ORANGA TAMARIKI
Ministry for Children

Report

Date: 6 September 2019 **Security Level:** IN CONFIDENCE

To: Hon Tracey Martin, Minister for Children **Report Number:** REP-OT/19/8/221

Further advice on the subsequent children provisions

Purpose of the report

1 This report seeks your agreement to further work to better understand the subsequent children provisions in the Oranga Tamariki Act 1989 (the Act), and to the proposed objectives, scope, and timing of this work.

Recommended actions

It is recommended that you:

1 **note** that the subsequent children provisions were intended to ensure greater oversight of the safety of subsequent children, but have not operated as anticipated

2 **note** that we provided you with advice in June 2019, noting that there is an opportunity to undertake further work on the provisions in light of the new Oranga Tamariki operating model

3 **agree** that officials proceed with further work on the provisions as set out in this paper

Agree / Disagree

4 **note** that, subject to your agreement, this report outlines the approach we will take to this work on the subsequent children provisions

5 **agree** that the objectives of this work will be:

5.1 to better understand the needs and circumstances of children and whānau who fall within the provisions

5.2 to better understand how the provisions have operated since they were implemented, including an understanding of current practice (through decisions made by both the Family Court and Oranga Tamariki)

5.3 to consider how the provisions align with a child and whānau centric approach, section 7AA of the Oranga Tamariki Act 1989, and the Oranga Tamariki outcomes framework

5.4 to identify options for reform that ensure subsequent children and their whānau receive the most appropriate support to promote their safety and wellbeing

Agree / Disagree

6 **agree** that the scope of this work will focus on the policy settings and practice for subsequent children and their whānau, including any legislative amendments required to give effect to those settings

Agree / Disagree

7 **note** that if you agree to recommendation 3, officials will undertake this work over two phases:

7.1 phase one: problem definition work, with advice to you in late 2019

7.2 phase two: develop options for reform with advice to you in the new year

Anita West
Deputy Chief Executive, Policy and Organisational Strategy

Date

Hon Tracey Martin
Minister for Children

Date

Further work on the subsequent children provisions is needed because they are not operating as originally intended

2 In June 2019, we provided you with an aide-mémoire that set out some of the key issues with how the subsequent children provisions (the provisions) are operating [REP OT/196/174 refers]. We identified the key issues as:

- the original policy intent is not being met
- the provisions do not consistently operate in a way that promotes the best interests of children
- the practice of Oranga Tamariki and the Family Court (the Court) regarding the provisions is different to what was originally envisaged.

3 We identified the opportunity to undertake further work on the provisions in light of the new Oranga Tamariki–Ministry for Children (Oranga Tamariki) operating model, and that we would provide you with advice on the objectives, scope, and timing of this work.

4 Appendix One summarises why and how the provisions have not operated as intended, and the unintended consequences of this. Appendix Two sets out the provisions in full.

The scope of the work is the policy settings and practice for subsequent children

5 We propose that the work examines the purpose and intent of the subsequent children policy, how they have operated since they have been in force, and the best approach and settings to achieve safety for subsequent children and their whānau.

6 The scope of the work is on the policy settings and practice for subsequent children and their whānau, including any legislative amendments that may be required. This could include reworking the provisions, or repealing them.

7 We propose four key objectives for this work:

- to better understand the needs and circumstances of children and whānau who fall within the provisions
- to better understand how the provisions have operated since they were implemented, including an understanding of current practice for subsequent children (through decisions made by both the Court and Oranga Tamariki)
- to consider how the provisions align with a child and whānau centric approach, section 7AA of the Act, and the Oranga Tamariki outcomes framework
- to identify options for reform that ensure subsequent children and their whānau receive the most appropriate support to promote their safety and wellbeing.

8 These objectives are intended to guide the approach taken to this work.

There are key linkages with other pieces of work underway including the internal review on children being brought into care

9 This work is likely to connect to several pieces of other work currently underway. Work on the provisions will be distinct from any policy decisions or legislative reform already being considered, we will ensure that possible options for reform align with them. Key linkages are set out below.

- **The government's response to the Family Court review** – the government is considering its response to the Independent Panel's review of the 2014 family justice reforms (the Family Court review). Oranga Tamariki and the Ministry of Justice consider there is an opportunity to explore how the wider family justice system might better support children

and whānau. This could include care and protection proceedings. The Family Court review may bear on the Court's role in overseeing the safety of subsequent children. We will work with the Ministry of Justice to ensure that any overlap is identified and managed.

- **New intensive intervention service** – the decision by Cabinet to develop this new function adds to the need and timing for further work on the subsequent children provisions. The new intensive intervention service is focused on supporting whānau to care for their children and young people safely at home. There are strong links between an intensive intervention service and the needs of whānau and tamariki who fall within the subsequent children provisions. This work on the provisions will need to take account of these links and ensure any learning from the roll out of intensive intervention in five sites around the country is considered in our work.
- **Reviews underway around children being brought into care** – there are a number of reviews underway surrounding the removal of children (including within 30 days of birth) from their parents and placement into care, as a result of the Hastings case. Some of these reviews are likely to link to the subsequent children provisions. It will be important to consider the findings, recommendations, and timing of these reviews when developing possible options for reform.

We propose taking a phased approach to the work

10 We propose splitting the work into two phases, with advice to you at the end of each phase. Phase one will focus on the first three objectives of the work, with phase two focused on identifying options for reform of the provisions.

Phase one will focus on the status quo and determining the scale of the problem

11 Given the complexity of the provisions and the unintended consequences they have had so far, it will be important to assess the significance of the problem the provisions were intending to address and understand how they have operated so far.

12 Phase one will involve:

- undertaking a cohort analysis to better understand the needs of whānau and tamariki who may fall within the provisions
- assessing current practice and data around the use of the provisions
- analysing the provisions' alignment with:
  - a child and whānau centric approach
  - section 7AA of the Act (particularly with respect to reducing disparities and having regard to the mana tamaiti and whakapapa of Māori children and young people, and the whanaungatanga responsibilities of their whānau, hapū and iwi)
  - the Oranga Tamariki outcomes framework.

13 It will be important to work with key stakeholders who have an interest and expertise in this area early on. We intend to engage with the Māori Design Group, which has previously raised concerns about the provisions with us.

14 We will report back to you in late 2019 with advice on the key findings of phase one of this work.

Phase two will focus on developing options for reform and engagement with a wider range of stakeholders

15 The focus of phase two will be to develop policy options to support subsequent children and their whānau to achieve outcomes and to receive the best support that promotes their safety and wellbeing.

16 As part of phase two we expect a wider engagement period to occur on potential options for reform in early 2020. This could include engagement with our strategic and Treaty partners, and with other stakeholder groups.

17 Following this, we propose to provide you with advice in the new year on options for reform of the provisions. This advice will include potential legislative and operational implications. This work will need to be considered in light of reviews underway around children being brought into care.

Appendix One: Overview of the provisions

The provisions were intended to ensure greater oversight over the safety of subsequent children

1 The subsequent children provisions (the provisions) were introduced in 2016 and are set out in sections 18A to 18D of the Oranga Tamariki Act 1989.

2 Section 18B defines a subsequent child as any child who is, or is likely to be, in the care or custody of a person who has:

- had a previous child placed in the custody or guardianship of Oranga Tamariki or placed under the Care of Children Act 2004, and where a family group conference has agreed or the Family Court (the Court) has determined that there is no realistic possibility of return; or
- been convicted under the Crimes Act 1961 of the murder, infanticide, or manslaughter of a child or young person that was in their care or custody.

The Court is applying the provisions differently from the original policy intent

3 Soon after the provisions took effect, it became clear through a number of cases that the legislative drafting of the provisions meant that the Court was applying them in a way that differed from the policy intent. The original intent of the provisions was that they would apply only where:

- the Court had approved a plan of permanency for the previous child at the time the child came into care; or
- subsequent to Custody Orders being made, permanency for the previous child had been secured via further Court orders.[1]

4 However, the Court has ruled that the legislation requires Oranga Tamariki to make an additional application to the Court to seek a determination that there is no realistic possibility of the previous child returning home. Only once this determination has been made does the Court consider that the provisions are triggered.

5 s 9(2)(h) [redacted]

The requirement to make an additional application has had unintended consequences

6 While the Court's interpretation of the provisions is consistent with their drafting, this interpretation has had a number of implications. These include:

- significantly delaying outcomes of permanency for both the previous and subsequent child, who must wait for this additional application to be heard
- drawing the previous child into an additional set of Court proceedings
- creating undue stress for a parent who is working to demonstrate progress, potentially impeding a social worker's ability to work constructively with them

[1] A plan for permanency means that there is no intention for the child to return to their parent's care. Permanence is secured via Court orders sometime after a Custody Order is made, and transfers legal authority for the child from the Chief Executive of Oranga Tamariki to the caregiver. These orders are made under section 113A of the Oranga Tamariki Act 1989 or section 48 of the Care of Children Act 2004.

- tying up Court time and diverting social work resources from children who require protection or support, because applications are likely to be contested.[2]

7 This means that the additional application required by the Court to trigger the provisions is often not in the child's best interests. Therefore, the core problems with the provisions are that the original policy intent of the provisions is not being met, and they do not consistently operate in a way that promotes the best interests of the child.

[2] This is because parents are unlikely to agree to a determination that would formally declare that there is no realistic possibility of their child returning to their care.

Appendix Two: Sections 18A to 18D of the Oranga Tamariki Act 1989

18A Assessment of parent of subsequent child

(1) This section applies to a person who—

(a) is a person described in section 18B; and

(b) is the parent of a subsequent child; and

(c) has, or is likely to have, the care or custody of the subsequent child; and

(d) is not a person to whom subsection (7) applies.

(2) If the chief executive believes on reasonable grounds that a person is a person to whom this section applies, the chief executive must, after informing the person (where practicable) that the person is to be assessed under this section, assess whether the person meets the requirements of subsection (3) in respect of the subsequent child.

(3) A person meets the requirements of this subsection if,—

(a) in a case where the parent's own act or omission led to the parent being a person described in section 18B, the parent is unlikely to inflict on the subsequent child the kind of harm that led to the parent being so described; or

(b) in any other case, the parent is unlikely to allow the kind of harm that led to the parent being a person described in section 18B to be inflicted on the subsequent child.

(4) Following the assessment,—

(a) if subsection (5) applies, the chief executive must apply for a declaration under section 67 that the subsequent child is in need of care or protection on the ground in section 14(1)(ba); or

(b) in any other case, the chief executive must decide not to apply as described in paragraph (a), and must instead apply under section 18C for confirmation of the decision not to apply under section 67.

(5) The chief executive must apply as described in subsection (4)(a) if the chief executive is not satisfied that the person, following assessment under this section, has demonstrated that the person meets the requirements of subsection (3).

(6) No family group conference need be held before any application referred to in subsection (4) is made to the court, and nothing in section 70 applies.

(7) This subsection applies to the parent of a subsequent child if, since the parent last became a person described in section 18B,—

(a) the parent has been assessed under this section in relation to a subsequent child and, following that assessment,—

(i) the court has confirmed, under section 18C, a decision made under subsection (4)(b); or

(ii) the chief executive applied for a declaration under section 67 that the child was in need of care or protection on the ground in section 14(1)(ba), but the application was refused on the ground that the court was satisfied that the parent had demonstrated that the parent met the requirements of subsection (3); or

(b) the parent was, before this section came into force, subject to an investigation carried out by a social worker under section 17 in relation to a child who would, at that time, have fallen within the definition of a subsequent child, and—

(i) the social worker did not at that time form the belief that the child was in need of care or protection on a ground in section 14(1)(a) or (b) (as in force at that time); or

(ii) a family group conference was held, the parent addressed the concerns raised to the satisfaction of the chief executive, and the parent subsequently maintained care of the child.

18B Person described in this section

(1) A person described in this section is a person—

(a) who has been convicted under the Crimes Act 1961 of the murder, manslaughter, or infanticide of a child or young person who was in the person's care or custody at the time of the child's or young person's death; or

(b) who has had the care of a child or young person removed from that person on the basis described in subsection (2)(a) and (b) and, in accordance with subsection (2)(c), there is no realistic prospect that the child or young person will be returned to the person's care.

(2) Subsection (1)(b) applies, in relation to a child or young person removed from the care of a person, if—

(a) the court has declared under section 67, or a family group conference has agreed, that the child or young person is in need of care or protection on a ground in section 14(1)(a) or (b); and

(b) the court has made an order under section 101 (not being an order to which section 102 applies) or 110 of this Act, or under section 48 of the Care of Children Act 2004; and

(c) the court has determined (whether at the time of the order referred to in paragraph (b) or subsequently), or, as the case requires, the family group conference has agreed, that there is no realistic possibility that the child or young person will be returned to the person's care.

(3) If a person is a person described in this section on more than 1 of the grounds listed in subsection (1), the references in section 18A(3) to the kind of harm that led a person to being a person described in this section is taken to be a reference to any or all of those kinds of harm.

18C Confirmation of decision not to apply for declaration under section 67

(1) An application under this section for confirmation of a decision under section 18A(4)(b) relating to the parent of a subsequent child must include—

(a) information showing that the person is a person to whom section 18A applies; and

(b) an affidavit by the person making the application setting out the circumstances of the application and the reasons for the person's belief that the parent meets the requirements of section 18A(3).

(2) The application must be served in accordance with section 152(1) as if it were an application for a declaration under section 67.

(3) When considering the application, the court may (but need not) give any person an opportunity to be heard on the application and, if it does, may appoint a barrister or solicitor (under section 159) to represent the subsequent child.

(4) After considering the application, the court may,—

(a) if subsection (5) applies, confirm the chief executive's decision under section 18A(4)(b) not to apply for a declaration under section 67; or

(b) decline to confirm the chief executive's decision under section 18A(4)(b), in which case section 18D applies; or

(c) dismiss the application on the ground that it does not relate to a person to whom section 18A applies; or

(d) adjourn the hearing and require the chief executive to—

(i) provide such information as the court specifies, within the period specified by the court; or

(ii) reconsider all or any aspect of the assessment and report to the court within a period specified by the court.

(5) The court may confirm the decision of the chief executive under section 18A(4)(b) only if it is satisfied, on the basis of the written material before it (and, if the court has heard any person under subsection (3), any other material heard), that the parent in respect of whom the application is made has demonstrated that the parent meets the requirements of section 18A(3).

(6) Except as provided in this section, nothing in Part 3 applies in respect of an application for, or a decision of a court on, confirmation of a decision made under section 18A(4)(b).

18D Court declining to confirm decision

If, under section 18C(4)(b), the court declines to confirm the chief executive's decision under section 18A(4)(b), the court must give written reasons for its decision, and the application for confirmation—

(a) must be treated as an application for a declaration under section 67 on the ground in section 14(1)(ba); and

(b) must be served and heard in accordance with Part 3 and the rules of court, except that, although section 70 does not apply, if a family group conference is convened pursuant to section 72(3), the chief executive (or the chief executive's representative) is entitled to attend the conference as if the chief executive were entitled to do so under section 22(1)(a) to (h).