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Office of the Minister for Social Development and Employment
Cabinet Legislation Committee

OVERSIGHT OF THE ORANGA TAMARIKI SYSTEM AND CHILDREN AND YOUNG PEOPLE'S COMMISSION BILL: APPROVAL FOR INTRODUCTION

Proposal

- 1 This paper seeks Cabinet agreement to introduce the *Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill* (the Bill).

Policy

- 2 Cabinet agreed in March 2019 that oversight of the Oranga Tamariki system should be strengthened by developing primary legislation that:
 - 2.1 establishes a new independent monitoring agency for the Oranga Tamariki system (the Monitor)
 - 2.2 provides for a strengthened complaints and investigation system, led by the Office of the Ombudsman (the Ombudsman)
 - 2.3 strengthens system-level advocacy for all children and young people [CAB-19-MIN-0113 refers].
- 3 In December 2019, Cabinet agreed on the purpose and function of the Monitor. Cabinet also agreed to replace the current Commissioner-sole model of the Office of the Children's Commissioner with a new Children and Young People's Commission (the Commission), and made requirements for the oversight bodies to demonstrate a practical commitment to the Treaty of Waitangi [CAB-19-MIN-0687 refers].
- 4 In July 2020, Cabinet agreed that the Children's Commissioner Act 2003 should be reviewed and refreshed, instead of being incorporated within a single oversight Act. The Bill has been prepared as an omnibus Bill that will be split into two Bills during the Committee of the Whole House stage [CAB-20-MIN-0352.01 refers].
- 5 In May 2021, Cabinet confirmed institutional arrangements for the Monitor, clarified the scope of the monitoring function, and agreed on the governance arrangements for the Commission. Cabinet rescinded its earlier in-principle decision to place the monitoring function within the Commission, and agreed to establish a statutory officer with responsibility for the monitoring function to be the chief executive of a new departmental agency, hosted by the Education Review Office [CAB-21-MIN-0153.01 and CAB-21-MIN-0153.02 refers].
- 6 This Bill is required to give effect to Cabinet's previous policy decisions by:
 - 6.1 providing a legislative framework for the Monitor with the functions, powers, and duties associated with the statutory officer role
 - 6.2 giving the Ombudsmen additional duties and powers when dealing with complaints and undertaking investigations relating to children, young people, and their families and whānau receiving services and support through the Oranga Tamariki system

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- 6.3 repealing the Children's Commissioner Act 2003, and enacting a new Children and Young People's Commission Act with a strengthened advocacy approach
 - 6.4 establishing duties for the Monitor, Ombudsmen and Commission to work together effectively, to minimise the burden on individuals and agencies, and to share information, as appropriate
 - 6.5 establishing rules and guidance to support safe and ethical engagement with individuals and agencies
 - 6.6 including duties throughout the Bill that reflect the need for the Monitor, Ombudsmen and Commission to demonstrate a practical commitment to the Treaty of Waitangi (te Tiriti o Waitangi) (the Treaty).
- 7 Several policy decisions reflected in the Bill are likely to be contentious and may be raised at Select Committee, as outlined in the Appendix.

Noting minor policy matters

- 8 I am authorised to take decisions on minor and technical matters required to finalise the Bill [CAB-19-MIN-0113, 52]. I have made the following policy decisions that are consistent with the overall policy intent agreed previously by Cabinet:
- 8.1 I note the Monitor will be required to annually demonstrate how they have had regard to the views of the Māori Advisory Group on an internet site maintained by or on behalf of the Monitor. I consider the reporting requirements support the need for transparency in how the group's views are considered.
 - 8.2 I note the Bill refers only to the Minister responsible for the Monitor being able to request reviews by the Monitor. Other Ministers will still be able to request reviews through the Minister responsible for the Monitor (consistent with CAB-21-MIN-0153.01, 11), ensuring that Ministerial requests for reviews are co-ordinated through a single Minister.
 - 8.3 I note the Bill does not require the Ombudsman to develop information rules as previously agreed by Cabinet [CAB-19-MIN-0687, 19-20]. The Ombudsman has well established processes for ensuring sensitive data is collected, stored and used safely and securely, underpinned by the strict confidentiality requirements of the Ombudsmen Act 1975, meaning that the development of information rules is unnecessary. Moreover, given that the Ombudsman will acquire information through a hybrid of powers under the Bill and Ombudsmen Act 1975, it would not be practicable for separate rules to operate with respect to information obtained under each Act and would also risk impinging on the Ombudsman's general powers.
 - 8.4 I note the Bill does not require the Ombudsman to be subject to a review within five years, as previously agreed by Cabinet [CAB-19-MIN-0687, 40-41 refers]. This is owing to constitutional concerns raised by the Ombudsman about being subject to a Minister-initiated review. The Bill instead provides for a review of how the Monitor works with bodies, including the Ombudsman, which maintains the intent to review the effectiveness of oversight arrangements without compromising the Ombudsman's independent constitutional position. Although not contained in the Bill, the Ombudsman has committed to undertake a review of their own operations within five years, which will consider the matters set out in the Cabinet minutes referred to above. Select Committee may wish to consider the merits of the Bill providing for this Ombudsman-initiated review to provide public assurance that this will be undertaken.

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Confirming the Ombudsman's jurisdiction

- 9 Although Cabinet has previously agreed the Ombudsman's jurisdiction should be broadened [CAB-19-MIN-0113 refers] the precise extent of this broadening has not been explicitly considered. While I see merit in including all services or support delivered through the Oranga Tamariki System, I recognise that further work is needed to assess the operational feasibility of doing so and the potential impacts on some service partners (see Appendix 1).
- 10 I note the Bill provides for a limited broadening of the Ombudsman's jurisdiction to include providers who hold custody or have responsibility for overseeing care arrangements under Section 396 of the Oranga Tamariki Act 1989. Consultation with the Ombudsman and Oranga Tamariki has confirmed this would be operationally feasible. It also aligns with community expectations that children and young people in care or custody should be able to seek independent support for complaint resolution from the Ombudsman in relation to their care or custody provider.
- 11 I seek Cabinet agreement that it be recommended to Select Committee that they consider the merits and feasibility of a potential wider broadening of the Ombudsman's jurisdiction (beyond what is provided for in the Bill) to include partners delivering community and other services to children, young people and their families under the Oranga Tamariki Act 1989. The Select Committee process will provide an opportunity to consider the views of stakeholders impacted by the broadening of the Ombudsman's jurisdiction.

Impact analysis

- 1 The Treasury's Regulatory Impact Analysis team has determined that the proposed new oversight arrangements are exempt from the requirement to provide a Regulatory Impact Statement on the grounds that they have no or only minor impacts on businesses, individuals, and not-for-profit entities. Providers delivering support and services through the Oranga Tamariki system are subject to a cost recovery funding model, and any regulatory burdens on providers associated with the new oversight arrangements would be passed on in full as a cost to Government.

Fiscal implications

- 12 We expect there will be financial implications for the Education Review Office (as the host agency of the Monitor) and the Office of the Children's Commissioner associated with transitioning existing monitoring arrangements. The interim Independent Children's Monitor have advised they have already budgeted for transitional costs.
- 13 The Ministry of Social Development, Te Kawa Mataaho Public Service Commission, the Education Review Office, and the Office of the Children's Commissioner will provide advice to the Minister of Social Development and Employment, the Minister for Public Services, Associate Minister of Education and the Minister of Finance by the end of 2021 regarding the establishment and ongoing operation of the new departmental agency and any budget implications [CAB-21-MIN-0153.01, 21 refers].

Compliance

- 14 The Bill complies with:
 - 14.1 the principles of the Treaty of Waitangi - Te Tiriti o Waitangi
 - 14.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

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14.3 the disclosure statement requirements (draft attached)

14.4 the Privacy Act 2020

14.4.1 The Bill is broadly compliant with the purposes and principles of the Privacy Act 2020. However, it overrides the Privacy Act in a number of respects to provide greater privacy protections to acknowledge the particular vulnerabilities of children and young people in the Oranga Tamariki system and their families and whānau. The Office of the Privacy Commissioner have been clear that they do not have significant concerns with the Bill.

14.4.2 MSD commissioned a privacy, human rights, and ethics assessment, and this has not identified any outstanding issues with the Bill.

14.5 relevant international standards and obligations

14.6 the Legislation Design and Advisory Committee's Legislation Guidelines.

Consultation

- 15 MSD conducted 21 hui with care-experienced Māori, Māori health and education professionals, academics, and iwi leaders throughout New Zealand during 2019 to seek input into policy development for the Bill. MSD also established a Māori advisory group (Te Kāhui) to advise on the Bill. Regular meetings have been held with Te Kāhui throughout the development of the Bill.
- 16 The following agencies were consulted on the draft Bill: Oranga Tamariki-Ministry for Children, the Office of the Children's Commissioner, the Independent Children's Monitor, The Office of the Ombudsman, Te Kawa Mataaho Public Service Commission, Te Puni Kōkiri, the Ministry of Health, the Ministry of Education, the Ministry of Justice, New Zealand Police, the Treasury, the Department of Prime Minister and Cabinet, the Ministry for Women, the Office of Disability Issues, the Ministry for Pacific Peoples, the Ministry of Youth Development, the Office of the Privacy Commissioner, the Education Review Office, Te Arawhiti, the Legislation Design and Advisory Committee, and the Remuneration Authority; and the Independent Police Conduct Authority.
- 17 Agencies have provided feedback on various aspects of how the Bill has been drafted. The Bill has been revised, where appropriate, to address this feedback (see Appendix 1).

No requirement in the Bill for Ombudsman to seek consent from children and young people or have a code of ethics

- 18 Some agencies provided feedback expressing concern that the Bill does not require the Ombudsman to seek consent from children and young people when engaging with them, or to develop a code of ethics.
- 19 I note that while Cabinet has previously agreed that the Monitor, the Ombudsman and the Commission will have the power to engage with children and young people, subject to a consent process, and should develop a code of ethics [CAB19-MIN-0687, 18.1 and 21 refer], this agreement did not extend to a requirement that the Bill must explicitly provide for this.

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- 20 The Ombudsman has advised that legislative prescription as to how they should seek consent is at odds with the Ombudsman's independent statutory function and would create a potentially problematic precedent for constraining the Ombudsman's existing powers.¹
- 21 However, the Ombudsman considers they are bound by a general principle to act in the best interests of a child and would routinely seek a child or young person's informed consent as part of any preliminary inquiry or investigation. The Ombudsman is also in the process of developing an ethics framework to provide further assurance that the Ombudsman's engagement with individuals, including children and young people, is undertaken in a safe and ethical manner. The framework will be developed in consultation with relevant ethics experts, Māori, and experts with clinical expertise working with children and young people with experience of severe psychological distress and trauma.
- 22 I am therefore satisfied that these consent processes, and the ethics framework that is being developed by the Ombudsman, aligns with Cabinet's intent to ensure the safe and ethical gathering and use of personal information, including when engaging with individuals.

Scope of the Bill as it relates to youth justice

- 23 Police have sought clarity on the Monitor's scope in the draft Bill as it relates to youth justice. I note the scope of the monitoring function extends to those parts of the Oranga Tamariki system responsible for responding to offending by children and young people, as implied by CAB-19-MIN-0113, 10. This includes Part 4 of the Oranga Tamariki Act 1989. The Bill has been drafted to enable the Monitor to monitor Police responses to offending by children and young people, irrespective of whether there is intersection with Oranga Tamariki. However, the Bill does not prescribe the nature and extent of this monitoring.

Omnibus Bill

- 24 I am seeking approval from the Business Committee that the Bill be introduced as a single omnibus bill under Standing Orders 269, to be split into two Bills during the Committee of the Whole House.
- 25 Parts 1 to 4 and Schedule 1 of the Bill will become the Oversight of the Oranga Tamariki System Bill. This Bill creates the legislative framework for the Monitor and incorporates new duties and powers for the Ombudsman.
- 26 Part 5 and Schedules 2 to 4 will become the Children and Young People's Commission Bill. This Bill reviews and refreshes the Children's Commissioner Act 2003 and reconstitutes the Office of the Children's Commissioner as the Children and Young People's Commission.

Binding on the Crown

- 27 I propose that the legislation will be binding on the Crown.

¹ These powers under Section 19 of the Ombudsmen Act 1975 extend to: "requiring any person who in his opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him any such information", and "an Ombudsman may summon before him and examine on oath any complainant; or with the prior approval of the Attorney-General in each case, any other person who in the Ombudsman's opinion is able to give any such information."

Allocation of decision-making powers

- 28 The Bill does not involve the allocation of decision-making powers between the Executive, the Courts, and Tribunals.

Associated regulations

- 29 The Bill will contain regulation-making powers for several purposes in relation to the parts of the Bill which relate to the oversight of the Oranga Tamariki System. This includes for reporting requirements for the Monitor and monitored agencies, requirements relating to the Monitor's code of ethics, and for determining to whom non-compliance with the Bill should be reported.
- 30 The Bill will also enable regulations in respect of the Commission including to specify the relevant agencies that may endorse a candidate applying to be a board member on the Commission's Board and prescribing requirements relating to the Commission's code of ethics.
- 31 The drafting of all regulations necessary for the administration of the Bill at the time of its enactment, or necessary for giving it full effect, will be completed before the Bill is enacted.

Definition of Minister/department

- 32 The Bill defines the 'Minister' as a Minister who, under the authority of any warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of the Act.
- 33 The Bill also defines "the Minister responsible for the Monitor" as a Minister who, under the authority of a warrant or with the authority of the Prime Minister, is the person for the time being responsible for the administration of the Monitor.
- 34 The Bill defines the departmental agency responsible for supporting the Monitor as the Independent Monitoring Agency of the Oranga Tamariki System which will be a public service agency named in Schedule 2 of the Public Service Act 2020. The Bill defines the chief executive of the Independent Monitoring Agency of the Oranga Tamariki System under the Public Service Act as the Monitor.
- 35 The Bill defines the chief executive of Oranga Tamariki as the chief executive of Oranga Tamariki—Ministry for Children.

Commencement of legislation

- 36 I propose that the Bill comes into force on enactment.

Parliamentary stages

- 37 I propose the Bill should be introduced as soon as practicable after Cabinet agreement.
- 38 The Bill holds a priority 4 on the 2021 Legislation Programme.
- 39 I intend to refer the Bill to the Social Services and Community Committee for consideration, with a six-month deadline to report the Bill back to the House of Representatives.

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40 I propose that the Bill be passed by the end of 2022 / early 2023.

Proactive Release

41 I intend to proactively release this paper within 30 working days as required by CO (18)(4), subject to the Official Information Act 1982. The Bill and Disclosure Statement will be available upon introduction to the House.

Recommendations

42 It is recommended that the Committee:

1. **note** the Bill requires the Monitor to demonstrate annually how they have had regard to the views of the Māori Advisory Group
2. **note** the Bill only requires the Statutory Officer to give effect to a request for a review made by the Minister responsible for the Monitor, through which requests by other Ministers may be coordinated
3. **note** the Bill does not require the Ombudsman to develop information rules as previously agreed by Cabinet [CAB-19-MIN-0687, 19-20 refers] because such rules would be unnecessary given the existing safeguards within the Ombudsmen Act 1975 for ensuring information is managed securely
4. **note** the Bill does not include a requirement for the Ombudsman to be subject to a direct qualitative review as agreed previously by Cabinet [CAB-19-MIN-0687, 40-41 refers] but retains the requirement of review of how the Monitor works with the Ombudsman in performance of the monitoring function
5. **note** the Ombudsman has committed to undertake a review of their own operations under the Bill that includes consideration of the matters set out in CAB-19-MIN-0687, 40-41. The review will be undertaken within five years of enactment
6. **note** the Bill provides for a limited broadening of the Ombudsman's jurisdiction to include care providers and custody providers delivering services under section 396 of the Oranga Tamariki Act 1989, to the extent that they are delivering services under that Act
7. **agree** that it be recommended to Select Committee that further broadening of the Ombudsman's jurisdiction, to encompass community service providers under section 403 of the Oranga Tamariki Act 1989 and other providers delivering services to children, young people and their families and whānau under the Oranga Tamariki Act 1989, be considered as part of the Select Committee process
8. **note** the Bill does not include a requirement for the Ombudsman to seek consent when collecting information or to be subject to a code of ethics when undertaking investigations under the Ombudsmen Act 1975. However, the Ombudsman is developing an ethics framework to ensure the safe and ethical gathering of information and has provided assurance they would routinely seek consent from children and young people as part of any preliminary inquiry or investigation
9. **note** the scope of the monitoring function extends to the monitoring of Police responses to offending by children and young people under Part 4 of the Oranga Tamariki Act 1989

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10. **note** the Bill holds a category 4 priority on the 2021 Legislation Programme, meaning that it is intended for introduction and referral to a select committee in the current calendar year
11. **authorise** the Minister for Social Development and Employment, in consultation with other Ministers as appropriate, to make decisions on related minor and technical matters to enable finalisation of the Bill
12. **note** that I am seeking approval from the Business Committee for the Bill to be introduced as a single omnibus bill under Standing Orders 269, and to be split into two bills at the Committee of the Whole House
13. **agree** that the Bill once enacted will bind the Crown
14. **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives
15. **agree** that Bills will come into force on the day after the date on which each Bill receives Royal assent
16. **agree** that the Bill will be introduced as soon as practicable after Cabinet agreement
17. **agree** that the Government proposes that the Bill be:
 - 17.1. referred to the Social Services and Community Committee for consideration
 - 17.2. with a timeframe for report back of six months
 - 17.3. enacted by end of late 2022 / early 2023.

Authorised for lodgement

Hon Carmel Sepuloni
Minister for Social Development and Employment

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Appendix 1: s (9)(2)(g)(i)

[Redacted]

[Redacted]

s (9)(2)(g)(i)

[Redacted]

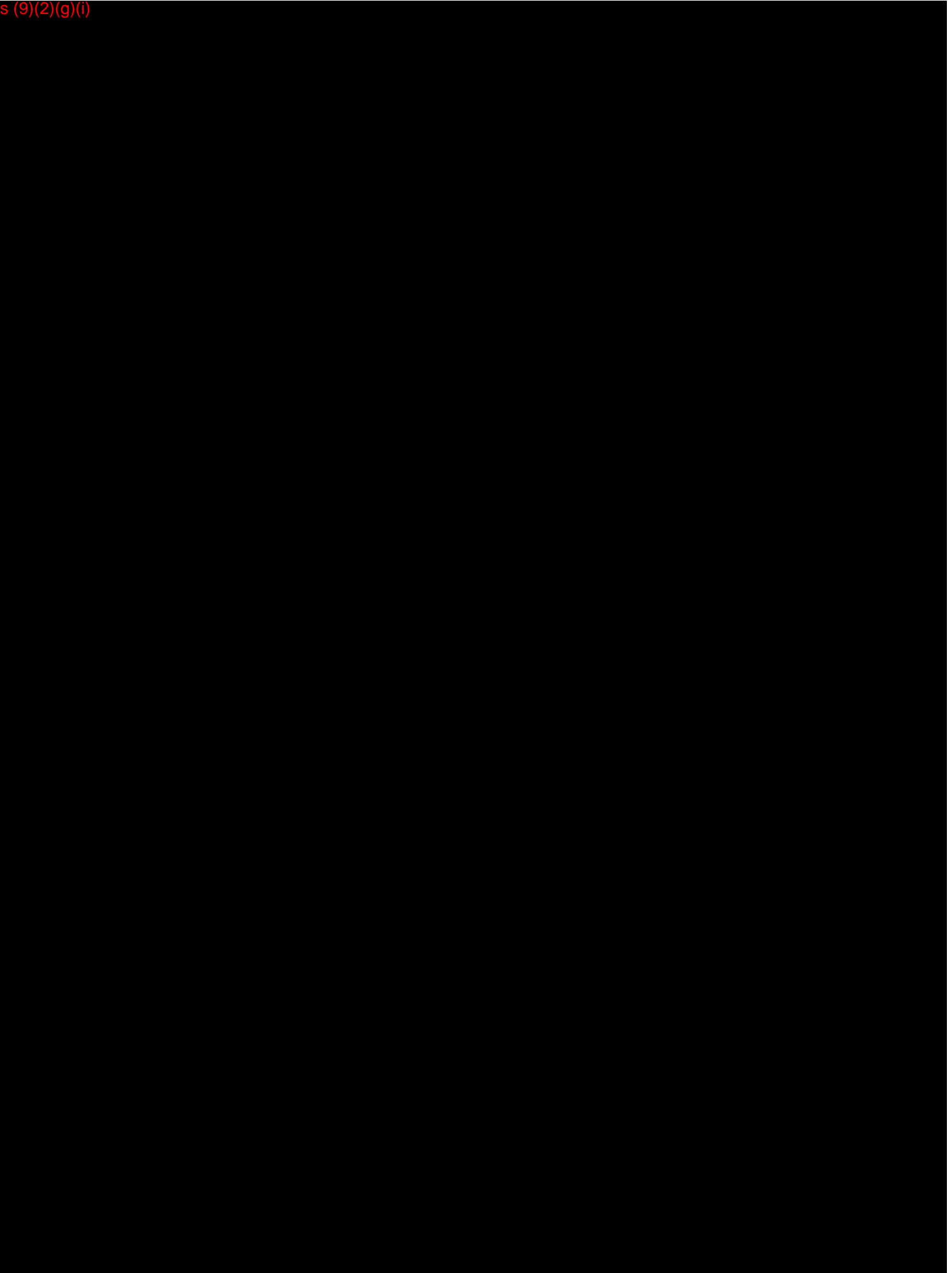
s 9(2)(h)

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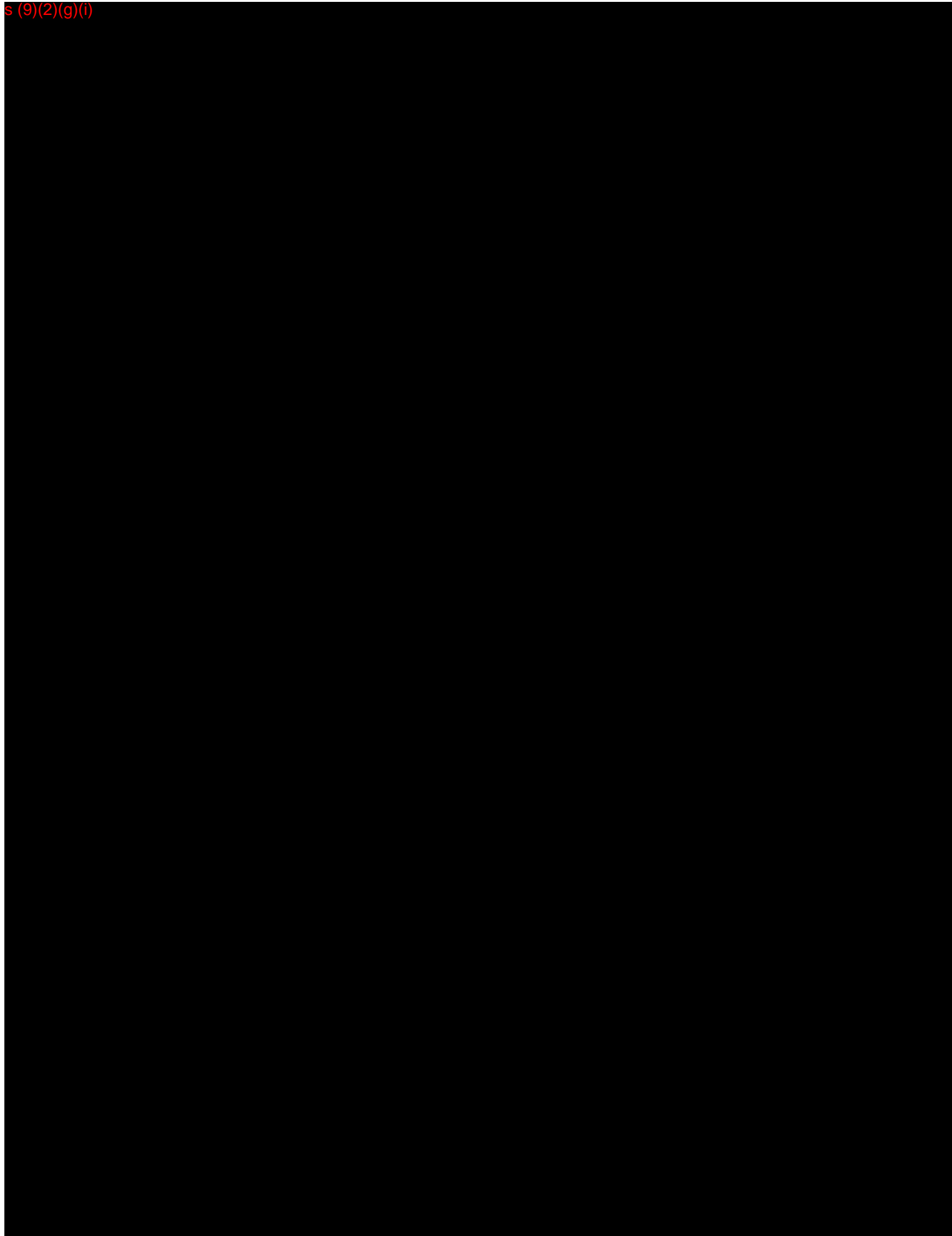
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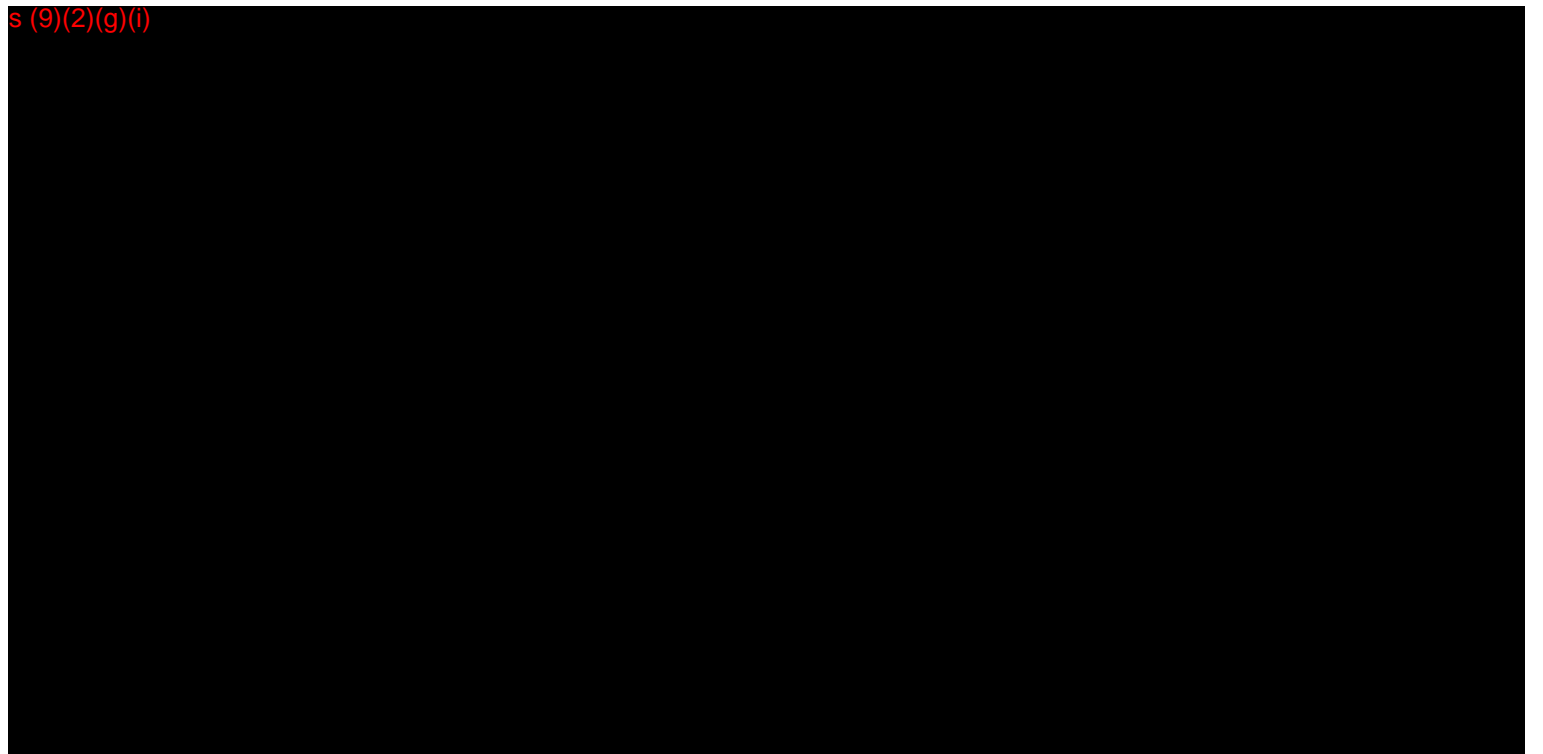


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