first criticism, the requirement to merely "have regard to" the values does not strictly guarantee that the values will be integrated into policies, practices and services. The phrase implies that the values should be considered but does not require that the values be upheld. This aspect becomes apparent on the Oranga Tamariki's website. It is simply stated that the policies and practices must be developed with the aim of meeting the mana tamaiti

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[37] Oranga Tamariki Ministry for Children "Practice for working effectively with Maori" (22 November 2019) <https://practice.orangatamariki.govt.nz/core-practice/working-with-maori/how-to-work-effectively-with-maori/practice-for-working-effectively-with-maori/>.

[38] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 111.

[39] At 111.

objectives, not that the mana tamaiti objectives have to be met.[40] The wording introduces a level of leniency in the application of the obligations. The term 'regard' is defined in the Oxford Dictionary as "attention to" or "thought and care for".[41] The definition of 'regard' suggests that the values might not significantly impact the formulation and implementation of the policies, practices and services. Nevertheless, the requirement outlined in s 7AA(2)(b) would still be considered met in a technical sense.

Regarding the second criticism, s 7AA(2)(b) only inserts the words 'mana tamaiti' 'whakapapa' and 'whanaungatanga'. The section specifies aspects of the Māori worldview instead of requiring the Chief Executive to act in accordance with the Māori worldview as a whole. Tikanga Māori encompasses many different meanings, with a consensus being that it means 'the Māori way' or is done in accordance with 'Māori custom'.[42] Sir Hirinir Moko Mead described Tikanga as:[43]

> Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do …

Tikanga Māori underpins all activities engaged in by whanau, hapu and iwi, providing a framework to guide actions in life.[44] Tikanga is comprised of a set of core values which were set out and defined by Williams J in these terms:[45]

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[40] Oranga Tamariki Ministry for Children "Practice for working effectively with Maori" (22 November 2019) <https://practice.orangatamariki.govt.nz/core-practice/working-with-maori/how-to-work-effectively-with-maori/practice-for-working-effectively-with-maori/>

[41] Oxford Learners Dictionary 'regard' (2023) <https://www.oxfordlearnersdictionaries.com/definition/american_english/regard_2#:~:text=%2Fr%C9%AA%CB%88%C9%A1%C9%91rd%2F,without%20regard%20to%20speed%20limits.>.

[42] Hirini Moko Mead *Tikanga Maori: Living by Maori Values* (Revised Edition, Huia Publishers, 2016) at ch 2.

[43] At ch 2.

[44] At ch 2.

[45] Joseph Williams "The Harkness Henry Lecture Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 LR 1 at 3.

> Whanaungatanga or the source of the rights and obligations of kinship; mana or the source of rights and obligations of leadership; tapu as both a social control on behaviour and evidence of the indivisibility of divine and profane; utu or the obligation to give and the (and sometimes obligation) to receive constant reciprocity; and kaitiakitanga or the obligation to care for one's own.

The values are interconnected, with some values being the natural result of others. For example, one cannot have whanaungatanga without kaitiakitanga; a right over a resource carries a reciprocal obligation to care for the resource.[46] Therefore, you cannot have whanaungatanga over a resource without having an obligation to care for it, also described as kaitiakitanga.[47]

Section 7AA splits tikanga Māori, only choosing to incorporate whanaungatanga, whakapapa and mana tamaiti into the Act. Tikanga as a whole is the framework to guide actions, it is not and never was intended to be split into independent values. The individualisation of whanaungatanga is another demonstration of systemically racist practices filtering Māori customs and beliefs through a British Westernised system. The Westernised system interprets Māori customs from a Westernised worldview.[48] However, as seen by the connection between whanaungatanga and kaitiakitanga, Māori values are interconnected and are not intended to be separated.

Many instances can be observed where tikanga, the Māori customary system, has been forced to adapt to fit into New Zealand's primarily Western legal framework. The incorporation of Māori customs into legislation is a politicised gesture of cultural reform.[49] Two examples of tikanga incorporated into statute are the Resource Management Act 1991 and the Marine and Coastal Area (Takutai Moana) Act 2011. Within both these Acts, kaitiakitanga is introduced, though the other core values of tikanga remain notably absent. As demonstrated by the sole incorporation of kaitiakitanga into the above two acts, Māori customs are selectively

[46] At 4.

[47] At 4.

[48] Arnu Turvey "Te Ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 L Rev 532 at 532.

[49] At 532.

incorporated into legislation and interpreted in a way that suits the values and interests of the sovereign.[50]

Furthermore, the Freshwater report, as articulated by Annette Sykes, emphasises that Māori rights should be assessed in a Kaupapa Māori framework.[51] The report concerned the Crown's plan to privatise 49 per cent of four publicly owned companies.[52] The report centred around the claimant's argument that Māori had proprietary rights in water and the Crown's argument that no person is capable of having proprietary rights in water.[53] The foundation of this report revolved around Māori property rights, but the discussion around Kaupapa Māori provides insight into the law altering tikanga to better fit the system. Annette Sykes's critique emphasises the need for Māori rights to be addressed within their cultural framework.[54] The dominant English framework fundamentally differs from tikanga, where interconnectedness pervades, and mutual responsibilities accompany rights.[55]

Incorporating tikanga into a legal system not founded on the same collective reciprocal principles transforms the values into individualist principles, which they were never intended to be.

B Sections 7AA(3)-(4)

At first glance, s 7AA(3)-(4) encourages strategic partnership between iwi or Māori organisations and Oranga Tamariki. Upon closer examination, it becomes evident that these sections do not require the Chief Executive to actively engage in strategic partnerships. Rather, it grants iwi and Māori organisations the power to extend invitations to form these partnerships and requires the Chief Executive to consider and respond.

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[50] At 537.

[51] Waitangi Tribunal *The Sage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358 2012) At 34.

[52] At 1.

[53] At 5 and 36.

[54] At 34.

[55] At 34.

Examining the statute's wording alone indicates that the Chief Executive retains the discretion to decline partnership invitations. Consideration and response to invitation is all that is statutorily obliged; the formation of partnerships is not necessary to fulfil the obligations placed under the sections.[56] The wording confers excessive discretion to the Chief Executive and places the onus on iwi to initiate the partnerships. In order to truly meet the 'partnership' requirements under Article Two of te tiriti o Waitangi/the treaty of Waitangi, the Crown must establish strategic partnerships grounded in mutual acceptance with reciprocal influence.[57]

The current system does align with this requirement. Even if strategic partnerships are formed, the unequal balance of powers results in unequal influence. While s 7AA marks a starting point to meet partnership requirements, the high level of discretion appointed to the Chief Executive results in the section falling short of its purpose.

Furthermore, the Chief Executive possesses the authority to exercise discretion in choosing which iwi or Māori organisation to establish strategic partnerships with. The discretionary power prompted concerns by the claimants in the Wai 2915 report. The concerns regarded the exclusion of whanau, hapu and smaller Māori organisations due to preference given to larger established iwi and organisations.[58] Furthermore, s 7AA does not create a mechanism to allow partners to challenge the views and procedures of Oranga Tamariki, essentially allowing Oranga Tamariki to make decisions without being held accountable to their partner's inputs.[59]

Sections 7AA(3)-(4) present the prospect of strategic partnership. However, the current wording of the statute falls short of ensuring fair, equal and reciprocal partnerships. The discretionary power appointed to the Chief Executive affords Oranga Tamariki an undue degree of unilateral control over the partnership process. The result of the lenient wording is an unfair process for Māori, again placing little power on their side.

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[56] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 119.

[57] At 155.

[58] At 125.

[59] At 148.

IV Systemic Racism

Systemic racism is the integration of racism into societal institutions and frameworks, including those that govern housing, employment, and the criminal justice system.[60] Systemic racism is entrenched within rules, organisations, norms and procedures of social institutions.[61] The operation of systemic racism results in policies and procedures maintained by law that disadvantage minority groups.[62] The effects of systemic racism are vast but include poorer health, barriers to educational success and higher incarceration rates.[63] In New Zealand, the foundation for systemic racism is colonisation, which led to the displacement of Māori political, economic, cultural and societal structures.[64] Due to systemic racism, New Zealand's national structures have been created with Westernised values, requiring minority groups such as Māori to conform to the dominant culture's norms.[65]

The architecture of systemic racism takes shape through continuous oppressive behaviour that denies indigenous rights whilst upholding Western perspectives. In the New Zealand context, systemic racism is interwound with historical events such as the Treaty of Waitangi, the settlement of British settlers, land wars, land alienation and national colonialism.[66] The first laws in New Zealand following the signing of the treaty created a precedent for subsequent legalisation, many of which had racist tendencies, prioritising the British rule of law.[67] These laws systematically disadvantaged Māori.

The subsequent historical legislation demonstrates the premise that many historic laws systematically disadvantage Māori. The New Zealand Land Settlements Act 1863 vested power in the Crown to confiscate Māori land in areas where the Crown deemed there was a

[60] Joe R. Feagin *Systemic Racism: A Theory of Oppression* (Routledge, New York, 2006) at ch 1.

[61] Louise Humpage "Systemic Racism: Refugee, Resettlement, and Education Policy in New Zealand" (2000) 19 Refuge 33 at 34.

[62] At 34.

[63] Sylvia Pack, Keith Tuffin and Antonia Lyons "Resisting Racism: Māori experiences of interpersonal racism in Aotearoa New Zealand" (2015) 11 Int J Indig 269 at 270.

[64] At 270.

[65] At 270.

[66] Haenga-Collins and Tudor "Racism in New Zealand", above n 6, at 41-42.

[67] At 44-45.

considerable number of Māori rebellions. [68] Similarly, the Native Land Act of 1865 vested the powers in the courts to determine land ownership, individualising land titles. [69] The Native Schools Act 1867 set up schools in Māori villages at the expense of Māori and required only English to be spoken.[70]

Although these are historic laws, their impact persists in modern society. The Native Schools Act can be linked to the loss of te reo Māori.[71] The Act emphasised English as the sole language spoken and prioritised Western culture and values.[72] The loss of Māori language, culture and identity can be attributed to this Act and others of its kind.[73] The fact that as of 2021, only 7.9 per cent of people indicated they could speak te reo Māori demonstrates fairly well the lasting effect of historical laws.[74] The overarching effect of colonisation remains a foundational element for systemic racism in New Zealand; through legislation such as the Native Schools Act, Western social beliefs, values and customs were injected into society.

A Systemic Racism and the Department of Social Welfare / Oranga Tamariki

The Puao-Te-Ata-Tu report investigated the Department of Social Welfare from a Māori perspective.[75] The report found that from a cultural and legal perspective, Māori interests were not at the forefront of decisions, and on occasion, legislation was enacted that went against Māori customary preferences.[76] Legislation that fails to consider Māori customary preferences, cultural beliefs or societal norms is a result and example of systemic racism. The forced assimilation of Māori values into the Pakeha world indicates the promotion of Pakeha beliefs into legislation and society.[77]

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[68] At 45.

[69] At 45.

[70] At 45.

[71] Rachael Ka'ai-Mahuta "The impact of colonisation on te reo Māori: A critical review of the State education system" (2011) 4 Te Kaharoa 195 at 196.

[72] At 203.

[73] At 196.

[74] StatsNZ"Te reo Māori proficiency and support continues to grow" (5 July 2022) < https://www.stats.govt.nz/news/te-reo-maori-proficiency-and-support-continues-to-grow/>.

[75] Ministerial Advisory Committee Puao-Te-Ata-Tu (Day break), above n 3.

[76] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break),* above n 3, at 7.

[77] Haenga-Collins and Tudor "Racism in New Zealand", above n 6, at 46.

The effects of systemic racism are strongly reflected in the findings of Puao-Te-Ata-Tu. The advisory committee found that many areas of the department portrayed inherently racist practices, including policy formation and racial imbalances in staffing.[78] The report considered the causes of systemic racism in New Zealand. The alienation of Māori customary beliefs from law stems back to the individualisation of laws in New Zealand.[79] The movement away from community-owned land and traditional leadership authority to individualisation and authority vested in the courts indicates Māori customary being replaced by Western principles. The individualisation of laws trickled down into all aspects of the laws, including those focused on state care. By 1962, all adoption of Māori children, whether by Māori or European adoptive parents, was placed in the courts following a Western preference of individual rights.[80]

In 2020, Whānau Ora published a Māori inquiry report in response to the Government's inaction on the treatment of tamariki and whānua in state care. The report outlined the history of state care and included whānau experiences with Oranga Tamariki. The report concluded that long-term Māori wellbeing will always be negatively impacted by the current practices used by state care, especially the uplifting of tamariki.[81]

Under Māori customary, a child is the child of the whanau, not just the birth parents and the family is part of a wider community that all have reciprocal obligations to the children of their descent.[82] Following this way of thinking, when a child needed to be placed, they were done so within the community and were placed with whoever had the ability to care for them the best. When placing children into homes, the current Westernised system of uplifting children does not consider this communal form of social life.

Oranga Tamariki has been criticised for the large disparity of Māori taken from families. The system's structure has been set up without regard to Māori views and instead reflects an English

[78] At 5.

[79] At 72.

[80] At 75-76.

[81] Hector Kaiwai and others, *Ko Te Wā Whakawhiti It's Time for Change: A Maori Inquiry into Oranga Tamariki* (Whānau Ora Commissioning Agency, February 2020) at 74.

[82] At 74-75.

Westernised view.[83] Systemic racism is entangled in all facets of New Zealand society. Thus, it is not surprising that it is a feature of Oranga Tamariki, as Oranga Tamariki reflects the socio-political framework of New Zealand. Māori identity and wellbeing are strongly related to a sense of belonging to whanau, iwi, hapu and the spiritual and physical environment.[84] Removing a child from their whanau hinders this sense of belonging.

B Views on how to fix Systemic Racism

The repercussions of systemic racism manifest in all aspects of New Zealand society, whether it be housing, health care, child protection or employment.[85] The extensive impacts of systemic racism dictate that isolated legislative efforts aimed at specific issues will not effectively combat the problem, as its effects are interconnected and widespread. Legislation designed to fix the disparities in child protection will fall short of its goal if systemic racism and its broader implications are omitted. This is evident from the history of unsuccessful reforms in the New Zealand child protection system. Decades of reviews, reports and legislation have attempted to improve the system, but all have failed to produce a system that puts Māori needs first. [86]

Numerous academics have outlined procedures to improve the system for Māori. The multitude of investigations and analyses emphasise that addressing systemic racism is a complex endeavour requiring more than government intervention. Given the strong connection between systemic racism and colonisation, addressing the effects of systemic racism necessitates a focus on decolonisation.[87] Even well-intentioned policies and practices can inadvertently perpetuate the marginalisation of Māori if enacted by non-Māori without genuine engagement with the Māori community.[88]

The first step taken must be to acknowledge that systemic racism is present in decision-making and legislation. A conscious effort to infuse cultural inclusivity into the system is vital to

[83] At 98.

[84] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break)*, above n 3, at 29-39.

[85] Haenga-Collins and Tudor "Racism in New Zealand", above n 6, at 42-43.

[86] Kaiwai and others, *Ko Te Wā Whakawhiti It's Time for Change: A Maori Inquiry into Oranga Tamariki*, above n 81, at 74.

[87] Haenga-Collins and Tudor "Racism in New Zealand", above n 6, at 53.

[88] At 53.

mitigate the consequences of systemic racism.[89] As articulated in this report, the effects of systemic racism and colonisation on Māori extend across every aspect of life. Rather than attempting to fix isolated aspects of the system, it is essential to address the foundational impacts of systemic racism and colonisation.[90]

V Applying a Systemic Racism Analysis to s 7AA

Section 7AA was enacted to improve outcomes for Māori, however, the section did not consider systemic racism. The section outlined the duties of the Chief Executive in line with te tiriti o Waitangi / the treaty of Waitangi, strategic partnership requirements and annual reporting.[91] The intention was that by exercising these practices, Māori outcomes would be improved, decreasing the disparity of Māori in state care. However, evidence provides that this has not been the result. A 0.9 per cent reduction was seen in the number of Māori in state care between 2019 to 2022.[92] A reduction of this size does not indicate the occurrence of meaningful change.

The initial flaw of s 7AA is the failure to address systemic racism. Failing to identify systemic racism places the assumption that the disparity problem is the sole result of the child protection system with no other driving factors. However, as stated in many reports and reviews, it is clear that the disparities result from the failing system, which is failing due to systemic racism. Consequently, as the section attempts to amend the system but does not account for systemic racism, it is merely fixing the surface without regard to the deeper problem. In order to truly effect change, effort has to be made to amend the historical effects of systemic racism. The impacts include poverty, land alienation, and ignorance of Māori customary preferences.

[89] Nicola Atwool "Challenges of operationalizing trauma-informed practice in child protection services in New Zealand" (2018) 24 Child Fam Soc Work 25 at 28.

[90] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 51.

[91] Oranga Tamariki Ministry for Children "Section 7AA background" (16 September 2022) < https://www.orangatamariki.govt.nz/about-us/performance-and-monitoring/section-7aa/our-background/.

[92] At 16.

Poverty has resulted from land alienation and urbanisation of Māori, disconnecting Māori from resources and support networks.[93]

In the Puao-Te-Ata-Tu report, it was acknowledged that the disparities were partially a result of systemic racism. The breadth of recommendations provided in the report signifies that one section alone will not fix this issue. The framework established by s 7AA includes policies to reduce disparities, mana tamaiti and whanaungatanga responsibilities, strategic partnerships and annual reporting.[94] It is clear from the extent of the recommendations in the Puao-Te-Ata-Tu report that the amendments made in s 7AA are insufficient. First and foremost, one section of an Act is insufficient to produce substantive change to a system in which all aspects have been created to disadvantage Māori. The Puao-Te-Ata-Tu report and various academics emphasise the necessity of comprehensive amendments to all legislation that directly or indirectly influences the child protection system. Merely requiring that policies aim to reduce disparities is insufficient when the broader system does not reflect this objective.

In exercising any power conferred by the Act ss 4A, 5, 13 must be considered.[95] The powers conferred by the Act include the right of the Courts to issue a warrant to uplift a child.[96] When determining whether to grant the warrant, the Court must have regard to the principles set out in ss 4A, 5, 13.[97] The reduction of disparities is not mentioned in any of the stated sections and, therefore, does not need to be considered by the courts when exercising their powers. The sections centre around the child's wellbeing, with s 4A being the paramount consideration. Section 4A outlines four considerations:[98]

> (a) the wellbeing and best interests of the child or young person; and (b) the public interest (which includes public safety); and (c) the interest of any victim; and (d) the accountability of the child or young person for their behaviour.

[93] Catherine Savage and others "Hāhā-uri, hāhā-tea: Māori Involvement in State Care 1950-1999" (Ihi Research, July 2021) at 15.

[94] Oranga Tamariki Act 1989, s 7AA.

[95] Oranga Tamariki Act 1989.

[96] Part 2.

[97] Oranga Tamariki Act 1989.

[98] Section 4.

Sections 5 and 13 add extra obligations onto the Court or other persons when exercising powers under the Act, however, these are subject to the consideration of s 4A.[99] These sections place a Pakeha view of wellbeing onto Māori tamariki. The system, due to systemic racism and the oppression of Māori customary preferences, is designed with a Pakeha preference. Section 5(1)(b)(iv) states that:[100]

> mana tamaiti (tamariki) and the child's or young person's wellbeing should be protected by recognising their whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi, and family group.

This subparagraph incorporates a Māori view of wellbeing into the section. Māori wellbeing is strongly connected to a sense of belonging to whanau, hapu and iwi.[101] However, the importance of a sense of belonging is commonly overlooked when assessing a child's wellbeing. This is likely because, under a Westernised view, a sense of belonging is not paramount to wellbeing. A prime example is the *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*.[102] The judge decided that other factors contributing to the wellbeing of GW (the child) trumped the need for a whanau connection.[103]

VI How the Courts have Interpreted s 7AA

An analysis is made of two cases that provide an example of the practical application of s 7AA and how the application falls short of its true intention. It is accepted that these two cases do not indicate every case concerning Oranga Tamariki. Nevertheless, the differing outcomes between the two cases demonstrate that s 7AA does not require enough to produce substantial change. The two cases to be analysed are the *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*[104] and *McHugh v McHugh.*[105]

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[99] Sections 5 and 13.

[100] Section 5(b)(iv).

[101] Atwool "Challenges of operationalizing trauma-informed practice in child protection services in New Zealand", above n 89, at 28.

[102] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ* [2021], above n 8.

[103] At 323.

[104] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ* [2021], above n 8.

[105] *McHugh v McHugh*, above n 9.

A Chief Executive of Oranga Tamariki-Ministry for Children v MQ

In 2021, Judge Callinicos heard this matter before the Family Court in Napier. The case involved GW, MQ's daughter, who was placed in the care of Oranga Tamariki's Chief Executive.[106] MQ had five children, all under the custody of the Chief Executive and placed with different caregivers.[107] Following concerns about MQ's parenting capability, Oranga Tamariki inquired into possible placements for GW. It is stated that Oranga Tamariki did not inquire extensively into possible whanau placements. On 17 September 2018, after obtaining custody orders, the Chief Executive placed GW with WS and AS (the caregivers).[108] The caregivers were a Pakeha couple, and no cultural assessment was undertaken to ensure the caregivers had the cultural capabilities to care for a Māori child.[109] In January 2019, MQ's newborn child, RQ, was placed into the care of TH and MH (the H's), who whakapapa to MQ through marriage.[110]

The applications to be determined were as follows; (a) Mr and Mrs [S] and Mr and Miss [H] seek to lift a custody order (s 101 Oranga Tamariki Act), (b) the Chief Executive wanted to remove a condition restricting [GW's] removal from their current caregivers (s 125 Oranga Tamariki Act), (c) Mr and Mrs [S] and Mr and Miss [H] had competing applications for day-to-day care (s 48 COCA) and (d) both couples compete for additional guardianship of [GW] for day-to-day care (s 27 COCA)[111]

GW was uplifted and placed in the care of the caregivers in 2018. The statutory reform that implemented s 7AA and changed the Children, Young Persons and Their Families Act 1989 to the current Oranga Tamariki Act 1989 was not implemented until July 2019. As a result, the actions taken by the Chief Executive before July 2019 cannot be analysed in light of the obligations placed under s 7AA. However, actions taken by the Chief Executive after July 2019 should comply with the obligations placed under s 7AA. Oranga Tamariki's change in view as

[106]At 1 – 8.

[107] At 7.

[108] At 5-7.

[109] At 109-110.

[110] At 12.

[111] At 28.

to where GW should be placed could have resulted due to the new obligations placed by s 7AA.[112]

Oranga Tamariki intended to place GW with the H's, who had whakapapa ties to MQ. Placing GW with the H's would better adhere to s 7AA. The right of tamariki Māori to be connected to their whanau, iwi, and hapu is at the heart of s 7AA(2)(b) and Quality Assurance Standard 1(a). The right under s 7AA(2)(b) is to be administered through policies, practices and services. As the caregivers had no whakapapa connections to MQ, this placement likely did not meet the obligations under s 7AA(2)(b).

Oranga Tamariki's intention to place GW with the H's is an indication that s 7AA has the capability of strengthening whakapapa ties for tamariki Māori in state care. Prior to s 7AA, as demonstrated in this case, insufficient attention was given to potential whanau placements, as "less than proactive steps were taken by Oranga Tamariki" to find suitable whanau placements for GW.[113] However, following the enactment of s 7AA, more weight was placed on whanau and whakapapa connections, which is likely why RQ was placed with the H's.

Judge Callinicos gave little discussion on s 7AA. The section was laid out in the judgment to illustrate the obligations of the Chief Executive. Judge Callinicos stated that the relevance of s 7AA to this case was determining whether the Chief Executive met their responsibilities under the section.[114] However, the judge placed little importance on the principles of s 7AA in deciding the outcome of this case. Instead, the judge stated that s 7AA placed no obligations on the Court and rather consideration must be given to statutory words contained in provisions that confer powers onto courts, statutory principles and the legislative purpose.[115]

Judge Callinicos determined that no principle contained in the Act trumped another, and in deciding the outcome of this case, a holistic approach was to be taken, placing GW at the centre of the decision.[116] Due to the holistic approach, the outcome of this case was that GW remained

[112] At 49.

[113] At 5.

[114] At 50.

[115] At 50.

[116] At 57.

with Mr and Mrs S in Hawkes Bay instead of residing with the H's, who whakapapa to GW.[117] Judge Callinicos also ordered integration with the H's and for the caregivers to obtain support to maintain GW's cultural connection and needs.[118]

In reaching the decision, GW's wider emotional, educational and psychological needs were given more weight than GW's whanau and cultural connections.[119] It was determined that GW had whanau connections in Hawkes Bay as GW's Mother and other family members resided there.[120] However, this evidence was not the primary reason for the Court's decision.

B McHugh v McHugh

McHugh v McHugh was an appeal decision brought before the High Court by the maternal grandfather and step-grandmother of the child.[121] The case was heard by Doogue J and was an appeal of a Family Court decision dated 20 May 2021, where the appellant's application for special guardianship orders were declined.[122] Since the child's birth on 14 June 2015, Oranga Tamariki had been involved in their care, with interim custody orders granted on 26 June 2015.[123] The mother and child were placed in Te Kainga (Youth Horizons Trust) between 3 September 2015 and 25 May 2016 to support the mother and child.[124] However, during this time, it was determined that the mother could not safely care for her child.[125] On 28 January 2016, Oranga Tamariki obtained custody of the child under s 101 of the Children, Young Persons, and Their Families Act 1989, subsequently, on 24 May 2017, the child was placed into the care of the appellants.[126] On 28 January 2020, the appellants applied to discharge the 2016 custody orders in favour of Oranga Tamariki and to appoint the couple special guardianship.[127]

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[117] At 322.

[118] At 322.

[119] At 319.

[120] At 317.

[121] *McHugh v McHugh*, above n 9, at 1.

[122] At 1.

[123] At 6.

[124] At 8.

[125] At 8.

[126] At 9-10.

[127] At 11.

Special guardianship is granted under s 113A of the Oranga Tamariki Act.[128] Section 113A requires that the person is a sole or additional guardian under s 110; the purpose of the grant is to ensure the child is safe, and either the child does not have a guardian or the special guardian will be a replacement or additional guardian.[129] In 2021, the Waitangi Tribunal inquired into Oranga Tamariki. One of the claims was that the approach that implemented the special guardianship (Noho Ake Oranga) provisions breached the Treaty of Waitangi/te Tiriti o Waitangi.[130] The claimants stated that special guardianship went against s 7AA as special guardianship hinders whakapapa connection and the ability to exercise whanaungatanga.[131]

In determining the correct legal approach for special guardianship in light of s 7AA, Doogue J considered the cases put forth by both parties. Firstly, the approach in *Chief Executive of Oranga Tamariki-Ministry for Children v BH* put forth by counsel for Oranga Tamariki, subsequently the approach in *Re WH* put forth by the appellants and the child's counsels.[132] Judge Southwick QC in *Re WH* stated that the Act merely requires the Court to recognise and respect the te ao Māori values of mana tamaiti, whanaungatanga and whakapapa.[133] Justice Doogue did not agree with this position and instead agreed with the Judge in *BH,* stating that the active words used throughout the Act, such as "protect", "maintain", and "strengthen", demonstrated Parliament's intention for the values to be actively applied.[134]

C What the cases demonstrate

The differing importance placed on s 7AA and the respective te ao Māori values demonstrates the failure of the section. Section 7AA merely places obligations on the Chief Executive, if the case goes to court, the section places no obligations on the courts. Sections 5 and 13 states that when exercising powers, the court must be 'guided' by mana tamaiti, whakapapa and

[128] Oranga Tamariki Act 1989.

[129] Section 113A.

[130] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 129-130.

[131] At 131.

[132] At 65.

[133] *McHugh v McHugh*, above n 9, at 94, referring to; *Re WH* [2021] NZFC 4090, [2021] NZFLR 216 at 53.

[134] At 95 and 116.

whanaungatanga.[135] As the cases demonstrate, the weight placed on these values differs depending on the judge.

The two cases provide insight into how differing weight can be placed on te ao Māori values due to the court's discretion. Judge Callinicos placed little importance on s 7AA and the te ao Māori principles. Instead, the decision was guided by other sections of the Act, with a holistic approach taken, placing the child's wellbeing at the centre of the decision. Whereas Doogue J took a Māori centric approach, indicating that the te ao Māori principles were to be actively applied to shape the decision.

The differing weight placed on te ao Māori illustrates systemic racism. Judge Callinicos examined GW's wellbeing through a Westernised individualised perspective, giving consideration to mana tamaiti and whakapapa, though not enough.[136] The case demonstrates that there is a possibility for more weight to be appointed to a Western perspective of wellbeing where a sense of belonging is not at the centre. Taking a te ao Māori approach, it would have been understood that whanau connections and belongingness are interlinked with Māori wellbeing.[137] In contrast, Doogue J adopted a Māori centric approach, recognising that Māori tamariki are taonga and emphasising the responsibility of whanau, iwi and hapu in their care.[138] Justice Doogue emphasised the importance of whanau connections with the understanding that whanau is not restricted to immediate family.

VII Recommendations

The findings of this report indicate that s 7AA failed due to systemic racism not being considered. Therefore, it is clear that for future change to be successful, systemic racism and its effects must be considered. Modern legislation will continue to reflect the precedents set in systemically racist historic laws unless a conscious effort is made to negate this precedent. The

[135] Oranga Tamariki Act 1989.

[136] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*, above n 8, at 51-57.

[137] Atwool "Challenges of operationalizing trauma-informed practice in child protection services in New Zealand", above n 89, at 28.

[138] *McHugh v McHugh*, above n 9, at 113-114.

current system in New Zealand is based on individualised preferences, developed through legislation overturning Māori customs.

Individualisation of legislation is a framework to treat individuals as separate entities, disregarding the collective culture of Māori society. Māori traditional values are deep-rooted in a collectivist culture, and the current system undermines these interests. The individualist system is not designed to benefit Māori. For example, the individualisation of land titles under the Native Lands Act 1862 and the Native Land Courts was another mechanism of land alienation.[139] Once it is appreciated that the system was not created to benefit Māori, it becomes clear that pushing a Māori solution through a prejudiced system will not work. Attempting to incorporate Māori based solutions without addressing that the system is inherently discriminatory results in superficial change.

The best solution would be to remake the system incorporating a Westernised individualist system and Māori customary collectivist systems. However, this is not possible therefore, other changes are needed to ensure that outcomes for Māori are improved.

Replacing the whole system is impractical in the immediate future. Nevertheless, it is possible to modify certain aspects of the system to more accurately incorporate Māori customary values. One such area is the foster care system. The foster system should be redesigned to better align with Māori values, particularly the view that children are tamariki of their whanau, iwi and hapu.[140] Due to this, the obligation to care for tamariki extends beyond the nuclear family unit.[141] Embracing this broader understanding of whanau and community obligation would bring the foster system into closer harmony with Māori values. The on-flow effect of this would be the improvement of Māori outcomes in state care. Placing children with their whanau (in the broader sense, encompassing hapu and iwi) provides a deeper link to whakapapa, fostering a more robust sense of identity and cultural continuity. These elements are essential for overall wellbeing.

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[139] Richard Boast "Individualization – an idea whose time came, and went" (eds) Lee Godden and Maureen Tehan Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures (Routledge, Oxon, 2010) at 145-146.

[140] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break)*, above n 3, at 74-75

[141] At 74-75.

To ensure the success of an amendment such as this, strong relationships must be formed with Māori, ensuring they are appointed equal power in the decision-making process. Māori must be central to the development and implementation to ensure the amendment does not further marginalise them.[142] An amendment such as this can reduce the disparity in state care as it casts a wider net of possible stable homes for tamariki.

Sections 5 and 13 of the Oranga Tamariki Act outline principles for the Courts to consider when exercising powers under the Act.[143] The weight appointed to each of these principles is at the courts' discretion. The discretion can result in Māori values being appointed less weight. Amendment should be made which statutorily require the courts to prioritise the wellbeing of a child in relation to their sense of belonging.

An amendment like this recognises that a sense of belonging is tied to wellbeing. Acknowledging this vital dimension of wellbeing would lead the court to prioritise the impact of a placement on a child's whakapapa connections and cultural identity. The principles under ss 5 and 13 would further guide the decision after this consideration was made. As a result, under s 43(1),[144] which deals with placements, preference would likely be given to whanau members. Statutorily requiring the courts to consider a child's sense of belonging as a primary factor under the Act would lead to placements that prioritise the child's cultural identity and whakapapa connections.

From a Māori perspective, a sense of belonging is influenced by whakapapa and whanaungatanga.[145] Whakapapa is the connection of Māori to the people and the land.[146] Whanaungatanga encompasses the Māori perspective on maintaining and strengthening whanau, iwi and hapu relationships.[147] Whanau does not solely include the nuclear family unit

[142] Haenga-Collins and Tudor "Racism in New Zealand", above n 6, at 53.

[143] Oranga Tamariki Act 1989.

[144] Oranga Tamariki Act 1989.

[145] Lesley Rameka "A Māori perspective of being and belonging" (2018) 19 Contemp Issues Early Child 367 at 367.

[146] At 369.

[147] At 372.

and can include the extended community.[148] Hence, strong whanau connections influence a sense of belonging. Māori wellbeing is heavily influenced by a sense of belonging with whanau connections at the centre.[149]

An amendment such as this would ensure that Māori principles are applied foremost, thus allowing decisions impacting Māori tamariki to be guided by Māori worldviews. The amendment would represent a step towards systemic change by recognising the importance of Māori values and perspectives in legislation. It acknowledges that Māori principles can provide meaningful guidance and removes the assumption that British Western laws trump Māori customs.

A comprehensive community-driven strategy is imperative to rectify the impacts of systemic racism. Among the many effects of systemic racism, the cycle of poverty facilitated by inequities remains particularly prominent. Invariably, poverty contributes to the challenges faced by whanau in caring for their children, amplifying disparities.[150] To address this problem, government-funded community groups should be created. The primary objective of these groups would be to offer essential classes to equip whanau with practical skills and knowledge.

The driving factor of this approach is the emphasis on the centralisation of Māori in the decision-making and implementation process. This approach necessitates that systemic change requires inclusivity and cultural respect by integrating Māori values and perspectives. Iwi and Māori organisations should be central to the decision-making and integration process. Such an arrangement ensures that the programs are not only culturally relevant but are also informed by the unique needs, experiences and aspirations of these individual communities.

The recognition of systemic racism is a necessary step to effecting meaningful change. New Zealand has for far too long passed legislation such as s 7AA, which omits to consider systemic racism, resulting in its inevitable failure. The current system is rooted in individualist

[148] Erena Kara and others "Developing a Kaupapa Māori Framework for Whānau Ora" 2011 7 AlterNative 100 at 101.

[149] At 101.

[150] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīgna Wharuarua: Oranga Tamariki Urgent Inquiry*, above n 5, at 51.

preferences and is unable to cater for Māori collective values. While comprehensive system-wide changes are unfeasible, targeted amendments offer a solution. Along with targeted amendments, community-based solutions offer another avenue to mend systemic inequities.

VIII Conclusion

Section 7AA signifies a significant step forward in addressing the disparity and treatment of Māori tamariki in the child protection system in New Zealand. The enactment signifies the government's acknowledgment of the system's flaws and commitment to mend them. However, the section's shortcomings lie in its failure to address systemic racism, a foundational issue that impedes meaningful change. The omission confines the section's potential, presupposing that the system's failure is solely its own.

The historical context of systemic racism within New Zealand is closely related to colonisation and the historical events that followed.[151] The resulting effect is the cultural oppression Māori face and the dominance of the British legal system. The insertion of the British legal system resulted in inherently racist laws, undermining the interests of Māori. Systemic racism is interwound with the failures of the child protection system, as evidenced by reports such as Puao-Te-Ata-Tu, which highlighted its impact.[152] Amendments following the report, including the Children, Young Persons, and Their Families Act, have fallen short of addressing the core issues. Section 7AA, following previous amendments, failed to address systemic racism, resulting in the section's failure.

Despite the section's intentions, s 7AA's failure to address systemic racism has hindered improvements in outcomes for tamariki. The lenient language of s 7AA(2) places insufficient obligation on the Chief Executive, failing to produce substantive change. The sections focus on partial aspects of the Māori worldview, individualised tikanga, inadvertently Westernising it. Sections 7AA(3)-(4) seek to uphold the partnership requirement under Article Two of the Treaty. However, the partnership obligations are not fulfilled due to the unbalanced powers and lack of accountability.

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[151] Pack, Tuffin and Lynos "Resisting Racism: Māori experiences of interpersonal racism in Aotearoa New Zealand", above n 63, at 270.

[152] Ministerial Advisory Committee *Puao-Te-Ata-Tu (Day break)*, above n 3, at 24.

The interpretation of s 7AA shines a light on its failure. Placing obligations on the Chief Executive while neglecting the judiciary's role reveals the limited power of the section. Other sections of the Act guide the Court's decision, notably emphasising the importance of whakapapa and whanaungatanga responsibilities on wellbeing. [153] However, the weight given to these principles lies within the judge's discretion, as evidenced in cases like the *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*[154]. In this case, the Judge appointed more weight to other principles.[155]

Ultimately, s 7AA serves as a reminder that addressing systemic racism and its vast implications requires more than legislative action. A comprehensive system-wide restructure may not be immediately feasible. However, targeted amendments to parts of the system, particularly in the foster care sphere and guiding decision-making principles, hold promise for substantive change. Coupled with community-based programs providing essential resources and skills, these changes can begin to mitigate the inequities resulting from systemic racism. Crucially, all reforms made to the system must be undertaken with Māori input, recognising that equitable decision-making and implementation require Māori voices and leadership. Achieving meaningful progress in dismantling systemic racism demands not only legal adjustments but also a genuine commitment to systemic transformation rooted in justice, equity and Māori empowerment.

[153] Oranga Tamariki Act 1989, s 5(1)(b)(iv).

[154] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*, above n 8.

[155] *Chief Executive of Oranga Tamariki-Ministry for Children v MQ*, above n 8.

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