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For: Hon Tracey Martin, Minister for Children

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Update on the subsequent children provisions – legislation and current practice

Minister Hon Tracey Martin, Minister for Children

Purpose To provide you with an update on the key issues regarding the subsequent children provisions (the provisions) including legislation and current practice.

Background **The provisions, introduced in 2016, were intended to ensure greater oversight over the safety of subsequent children**

The subsequent children provisions (set out in sections 18A to 18D of the Oranga Tamariki Act 1989) came into force on 30 June 2016. The provisions are set out in full at Appendix One. 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 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 provisions were developed in response to concerns about the welfare of future children of individuals who had previously been responsible for the death of a child or who had had a child permanently removed from their care because of safety issues.

The provisions reverse the usual onus of proof by requiring parent(s) of a subsequent child to demonstrate that they are unlikely to inflict the same type of harm that they have previously. This is based on the premise that past actions are a good indicator of how an individual will care for children in the future.

The provisions establish a new care and protection pathway, different from the usual process

Normally, cases are brought before the Family Court where protective orders (which can include custody orders¹) are recommended. The subsequent children provisions differ because they require Family Court oversight of all

¹ Protective orders include: custody order, guardianship order, restraining order, support order, services order (if providing support).

subsequent children cases, even where a social work assessment concludes that there are no concerns.

Key issues**The Family Court is applying the provisions differently from the original 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; or
- permanency for the previous child had been secured via court orders².

However, the Court has not accepted this approach. Instead, it 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. ^{§ 9(2)(h)}

The requirement to make an additional application to the Court to determine that there is no realistic possibility of the child returning to the parent has had unintended consequences, including:

- 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
- tying up Family Court time and diverting social work resources from children who require protection or support, because applications are likely to be contested.³

This means that undertaking an application for the Court to explicitly determine that the child has no realistic possibility of returning home is often not in the child's best interests.

This has had implications for Oranga Tamariki practice regarding subsequent children

The impact of the Family Court's interpretation can be seen in the number of applications that have been made. Before the provisions came into effect, it was estimated that there would be around 450 applications per year under the provisions. However, since 30 June 2016, only 58 subsequent children cases have been recorded in our system.

While we have not yet conducted a thorough analysis of how the provisions are currently operating, our initial view is that the low number of applications suggests that the normal care and protection pathways are likely being used to

² 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.

³ 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.

ensure the safety of subsequent children. This may indicate that while we are not using the subsequent children provisions as expected, we may still be getting involved in subsequent children cases earlier and in a more planned way than previously.

The core issues with the provisions and practice therefore are:

- the original policy intent of the provisions is not being met
- the provisions do not consistently operate in a way that promotes the best interests of the child.

Further analysis is required to determine how we are ensuring that subsequent children receive the level of oversight envisaged by the provisions.

Next steps

There is an opportunity to undertake a first principles review of the provisions in light of the new Oranga Tamariki operating model

When we last provided advice on the subsequent children provisions in early 2018 [REP-OT/18/2/052 and REP-OT/18/3/108 refers], you agreed to further work being undertaken on options for reform of the provisions. However, this work was deferred in order to focus on building and implementing the operating model and 1 July 2019 legislative changes.

Given implementation of the operating model is well underway and new legislative provisions come into effect in a few weeks, we now propose to progress this work. A first principles review is needed to answer some fundamental questions about the purpose and intention of the policy and the best approach to ensuring greater oversight of the safety of subsequent children. A review would need to consider:

- a child-centric perspective: how we can ensure that subsequent children receive the best support that promotes their safety and wellbeing
- applying a section 7AA lens to the existing provisions
- gaining a better understanding of existing practice and data around the subsequent children provisions
- how the policy settings could support subsequent children to be safe at home where possible.

As a next step, we will provide you with advice on the objectives, scope and timing of an internal policy review in early August 2019. This will also include advice on the level of engagement with iwi and Māori who are likely to have a high level of interest and concern in this review. There is an opportunity to work with them from the beginning as we consider any potential changes.

Any recommendations from the review are likely to require legislative changes and an appropriate legislative vehicle, which is approximately an 18 month process.

Appendix One: Oranga Tamariki Act 1989 Sections 18A and A8B

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).