

Chair
Cabinet Social Wellbeing Committee

CLARIFICATION OF POLICY MATTERS TO SUPPORT THE OVERSIGHT OF THE ORANGA TAMARIKI SYSTEM AND CHILDREN'S COMMISSION LEGISLATION BILL

Proposal

- 1 This paper seeks your agreement to proposals to strengthen independent oversight of the Oranga Tamariki system¹ and children's issues, which have been further developed since March 2019 Cabinet decisions and are required to draft the *Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*.

Executive summary

- 2 On 25 March 2019, Cabinet agreed to strengthen independent oversight of the Oranga Tamariki system and children's issues in three core areas: system-level advocacy for all New Zealand children and young people; oversight and investigation of complaints of matters related to application of the Oranga Tamariki Act 1989 and/or children in the care or custody of the State; and independent monitoring and assurance of the operations and obligation delivered under the Oranga Tamariki Act 1989 and associated regulations [CAB-19-MIN-0113 refers].
- 3 Since March 2019, the Ministry of Social Development (MSD) has focused on how best to implement Cabinet's decisions. As a result of extensive engagement and working through the detail of the policy proposals, some have been further refined. Due to the significance of the detailed work MSD has undertaken, Cabinet consideration is now required. This paper seeks Cabinet approval of the further decisions or clarifications required to assist with drafting the *Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill* (the Bill).
- 4 I am seeking Cabinet approval of the provisions in the Bill to articulate the oversight bodies' duties in relation to the Treaty of Waitangi. This paper also specifies the detail that is required to enable further drafting of the independent monitoring provisions in the Bill. I am seeking Cabinet approval of the proposed approach for the independent monitor, including further clarification of the purpose, functions and reporting requirements. The monitor's purpose and functions reflect a broad spectrum of monitoring, from compliance and practice quality, through to monitoring outcomes being achieved for tamariki and whānau. One of the goals of the independent monitor is to support learning and continuous improvement of the Oranga Tamariki system to ensure tamariki and whānau wellbeing. The monitor will draw on a range of information sources to inform its function, including qualitative and quantitative information,

¹ The term 'Oranga Tamariki system' is used in this paper to describe not only the early intervention, statutory care, protection, youth justice and transitions support systems as outlined in the Oranga Tamariki Act 1989, but also other agency services provided to children and young people under the Act (for example health, education and disability services, including by NGOs). It also includes services provided by Children's Agencies to the core populations of interest to Oranga Tamariki as defined under the Children's Act 2014, including children who have early risk factors for future involvement in the statutory care, protection and youth justice systems.

performing site visits and engaging directly with tamariki and whānau, and the Bill will provide for these functions.

- 5 I am also seeking Cabinet approval of the proposed approach to information access and sharing, and governance arrangements for the Office of the Children's Commissioner (OCC). This paper sets out the proposed information sharing and access framework, that will enable the oversight bodies to operate as a cohesive system. The governance arrangements of the OCC will support the monitor and advocate to perform their roles effectively.
- 6 Cabinet consideration is also required for a range of other matters that have been clarified throughout MSD's subsequent work including; the oversight bodies' relationship with Ministers; the Children's Commissioner's role in the grievance panels associated with Youth Justice and Care and Protection Residences; and a minor legislative amendment required to clarify the scope of arrangements for resolving historic complaints and claims.

Background

- 7 In 2017, in response to reforms of the Oranga Tamariki system and new government priorities for children (including the reduction of poverty and the child wellbeing strategy), the Government commissioned a review of independent oversight arrangements for the Oranga Tamariki system and children's issues (the Review).
- 8 The Review found that the oversight arrangements require strengthening to address key issues and gaps relating to resourcing for system-level advocacy; under-investment in the resources and powers required for independent monitoring and for complaints resolution; and a need for more engagement with Māori across all elements of the Oranga Tamariki system and across independent oversight functions.
- 9 In response to the Review, on 25 March 2019, Cabinet agreed to strengthen the system of independent oversight of the Oranga Tamariki system and children's issues in three core areas:
 - system-level advocacy for all New Zealand children and young people, which will continue to be undertaken by the Office of the Children's Commissioner (OCC)
 - oversight and investigation of complaints of matters related to application of the Oranga Tamariki Act 1989 and/or children in the care or custody of the State, which will be undertaken by the Office of the Ombudsman
 - independent monitoring and assurance of the operations and obligations delivered under the Oranga Tamariki Act 1989 and associated regulations. MSD was appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the in-principle intent that it is transferred to the OCC, once a robust monitoring function is established and a new legislative framework is in place [CAB-19-MIN-0113 refers].
- 10 Cabinet agreed to new primary legislation to bring the respective roles, responsibilities and powers of the oversight bodies together in one place² [CAB-19-MIN-0113 refers]. The Bill is provisionally titled the *Oversight of the Oranga Tamariki system and Children's Commission Legislation Bill* (the Bill).

² The Ombudsman will use its powers contained in the Ombudsmen Act 1975, while giving regard to any additional powers or constraints (eg duties relating to the Treaty of Waitangi, general principles, information access and sharing provisions, including the Codes for engaging with children and young people) as applicable in the new Act, to perform its specific function as oversight body for complaints and investigations within the Oranga Tamariki system.

- 11 In the March 2019 Cabinet paper, I outlined that the independent monitoring function should initially focus on monitoring the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (the NCS regulations) but over time could extend to cover intake, referral and assessment processes and monitoring the delivery of services within, and outcomes achieved by, the Oranga Tamariki system, across their core operating model. Oversight of the Oranga Tamariki Act 1989 will mean that monitoring and assurance will also apply to other agencies providing services (e.g. health and education services, including non-governmental organisations (NGOs)) to children and young people in the Oranga Tamariki system, in line with requirements of that Act. MSD has engaged with the Ministries of Health, Education and Justice to ensure they are aware of this. The Independent Children's Monitor will engage extensively across the NGO sector as it builds its assessment and outcomes framework.
- 12 The approach taken to date to strengthen independent oversight of the Oranga Tamariki system has been driven by the NCS regulations, which required a monitor to be appointed, and for monitoring of the NCS to start on 1 July 2019. Given the complexity and time required to establish a new monitoring body, a phased-approach is being taken to build the function up over time. The assessment framework for monitoring is being developed first. Full monitoring of the NCS will commence on or before 31 December 2020. Monitoring of the other elements of the Oranga Tamariki system will commence in a later phase. This phased-approach will also provide time to ensure the monitor is established and scaled-up to adequately meet future monitoring needs.
- 13 Since Cabinet decisions, MSD has worked closely with key agencies³ on further developing legislative proposals and engaged externally with Māori individuals and groups on how best to implement Cabinet's decisions. The Māori individuals and groups MSD has engaged represent a range of interests and expertise across the Oranga Tamariki system, such as strategic Treaty/iwi partners, medical professionals, providers, care-experienced individuals, caregivers and other relevant stakeholders. This engagement, and the work to develop proposals, is overseen by a Kāhui group.⁴
- 14 MSD has provided initial drafting instructions to Parliamentary Counsel Office (PCO) on aspects of the Bill, including the purpose of the Act, the general principles and the functions of the Children's Commissioner and the Ombudsman for the Complaints Oversight and Investigations function.

Detailed policy proposals to strengthen independent oversight of the Oranga Tamariki system and children's issues

- 15 As a result of extensive engagement and working through the detail of the policy proposals agreed by Cabinet in March 2019, I am seeking Cabinet's agreement to further decisions and clarifications required to assist with drafting the Bill. I am seeking Cabinet's agreement to the proposed approaches for:

³ MSD has been consulting with Oranga Tamariki – Ministry for Children, Ministry of Justice, the Office of the Privacy Commissioner, the Office of the Ombudsman, the OCC, Te Puni Kōkiri – Ministry for Māori Development and The Office for Māori Crown Relations - Te Arawhiti on the development of legislative proposals and approaches to monitoring.

⁴ The Kāhui Group was established in May 2019 to assist the Ministry of Social Development in achieving engagement and collaboration goals, as well as to provide ongoing advice and support on the independent oversight work. The Group consists of Sir Mark Solomon, Druis Barrett, Katie Murray, Eugene Ryder and Donna Matahaere-Atariki. Group members were appointed for their expertise, leadership and mana in the area of health and social services for Māori and will be providing feedback throughout the independent oversight work programme.

- provisions in the Bill to articulate the oversight bodies' duties in relation to the Treaty of Waitangi
- the independent monitor's role, including the purpose, functions and reporting requirements
- information access and sharing provisions
- governance arrangements for the OCC
- the OCC's role in the grievance panels associated with Youth Justice and Care and Protection Residences
- a minor legislative amendment required to clarify the scope of arrangements for resolving historic complaints and claims.

The oversight bodies' commitment to the Treaty of Waitangi/ te Tiriti o Waitangi in the Bill

- 16 In recognition of both the Crown's Treaty partnerships with Māori and the high rates of Māori children and young people in the Oranga Tamariki system, Cabinet agreed that the Bill would require oversight bodies to make a practical commitment to the Treaty of Waitangi (the Treaty) through the provision of specific duties on the oversight bodies. It was noted that section 7AA of the Oranga Tamariki Act 1989 may be used as a guide to establish these duties [CAB-19-SUB-0113].
- 17 MSD has developed the list of duties in paragraph 17 in consultation with the OCC, Office of the Ombudsman, Te Puni Kōkiri, technical advice from Māori lawyers, and the Kāhui group. The duties have been developed to align with section 7AA of the Oranga Tamariki Act 1989 where possible and will ensure the oversight bodies can demonstrate their commitment to the Treaty in a practical way.
- 18 I propose that the duties include the following matters (to be further developed during drafting and further consultation):

Oversight bodies must ensure:

- that in setting strategic priorities and in the development of the work programme have as a key priority the need to support improved outcomes for Māori children and young people
- Māori participation in the context of the oversight bodies discharging their respective functions
- their engagement approaches, policies, procedures, employment and other practices give effect to tikanga, mana tamaiti (tamariki), whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū and iwi
- oversight bodies, iwi and Māori organisations enter into partnerships or arrangements to:

- provide opportunities to, and invite proposals on how to improve oversight of the Oranga Tamariki system and in so doing, outcomes for Māori children, young persons, and their whānau who come into contact with the Oranga Tamariki system
 - enable the robust, regular, and genuine exchange of information between oversight bodies and those iwi and Māori organisations (supported by information sharing provisions)
 - agree on any action both or all parties consider is appropriate.
- the complaints and investigations processes are accessible for Māori children and young people, their whānau, hapū, iwi or any other Māori organisation supporting them
 - the complaints and investigations processes incorporate a tikanga approach, and the whānau, hapū, and iwi of the child or young person are engaged with, where possible, during the complaints and investigations processes, unless to do so would be impracticable or risk harm to a child or any other person
- 19 I recommend that Cabinet endorse the proposed duties to ensure oversight bodies give effect to the Treaty in a practical way, subject to further developments through the process of drafting the Bill and with further consultation.

The role of the Independent Monitor

- 20 On 25 March 2019 Cabinet agreed that MSD should be appointed to establish and operationalise independent monitoring of the Oranga Tamariki system from 1 July 2019. [CAB-19-MIN-0113 refers]. The March 2019 Cabinet paper stated that the *role of the independent monitor will be to objectively assess the quality and extent of compliance with and delivery of the Oranga Tamariki Act 1989 and related regulations and standards* and set out a range of functions the monitor would undertake to fulfil its role
- 21 Subsequent work has identified that greater specificity is required in respect of the monitor's purpose, functions and reporting requirements to enable effective independent monitoring of the performance of the Oranga Tamariki system. The refined purpose and functions outlined below reflects the monitor's role across a broad spectrum of monitoring, from compliance and practice quality, through to monitoring outcomes being achieved for tamariki and whānau. The proposals also reflect one of the goals of monitoring, to support systems participants to learn and improve in order to increase the wellbeing of tamariki and whānau.
- 22 In March 2019, Cabinet also agreed with the intention for the independent monitor to transfer to the OCC once a robust monitoring function is established and the new legislative framework is in place [CAB-19-MIN-0113 refers]. Throughout consultation⁵, concerns have been raised regarding having the system advocacy and independent monitoring functions

⁵ As Cabinet agreed, MSD has engaged with a group of key stakeholders and Māori, specifically to support its work on advice to Ministers around preparation for further policy decisions and the draft legislation. The Independent Children's Monitor will undertake an extensive programme of engagement with stakeholders and Māori to inform development of the monitoring assessment and outcomes frameworks. For example, local iwi leaders, regional iwi organisations and NGO providers, either in a particular area or area of interest and national organisations – across the government and NGO sector. Once legislation has been introduced into the House, MSD will also point groups to the public select committee process, if they are wanting to provide input directly.

operated within the same organisation. Some stakeholders have concerns that the independent monitor may be influenced by the system advocate and that information collected for independent monitoring may be inappropriately shared. There have also been concerns about the independent monitoring function delivered by MSD in the interim, while the function is being established. For this reason, in developing proposals for the Bill, I have considered how the information sharing provisions could help mitigate these concerns.

- 23 Consultation also highlighted that there are a range of views held by agencies and Māori on the level of independence the monitor should have from ministers and Oranga Tamariki, and how this is perceived publicly; what would be considered 'sufficient' powers for the independent monitor to have in order to promote systems learning and improvement in the Oranga Tamariki system; what level of public transparency would be the most effective in creating change in the system; and what should be expected from those being monitored in responding to the monitor. I have considered a range of views in the development of the proposals outlined below.

Purpose of the Independent Monitor

- 24 There are several reasons why strong independent monitoring is needed, including:
- historical failures in the care system resulting in a recognition that Ministers require trusted advice on systems performance, compliance with the law, service and practice quality and the impact on the wellbeing of tamariki independent from those who hold custody and provide care services
 - an acceptance both domestically and internationally that a degree of independent checks on the use of strong coercive powers is appropriate
 - where complex systems are operationalised by a range of providers, understanding systems is benefited by having a focal point for monitoring that is adjacent to but not part of the delivery of services.
- 25 In the Bill, the proposed purpose of the monitor will consist of specific objectives to bring greater clarity to the role and focus of the independent monitor, by incorporating concepts such as:
- supporting the rights, interests and wellbeing of children, young people and their families
 - improving public trust and confidence
 - supporting systems learning and continuous systems improvement
 - recognising the Crown's Treaty partnerships with Māori and the significant proportion of Māori tamariki in care.

Functions of the Independent Monitor

- 26 The duties of the independent monitor that were agreed by Cabinet have been clarified to ensure that they enable the fulfilment of the purpose of the monitor. The functions of the independent monitor in the Bill will comprise of key components including:
- *Effective systems performance monitoring* – looking at how the Oranga Tamariki system has changed over time (eg by developing and measuring against key indicators) and how this change has impacted on desired outcomes for tamariki and whānau. This also includes the ability to undertake more frequent reviews of specific aspects of the system

to look at what actions are being taken now and whether these actions are having their intended impacts.

- *Recognising the interface between systems* – the Oranga Tamariki system interfaces heavily with other systems (ie. health, education, housing etc) which also impact on the outcomes of tamariki and whānau. Tamariki often come into contact with the Oranga Tamariki system due to a range of exacerbating factors, for example, drug and alcohol addiction, homelessness, poverty and other factors that cause a family to struggle. To provide a wider context of system performance, it will be necessary for the monitor to acknowledge the factors that can drive tamariki into the Oranga Tamariki system and monitor the effectiveness of the interface between the Oranga Tamariki system and other systems.
- *Providing for the Crown's commitment to Māori* – due to the significant proportion of tamariki in care who are Māori and given the Crown's Treaty partnerships with Māori through the Treaty of Waitangi, it is important that the monitor has an explicit focus on monitoring outcomes for Māori tamariki and providing assurance that practice and services are being delivered in accordance with Māori culture and values.

Supporting transparency and accountability

- 27 To grow public trust and confidence in the Oranga Tamariki system, it is vital that there is transparency and accountability in the monitor's role and in the Oranga Tamariki system. I propose that this will be supported through the reporting activity of the monitor and its relationship with Ministers and Oranga Tamariki.
- 28 Throughout the course of monitoring, the monitor will produce a range of reports on its findings to the Minister responsible for Oranga Tamariki, the Minister responsible for the Act (i.e. the proposed Oversight legislation), Ministers with responsibilities for Māori portfolios and Minister's with portfolio responsibilities related to children. This will include a three-yearly 'state of the Oranga Tamariki system' report, similar to what is currently specified in regulation 81 of the NCS Regulations, as well as annual reports on compliance with the NCS and operations of the Oranga Tamariki system, and outcomes being achieved for Māori tamariki and whānau. It will also be able to report on any other topics it considers necessary to discharge its function. The purpose of the monitor's reporting is to help achieve its objectives specified in paragraph 25, including improving public trust and confidence and supporting systems learning.
- 29 I propose that the Bill contain provisions to enable the monitor to discharge its reporting function, including specifying that the monitor will produce and publish the types of reports mentioned above, and that responses by those who have been subject to or a party to the report may be required. The detail as to what these reports must contain, and key processes may be specified in the regulations to the Bill. This will include requirements for responding to, and publishing and tabling reports in Parliament, setting timeframes for these processes, and requirements around dissemination in a manner accessible to individuals, whānau and iwi. Further detail on these arrangements will be provided in the paper accompanying the draft Bill to the Legislation Committee of Cabinet.

The relationship with Ministers and Chief Executive of Oranga Tamariki

- 30 To build public trust and confidence in the oversight system, it will be important for the monitor, Ombudsman and Children's Commissioner to maintain independence from Ministers. For monitoring, a balance is needed so the monitor can be responsive to Ministers while ensuring a degree of independence to support the provision of free and frank reporting.

- 31 Currently the Minister responsible for the Oranga Tamariki Act 1989 is legislated as the Minister responsible for the Children’s Commissioner and receives reports generated by the Commissioner into specific issues. However, functions relating to the administration of the Commissioner (eg budget, Statement of Performance Expectations, etc) have been delegated to myself.
- 32 To ensure a high degree of independence from Ministers, I had considered whether the Bill should define “the Minister responsible for the Act” as any Minister other than the Minister responsible for the Oranga Tamariki Act 1989, as this would address any perceived conflict of interest of having a Minister being responsible for both service delivery and the oversight system.
- 33 On balance, I do not consider that the responsible Minister needs to be specified in the Bill and, as with usual practice, the Prime Minister would designate “the Minister responsible for the Act⁶”. This will help ensure that the legislation is fit for purpose and future-proof.
- 34 I also propose that the Bill enable the “Minister responsible for the Act”, the Minister responsible for the Oranga Tamariki Act 1989, and the Prime Minister to request reports from the monitor on specific issues of interest or concern. Providing the Minister responsible for the Oranga Tamariki Act 1989 or the Prime Minister with the ability to request, rather than direct, reports from the monitor will help maintain a degree of independence for the monitor and will ensure that the monitor’s work programme will not be unduly influenced by Ministers. The Bill will also enable the Chief Executive of Oranga Tamariki to request reports from the monitor on specific issues, for example to support systems learning.

Information sharing and access framework

- 35 In March 2019, Cabinet authorised me, in consultation with other Ministers as appropriate, to make decisions on access to information and powers of entry to enable the progress of legislative drafting to finalise the Bill [CAB-19-MIN-0113 refers]. Due to the significant implications of information sharing with respect to the proposed oversight bodies, I have set these out in more detail for Cabinet consideration.
- 36 To support the oversight bodies to be effective and to maintain their independence, there needs to be strong provisions for the access to and sharing of information. Each oversight body will have different information needs and different information access and sharing requirements as a result – this could include records for individual children, court information, information regarding Oranga Tamariki practices, statistics and other documents. Oversight bodies will also need to generate information through engagement with tamariki, whānau and staff. To ensure safe and ethical engagement and management of information, particularly private information, this access will be subject to a Code and Information Management Rules, as set out below.
- 37 To facilitate access to information, I propose that where necessary, oversight bodies will have the power to:
- require the provision of information from organisations - the independent monitor and the Ombudsman will be able to require information from organisations that engages children and young people in the Oranga Tamariki system⁷ whereas the advocate will only be able to require some specific information from government agencies (outlined in

⁶ For clarity, this is different from the Ministry responsible for administering the Act.

⁷ This includes any organisation that engages children and young people in the Oranga Tamariki system, for example, Government agencies such as Oranga Tamariki, Ministries of Health, Education etc, schools, District Health Boards, disability services and NGOs.

paragraph 52 of this paper). Only the monitor and Ombudsman will be able to require the provision of identifiable or de-identifiable personal information. Requirements for provision of such information will need to meet the principle of being both necessary and proportionate.

- engage directly with individual children, young people and whānau, after obtaining informed consent
- share information with each other, other agencies, iwi/Māori organisations (other than personal information) or parties that have a role with children, young people and their families within the Oranga Tamariki system to support their functions.

38 It is crucial that information-sharing and the management of information is properly conducted, to ensure that rights to privacy are maintained and that information is only accessible by those who require it for a specific function.

Information Management Rules

39 To support the oversight bodies' power to require information from organisations and effectively manage that information (as outlined above), I propose the Bill provide for each oversight body to develop a set of Information Management Rules (the Rules)⁸. This would usually be dealt with through Memorandums of Understanding (MoUs), which would be negotiated with individual organisations. However, due to the large number of organisations oversight bodies will be engaging with, negotiating individual MoU's would be impractical. I propose the Rules will be developed in consultation with other affected organisations and the Privacy Commissioner before being finalised and signed-off by the Chief Executive or equivalent of each oversight body. The Rules will reflect the requirements of the Privacy Act 1993, and specify such matters as:

- why and how information can be sought
- whether information is regularly provided and/or done so in response to requests
- who within the oversight agency may access what information for what purpose(s)
- how information will be stored and disposed of
- ensuring the accuracy of information
- provisions for providing information under urgency
- how to support the sharing of information between oversight bodies and iwi/Māori organisations.

Codes to support engagement with individuals

40 Oversight bodies will interact directly with individuals, including tamariki and whānau who may be particularly vulnerable. It is important to ensure the rights of these individuals are adequately protected, and that the rights of children to be heard is upheld. It is also important

⁸ The Social Investment Agency's (SIA) data collection and use policy (information management code of practice) was considered in the development of the Information Management Rules and the proposals are consistent with the direction/intent of the SIA policy and what it is trying to achieve. The expectation is that in developing the Rules (and the Code), the SIA policy and associated tool kits will be important inputs for oversight agencies.

to ensure that oversight agency staff engagement with individuals is done in a safe and ethical manner. I propose that the Bill will also require the oversight bodies to develop a Code. The Code will support staff to engage with individuals safely and ethically without diminishing their right to be heard. The Code for each oversight body will incorporate tikanga and te ao Māori and set out protocols to guide employees of oversight bodies, including:

- when it is appropriate to request, engage with individuals (ie. when to rely on existing information held by agencies and when to engage individuals to gather new information)
- protocol for before, during and after engagement
- support mechanisms for a child or young person who is involved in a complaint
- how an ethics lens will inform how individuals are engaged with, and how personal information is used, including the use of appropriate ethical expertise
- ensuring tamariki are supported to uphold mana tamaiti and whanaungatanga and their views are reflected in the context of their whānau, hapū, iwi and wider connections and community.

41 When oversight bodies develop their respective Codes they must, where possible, take a common approach to support certainty and minimise any potential burden on individuals or those who are responsible for them. The oversight bodies would be expected to seek input from ethics specialists and from Māori and consult with the Privacy Commissioner, to ensure the content of the code is appropriate. Once developed the Code will be published on agencies websites. Key stakeholders, including the OCC, the Office of the Ombudsman, and Oranga Tamariki are supportive of this approach. The content of the Code may be incorporated into the Rules to enable ease of use. This matter will be considered further in the paper accompanying the draft Bill to the Legislation Committee of Cabinet.

Other information access and sharing provisions

42 The Bill will also make provision for:

42.1 *Facilitating timely access* - given the reliance the monitor (and other oversight bodies) will have on Oranga Tamariki and providers when gaining access to individuals, I propose the Bill provide for a duty to facilitate timely access to individuals, in accordance with the Code. The duty will fall on the agencies that hold the information and those who have direct care of the child or young person, for example, the manager of a site or group home or foster carer. This is because those with direct care are in the best place to determine whether there is likely to be a risk of harm to the individual or whether there are any other exceptional circumstances.

42.2 *Consent* – informed consent is required from the individual being engaged by oversight bodies.⁹ Individuals retain rights to refuse consent at any point prior to or throughout the engagement process either on their own or on their behalf. Where the individual does not have the capacity to consent their direct caregiver may object if they consider engagement is likely to lead to serious physical or emotional harm. Where consent is required to engage with a child relating to a complaint, the child does not have capacity to consent and the direct care giver is the subject of the complaint, the custody holder (eg. Oranga Tamariki) may give consent.

⁹ Informed consent means that permission is granted by an individual in full knowledge of the possible consequences.

42.3 *Secrecy and privacy* – the Bill will provide for secrecy and privacy provisions to encourage individuals to engage with oversight bodies in a free and frank manner without fear of reprisal. Reasons for disclosing information to any other agencies¹⁰ will be limited to:

- where the oversight body has information that suggests a person is at risk of harm or where the oversight body believes a serious criminal offence has been committed that justifies notifying the police
- to support a child or young person who is involved in a complaint
- support notifications, referrals and the efficient and effective discharge of functions.

42.4 *Relationship between the Crown and Māori* - provisions in the Bill will be made to ensure the regular safe exchange of information between oversight bodies and Iwi. These will be governed by the Code established by the Bill and partnerships/arrangements with Iwi and Māori organisations.

Information provisions for the monitor

- 43 The monitor will require the ability to request individual level information to enable it to complete its functions. In requesting personal information, it will do so in a way to demonstrate its necessity to complete its function and that the requirement is proportionate.
- 44 For example, while the monitor is a systems monitor and will in the first instance be monitoring the compliance with the NCS Regulations (and in future the whole Oranga Tamariki system, as defined under the Oranga Tamariki Act 1989), it will need to be able to triangulate the system level information it receives, by cross checking against a selection of case files, through interviews with staff and other participants in the system, including children.
- 45 One of the purposes of the monitor is to provide the Government and the New Zealand public with increased trust and confidence in the Oranga Tamariki system. Without reviewing personal information or talking with individual participants, it will be difficult for the monitor to provide the required trust and confidence as the monitor would only be relying on information provided by Oranga Tamariki itself or care providers, and some conversations with external partners and stakeholders.
- 46 It is important that the monitor can look at the full spectrum of monitoring, from compliance and practice quality, through to outcomes. Monitoring each of the interrelated areas will enable the monitor to ultimately assess if outcomes are being achieved for tamariki and whānau. When findings from these areas are continuously triangulated, it will give the most comprehensive assessment of where the gaps and issues are in the system, whether that relates to core regulatory compliance, practice quality and whether or not outcomes are ultimately being achieved.

Power of entry with notice for the monitor

- 47 The monitor will need to gather information relating to the environments within which children and young people reside (other than private homes) and the environments in which staff work. It is proposed that the monitor have the power to enter premises with notice for the purposes of observing practice or observing environments where children and young people reside.

¹⁰ Individuals can still request their own information pursuant to the Privacy Act 1993

- 48 These activities are distinct from engaging directly with tamariki, whānau and staff. To gather this information from individuals, it is proposed that oversight bodies will not have a right of access but will rely on consent as set out above.
- 49 In recognition that some premises may be home to children and young people I propose that the right of entry may be refused in the following exceptional circumstances:
- where there has been a serious incident such as a police matter, an assault at the premises, or a death has occurred, between the time the visit is notified and the time visit is to take place
 - because the site is experiencing serious health concerns
 - where any other serious event has occurred, and a site visit is likely to exacerbate tension or emotional harm.
- 50 Where entry is denied a reason must be provided in writing to the oversight agency.

Information acquisition powers for the Children's Commissioner

- 51 Cabinet agreed that the Children's Commissioner Act 2003 (the Children's Commissioner Act) will be repealed and provisions relating to the Children's Commissioner's system advocacy role be established in the new Act, including the function to inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children (s 12(1)(l)) [CAB-19-MIN-0113 refers].
- 52 The Children's Commissioner's general inquiry function is enhanced by the power in section 20 to *formally request information by notice in writing in order to enable the Commissioner to carry out an investigation*. The purpose of this power was to *enhance the Commissioner's investigative and inquiry functions* (s 3(e)). Investigations include inquiries as well as investigating decisions in respect of a specific child (sections 12(1)(a) and 13(1)(a)).
- 53 Under the Bill, the Ombudsman will have jurisdiction to cover complaints relevant to the children and young people under the care of the Oranga Tamariki system and other types of complaints to do with government agencies. Under the Bill, the OCC will no longer have functions to investigate decisions in respect of individual children. The OCC will still be able to advocate for individual children, advise individuals how to navigate complaints pathways, and can make enquiries on behalf of an individual (with their consent) without a formal investigation function in the Bill and associated powers to call for information.
- 54 The Children's Commissioner has advised that the investigation function (investigating for individuals and for all children generally) is an essential back-stop for system advocacy. The associated information powers may be rarely used but are useful in motivating agencies to provide information. The MSD view is that as the complaints and investigation function for individual children will move to the Ombudsman, the information request power can be replaced by a power more suited to advocacy.
- 55 The predominant role of a system advocate is to stimulate and support public discussion and debate relating to significant issues of public interest. I recognise that a system advocate requires information to undertake informed system advocacy, such as to gather information from agencies in order to fulfil its role overseeing agencies' implementation of the United Nations Convention on the Rights of the Child. Although the Children's Commissioner has powers to call for information in relation to investigations and inquiring generally, I note that other system advocates in New Zealand rely on the Official Information Act (OIA), their public standing and other soft levers to access information that is not publicly available.

- 56 In order to strike a balance between the Children’s Commissioner’s view that he requires information to be an effective advocate for children and ensuring its information powers are appropriate for a system advocate, I propose there is an option for the Children’s Commissioner’s system advocacy functions to be supported by the power to require information through general information access provisions under the Bill, with some restrictions. The advocate would only be able to require information to discharge its specific functions. This is the same approach that will be taken with the independent monitor and Ombudsman. The monitor will not be able to share personal or identifiable information obtained for its monitoring function with the advocate.
- 57 The restrictions for the Children’s Commissioner would include requesting personal information, court information held by agencies and certain sensitive information (eg draft material including draft ministerial and Cabinet material, monitoring reports and responses, pre-budget material and commercially sensitive material). The provisions in the Bill will align where possible with provisions in similar legislation about sharing information with system advocates.
- 58 This proposal would support informed system advocacy and ensure that the advocate only has access to information relevant to the performance of its role. This would enhance their ability to access relevant information (as it would apply to all advocacy functions and not just the general inquiry function) and enable the system advocacy to perform its function more efficiently.
- 59 As other system advocates in New Zealand rely on the OIA to access information that is not publicly available, there is a risk that this option may set a precedent as to whether other system advocates should also have the ability to require information from agencies. I did consider whether it would be appropriate for the Children’s Commissioner’s powers to align with other system advocates across New Zealand and rely solely on ‘soft levers’ to obtain information. However, as the Children’s Commissioner already has the power to call for information in relation to general inquiries, the option to restrict the power to call for information rather than remove it completely would strike the right balance between the Children’s Commissioner’s position that its ability to be an effective advocate is not reduced and ensuring that the powers are appropriate for a system advocate.

I propose new governance arrangements for the OCC

- 60 In March 2019, Cabinet agreed that the governance of the OCC would require updating before it would be able to take on the independent monitoring function [CAB-19-MIN-0113 refers]. The State Services Commission (SSC) has taken the lead on developing the proposed updated governance arrangements.
- 61 MSD and SSC have engaged with stakeholders about the governance of the OCC, workshopping several possible approaches, and asked the following key questions:
- to what extent does the functional separation between the advocacy and independent monitoring need to be ‘hardwired’ in the governance structure?
 - how can real partnerships with Māori be achieved in governance of the future Children’s Commission?
 - how can we change to a more collective form of governance while keeping one of the most valued features of the current Commissioner sole – the mana and flexibility to hold government to account?

- 62 The Minister of State Services and I propose to change the governance of the OCC from a corporation sole (Commissioner) to a board of two to six members (Commission), all appointed by the Governor-General irrespective of whether the new independent monitoring function should transfer to it. This approach will support the OCC to carry out its functions in different circumstances. The number of board members appointed would depend in part on which functions are being performed by the OCC. There will be a Commissioner responsible for each oversight function the OCC is responsible for under the Act.
- 63 This change will allow for partnership with Māori in the governance of the OCC, and for a wider range of skills to be represented through board membership.

Providing for functional separation between independent monitoring and advocacy functions

- 64 Having the independent monitoring and advocacy functions in the same organisation creates a risk that the effectiveness of both functions could be compromised if the arrangements providing for functional separation are not trusted.
- 65 In the context of the in-principle intention to transfer the monitoring function to the OCC, in the event that the monitoring function is transferred there, we propose to reinforce functional separation by including in the Bill a duty on the board to provide for functional separation between advocacy and monitoring and separate Commissioners for each function who would speak publicly on the issues relating to the function they are assigned. Further detail on these arrangements will be outlined in the paper accompanying the draft Bill to the Cabinet Legislation Committee.

Māori in governance of a future Children's Commission

- 66 We are committed to seeing genuine partnerships with Māori in the governance of the Children's Commission, as Māori engagement in reviewing and critiquing the care system from a position of real influence is a critical element in supporting change to the overrepresentation of Māori in the care system¹¹.
- 67 We are proposing that, to give effective representation to the population affected by the care system and in recognition of the Treaty, the legislation should provide for the board to embody a partnership with Māori, to be given effect through the board appointed through an appropriate process that incorporates te ao Māori and ensures Māori participation. MSD are working with Māori stakeholders and specialist advisers on how these aspects should be reflected in the Bill, including which aspects need to be in legislation and which can be worked through by the board once established.
- 68 We are proposing that, to give effective representation to the population affected by the care system and in recognition of the Treaty, the legislation should provide for the board to embody a partnership with Māori, to be given effect through the board being appointed through an appropriate process that incorporates te ao Māori and ensures Māori participation.

Enabling a board to hold government to account for its performance for children

- 69 The nature of the OCC's work is to hold government to account, including publicly raising issues about government policies and performance. With a Commissioner sole, the Commissioner is the lead spokesperson, combining individual credibility and status with the mana of the organisation.

¹¹ Nearly 70 percent of children and young people in care are Māori.

- 70 Stakeholders have expressed concern that a conventional non-executive board model would limit the OCC's effectiveness. The challenge inherent in the OCC's work needs to be delivered by board members with individual credibility.
- 71 The role and person specifications for this board need to reflect the nature, functions and risk profile of the organisation. The legislation would specify a range of relevant skills and attributes including being care experienced, having a wider understanding of children's issues, and understanding and experience of te ao Māori.
- 72 The range of skills and attributes sought for the board and the key elements of the nomination process will need to be further worked through with stakeholders during drafting. Further detail will be provided in the paper accompanying the draft Bill to the Legislation Committee of Cabinet.

I propose the OCC maintain its advisory role for appointments to the grievance panels associated with Youth Justice and Care and Protection Residences and continue to be in receipt of quarterly outcome reports

- 73 Cabinet agreed that the Ombudsman would undertake third-tier reviews of complaints not resolved to the satisfaction of complainants within Oranga Tamariki, and that this should include complaints about decisions made by the grievance panels associated with Youth Justice and Care and Protection Residences (grievance panels)- set up pursuant to the Oranga Tamariki (Residential Care) Regulations 1996 [CAB-19-MIN-0113 refers].
- 74 The OCC has advised that they believe it is appropriate that they retain the grievance panel role, including the ability to escalate and investigate grievances (in consultation with the Ombudsman) when requested to do so by children and young people. The OCC note the challenge in building the trust of young people in residences to participate in any complaints model and having the extra step of taking a complaint to another unknown agency may be a further barrier. The Ombudsman has committed to outreach and creating tamariki and whānau-friendly gateways to ensure their services are accessible to tamariki, whānau and their communities.
- 75 The role of reviewing decisions of the grievance panel can reside with either a Commissioner or an Ombudsman, and is currently undertaken by the OCC. I note that the OCC has two other roles in relation to grievance processes in residences: an advisory role for appointments to the panels and being a recipient of quarterly reports on the outcome of grievance panel decisions. The latter helps them to perform their NPM function under OPCAT¹² for care and protection and youth justice residences, by providing them with insights into what is happening in residences. I propose that the OCC retain these two roles in the grievance panels but that the complaints oversight role for the grievance panels be transferred to the Ombudsman as agreed by Cabinet.

I propose that a review of the oversight arrangements be undertaken no later than five years from commencement of the Act

- 76 On 25 March 2019, Cabinet agreed that there be a statutory requirement to review the independent oversight arrangements in 2023 [CAB-19-MIN-0113 refers]. Monitoring of all the NCS Regulations will not commence until December 2020, and full monitoring of the Oranga Tamariki system will not commence for some time after that. Given this, it has become clear that 2023 is too soon to undertake an effective review of how the system is functioning.

¹² The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international agreement where State Parties agree to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention and closed environments. Cabinet agreed that the OCC should retain its OPCAT monitoring role.

- 77 I recommend that the Bill provide for a review of the oversight arrangements to be undertaken at any time, but no later than five years from commencement of the Act
- 78 I propose that the review of the oversight arrangements include how the oversight system (including the Act) is operating and specifically consider whether oversight bodies are:
- working effectively with iwi and Māori organisations and giving effect to their Treaty duties (as set out in paragraph 17)
 - working effectively as a system
 - being effectively supported by systems participants, and whether there is any evidence of agencies being obstructed in performing their functions
 - discharging their functions, duties and powers in an effective manner, that is ethical and safe for system participants
 - appropriately resourced to effectively discharge their functions and add value to supporting the resilience of the Oranga Tamariki system
 - whether the functions, duties and powers provided for in the Act are supporting agencies to give effect to the purpose of the Act.
- 79 The review should also cover any other matters the Minister responsible for the Act considers appropriate, in consultation with other Ministers with relevant portfolios, as necessary.

I propose a minor legislative amendment to clarify the scope of arrangements for resolving complaints and claims

80 An important part of the system of oversight of Oranga Tamariki is the provision of robust mechanisms for individuals to make complaints or claims about events that took place in state care.¹³ These mechanisms need to be clearly defined and easy to access.

81 **s 9(2)(g)(i)** [REDACTED] The Oranga Tamariki Act 1989 also places an obligation on Oranga Tamariki to ensure a mechanism is in place to consider complaints about any act or omission that took place from 1 January 2008 onwards, and that mechanism (including the opportunity for review) is used prior to any proceedings being taken to court for acts or omissions by Oranga Tamariki that have occurred on or after 1 July 2019.¹⁴

82 **s (9)(2)(g)(i)** [REDACTED] Since then, I have worked with the Minister for Children to develop arrangements that are clear, effective, accessible and provide for the independent resolution of claims where possible and appropriate. Under these arrangements, MSD would be responsible for resolving claims about events prior to 1 April 2017, and Oranga Tamariki would be responsible for resolving claims about events from that date onwards.

¹³ A complaint is generally made while in state care and can cover a wide range of acts or omissions. A claim is a specific allegation of abuse or neglect that took place in state care and is generally made to seek redress for that allegation after the claimant has left care.

¹⁴ Section 7(2)(bad) of the Oranga Tamariki Act 1989 requires Oranga Tamariki to ensure a complaints mechanism is in place. Schedule 1AA, clause 6 of the Act specifies that the scope of this mechanism applies to any events that took place from 1 January 2008 onwards.

83 s (9)(2)(g)(i) [Redacted]

84 s (9)(2)(g)(i) [Redacted]

85 Subject to Cabinet agreement, MSD will work with Oranga Tamariki and PCO to include this amendment in the Oranga Tamariki system and Children’s Commission Legislation Bill.

Consultation

86 Agencies and groups consulted on this paper were Oranga Tamariki, the State Services Commission, the Ministry of Health; Ministry of Education, the Ministry of Justice; the Treasury; New Zealand Police; Te Puni Kōkiri; Te Arawhiti; the Ministry for Youth; the Ministry for Pacific Peoples; the Department of Corrections; the Ministry for Women; the Office for Disability Issues; Office of the Privacy Commissioner, and the Department of the Prime Minister and Cabinet.

Financial implications

87 In March 2019, Cabinet agreed [CAB-19-MIN-0113] to strengthen the oversight system in three core areas, specifically: system-level advocacy for all New Zealand children and young people, oversight and investigation of complaints of matters related to application of the Act and/or children in the care or custody of the State and independent monitoring and assurance of the operations and obligations delivered under the Act and associated regulations. Cabinet also agreed that new primary legislation Independent Oversight (Oranga Tamariki and Children’s Issues) Bill (the Bill) bring together in one place the respective roles, responsibilities and powers of oversight bodies assigned the three primary oversight functions, with regulations to be made under the Bill as appropriate.

88 The March 2019 Cabinet paper detailed the financial implications associated with these policy decisions. It also noted that a bid of \$49.2 million over four years from 1 July 2019 had been proposed in Budget 2019 to fund the establishment and operation of the independent monitor (subsequently changed to 2 years funding only for 2019/20 and 2020/21) and the Children’s Commissioner maintaining existing level of monitoring funding until 31 December 2020.

89 s 9(2)(f)(iv) [Redacted]

¹⁵ s (9)(2)(g)(i) [Redacted]

90 s 9(2)(f)(iv) [Redacted text block]

Human rights implications

91 Draft legislation will be assessed comprehensively for compliance with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative implications

92 The proposals in this paper will be provided to PCO for drafting the Oversight of the Oranga Tamariki System and Children’s Commission Legislation Bill.

Privacy implications

93 The Privacy Commissioner supports strengthening the oversight of the Oranga Tamariki system. While he appreciates the proposed secrecy and privacy provisions, the Commissioner considers that the information access and sharing proposals will need to be drafted with precision to avoid confusion. The Commissioner likewise considers that the legal parameters of independence for the Monitor should be clearly articulated in the Bill. The Commissioner is happy to assist officials during the drafting process.

94 MSD is developing a Privacy, Human Rights and Ethics Assessment on the policy proposals, which will be used to inform the Bill and legislation process.

Regulatory impact and compliance cost statement

95 Treasury has exempted these changes from a regulatory impact assessment. Impact analysis requirements do not apply to this paper since the proposals are not expected to impose any regulatory burden on businesses, individuals or not-for-profit organisations outside government itself. I note that an impact assessment was undertaken when the NCS Regulations were agreed by the Committee Social Wellbeing Committee [SWC-18-MIN-0010 refers].

Child Impact Assessment

96 A Child Impact Assessment (CIA) has been conducted for the proposals in this paper. The CIA demonstrates that the proposals in this paper will help to safeguard and support the wellbeing of New Zealand’s children and young people, particularly some of our most at-risk and vulnerable children and young people in contact with and/or in the care of the Oranga Tamariki system.

97 Māori children and young people account for a significant proportion of children in the Oranga Tamariki system and can be expected to benefit from the proposals in the paper. The disparities in the numbers of Māori and non-Māori in the system continue to widen. For

example, 69 percent of all children in care are Māori. As previously noted, the Bill will ensure that the set of core principles related to the functions align as appropriate with Treaty of Waitangi principles.

Gender implications

- 98 The oversight functions are being developed to be child-friendly and child-centred, which includes being responsive to the individual needs of each child, including needs related to gender identity, and the needs of their whānau and caregivers.
- 99 Boys and young men are slightly overrepresented in care, and significantly overrepresented in the youth justice system, and as such are likely to benefit from the proposals in this paper.
- 100 Women, many of whom head single-parent households, are more likely than men to be primary caregivers for children and young people receiving services from the Oranga Tamariki system and will benefit from the proposals in this paper. Women are also dominant in the professional care system (eg. as social workers and service providers) to which the proposed monitoring and complaints oversight arrangements in this paper will apply.

Disability perspective

- 101 There is an over-representation of disability needs in the care and youth justice systems. International research indicates that abuse and disability often coexist in the lives of children. Children who are abused are at a higher risk of developing a disability, and children with a disability are at a higher risk of being abused and neglected.
- 102 The initiatives to strengthen the oversight of the Oranga Tamariki system and children's issues proposed in this paper can be expected to support better outcomes for disabled children and young people.

Publicity and proactive release

- 103 I intend to proactively release this paper as required by CO (18)(4), subject to the Official Information Act 1982. No publicity is planned.

Recommendations

It is recommended that the Cabinet Social Wellbeing Committee (SWC):

- 1 **note** that on 25 March 2019, Cabinet agreed to strengthen independent oversight of the Oranga Tamariki system and children's issues in three core areas: system-level advocacy for all New Zealand children and young people; oversight and investigation of complaints, and independent monitoring and assurance and to new primary legislation to give effect to these proposals [CAB-19-MIN-0113 refers]
- 2 **note** that since Cabinet decisions, the Ministry of Social Development has undertaken further work, including engagement with key agencies and Māori individuals and groups on how to best implement Cabinet decisions, and this has resulted in further refinement to some policy proposals which require further Cabinet consideration

Providing a commitment to the Treaty of Waitangi

- 3 **agree** that, for the oversight bodies to demonstrate a practical commitment to the Treaty of Waitangi, the Bill will provide for duties which will include the following matters (to be further developed during drafting):

Oversight bodies must ensure:

- 3.1 that in setting strategic priorities and in the development of the work programme have as a key priority the need to support improved outcomes for Māori children and young people
- 3.2 Māori participation in the context of the oversight bodies discharging their functions
- 3.3 their employment, engagement and other policies, procedures and practices must give effect to tikanga, mana tamaiti (tamariki), whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū and iwi
- 3.4 oversight bodies and iwi and Māori organisations will enter into partnerships or arrangements to:
 - 3.4.1 provide opportunities to, and invite proposals on how to improve oversight of the Oranga Tamariki system and in so doing, outcomes for Māori children, young persons, and their whānau who come into contact with the Oranga Tamariki system
 - 3.4.2 enable the robust, regular, and genuine exchange of information between oversight bodies and those iwi and Māori organisations (supported by information sharing provisions)
 - 3.4.3 agree on any action both or all parties consider is appropriate.
- 3.5 the complaints and investigations processes are accessible for Māori children and young people and their whānau, hapū, and iwi or any other Māori organisation supporting them
- 3.6 the complaints and investigations processes incorporate a tikanga approach, and the whānau, hapū, and iwi of the child or young person are engaged with, where possible, during the complaints and investigations processes, unless to do so would be impracticable or risk harm to a child or any other person

Independent monitoring

- 4 **agree** that the purpose of the independent monitor be clarified to include specific objectives, incorporating the concepts such as:
- 4.1 supporting the rights, interests and wellbeing of children, young people and their families
 - 4.2 improving public trust and confidence
 - 4.3 supporting systems learning and continuous systems improvement
 - 4.4 recognising the Crown's Treaty partnerships with Māori and the significant proportion of Māori tamariki in care.

- 5 **agree** that the functions of the independent monitor be clarified to incorporate the following components:
 - 5.1 effective systems performance monitoring
 - 5.2 recognising the interface between systems
 - 5.3 providing for the Crown's commitment to Māori
- 6 **agree** that the monitor's reporting will consist of a three-yearly 'state of the Oranga Tamariki system' report to the Minister responsible for the Oranga Tamariki Act 1989, annual reports on compliance with the National Care Standards and operations of the Oranga Tamariki system, and outcomes being achieved for Māori tamariki and whānau, and reports on any other areas it considers necessary to discharge its function
- 7 **agree** the Bill contain a provision to enable the monitor to discharge its reporting function, including specifying that the monitor would produce and publish the types of reports mentioned in recommendation 6 and that responses by those who have been subject to or a party to the report may be required
- 8 **agree** that the detail as to what these reports must contain, and requirements for responding to, and publishing and tabling reports, timeframes for these processes, and requirements around dissemination in a manner accessible to individuals, whānau and iwi will be specified in regulations to the Bill

Relationship of oversight bodies with Ministers and Chief Executive of Oranga Tamariki

- 9 **agree** that the Prime Minister may designate "the Minister responsible for the Act" rather than specifying which Minister that might be in the proposed legislation
- 10 **agree** that the Minister responsible for the Oranga Tamariki Act, the Minister responsible for the Act (i.e. the proposed Oversight legislation), Ministers with responsibilities for Māori portfolios and Minister's with portfolio responsibilities related to children will receive reports generated by the monitor
- 11 **agree** that the Prime Minister, the "Minister responsible for the Act" as stipulated in the Bill, and the Minister responsible for the Oranga Tamariki Act 1989 may request reports from the monitor on specific issues of interest or concern
- 12 **agree** that the Chief Executive of Oranga Tamariki may request reports from the monitor on specific issues, for example to support systems learning

Information access and sharing

- 13 **note** in March 2019, Cabinet authorised the Minister for Social Development, in consultation with other Ministers as appropriate, to make decisions on access to information and powers of entry to enable the progress of legislative drafting in order to finalise the Bill
- 14 **note** that due to the significant implications of information sharing with respect to the proposed oversight bodies, I have set these out in more detail for Cabinet consideration
- 15 **agree** that to effectively discharge their functions and achieve the purpose of the Bill, the independent monitor and the Ombudsman will have the powers to require the provision of information from organisations:

- 15.1 the independent monitor and the Ombudsman will be able to require information from any organisation that engages children and young people in the Oranga Tamariki system
- 15.2 only the independent monitor and Ombudsman will be able to require the provision of identifiable or de-identifiable personal information
- 16 **agree** that the Children's Commissioner's system advocacy function be supported by the power to require information to discharge its functions through general information access provisions in the Bill, with some restrictions on what information can be obtained, including personal information, court information or certain sensitive information (any draft material including draft ministerial and Cabinet material, monitoring reports and responses, pre-budget material and commercially sensitive material)
- 17 **note** that information access provisions for the Children's Commissioner in the Bill will, where possible, align with provisions in similar legislation about sharing information with system advocates
- 18 **agree** that to enable the oversight bodies to effectively discharge their functions and achieve the purpose of the Bill, the oversight bodies will have the powers to:
- 18.1 engage directly with individual children, young people and whānau, after obtaining informed consent
- 18.2 share information with each other, other agencies, iwi/Māori organisations (other than personal information) or parties that have a role with children, young people and their families within the Oranga Tamariki system to support their functions
- 19 **agree** that the Bill require each oversight agency to develop, in consultation with affected organisations and the Privacy Commissioner, a set of Information Management Rules to govern how the oversight agency access information held by other agencies and manages information it holds
- 20 **agree** that the Rules are signed off by the Chief Executive or equivalent of each oversight body
- 21 **agree** that to ensure personal information and rights of individuals are protected, each oversight body should develop a Code, to support safe and ethical gathering and use of personal information, including when engaging with individuals
- 22 **agree** that in developing their respective Codes, oversight bodies must, where possible, take a common approach to support certainty and minimise any potential burden on individuals or those who are responsible for them, seek input from ethics specialists and from Māori and consult with the Privacy Commissioner, to ensure the content of the code is appropriate
- 23 **agree** that prior to engaging directly with individuals oversight bodies must obtain their informed consent.
- 24 **agree** that where the individual does not have the capacity to provide informed consent the person responsible for their day-to-day care may object to engagement on the grounds that engagement may place the individual at a risk of physical or emotional harm

- 25 **agree** that where engagement is for the purposes of a complaint and the person responsible for the day-to-day care is the subject of the complaint, consent may be obtained from the party who holds custody of the child
- 26 **agree** that the independent monitor will have the power to enter premises (other than private homes) with notice for the purposes of observing practice or conducting inspections to attest to compliance with the Oranga Tamariki Act 1989 and/or regulations
- 27 **agree** that the power of entry may be refused in the following exceptional circumstances:
- 27.1 where there has been a serious incident such as a police matter, an assault at the premises or a death has occurred between the time the visit is notified, and the time the visit is to take place
- 27.2 because the site is experiencing serious health concerns
- 27.3 where any other serious event has occurred, and a site visit is likely to exacerbate tension or emotional harm.
- 28 **agree** that a duty is imposed on individuals and agencies engaging with oversight bodies to facilitate access to information they hold, premises and/or individuals where consent has been obtained
- 29 **agree** that the Bill provide for secrecy and privacy provisions to enable individuals to engage with oversight bodies in a free and frank manner
- 30 **agree** that reasons for oversight bodies to disclose information will be limited to:
- 30.1 where the oversight body has information that suggests a person is at risk of harm or where the oversight body believes a serious criminal offence has been committed that justifies notifying the police
- 30.2 to support a child or young person who is involved in a complaint
- 30.3 support notifications, referrals and the efficient and effective discharge of functions

Governance of the Office of the Children's Commission(er)

- 31 **note** that Cabinet previously agreed that the governance of the Office of the Children's Commissioner would require updating before it would be able to take on the independent monitoring function
- 32 **note** that MSD's work to determine the statutory requirements for each function will establish the duties the governing body needs to meet
- 33 **agree** that governance of the Office of the Children's Commissioner, currently a corporation sole with no deputy arrangements, should be updated irrespective of Cabinet's decision that the new independent monitoring function should transfer to it, as intended in principle
- 34 **agree** that the governance arrangement should be a board of two to six members, appointed by the Governor-General, and collectively possessing a range of relevant skills and attributes including experience of the care system, wider understanding of children's issues, understanding of te ao Māori, and management skills

- 35 **agree** that, both to give effective representation to the population most affected by the care system and in recognition of the Treaty, the legislation should provide for the board to embody partnerships with Māori, to be given effect through the board being appointed through an appropriate process that incorporates te ao Māori and ensures Māori participation
- 36 **note** that adopting a partnerships approach for this purpose may heighten expectations for similar approaches to be applied elsewhere
- 37 **agree** that the Bill will impose a duty on the board to provide for functional separation between the monitoring and advocacy functions subject to the board being assigned the monitoring function
- 38 **agree** that the Bill include provisions for the OCC to have separate Commissioners responsible for each oversight function it is responsible for under the Act
- 39 **agree** that the Office of the Children’s Commission retain the role as advisory for appointments to the grievance panels and a recipient of quarterly reports on the outcome of grievance panel decision but that the complaints oversight role for the grievance panels be transferred to the Ombudsman as agreed by Cabinet

Review of Oversight Arrangements

- 40 **agree** the Bill provide for a review of the oversight arrangements to be undertaken at any time, but no later than five years from commencement of the Act
- 41 **agree** that a review of the oversight arrangements include how the oversight system (including the Act) is operating and specifically consider whether oversight bodies are:
- 41.1 working effectively with iwi and Māori organisations and giving effect to their Treaty duties
 - 41.2 working effectively as a system
 - 41.3 being effectively supported by systems participants, and whether there is any evidence of agencies being obstructed in performing their functions
 - 41.4 discharging their functions, duties and powers in an effective manner
 - 41.5 appropriately resourced to effectively discharge their functions and add value to supporting the resilience of the Oranga Tamariki system
 - 41.6 whether the functions, duties and powers provided for in the Act are supporting agencies to give effect to the purpose of the Act.

Historic claims

- 42 **note** that the MSD and Oranga Tamariki are developing improved arrangements for the resolution of claims relating to abuse in state care, in which MSD would be responsible for resolving claims about events prior to 1 April 2017, and Oranga Tamariki would be responsible for resolving claims about events from that date onwards

- 43 **s (9)(2)(g)(i)**
[Redacted text]

44 **agree** that the amendment specified in recommendation 43 be included in the Bill

General

45 **invite** the Minister for Social Development to issue further drafting instructions to the Parliamentary Counsel Office to continue to draft the Bill and associated regulations to be made under the Bill

46 **authorise** the Minister for Social Development, in consultation with other Ministers as appropriate, to make decisions on related policy matters or determine additional policy matters to enable the progress of legislative drafting in order to finalise the Bill

47 **authorise** the Minister for Social Development, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill

Hon Carmel Sepuloni
Minister for Social Development

____ / ____ / ____