

06 JUL 2022



Tēnā koe

On 11 December 2021, you emailed my office requesting, under the Official Information Act 1982 (the Act), the following information in relation to the Oversight of Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (the Bill):

- *Briefings prepared to the Minister in relation to the oversight of the Oranga Tamariki System.*
- *Briefings to the Minister and Cabinet officials/committees about placing the Independent Monitor inside the Education Review Office.*

On 14 December 2021, you refined your request to papers from the period 2019-2021.

In response to your request, please find the following documents identified as in scope of your request enclosed, unless stated otherwise:

1. REP/19/6/526 - Report - *Progress update on the strengthening of independent oversight of the Oranga Tamariki system*, dated 20 June 2019
2. REP/19/8/768 - Report - *Strengthening Independent Oversight of the Oranga Tamariki System and Children's Issues: Progress update and advice for your consideration and decision*, dated 16 August 2019
3. REP/19/8/786 - Aide-mémoire - *Meeting with Judge Andrew Becroft, the Children's Commissioner*, dated 22 August 2019
4. REP/19/9/889 - Report - Cover Report - *Early Draft Cabinet Paper: Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commissioner Legislation Bill*, dated 10 September 2019
5. REP/19/9/844 - Aide-mémoire - *Meeting with the Kāhui Group - Independent Oversight of the Oranga Tamariki system and Children's Issues*, dated 16 September 2019
6. REP/19/11/1098 - Report - *Draft Cabinet Paper: Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, dated 7 November 2019

7. REP/19/11/1139 - Aide-mémoire - *Meeting with Judge Andrew Becroft, the Children's Commissioner*, dated 14 November 2019
8. REP/19/11/1220 - Aide-mémoire - *Social Wellbeing Consideration of – Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, dated 29 November 2019
9. REP/20/1/010 - Aide-mémoire - *Social Wellbeing Consideration of - Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, dated 13 December 2019
10. REP/20/11/1158 - Report - *Options for the long-term location of the Independent Monitor of the Oranga Tamariki System*, dated 17 December 2020
11. REP/20/3/324 – Report - *Implications of COVID-19 on progressing the Children's Commission and Independent Oversight of the Oranga Tamariki System Legislation Bill*, dated 31 March 2020
12. REP/20/3/266 - Report - *Governance arrangements for the proposed Children's Commission*, dated 15 April 2020
13. REP/20/5/537 - Report - *Proposed shape of the Children's Commission and Oversight of Oranga Tamariki Legislation Bill*, dated 19 May 2020
14. REP/20/5/604 - Aide-mémoire - *Meeting with the Minister for Children*, dated 29 May 2020
15. REP/20/7/810 - Aide-mémoire - *Shape of the Children's Commission and Oranga Tamariki System Oversight Legislation*, dated 16 July 2020
16. REP/20/11/1046 - Report - *Update briefing – Legislation to strengthen the oversight of the Oranga Tamariki System*, dated 5 November 2020
17. REP/20/11/1068 – Report - *Approval to consult on aspects of independent oversight of the Oranga Tamariki system*, dated 13 November 2020
18. REP/20/11/1113 - Aide-mémoire - *Meeting with Minister Davis*, dated 23 November 2020
19. REP/20/11/1159 – Report - *Strengthening Independent Oversight of the Oranga Tamariki System: Progress update and advice for your consideration and decision*, dated 17 December 2020
20. REP/21/2/105 - Report - *Options to establish new arrangements for the long-term home of the Independent Children's Monitor*, dated 17 February 2021
21. REP/21/6/670 – Report - *Confirming the proposed jurisdiction of the Ombudsman set out in the Oversight of the Oranga Tamariki System Bill prior to Legislation Committee*, dated 28 June 2021

22. REP/21/8/893 – Report - *Cabinet Paper: Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill*, dated 16 September 2021
23. REP/21/10/1097 – Report - *Agreement to minor policy decision to finalise Oversight Bill*, dated 8 October 2021
24. REP/21/10/1105 – Report - Cabinet paper – *Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill: Approval for Introduction*, dated 12 October 2021
25. REP/21/10/1140 - Aide-mémoire - *Introducing the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill*, dated 21 October 2021
26. REP/21/11/1263 – Report - *Letter to the Chairperson of the Social Services and Community Committee on the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill*, dated 18 November 2021
27. REP/21/5/463 - Aide-mémoire - *Cabinet decision: Arrangements for the Monitor of the Oranga Tamariki system and further policy decisions to progress legislation*, dated 7 May 2021
28. REP/21/5/436 - Aide-mémoire - *Arrangements for the Monitor of the Oranga Tamariki system and further policy decisions to progress legislation*, dated 3 May 2021
29. REP/21/4/345 - Report - *Cover report: agreement to lodge SWC papers on home of the ICM and residual policy issues*, dated 28 April 2021

REP/21/2/105 Report: Options to establish new arrangements for the long-term home of the Independent Children's Monitor

We note that while the Minister initially agreed to the Independent Children's Monitor becoming an Autonomous Crown Entity (ACE). This was superseded by a paper from the Public Service Commission which the Minister agreed to which subsequently changed the direction taken from pursuing an ACE to a Departmental Agency. A proactively released paper by the Public Service Commission sets out the rationale for allocating the monitoring of the care and protection system to a departmental agency:

www.publicservice.govt.nz/assets/Legacy/resources/Aide-Memoire-Strengthening-independent-oversight-of-childrens-system.pdf.

For REP/19/9/889, the *Future governance for the Children's Commissioner* report has not been included. This has been published under the 'advice seen by our Minister – 2019' tab available at the following link:

<https://www.publicservice.govt.nz/our-work/information-releases/advice-seen-by-our-minister/>.

Furthermore, for REP/19/11/1098, the Cabinet paper 'Clarification of Policy Matters to support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill' is available at the following link: www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/clarification-of-policy-matters-to-support-the-oversight-of-the-oranga-tamariki-system-and-children-s-commission-legislation/cabinet-paper-clarification-of-policy-matters-to-support-the-oversight-of-the-oranga-tamariki-system-and-children-s-commission-legislation-bill.pdf.

For REP/21/8/893 - Cabinet Paper: *Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill*. The following information can be read in conjunction: <https://legislation.govt.nz/bill/government/2021/0094/latest/LMS591372.html>.

You will also note for REP/21/10/1105, the departmental disclosure statement is available at the following link: <http://disclosure.legislation.govt.nz/bill/government/2021/94>.

You will note that the names and contact details of some individuals are withheld under section 9(2)(a) of the Act in order to protect the privacy of natural persons. The need to protect the privacy of these individuals outweighs any public interest in this information.

Some information is withheld under section 9(2)(h) of the Act in order to maintain legal professional privilege. The greater public interest is in ensuring that government agencies can continue to obtain confidential legal advice.

You will also note that some information is withheld under section 9(2)(g)(i) of the Act to protect the effective conduct of public affairs through the free and frank expression of opinions. I believe the greater public interest is in the ability of individuals to express opinions in the course of their duty.

If you are not satisfied with this response, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at www.ombudsman.parliament.nz or 0800 802 602.

Ngā mihi nui



Hon Carmel Sepuloni
Minister for Social Development and Employment



Report

Date: 20 June 2019

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Progress update on the strengthening of independent oversight of the Oranga Tamariki system

Purpose of the report

- 1 This report provides you with a progress update on key areas of the work relating to the strengthening of independent oversight of the Oranga Tamariki system and children's issues. The areas covered in this report are:
 - 1.1 policy and legislation progress
 - 1.2 the Office of the Ombudsman's progress in strengthening complaints oversight and investigations
 - 1.3 our readiness to commence initial monitoring from 1 July 2019.

Executive Summary

- 2 Progress is being made on the legislative proposals relating to the development of the Independent Oversight (Oranga Tamariki System and Children's Issues) Bill (the Bill). We are continuing to engage with our stakeholders, including the Office of the Children's Commissioner (OCC), the Office of the Ombudsman and Oranga Tamariki, on key matters relating to the development of the Bill.
- 3 We have started engagement with Māori with the first meeting of our Kāhui group held on 30 May 2019 and further engagement with wider Māori groups planned over the coming weeks.
- 4 Due to the collaborative nature of our engagement approach with stakeholders and Māori groups, engagement is taking longer than first anticipated, which may result in some amendments to our initial planned timeframes. We are working as quickly as possible and taking every opportunity to develop proposals and engage with stakeholders concurrently. We will provide you with further advice on timeframes in July 2019.
- 5 The Ombudsman's Office is continuing to work with the Ministry of Social Development (MSD) and Oranga Tamariki to strengthen complaints oversight and investigations, including preparing for new resourcing.
- 6 MSD is on track to begin initial limited monitoring of the NCS Regulations, focusing on the response to allegations of abuse and neglect in care, from 1 July 2019. We are currently finalising the development of an assessment framework for initial monitoring.

Recommended actions

It is recommended that you:

- 1 **note** the contents of this report
- 2 **discuss** with officials how you would like us to engage with the Minister for Children and how to keep her informed and updated.



Stephen Crombie

DCE Corporate Solutions

Ministry of Social Development

22/6/19
Date



Hon Carmel Sepuloni

Minister for Social Development

23/06/19
Date

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Background

- 3 On 25 March 2019, Cabinet agreed to legislative amendments to restructure current legislation which underpins independent oversight of the Oranga Tamariki system and children's issues, and establish a dedicated oversight Act and associated regulations covering all oversight functions [CAB-19-MIN-0113 refers].
- 4 Cabinet directed MSD to work with Oranga Tamariki, the Office of the Ombudsman and the OCC on the development of the legislative proposals.
- 5 Provisionally titled the *Independent Oversight (Oranga Tamariki System and Children's Issues) Bill*, the Bill will be progressed through 2019/2020.
- 6 On 25 March 2019, Cabinet also agreed that MSD be appointed the independent monitor from 1 July 2019 and noted that MSD's role will be to design and establish the framework for the monitoring of compliance with the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (the NCS Regulations) [CAB-19-MIN-0113 refers].
- 7 Once the Bill and associated Regulations have been enacted and the monitoring function has been established, the intention is that it be transferred to the OCC.

We are making progress on the development of the legislation

- 8 We have made progress in a number of areas, including the progression of legislative proposals relating to the development of the Bill and engagement with key stakeholders and Māori groups as agreed in the cabinet paper.
- 9 In order to undertake effective and extensive engagement, we have been taking a collaborative approach with the OCC, the Ombudsman's Office, Oranga Tamariki and with Māori. This has involved listening to the feedback and input of our stakeholders and demonstrating our willingness to work together on key issues as we finalise proposals required for the legislation.
- 10 While the collaborative approach we are taking to develop proposals for the legislation is necessary and is providing valuable insight, it is also proving to be a lengthier process than initially planned. We are working as quickly as possible and are taking every opportunity to develop proposals and engage with stakeholders concurrently. There is the possibility that we may need to go back to the Social Welfare Committee prior to the introduction of the Bill to seek clarification on some policy issues arising from our engagement.
- 11 As a result, we anticipate that there is likely to be some delay to the introduction of the Bill (currently planned for October 2019). We will provide you with a further update in July 2019 including any impact on timeframes.

We are consulting on legislative proposals with our stakeholders

- 12 As outlined in the Cabinet paper [CAB-19-MIN-0113 refers] the following key issues have been/are being discussed with stakeholders to inform the drafting of the Bill:
 - the overall purpose of the Act
 - the general principles that will guide the activities of each of the oversight functions contained within the Act
 - the provision to recognise explicitly the Treaty of Waitangi (te Tiriti o Waitangi) and the specific duties the parties who are responsible for oversight in this legislation will have
 - information sharing and privacy provisions

- governance of the OCC (the State Services Commission are leading this work)
 - the independent monitor's relationship with the responsible Minister.
- 13 We have prepared briefing materials on these issues to facilitate conversations and gather input from our key stakeholders, notably the OCC, the Ombudsman's Office, Oranga Tamariki and Māori groups.

We are engaging on a number of issues with the OCC, the Ombudsman's Office, Oranga Tamariki and Approved Organisations

- 14 We have been engaging extensively with the OCC and the Ombudsman's Office through a number of meetings and workshops. Both agencies are key partners in the creation of the oversight system and our close working relationship will continue as we develop proposals for the Bill.
- 15 On 25 March 2019 Cabinet directed officials to report to the Minister for Children and the Minister for Social Development on the issues of access to information and powers of entry that oversight bodies will require to enable them to perform their functions effectively [CAB-19-MIN-0113 refers].
- 16 MSD has been undertaking extensive engagement with both the OCC and the Office of the Ombudsman to co-design information access and sharing proposals for the Bill. We are keeping Oranga Tamariki informed on the progress of this engagement.
- 17 We are proposing to provide yourself and the Minister for Children with an interim report on access to information before the end of June. A further comprehensive report on information sharing provisions will be provided to you in late July or early August.
- 18 As we develop the frameworks for the monitoring function, we are conscious that they need to be developed with consideration of the systems and processes which Oranga Tamariki and the Approved Organisations¹ currently have in place. We are working closely with Oranga Tamariki and other Approved Organisations on the development of monitoring frameworks and in preparation for the commencement of monitoring from 1 July 2019.

We have commenced our engagement with Māori

- 19 We have developed a Māori engagement plan which involves engaging with a wide range of Māori groups and individuals. We believe that such an approach best serves our goal of engaging in a timely, efficient and focused manner with a range of individuals and groups who have knowledge, experience and expertise in all aspects of the Oranga Tamariki system. The participants represent a range of interests and expertise in varying aspects of the oversight system (strategic Treaty/Iwi partners, professionals, providers, children and young people, caregivers and other relevant stakeholders).
- 20 A Kāhui group has been established to assist us to achieve our engagement and collaboration goals by providing oversight, advice and ongoing support to us throughout the Māori engagement process. The members of the Kāhui Group are Sir Mark Solomon, Druis Barrett, Eugene Ryder and Katie Murray. The inaugural meeting of the group was held on 30 May 2019.

¹ Approved Organisations are providers who have care or custody of children in their own right.

- 21 We have also met with MSD's Māori Reference Group and Oranga Tamariki's Māori Design Group. Both of these meetings have proven extremely valuable as we build our understanding of how to weave a Māori world view into the Bill and monitoring practices.
- 22 Further engagement with wider Māori is being organised and will include engaging with:
- individuals — we propose to meet with some individuals on a one-to-one basis, as their mana and expertise deserve to be recognised in this manner (this could include individuals such as Dame Tariana Turia, Dame Naida Glavish, Sir Mason Durie and John Tamihere, among others)
 - professional Bodies (eg Māori Midwives Association and Māori Doctors Association)
 - past care experiences through Voyce (Voice of the Young and Care Experienced)
 - Māori reference groups (eg the Whānau Ora Commission and the E Tu Māori Group)
 - public sector (MSD's Iwi Partnerships Team, Te Puni Kōkiri and Te Arawhiti).

The Ombudsman's progress in establishing the complaints and investigations function

- 23 Cabinet has agreed that the Ombudsman should establish strengthened complaints oversight and investigations capability in regard to services provided under the Oranga Tamariki Act and associated regulations [CAB-19-MIN-0113 refers].
- 24 The Ombudsman's Office is currently:
- working with MSD on the issues relating to the complaints and investigations function which need to be considered for the new oversight legislation
 - liaising with Oranga Tamariki as they set up their new internal complaint handling procedures
 - finalising the identification of some initial new positions so that the Chief Ombudsman can commence development of the role pending resourcing and the new oversight legislation
 - preparing to submit a budget bid to the Officers of Parliament Select Committee for the 2019/2020 financial year to resource the enhanced functions
 - implementing transitional arrangements pending resourcing and the passage of the new legislation, including in relation to both complaints oversight and systemic investigations
 - commencing the development of a refined Māori and youth engagement strategy.

Initial monitoring by MSD will commence from 1 July 2019

- 25 MSD is establishing the independent monitoring function with the first phase of monitoring to commence from 1 July 2019 (Phase 1). The three Phases of monitoring are set out below:
- **Phase 1** will be initial monitoring, extending from 1 July 2019 to December 2020, and will be confined to monitoring under Regulations 69 and 85 of the NCS

Regulations.² Under regulations 69 and 85, the independent monitor will be monitoring the response to notifications of abuse or neglect by agencies that have children in care or custody.

- **Phase 2** monitoring is scheduled to commence (subject to legislative change) on, or before, 31 December 2020. Phase 2 will consist of the expanded monitoring of organisations providing service under the Oranga Tamariki Act 1989 and will focus on compliance with all aspects of the NCS Regulations.
 - **Phase 3** monitoring is the potential future expansion of the monitoring function, which would enable broader monitoring of the wider Oranga Tamariki system at a date yet to be determined. We will shortly begin scoping what Phase 3 might potentially include.
- 26 The Phase 1 monitoring function is being established in an environment where further work is being carried out to define the purpose, role and scope of the monitor. This means we need to ensure that we do not get too far ahead of this wider work and there is also a need to ensure that stakeholder expectations and understandings of the monitor are aligned. For example, this means being clear that the monitor is focused on overall system performance and is not directly responsible for the safety and wellbeing of individual children and young people in care or custody.
- 27 We are proposing a 'soft launch' for the independent monitor from 1 July 2019, with no planned public announcement when the monitor commences its initial, limited monitoring. We will, however, update content on MSD's website and will provide targeted communications to key stakeholders. Work is still progressing on finalising a Māori name for the monitor, which will be followed by the launching of the brand and website at a future date (to be determined).

Who will be monitored

- 28 From 1 July 2019, we will monitor the four organisations which currently have care or custody of children or young people in their own right. These are Oranga Tamariki and three Approved Organisations: Open Home Foundation, Barnardos and Dingwall Trust. We are engaging with these organisations in preparation for the commencement of monitoring.
- 29 Other organisations who have care of children or young people under contract to Oranga Tamariki, but do not hold custody in their own right, will report notifications of abuse and neglect to Oranga Tamariki. Those reports will be included in reporting by Oranga Tamariki to the independent monitor. There is no intent to monitor those organisations directly during the Phase 1 period, with monitoring to be undertaken via Oranga Tamariki instead.

We are developing an Assessment Framework for monitoring

- 30 We are working collaboratively with Oranga Tamariki and the three Approved Organisations to develop an initial Phase 1 assessment framework for the independent monitor by 30 June 2019. This framework will be relatively narrow in scope but will be further evolved over Phase 1. A significant part of this work will be

² Regulations 69 and 85 of the NCS Regulations relate to notifications of abuse or neglect of children and young people in care or custody.

to refine the standards and develop measures that both the monitor and the agencies being monitored can utilise in their respective frameworks.

- 31 On 12 and 18 June 2019 officials met with Oranga Tamariki, the OCC and the three Approved Organisations who currently hold custody of children in their own right. The purpose of these meetings was to work together on the development of the initial assessment framework and to discuss the Memoranda of Understanding (MOUs) which the independent monitor will have with each agency.³ These meetings were useful for building understanding of each agency's systems and processes and for identifying the further work that will be required to refine and interpret the monitoring standards set out in Regulation 69 of the NCS Regulations in a way that they can be meaningfully monitored.
- 32 An Executive Director has been appointed to head the new Independent Monitor unit and other operational roles will be in place for 1 July 2019.

Next steps

- 33 We are continuing to engage with Oranga Tamariki, the OCC, the Office of the Ombudsman and our Kāhui group and other Māori technical groups to develop legislative proposals for inclusion in the Bill.
- 34 We will provide you with further advice in July 2019 on any issues relating to the key policy and legislative proposals raised through the engagement process and to indicate timeframes for the introduction of legislation.

File ref: REP/19/6/526

Author: Out of scope, Graduate Policy Analyst, Seniors and International Policy

Responsible manager: Megan Beecroft, Policy Manager

³ Two MOUs are currently being developed for Phase 1 monitoring: one with Oranga Tamariki and the other with the three Approved Organisations. The MOUs will outline the way in which the monitor will work operationally with these agencies.



Report

Date: 16 August 2019

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Strengthening Independent Oversight of the Oranga Tamariki System and Children's Issues: Progress update and advice for your consideration and decision

Purpose of the report

- 1 The purpose of this Report is to:
 - 1.1 update you on the engagement the Ministry of Social Development (MSD) has undertaken with Māori and key stakeholders
 - 1.2 seek your agreement on some matters required to progress the draft *Independent Oversight (Oranga Tamariki and Children's Issues) Bill*
 - 1.3 update you on the remaining issues that require further work
 - 1.4 seek your decision to take certain matters to the Cabinet Social Wellbeing Committee.

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, and independent monitoring and assurance [CAB-19-MIN-0113 refers].
- 3 Since Cabinet decisions, MSD has been working closely with key agencies on the development of legislative proposals and engaging externally with Māori individuals and groups. **Part 1** of this report describes our work to date, including the results of our engagement. The engagement hui with Māori to date have been positive and informative. A summary of the hui held to date is attached as **Appendix 1**.
- 4 Since March 2019, the process we have undertaken has focused on how best to implement Cabinet's decisions. While remaining within the policy intent, details of some policy proposals have been refined and further decisions are now required. **Part 2** of this report details where decisions are required, or where, due to feedback from stakeholders, confirmation of policy decisions would assist us in drafting the *Independent Oversight (Oranga Tamariki and Children's Issues) Bill* (the Bill). These areas include:
 - relationship between the monitor and Ministers in the Bill
 - when the Act should be reviewed
 - the Office of the Children's Commissioner's (OCC) role in Grievance Panels
 - oversight bodies' role in supporting a cohesive oversight system
 - the repeal of the Children's Commissioner Act 2003 and the title of the Bill

- whether an amendment to the Oranga Tamariki Act 1989, related to historic claims should be included in this Bill.
- 5 There are several key issues that, due to their high level of complexity, we are continuing to work through with stakeholders. Decisions in these areas are fundamental to how the independent oversight system will operate in practice. **Part 3** of the report details these issues, which include:
- how to reflect the commitment to te Tiriti o Waitangi/Treaty of Waitangi in the Bill
 - how to achieve appropriate levels of functional separation between the advocate and the monitor
 - identifying the most suitable future governance arrangements of the Office of the Children's Commissioner (OCC)
 - the role of the monitor, including:
 - purpose, powers and functions
 - how to explicitly recognise monitoring of the Chief Executive's obligations under section 7AA of the Oranga Tamariki Act
 - reporting obligations.
 - information sharing and access proposals
 - information access powers of the Children's Commissioner
 - whether the independent monitor requires powers of entry without permission.
- 6 Given the significance of some of the decisions in para 5 and the issues still to be worked through in para 4, it would be prudent for some items to be considered by Cabinet Social Wellbeing Committee (SWC). The matters we recommend be considered at SWC are detailed in **Table one**. We note that this will have an impact on our timeframes for introducing the Bill. An updated proposed timeframe for introducing the Bill in early December 2019 is attached as **Appendix 2**.
- 7 To finalise the issues set out in para 5, we will be engaging with Oranga Tamariki, the OCC, the Ombudsman's Office and other key stakeholders, and will continue engagement with Māori on these issues. We have endeavoured to balance a wide range of stakeholder views throughout this work, and where possible reach consensus. However, some proposals presented in this report, and many of the issues still being worked through, have not been met with agreement from all parties. We have presented stakeholders views, along with our advice and recommendations, in this report and will do so in the next report on the remaining issues (due by 30 August 2019).

Recommended actions

It is recommended that you:

Part 1 – Engagement to date

- 1 **note** that since Cabinet decisions on 25 March 2019, MSD has been working closely with key agencies on the development of legislative proposals to strengthen oversight of the Oranga Tamariki system and children's issue, including engaging extensively with Māori individuals and groups

Part 2 – decisions required to assist drafting of the independent oversight Bill

- 2 **note** that following extensive engagement and further work since Cabinet decisions, some policy proposals have been refined and now require further decisions to assist with drafting the Bill
- 3 **note** that Cabinet authorised you, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill

Repeal of the Children's Commissioner Act 2003 and the title of the Bill

- 4 **note** that the Children's Commissioner has expressed concerns about the repeal of the Children's Commissioner Act 2003, but our advice remains that this is the best option
- 5 **agree** that, to mitigate the Children's Commissioner's concerns about repealing the Children's Commissioners Act 2003, we amend the title of the Bill to: *The Oversight of the Oranga Tamariki System and Children's Commission(er) Bill*, to reflect the Children's Commissioner's role (noting that this is subject to change during the drafting process)

Agree / Disagree

Minister responsible for the Act

- 6 **agree** that there is a conflict of interest in the Minister responsible for Oranga Tamariki also being the Minister responsible for independent oversight of the Oranga Tamariki system

Agree / Disagree

- 7 **agree** that "the Minister" responsible for the Act will be defined as any Minister other than the Minister responsible for Oranga Tamariki, who is with the authority of the Prime Minister, for the time being responsible for the administration of the Act

Agree / Disagree

Minister's relationship with the independent monitor

- 8 **agree** that the Minister responsible for Oranga Tamariki will receive reports generated by the monitor and be enabled to direct the monitor to provide specific reports on any matter

Agree / Disagree

Review of the Act

- 9 **agree** that the review of the Act be undertaken on a date set by the responsible Minister in 2021

Agree / Disagree

Office of Children's Commissioner's role in Grievance Panels

- 10 **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.

Agree / Disagree

Role of oversight bodies in supporting a cohesive system of oversight

- 11 **agree** that the Bill provide for a general duty for Oversight bodies to work in a manner that supports a cohesive system of oversight, as detailed in paragraph 31 of this report

Agree / Disagree

Historical claims amendment

- 12 **note** that work is being progressed by MSD to amend the Oranga Tamariki Act 1989, which would enable Oranga Tamariki to take responsibility for resolving all historic claims of abuse or neglect of children in State care relating to events for the period from 1 April 2017
- 13 **note** that in early August 2019, you and the Minister for Children agreed to an amendment to Schedule 1AA of the Oranga Tamariki Act to implement these arrangements and agreed that this amendment would be sought in the Oversight Bill, subject to it being in scope [REP/19/8/710 and REP-OT/19/8/222 refer].
- 14 **note** that this amendment needs to go to the Cabinet Social Wellbeing Committee for approval

Part 3 – Issues requiring further work

- 15 **note** that we are continuing to work through a number of issues, outlined in paragraph 5 of this report, along with with our stakeholders and Māori, and will provide you with further advice and seek decisions on these matters by 30 August 2019

Consideration by Cabinet Social Wellbeing Committee

- 16 **note** that given the nature of some of the more detailed work that has been undertaken since 25 March 2019 Cabinet approvals, we recommend having the items outlined in Table one (including the matter on historical claims) considered by Cabinet Social Wellbeing Committee before finalising the draft Bill
- 17 **agree** that MSD prepare a Cabinet paper on the matters outlined in Table one for Cabinet Social Wellbeing Committee

Agree / Disagree

- 18 **agree** to meet with officials to discuss the contents of this report and the timeline for introducing the Bill

Agree / Disagree

- 19 **agree** to forward this report to the Minister for Children, the Minister for Māori Development, the Minister for Whānau Ora, the Minister of Justice and the Minister of State Services

Agree / Disagree

Timeframes for introducing the Bill

- 20 **note** that we have requested an extension to the deadline for introduction to February/March 2020 to enable us more time to undertake further hui to capture the voices of tamariki Maori, and work through the remaining issues with stakeholders and Maori
- 21 **note** that this would reduce the likelihood of significant work being needed at Select Committee but would likely cause delays to passing the Bill as the second reading is likely to be in the second half of 2020. This would not affect full monitoring of NCS Regulations commencing from 1 January 2021 but would slightly delay the full monitoring of the wider Oranga Tamariki system
- 22 **agree** to extend the deadline for introduction of the Bill to February/March 2020

Agree / Disagree

Justine Cornwall

Justine Cornwall
General Manager Policy

16 August 19

Date

Hon Carmel Sepuloni

Hon Carmel Sepuloni
Minister for Social Development

18/8/19

Date

Background

- 8 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 and associated regulations. MSD was appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the 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].
- 9 To bring together in one place, the respective roles, responsibilities and powers of the oversight bodies, Cabinet agreed to new primary legislation provisionally titled the *Independent Oversight (Oranga Tamariki and Children's Issues) Bill* (the Bill) [CAB-19-MIN-0113 refers].
- 10 Cabinet authorised you, 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 [CAB-19-MIN-0113 refers].

Part 1 – Engagement to date

MSD has been engaging with key agencies and Māori individuals and groups on the development of the Bill

- 11 Since Cabinet decisions, MSD has been consulting with Oranga Tamariki – Ministry for Children (Oranga Tamariki), the Office of the Ombudsman, the OCC, Te Puni Kōkiri – Ministry for Māori Development (Te Puni Kōkiri) and The Office for Māori Crown Relations - Te Arawhiti (Te Arawhiti) on the development of legislative proposals and approaches to monitoring.
- 12 Consultation has focused on how best to implement the policy decisions made by Cabinet in relation to the functions, roles and purpose of the oversight system. While some areas require further work, and/or decisions to assist drafting, the policy intent has remained intact. We have given each of our stakeholders the opportunity to input into this work.
- 13 The Māori individuals and groups we have engaged with represent a range of interests and expertise in varying aspects of the oversight system (e.g. strategic Treaty/Iwi partners, professionals, providers, care experienced individuals, caregivers and other relevant stakeholders). This engagement, and the work to develop proposals, is overseen by a Kāhui group consisting of Sir Mark Solomon, Druis Barrett, Eugene Ryder and Katie Murray.
- 14 The engagement hui with Māori to date have been positive and informative, and the main themes which have emerged from Māori engagement so far include:
- Concerns about the independence of the monitor, including both comments regarding the need for the monitor to be independent from government and concerns around the perceived lack of independence of MSD from Oranga Tamariki. This perception may stem from the fact that MSD and Oranga Tamariki used to be one organisation, are co-located in the same premises and still share some common functions, such as Human Resources and IT.

- The importance of Treaty partnership with Iwi and Māori, including comments around the importance of partnership in decision making and therefore partnership in the proposed new governance arrangements of the OCC.
- The importance of viewing tamariki in the context of their whānau, hapū and iwi, as the wellbeing of the child is dependent on the wellbeing of the whanau, hapū and iwi, and cannot be seen in isolation.
- The practices of Oranga Tamariki - the issue of most concern was Oranga Tamariki's level of coercive powers and the practices that underpin how Oranga Tamariki exercise these powers, especially when decisions are made to remove a child from their family. Comments were made that these powers need to be monitored and challenged to ensure consistency in understanding and use of those powers, with consequences for improper use.
- The importance of having tikanga imbued within the monitoring framework.
- The need to build trust and confidence with Māori in the independent monitoring system.
- The need for the monitoring system to have the powers to ensure that change can follow on from the monitor's findings and any recommendations.
- The need for the monitoring function to oversee the commitments provided for under s7AA of the Oranga Tamariki Act 1989.

- 15 A summary of the engagement hui to date is attached as **Appendix 1**. Further engagement with Māori is planned, for example to capture the voice of tamariki.

Part 2 – Some decisions are now required to assist drafting of the independent oversight Bill

- 16 This section details where further work has clarified that decisions are required, or where, due to feedback from stakeholders, confirmation of policy decisions would assist us in drafting the Bill. These areas include:

- the relationship between the monitor and Ministers in the Bill
- when the Act should be reviewed
- the OCC's role in Grievance Panels
- the oversight bodies' role in supporting a cohesive oversight system
- the repeal of the Children's Commissioner Act 2003 and the title of the Bill
- whether a matter on historic claims should be included in this Bill.

The relationship between the monitor and Ministers needs to be clarified in the Bill

- 17 It will be important for the oversight system (the monitor, Ombudsman and Children's Commissioner) to maintain a high degree of independence from Ministers. This will be necessary to:
- build public trust and confidence that the system is truly independent and able to provide free and frank advice
 - enable the system to inquire into the use of coercive powers without perceptions of undue influence
 - balance the need to retain resources and focus on a long-term view of systems performance with the desire to delve into the issue of the moment.

- 18 The Bill seeks to balance the oversight system's relationship with Ministers in two ways. First, by defining "the Minister" responsible for the Act as any Minister other than the Minister responsible for Oranga Tamariki. This recognises the inherent conflict of interest in being responsible for service delivery and the oversight system. For example, the Minister for Oranga Tamariki is currently legislated as the Minister responsible for the Children's Commissioner; however, in practice functions relating to the administration of the Commissioner (i.e. budget, Statement of

Performance Expectations, etc) have been delegated to the Minister for Social Development, with the Minister for Oranga Tamariki responsible for receiving reports generated by the Commissioner into specific issues. It is proposed that this separation of responsibility continue in the Bill, in line with current practice.

- 19 The second way is by enabling the Minister for Oranga Tamariki to direct the monitor to provide specific reports on specific issues of interest or concern. The power to direct (rather than to just request) recognises that the monitor's role is first and foremost to provide trusted, independent advice and assurance to Ministers. However, by limiting the Minister's ability to direct specific reports (rather than to direct the monitor's broader work programme) this provides some safeguard against the monitor being diverted from its core business, which is to monitor against indicators and measures over time. This approach aligns with Ministers' relationships to other monitoring agencies, such as the Commerce Commission.
- 20 This is as opposed to the responsible Minister's relationship with the Children's Commissioner, where they may *request* the Children's Commissioner prepare reports into specific issues of interest or concern. This difference in relationships recognises their role as an advocate and provides protection against the Commissioner's limited resources being diverted.
- 21 It is the OCC's view that the Minister should be able to request reports from the Monitor, but not direct them, in order to protect the monitor's independence.
- 22 We are seeking your confirmation of these elements of the policy to assist with drafting the Bill.

A Review of the Act should be undertaken on a date set by the responsible Minister in regulations

- 23 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.
- 24 Cabinet agreed that officials will report to the Minister for Social Development and other key Ministers, including the Minister of Māori Development, the Minister for Whānau Ora, and the Minister of State Services, in March 2021 on the plan, timeframes, and readiness for the transfer of the monitoring function [CAB-19-MIN-0113 refers].
- 25 By this time, officials will have a much clearer understanding of the time in which full monitoring of the Oranga Tamariki system will commence and, therefore, it will be clearer when the most suitable date to review the oversight arrangements will be. We recommend that at the time of the March 2021 report, the Minister responsible for the Act specify in regulations the date in which the Act should be reviewed.

The OCC will maintain its advisory role for appointments to the Residential Care Grievance Panels and will continue to be in receipt of quarterly outcome reports

- 26 Cabinet agreed that one of the functions of the Ombudsman would be to 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 - set up pursuant to the Oranga Tamariki (Residential Care) Regulations 1996. 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.
- 27 In addition to the Grievance Panel complaints function, the OCC also 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 plays a part in the OCC's role as the monitor of the (United Nations' Optional Protocol to the Convention against Torture

(OPCAT)¹² for care and protection and youth justice residences, by providing them with insights into what is happening in residences which helps them to perform their National Prevention Mechanism function. We 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. This change will require an amendment to the Oranga Tamariki (Residential Care) Regulations 1996. As this is a clarification of Cabinet decisions it will need, subject to your agreement, to be approved by SWC.

- 28 The OCC has advised that they believe it is appropriate that they retain the grievance panel role, including the complaints oversight element. 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.

Seeking your confirmation of the oversight bodies roles in supporting a cohesive oversight system

- 29 The Cabinet paper stressed the importance of the oversight system being cohesive and collaborative if strengthening of oversight is to be successful. Specifically, the principles and purpose of the Bill should ensure that the independent oversight bodies work cohesively and collaborate.
- 30 In developing the duties that will support a collaborative and cohesive oversight system, the Office of the Ombudsman has stressed the importance of remaining independent.
- 31 Given the level of independence associated with the Ombudsman (as an Officer of Parliament) and the Children's Commissioner (as an Independent Crown Entity) there is a risk that oversight agencies may work more independently of each other than is required to achieve the policy intent. This is evident now with the separate reviews of Oranga Tamariki uplift practices being conducted by the Ombudsman and the Children's Commissioner.
- 32 After discussion with the Ombudsman's Office we have come to agreement on a proposal that balances the Ombudsman's need for independence with the need to be clear about where oversight bodies need to work together in order to achieve a cohesive oversight system that minimises the burden on systems participants. We propose that the Bill include a general duty for Oversight bodies to work in a manner that will ensure that:
- the burden and potential risk of harm when gathering information directly from individuals is minimised
 - the burden on agencies by gathering and sharing information where possible is minimised
 - duplication, particularly when undertaking investigations/deeper reviews is minimised
 - communications to individuals and organisations within the Oranga Tamariki system, Ministers and the public are co-ordinated.
- 33 To enable us to progress drafting of the Bill, we seek your agreement that this proposed general duty be included in the Bill.

¹ 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.

² Cabinet agreed that the OCC should retain its OPCAT monitoring role.

The Children's Commissioner has expressed concerns about the repeal of the Children's Commissioner Act 2003

- 34 To ensure that each oversight agency has the necessary powers, duties and provisions it needs to effectively deliver on its function, Cabinet agreed that the new primary legislation would bring together in one place the respective roles, responsibilities and powers of oversight bodies assigned the three primary oversight functions. Cabinet agreed this Bill would repeal the Children's Commissioner Act 2003 (Children's Commissioner Act) [CAB-19-MIN-0113 refers].
- 35 MSD has consulted extensively with the OCC on this matter and the Children's Commissioner has expressed concern about the repeal of the Children's Commissioner Act.
- 36 The Commissioner's main concerns are that:
- repealing the Children's Commissioner Act may be met with disapproval by some in the sector (e.g. child's rights groups)
 - housing the role of the Children's Commissioner within the new Bill may not reflect that the Children's Commissioner is responsible for advocacy for all New Zealand children and young people, unlike the two other oversight functions which will focus specifically on children and young people within the Oranga Tamariki system.
- 37 Acknowledging the Commissioner's concerns, we maintain that a single piece of legislation (rather than three separate Acts, or amendments to the Children's Commissioner Act and the Ombudsman Act 1975), is still the best option. A single Act reflects the importance of having a cohesive independent oversight system and will be easier for the public to navigate in order to see how the oversight system will function as a whole.
- 38 In order to mitigate the Commissioner's concerns, we recommend that you agree to the proposed new title for the Bill: *The Oversight of the Oranga Tamariki System and Children's Commissioner(er) Bill*, to reflect the broader scope of the Children's Commissioner (noting that this is subject to change during the drafting process³). If you agree, we will provide PCO with updated drafting instructions. The Children's Commissioner's broader scope of work will also be made clear in the purpose section of the Bill.

You and the Minister for Children have agreed that the Bill should include an amendment to the Oranga Tamariki Act 1989, relating to arrangements for claims

- 39 In early August 2019, you and the Minister for Children agreed to arrangements for the management of claims relating to the abuse or neglect of children in state care [REP/19/8/710 and REP-OT/19/8/222 refer]. Through these arrangements, MSD would hold responsibility for resolving claims relating to acts or omissions in state care for the period up to 1 April 2017, and Oranga Tamariki would hold responsibility for resolving claims relating to events that took place from 1 April 2017 onwards.
- 40 You noted that an amendment to Schedule 1AA of the Oranga Tamariki Act is required to implement these arrangements and agreed that this amendment would be sought in the Bill, subject to it being in scope [REP/19/8/710 and REP-OT/19/8/222 refer].
- 41 You also noted that this legislative amendment would require policy agreement from Cabinet. The following section of this paper proposes a means for seeking agreement to this decision and others.

³ The term "Commission(er)" reflects that decisions about the future governance of the OCC are yet to be decided, and this allows for an option were the OCC to become a Commission.

Part 3 – Matters requiring further work

- 42 We are also continuing to progress work at pace on a number of highly complex matters that are fundamental to how the independent oversight system will operate in practice and require ongoing consultation with stakeholders. This section updates you on these issues and we will report back to you seeking decisions on these matters by 30 August 2019.

We are working through how the oversight bodies' commitment to the Treaty of Waitangi (te Tiriti o Waitangi) will be articulated in the Bill

- 43 In recognition of both the Crown's special relationship with Māori and the high rates of Māori children and young people in the Oranga Tamariki system⁴, Cabinet agreed that the Bill would require oversight bodies to make a practical commitment to the principles of the Treaty of Waitangi (the Treaty) through the provision of specific duties on the oversight bodies e.g. a duty to establish objectives that are specific to Māori, to engage with Māori and to report on the performance of these duties. It was noted that section 7AA of the Oranga Tamariki Act 1989 would be used as a guide to establish these duties [CAB-19-MIN-0113 refers].
- 44 There are a range of views⁵ on how the oversight bodies' commitment to the Treaty of Waitangi is best expressed in the Bill, and how this will work in practice considering each of the different oversight bodies different levels of independence. Given this, we are continuing to develop proposals for the Bill, in consultation with our stakeholders, the Kāhui group and the Māori Lawyers Technical Advisory Group.

Details of the independent monitor's role and functions

- 45 On 25 March 2019, Cabinet agreed that the role of the independent monitor is to assess objectively the quality, extent of compliance with, and delivery of the Oranga Tamariki Act and related regulations and standards [CAB-19-MIN-0113 refers].
- 46 In the Cabinet paper, the purpose and functions of the independent monitor were at a relatively high level. As we continue to build the monitoring approach and assessment framework to support initial monitoring of reports of abuse and neglect, it has become clear that the detail of the role of the independent monitor requires further clarification. This will ensure the Bill provides for the functions, duties and powers required to support an effective, independent monitor for the Oranga Tamariki system.
- 47 The issues requiring clarification and development include:
- the purpose and functions of the independent monitor and how these will recognise tikanga Māori
 - how to explicitly recognise monitoring of the Chief Executive's obligations under section 7AA of the Oranga Tamariki Act
 - reporting obligations of the independent monitor and responses required.
- 48 We are continuing to consult with stakeholders on these issues, as a range of differing views have been expressed on the proposed provisions, for example the role of the monitor was of interest in all of the hui that was held with Māori individuals and groups.
- 49 The Cabinet paper also outlined that MSD would review any commitments that have been entered into through Treaty settlements to ensure that the monitoring function

⁴ The term 'Oranga Tamariki system' is used in this paper to describe any agency services provided to children and young people under the Act, at any stage from the point of notification until the cessation of post-care transition.

⁵ Differing views have been expressed on this matter by the OCC, the Ombudsman's Office, Oranga Tamariki, throughout the hui with Māori groups and individuals and by the Kāhui group.

considers how agencies are accounting for and meeting the obligations under relevant settlements [CAB-19-SUB-0113 refers]. The Tūhoe and Te Hiku settlements, for example, include specific commitments in relation to the care and protection system.

- 50 As both Te Puni Kōkiri and Te Arawhiti have a role in monitoring Treaty settlements, we are working through what specific role the independent monitor will have. We will do further consultation with stakeholders and Māori on this issue and provide you with more detail in the Cabinet paper for the Cabinet Legislation Committee later this year.

Achieving appropriate levels of functional separation between the OCC and the independent monitor

- 51 Cabinet has agreed that the in-principle intention is for the independent monitor to transfer to the OCC once the Bill has been passed and the monitoring function has been stood up and tested by MSD.
- 52 During our consultation with key agencies and our Māori engagement to date, some significant concerns have been raised regarding having system advocacy and independent monitoring performed within the same organisation. These concerns include:
- Oranga Tamariki system participants may be less likely to freely and frankly engage with the monitor if they believe information may be used for system advocacy or that an advocacy approach is taken to monitoring – detracting from the monitor's impartial assessment of performance of the system against standards
 - that the Children's Commissioner's execution of their general functions may be undermined as the OCC seeks to maintain relationships with Oranga Tamariki to support information flows to the monitor.
- 53 So long as the system advocacy and independent monitoring functions are operated within the OCC, Oranga Tamariki and those who may be monitored under this legislation, may always have concerns that the independent monitor is being influenced by the system advocate and that information collected for independent monitoring is being inappropriately shared.
- 54 In developing proposals for the Bill, achieving an appropriate balance between system advocacy and independent monitoring functions is one of the key considerations. We are considering how the information sharing provisions and governance arrangements for the OCC could mitigate these concerns.

We are progressing work on information sharing proposals

- 55 Information sharing and access is a core component of an effective, strengthened oversight system. MSD is working closely with key agencies, including the Office of the Privacy Commissioner (OPC), the OCC, Oranga Tamariki and the Office of the Ombudsman, to develop proposals to support the drafting of the Bill. Matters that we are continuing to work through include:
- engaging with Māori to address the gathering of information from Māori and the provision of information to Māori, including the relationship with Māori data sovereignty principles.
 - the need for the independent monitor to have the power to enter non-private residences
 - how the Bill will provide for consent to be sought from individuals prior to engagement
 - how to gather and manage information from a large number of individuals without the need for a proliferation of memorandums of understanding.
- 56 We are also developing a Privacy, Human Rights and Ethics (PHRaE) assessment for the Bill, which will be finalised once we have a complete set of draft proposals. We

will report to you by 30 August 2019 on the work and seek your agreement on the final information access and sharing provisions.

- 57 Further work is also required to develop the proposals for the Bill that will require the oversight bodies to notify each other under certain circumstances. While the Bill will enable notifications to occur, the detail relating to whom should be notified of what will be provided for in regulations. For example, the Ombudsman and monitor will come across issues in the course of their work that Oranga Tamariki should be informed of, such as possible abuse or neglect. When developing notification provisions, consideration will also have to be given to the relationship between the Ombudsman, monitor and advocate. The work to develop the regulations will be progressed throughout 2019/20.

The State Services Commission is leading work on the future governance arrangements of the Office of the Children's Commissioner

- 58 To support the new system changes, and the in-principle decision that the independent monitor and the system advocate are performed within the same organisation, the State Services Commission (SSC) is developing options for the appropriate level of governance of the OCC that would be required to effectively discharge these two functions. Advice will be provided to the Minister of State Services and forwarded to you for discussion.
- 59 The SSC are consulting with stakeholders on the proposed options for governance. We have advised that their proposal should:
- ensure a cohesive governance structure that enables the organisation to function operationally and as effectively as possible given the diverse functions
 - ensure that governance meaningfully provides for partnership and participation of Māori
 - enable the organisation to balance strategic priorities whilst remaining agile enough to deal with emerging issues
 - ensure efficiency by not being overly complex
 - support functional separation between the advocate and monitor.

We are working through what information acquisition powers are appropriate for the OCC

- 60 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 role be established in the new Act.
- 61 Section 20 of the Children's Commissioner Act currently provides the Commissioner with the power to call for information and documents when undertaking an investigation. This power to require information is to support its complaints and investigations role in respect of individual children. As per Cabinet decisions, the Ombudsman will be taking on complaints oversight of the Oranga Tamariki system and investigations functions that are currently provided for in the Children's Commissioner Act
- 62 Sections 4(1) and 12(1)(1) of the Children's Commissioner Act also extend the Commissioner's powers to require information *to inquiring generally into, and reporting on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.* Legal advice has confirmed that the general inquiry power relates to the Commissioner's system advocacy role
- 63 As the complaints and investigation functions will be the remit of the Ombudsman in the new Act, it raises the question of whether current information acquisition powers continue to be appropriate for the OCC.
- 64 We are considering this in relation to information sharing and access provisions and will provide you with advice, including options, by the 30 August 2019.

- 65 The OCC's view is that the power to investigate issues for all children is an essential back-stop for their system advocacy. It is rarely used due to resourcing constraints but is useful in motivating agencies to resolve issues without a full investigation. Without this function, they believe an alternative power to compel agencies to collaborate would be required.
- 66 The OCC also have a view that there is a gap in the complaints and investigations function for children who are not in the Oranga Tamariki system, and they currently provide this service. It is our view that the main systems (health, education, immigration, justice, etc) are already well served with advocacy and complaints services. Like the arrangements being established within independent oversight of the Oranga Tamariki system, the Ombudsman also provides an independent overview for these systems.
- 67 We will provide you with further advice and seek decisions on all of the matters outlined in **Part 3** by 30 August 2019.

Part 4 - matters to be considered by SWC

- 68 Given the nature of some of the more detailed work that has been undertaken since 25 March 2019 Cabinet approvals, we recommend that you take the issues detailed below to SWC for agreement.

Table one – issues we recommend be considered by SWC

Issue	Should this issue be considered by SWC?
The commitment to the Treaty of Waitangi	As we are not going beyond the policy intent set by Cabinet you do not need to go back to Cabinet on this issue. However, given the importance of this section to both Ministers and the public, you may wish to go back to Cabinet to confirm this.
Appropriate information acquisition powers for the OCC	NOTE we will provide you advice and options by 30 August 2019. This specific matter was not clarified within initial Cabinet decisions. Required
Future governance of the OCC	Cabinet has agreed to change the governance of the OCC in light of the intended transfer of the monitoring function to them in the future. OCC and the Kāhui Group have been developing their own governance options for SSC consideration. This has become a key area of interest to stakeholders and Māori, and Ministers should have the opportunity to assess whether they collectively support the proposals. Required
Monitoring functions, including reporting obligations	Further work has been done on developing the monitor's functions since Cabinet decisions, which may require SWC approval. We will continue engaging with key stakeholders and Māori to work through some of the concerns raised and provide further advice at the end of August.
The date in which the Act should be reviewed	Cabinet agreed to 2023 as the specified date for the statutory review of oversight arrangements. We have reflected further and are proposing a different approach to the review. Changing the date requires your agreement. You may wish to seek Cabinet approval for this change if you are going back on other matters.

The OCC's role in Grievance Panels	Cabinet agreed that the complaints oversight role for the Grievance panels be transferred to the Ombudsman, but did not take a decision on the two additional roles of the OCC: an advisory role for appointments to the Residential Care Grievance Panels and being in receipt of quarterly outcome reports. Clarifying Cabinet decisions on this matter will required Cabinet approval. Required
Information sharing provisions	NOTE proposals will be provided for your consideration by 30 August 2019.
Powers of Entry for the monitor	NOTE proposals will be provided for your consideration by 30 August 2019.
Amending the Oranga Tamariki Act on claims relating to abuse or neglect of children in State Care	This amendment requires Cabinet approval. Required

Timeframes for introducing the Bill

- 69 We have been working towards a deadline for introduction of the Bill to the House by mid October 2019. However, meeting the deadline of mid October 2019 for introduction is no longer possible.
- 70 Significant time has been required to work through the decisions made by Cabinet and to engage on policy issues with stakeholders and Māori. The collaborative approach we are taking to develop proposals for the legislation is necessary and proving valuable, but is time consuming. We have been working as quickly as possible, taking every opportunity to develop proposals and engage with stakeholders concurrently.
- 71 We are continuing to work through several complex issues, and further engagement needs to be undertaken with Māori and key stakeholders. To achieve a November/December introduction of the Bill, we would need to finalise all outstanding matters by the end of August 2019, and prepare a Cabinet paper for SWC on 25 September 2019.
- 72 This implies that within the next two weeks, all outstanding matters will need to be resolved, final decisions taken on proposals, and a draft Cabinet paper prepared for parallel agency and ministerial consultation, to enable enough time for PCO to draft the Bill for introduction in December 2019. There is a risk that meeting a November/December 2019 introduction will mean significant work being required during Select Committee and the need for Supplementary Order Papers. This presents a further risk that legislation will not be passed until early 2021.
- 73 We have requested an extension to the deadline for introduction to February/March 2020. The additional time would enable us to undertake further hui to capture the voices of tamariki Māori, and work through the remaining issues with stakeholders and Māori. This would reduce the likelihood of significant work being needed at Select Committee. However, this date will likely cause delays to passing the Bill, as the second reading is likely to be in the second half of 2020. This could mean the legislation is not enacted until mid-2021. While that is not ideal, in our view it will not affect full monitoring of NCS Regulations commencing from 1 January 2021. However, it will slightly delay the full monitoring of the wider Oranga Tamariki system.
- 74 An updated proposed timeframe for introducing the Bill in early December 2019 is attached as **Appendix 2**. Officials are available to discuss the timeframes for introduction as required.

Next steps

- 75 We will continue engaging with key agencies in the system of oversight, including Oranga Tamariki, the OCC, the Office of the Ombudsman, and Māori on the proposals to date and the remaining issues outlined in this report.
- 76 Subject to your decisions, MSD will issue further drafting instructions to the Parliamentary Counsel Office and draft a Cabinet paper for SWC.
- 77 We will provide you with further advice on the following substantive matters by the 30 August 2019:
 - how to reflect the commitment to te Tiriti o Waitangi/Treaty of Waitangi in the Bill
 - how to achieve appropriate levels of functional separation between the advocate and the monitor
 - identifying the most suitable future governance arrangements of the Office of the Children's Commissioner (OCC)
 - the role of the monitor, including:
 - purpose, powers and functions
 - how to explicitly recognise monitoring of the Chief Executive's obligations under section 7AA of the Oranga Tamariki Act
 - reporting obligations.
 - information sharing and access proposals
 - information access powers of the Children's Commissioner
 - whether the independent monitor requires powers of entry without permission.

Appendix 1: Summarised Māori engagement (as at 12 August 2019)

The engagement hui with Māori has been positive and informative. The participants expressed confidence in having the Kāhui Group provide oversight and support to the Ministry with the engagement process and over the duration of the work programme. They were also positive about enlisting Māori with expertise and skills to work on policy and legislative design, the monitoring assessment framework and the operating model. All participants indicated their interest in remaining involved as work progresses. The main issues raised during the hui were:

Child and Whānau-centric

Considerable importance was put on placing tamariki within the context of their whānau. Currently a child is seen as a singular entity or as an individual, but they are part of a whānau so it is essential to recognise and work holistically within that context.

The Treaty of Waitangi

There is a need for the legislation to have a strong emphasis on the Treaty of Waitangi. A Treaty reference can be open to broad interpretation but ultimately it needs to lead to change and have practical applicability that allows for those changes to be made. There was also a question around who holds accountability and takes responsibility to regarding a Treaty commitment in the legislation. The principles of partnership, protection and participation are important in this process as is the need for integrity, transparency and honesty in the way the Treaty partners interact.

The Monitoring and Assurance Framework

The whole system and design should be by default, Māori-focused rather than seen as an adjunct. It is not enough to incorporate a Māori design into a mainstream framework when Māori are the significant stakeholders. The framework must be imbued with tikanga Māori, whānau-centric and based on the premise that what works for Māori will work for everyone else.

There is the need to build trust and confidence with Māori in the independent monitoring system and the Independent Monitor. Māori should therefore be closely involved in its design and implementation since they are vastly over represented in the Oranga Tamariki system. It also needs to be well resourced and working cohesively across the three functions.

The monitoring system needs to be independent of the government with powers beyond making recommendations. There needs sufficient teeth to ensure that demonstrable change follows as a result of the recommendations. There was support for tabling and publishing reports and recommendations to the Minister in Parliament as an accountability and transparency tool. It is important for the public and Māori to see what is working well and where changes need to be made. Sharing these reports with Iwi would also be help them to identify areas requiring their attention.

The Independent Monitor should recognise that Iwi and whānau are an important source of information. The voice of whānau and their experiences need to be heard to give balance to the information Oranga Tamariki provides. It is therefore important

that Independent Monitor can request all sources of relevant information from Oranga Tamariki without requiring the Chief Executive's permission.

Independent Monitor and Governance

There were some who saw a perceived conflict with MSD's role as the Independent Monitor, but this was mitigated by the fact the system would be transitioned to an Independent organisation. As perception is an important factor in the credibility of the independent monitoring system, it needs to be robust and independent without undue influence from the government.

The Independent Monitor should have a regional focus and presence particularly if monitoring identifies issues with regional practice. There should also be a workforce with the appropriate mix of skills and resourcing to meet the needs of all children.

The appropriateness of transferring the Independent Monitoring role to the Children's Commission in its current form was raised. The main concern being the power resides in one person and is personality and priority-driven. Some thought there should be a Māori Children's Commissioner while others believed a non-Māori Children's Commissioner was appropriate if a Māori approach is taken.

Some participants thought there may be a perceived conflict in the advocacy and monitoring role residing within a sole Commissioner model particularly if there are not appropriate firewalls in place.

Regardless of where the independent monitoring function is transferred, the governance entity needs to reflect partnership with Māori and they also need to have input into the Appointments process. The independent monitoring system needs to embed a culture from the outset that ensures everyone has capability and capacity to respond to tamariki and whānau in the Oranga Tamariki system.

What needs monitoring

The issue of most concern was the high level of coercive power Oranga Tamariki has and the way they exercise that power. There seems to be an issue of interpretation at the practice level, especially with the uplift of tamariki. These powers need to be monitored and challenged to ensure consistency in understanding and use of those powers, with consequences for improper use.

Hui participants felt that Oranga Tamariki espouse principles of whanaungatanga, whakapapa, protection and mana tamaiti while in practice they are doing the complete opposite with the subsequent child policy. There is a long-lasting impact when these children are placed outside of whānau care and this is evident in the stories of Claimants currently in or been through the Historical Abuse Claims process.

Hui participants also felt that actual social work practice can be different to what was intended in legislation and policies. They believed that this means there are often examples where Oranga Tamariki's responses are more severe than what is warranted given the circumstances. They also had the strong view that Practitioners and Supervisors appear to have an entrenched view and practice of following policy

and processes without reference to contextual and mitigating circumstances. Whānau are often left out of any discussions or decision-making regarding their tamariki as they are seen to be a risk not part of the solution.

Early intervention is an important part of the Oranga Tamariki system but there is not enough emphasis on it. There are wider socio-economic determinants at play, so there needs to be a more integrated and intersectoral approach to the issues faced by tamariki and their whānau.

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Appendix 2: Proposed timeframe for introducing the Bill in early December 2019

Timeframes for SWC, LEG and Introduction

Step	Indicative date
Report to the Minister providing our final advice on information sharing proposals along with draft Cabinet paper	End of August 2019
Agency consultation and ministerial consultation on draft SWC Cabinet paper (due to tight timeframes, this will need to be done at the same time)	Monday 2 September 2019 to Friday 13 September 2019 (allow 2 weeks)
Lodge SWC Cabinet paper	Thursday 19 September 2019
Cabinet paper considered at SWC	Wednesday 25 September 2019
Minister to receive draft LEG Cabinet Paper with draft Bill attached	Friday 11 October 2019
Minister's feedback and consultation with agencies and others ministers on LEG Cabinet Paper and draft Bill	11 October 2019 to 4 November 2019
Minister to receive a revised LEG Cabinet Paper with Bill attached	By 8 November 2019
Lodge LEG Cabinet paper for LEG committee	Week beginning 11 November 2019
LEG Committee meeting	19 November 2019
Introduction of the Bill	Early December 2019
1 st reading and referred to Select Committee	Before 19 December 2019
Select Committee process	12 Feb 2020 until mid-July 2020
2 nd reading	August 2020
Committee of the Whole	Nov/Dec 2020 or early 2021
3 rd reading and enactment	Nov/Dec 2020 or early 2021

Aide-mémoire

Date: 22 August 2019 **Security Level:** In confidence

For: Hon Carmel Sepuloni – Minister for Social Development
Hon Tracey Martin – Minister for Children

File Reference: Ministry of Social Development REP/19/8/786
Oranga Tamariki REP-OT/19/8/241.

Meeting with Judge Andrew Becroft, the Children's Commissioner

Meeting details 5.00 – 5.30 pm, Tuesday 27 August 2019, Executive Wing Room 5.1

Expected Attendees

- Hon Carmel Sepuloni, Minister for Social Development
- Hon Tracey Martin, Minister for Children
- Judge Andrew Becroft, Children's Commissioner

Purpose of Event The Children's Commissioner has requested a meeting to discuss the following items:

1. Out of scope [REDACTED]
2. An update on work being done on the build of the Independent Children's Monitoring (ICM) Unit
3. The future organisation and governance of the Office of the Children's Commissioner and his concerns on the work done so far.

Key issues

Out of scope [REDACTED]

Background on oversight legislation (relates to items 2 and 3)

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; oversight and investigation of complaints of matters related to application of the Oranga Tamariki Act 1989 and independent monitoring and assurance of the operations delivered under that Act.

MSD was appointed the independent monitor to establish the function, with the in-principle intent that it is transferred to the OCC, once a robust monitoring function is established [CAB-19-MIN-0113 refers].

Cabinet also agreed to bring together in one place, the particular roles, responsibilities and powers of the oversight bodies in new primary legislation.

The proposed new legislation and the intended transfer of the monitoring function to the OCC has implications for the future functioning, organisation and governance of the Office. These implications will be discussed under the next two headings.

Item 2 - Build of the Independent Children's Monitoring (ICM) Unit

Initial Assessment Framework and Memoranda of Understanding (MoUs)

Preparations for Day One of the ICM for 1 July 2019 included:

- putting MoUs in place with Oranga Tamariki and the three providers subject to initial monitoring¹
- an Initial Assessment Framework (IAF) to support that monitoring
- communication material prepared and shared with key stakeholders.

Since 1 July 2019, the ICM has sent initial information requests to Oranga Tamariki and the other three providers that are being monitored from Day One. The information requests are focussed on the receipt and response to notifications of abuse or neglect by agencies that have children in care or custody under regulations 69 and 85 of the National Care Standards (NCS) regulations. Oranga Tamariki has responded to this request and is working with the ICM to support its understanding of current practice and internal monitoring approaches.

MoUs have been agreed between MSD and each organisation and these (MoUs) will be reviewed every 3 months (or earlier if both parties agree).

There is a single IAF which has been developed in consultation with the four organisations. Consultation included two full day workshops. The OCC have provided input on the development of the IAF and were part of these workshops.

Work on the Assessment Framework and operating model to prepare for full monitoring

Work is underway on the development of the assessment framework and operating model in order to be ready to monitor the NCS in full by December 2020.

The ICM is meeting with other monitoring bodies such as the Independent Police Conduct Authority, Department of Corrections, the Ombudsman and the OCC to provide information and advice on their frameworks and models. They are also meeting with Oranga Tamariki to discuss this work.

The ICM is meeting with the OCC to discuss the development of the framework, the role of the OCC and the resources and time required from now until December 2020.

Suggested talking points/response

- We acknowledge that the OCC is a key stakeholder in the development of the ICM unit and that its experience and knowledge is crucial in the further development of assessment frameworks and the operating model for the ICM unit.
- We understand that the OCC is involved in ongoing discussions with ICM unit on the development of the assessment framework and the operating model and we fully encourage that.

¹ There are four agencies being monitored directly at this time. These are Oranga Tamariki and three Approved Organisations that have care and custody of children or young people in their own right (Open Home Foundation; Barnardos and Dingwall Trust).

Item 3 - The future organisation and governance of the OCC

The State Services Commission (SSC) is leading work on the future governance arrangements of the OCC.

To support system changes, and the in-principle decision that the independent monitor and the system advocate will be performed within the same organisation, SSC is developing options for the appropriate level of governance of the OCC that would be required to effectively discharge these two functions.

The SSC are consulting with stakeholders on the proposed options for governance. We (MSD) have advised that their proposal should:

- ensure a cohesive governance structure that enables the organisation to function as effectively as possible
- ensure governance meaningfully provides for Māori partnership and participation
- enable the organisation to balance strategic priorities whilst remaining agile enough to deal with emerging issues
- ensure efficiency by not being overly complex
- support functional separation between the advocate and monitor.

A report on the future governance and organisation of the OCC is due with Minister Hipkins by early September and will be forwarded to you around the same time.

Issues the Commissioner may raise:

- The OCC recognises the need for functional separation between the advocate and monitor provided that the monitor can make recommendations based on its findings²
- The OCC are supportive of a governance model that consists of two separate independent crown entities, with linked governance, rather than a single entity (and have developed an option for SSC to consider³).

Suggested talking points/response

- We appreciate that the future organisation and governance structure of the OCC is of great interest to the Children's Commissioner.
- At this stage, we are waiting for further advice from SSC on possible future governance arrangements for the OCC.

Other issues the Children's Commissioner may raise at the meeting

The report on *Strengthening Independent Oversight of the Oranga Tamariki System and Children's Issues: Progress update...* [REP/19/8/768] that you (Minister Sepuloni) received recently was sent out to OCC for consultation. Based on the feedback received, Judge Becroft may raise the following issues:

² The proposed Bill will enable the monitor to make recommendations in its three-yearly systems report.

³ The Kahui group (engaged by MSD) has also provided a model to SSC to consider.

A. OCC is concerned that they will lose the power to require information from agencies to fulfil its systemic advocacy function

Background

The Children's Commissioner Act 2003 currently provides the Commissioner with the power to call for information and documents when undertaking an investigation. This power to require information is to support its complaints and investigations role in respect of individual children.

This power extends to the Commissioner being able *to require information to inquiring generally into, and reporting on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.*

As the complaints and investigation functions will be the remit of the Ombudsman in the proposed legislation, it raises the question of whether current information acquisition powers continue to be appropriate/needed for the OCC.

The Children's Commissioner is concerned that its systemic advocacy role is being too narrowly articulated and that the OCC should also have an individual-level advocacy focus. MSD notes that there are a number of (individual) advocacy mechanisms in place in the system⁴.

Suggested talking point/response

- Officials are working through all these issues and are considering options on information access and sharing provisions which may provide the OCC with access to information that is relevant to the OCC's future systemic advocacy role and functions (depending on the option chosen).


B. OCC does not endorse the proposed title of the Bill

The suggested title in the report is *The Oversight of the Oranga Tamariki System and Children's Commission(er) Bill*.

Suggested talking point/response


- The title of the Bill may be subject to change during the legislative drafting process, but we understand that the title will need to reflect the broader advocacy function of the OCC for all NZ children

Out of scope



⁴ VOYCE – Whakarongo Mai performs the individual advocacy function in the Oranga Tamariki system. Children in the wider system (e.g. Health, Education) are served by a number of other (individual) advocates.

⁵ Out of scope



Out of scope

D. The Children's Commissioner has expressed concerns about the repeal of the Children's Commissioner Act because:

- the new Bill may not fully reflect that the Children's Commissioner is responsible for advocacy for all New Zealand children and young people, unlike the two other oversight functions which will focus specifically on children and young people within the Oranga Tamariki system.
- it may be met by disapproval by some in the sector

Suggested talking points/response

- We recognise the concerns you have around the repeal of the Children's Commissioner Act but believe that a single piece of legislation (rather than three separate Acts, or amendments to the Children's Commissioner Act and the Ombudsman Act 1975), is still the best option
- A single Act reflects the importance of having a cohesive independent oversight system and will be easier for the public to navigate

E. The Children's Commissioner has concerns around the timeframes around the Oversight Bill

At the time of writing of this aide memoire, we have not advised key stakeholders (incl. OCC) of your decision around the timeframe for the introduction of the Bill. We are now developing a revised timeline which focusses on core policy issues being resolved by the end of September.

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Report

Date: 10 September 2019

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Cover Report – Early Draft Cabinet Paper: Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children’s Commissioner Legislation Bill

Purpose of the report

- 1 The purpose of this report is to:
 - seek your feedback on the direction of the attached early draft Cabinet paper
 - seek your agreement to consult with the Office of the Children’s Commissioner (OCC), the Office of the Ombudsman, the Kāhui group and key departments on the early draft Cabinet paper.

Recommended actions

It is recommended that you:

- 1 **note** that further work has been undertaken to clarify policy proposals agreed by Cabinet on 25 March 2019 and build on the progress report we provided to you on 16 August [REP/19/8/768 refers]
 - 2 **note** that the attached Cabinet paper is an early draft subject to change following your feedback and your planned Ministers’ meeting on 23 September
 - 3 **note** that this report provides you with further information on some of the more substantial issues contained in the attached early draft Cabinet paper and includes options MSD has considered in developing proposals
 - 4 **note** that we have drafted the Cabinet paper to reflect our recommended options
 - 5 **note** that to continue to progress work and manage timeframes, we would like to consult with agencies (OCC, the Office of the Ombudsman), the Kāhui group and key departments on the early draft Cabinet paper but note that we are still working through some issues and that, consequently, recommended options may change
 - 6 **agree** to consult with OCC, the Office of the Ombudsman and the Kāhui group on the early draft Cabinet paper by 23 September
- Agree / Disagree**
- 7 **agree** to consult with key departments on the early draft Cabinet paper by 23 September

Agree / Disagree

- 8 **note** that you may wish to wait until after the Ministers' meeting on 23 September to consult on the early draft paper but, depending on the amount of feedback received (incl. following further ministerial consultation), that this is likely to put (planned) Cabinet Social Wellbeing Committee consideration of the paper in October at risk
- 9 **note** that we will provide you with a set of A3s on the independent children's monitoring function, information access and sharing, hui engagement and the establishment timeline for the Independent Children's Monitor, along with presentation slides to facilitate your meeting on 23 September

Joornall

Justine Cornwall
General Manager Policy

Date

10 September 2019

Hon Carmel Sepuloni
Minister for Social Development

Date

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Background

- 1 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; oversight and investigation of complaints, and independent monitoring and assurance [CAB-19-MIN-0113 refers].
- 2 Since then, the Ministry of Social Development (MSD) has focused on how best to implement Cabinet's decisions. Following further analysis, some proposals have been further refined and now require Cabinet consideration. These proposals, which reflect your progress report decisions, are contained in the attached (early) draft Cabinet paper and are required to assist with drafting the Oversight of the Oranga Tamariki System and Children's Commission(er) Legislation Bill (the Bill).
- 3 To maintain momentum and manage timeframes we have developed this early draft for your feedback on the general direction and we also seek your agreement to consult key agencies and departments.
- 4 We understand you are also meeting with Ministers on 23 September to discuss this work and that subsequently changes to the paper may be required.

Providing for the oversight bodies commitment to the Treaty of Waitangi

- 5 In March 2019, Cabinet agreed that the Bill require oversight bodies to make a practical commitment to the principles of the Treaty of Waitangi (the Treaty) including by setting out duties for chief executives or the equivalent eg. a duty to establish objectives that are specific to Māori, to engage with Māori and to report on the performance of these duties [CAB-19-MIN-0113 refers].
- 6 During consultation, it has become clear that, in addition to these specific duties, a broad overarching commitment to the principles of the Treaty may be appropriate but this issue is complex as detailed below.
- 7 The way in which a commitment to the principles of the Treaty is articulated in Acts differs.¹ s9(2)(h)
[REDACTED]
- 8 Questions have been raised as to how the commitment to the principles of the Treaty may be articulated in the Bill, given that Officers of Parliament and Independent Crown Entities have a special independent status under the Crown. s9(2)(h)
[REDACTED]
- 9 The Ombudsman's published Strategic Intentions 2019/23 states that the Office "works to give effect to the principles of the Treaty of Waitangi".^{9(2)(g)(i)}
[REDACTED]

¹ For example, section 4 of the Conservation Act 1987: "this Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi", whereas section 7AA in the Oranga Tamariki Act: "the duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)."

- 10 9(2)(g)(i) [REDACTED]
- [REDACTED] This would avoid the Ombudsman being required to "give effect to" the principles given the unclear constitutional status of the Ombudsman under the Treaty and would ensure that the other oversight bodies would need to "give effect to" the Treaty.
- 11 However, considering the advocacy and the monitoring function may, in the future, reside with the Office of the Children's Commissioner (OCC), which is an ICE, it is also unclear whether the obligation to "give effect to" the Treaty should apply to them.
- 12 Providing a strong commitment to the Treaty in the Bill may set a precedent for other Offices of Parliament and may have constitutional implications. However, Te Puni Kōkiri and our Māori consultation partners have been clear that the initial standards proposed by the Ombudsman would not meet their expectations for this Bill. Similarly, the OCC is in favour of a strong commitment to the principles of the Treaty.
- 13 Te Puni Kōkiri, Māori consultation partners and the OCC have not seen the Office of the Ombudsman's latest suggestion, but given that they consider that oversight bodies should give a strong commitment to the principles of the Treaty, it is unlikely that they would be satisfied with the Office of the Ombudsman's suggestion.
- 14 The Ministry of Justice (MoJ) has indicated they are not concerned if the Bill requires the Ombudsman to give effect to the principles of the Treaty.
- 15 The Legislative Design and Advisory Committee has advised MSD to seek Crown Law advice on the overarching principle, as the effect of having a general Treaty principles provision on the Office of the Ombudsman would be unclear and could create an adverse inference.
- 16 We have taken the views of the different stakeholders into account and have considered two possible options:
- I. that the Bill is proposed to contain a broad overarching commitment which requires the oversight bodies to "give effect" to the principles of the Treaty, in addition to the proposed duties²
 - II. the Bill follow Cabinet's original decision, that the oversight bodies' commitment to the Treaty be reflected through the proposed duties.
- 17 Our preference would be to have an overarching obligation principle that would require all the oversight bodies to "give effect to" the principles of the Treaty. However, given the unique constitutional status of the Ombudsman, the strong views on this matter expressed by the Office of the Ombudsman, and the precedent it may set for other Officers of Parliament, you may wish to consult with the Minister of Justice and your Māori ministerial colleagues on the preferred option.
- 18 If your preference is to have a broad overarching commitment which requires the oversight bodies to "give effect to" the principles of the Treaty (in addition to the proposed duties) we would recommend seeking Crown Law advice.
- 19 In the meantime, we have drafted the Cabinet paper to reflect no overarching principle.

² These duties will ensure the oversight bodies can demonstrate their commitment to the Treaty in a practical, measurable and accountable way. See paragraph 15 of the attached draft Cabinet paper for a list of the proposed duties.

The role of the Independent Monitor

Reporting and response requirements for the independent monitor

- 20 Further work has identified that 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.
- 21 The early draft Cabinet paper proposes the regular publication of reports by the monitor and the requirement on Oranga Tamariki to respond to these reports. This would help ensure transparency and accountability and is aimed at encouraging real change in the Oranga Tamariki system.
- 22 As proposed in the attached draft Cabinet paper, throughout the course of monitoring, the monitor would produce a range of reports on its findings:
 - a three-yearly State of the Oranga Tamariki System Report to the Minister responsible for Oranga Tamariki and Māori Ministers
 - two annual reports; the first will consider the state of compliance with National Care Standards Regulations while the second will consider the state of the application of s7AA of the Oranga Tamariki Act
 - other reports as required, produced through routine monitoring, to support deeper reviews, following site visits or to support an understanding of progress in the rollout of initiatives. These reports may be produced at the monitor's initiative or commissioned by either the Minister responsible for Oranga Tamariki or the Chief Executive (CE) of Oranga Tamariki.
- 23 The reports mentioned in the last bullet point may be commissioned from the monitor by either the responsible Minister, the Prime Minister or the CE of Oranga Tamariki. It is proposed that Ministers may require the monitor to produce a report whereas the CE can only request a report.
- 24 Under the Bill, we propose that agencies would have a duty to respond to reports within 40 days of receipt (following engagement on drafts).
- 25 Originally, we had proposed a 20 day response timeframe but following discussions with Oranga Tamariki have decided that a 40 day timeframe may be more appropriate to address operational challenges. Subsequently, Oranga Tamariki has suggested that there should be a provision to extend this timeframe, for instance, in cases where a multi-agency response is required.
- 26 We consider a 40-day response timeframe sufficient as agencies will be consulted on draft reports prior to receiving the final report.
- 27 The Bill would require all reports, including Minister and CE commissioned ones, and agency responses to be published by the monitor on its website within 10 days following them being provided to the Minister for Oranga Tamariki. This ensures that the monitors' reports would not unduly be delayed and in doing so supports attainment of public trust and confidence by protecting the independent status of the monitor.
- 28 Oranga Tamariki officials have indicated that they consider reports produced by the monitor, specifically to support system learning, should not be published. For these reports to be effective, a high level of participation is required from system participants; by publishing these reports participants may be less inclined to participate.
- 29 As these types of reports are likely to be instigated at the request of the CE of Oranga Tamariki, we have considered an option that would exempt CE requested reports from being published (or published with the CE's agreement).

- 30 On balance, we believe that maintaining transparency and accountability through the publication of these reports is a consideration that outweighs Oranga Tamariki concerns (this option is currently reflected in the early draft Cabinet paper).

Information sharing and access framework

Ability to enter a site with notice

- 31 During consultation, a question was raised as to whether the independent monitor should have the power to access/enter premises³ where children and young people reside (powers of entry), such as residences under the Oranga Tamariki Act 1989.
- 32 The main proposed purpose of the independent monitor is to monitor and report on the performance of the Oranga Tamariki system. To do this, the monitor should not be restricted to desk top reviews of quantitative data but should incorporate qualitative information, such as hearing directly from children and young people, staff, providers and others.
- 33 The monitor is also likely to want to see first-hand the places where people in the system live and work. This will provide a richer and more multidimensional picture, as well as supporting triangulation and validation of data.
- 34 Furthermore, the monitor would not want to find itself being prevented from visiting or entering residences or other sites because such visits would provide an important source of information to assess compliance with care standards.
- 35 We have considered a number of options that would allow the monitor to visit sites for the above mentioned purposes/reasons including:
- I. No powers of entry (monitor can only enter/access a site with permission from a site manager).
 - II. Power of access/entry with notice - the monitor will have the statutory power to access/inspect a site but must give reasonable notice of an impending visit (**recommended**)
 - III. Power of entry without notice - Under this option the monitor may enter a site unannounced (without prior permission).
- 36 On balance, we recommend option II because it will sufficiently fulfil the monitor's need to obtain reliable (on-site) information while causing relative minor on-site disruption and protecting the privacy and wellbeing of children, young people and staff.
- 37 Not having powers of entry (option I) may see the monitor excluded from visiting sites and therefore prevent the monitor from obtaining a full picture of the functioning of the Oranga Tamariki system.
- 38 Having the power to enter a site without notice (option III) would most likely provide the monitor with a more accurate picture of the day-to-day functioning of a site, but is heavy handed and likely to cause major on-site disruption. Moreover, such a wide ranging power may not be appropriate for a system monitor and would be more appropriate for an agency charged with ensuring the (on-site) health and safety and security of individuals.
- 39 Cabinet decisions made in March 2019 authorised you to make decisions on information access and powers of entry in order to finalise the drafting of the Bill.

³ Premises includes Oranga Tamariki residences, Oranga Tamariki site offices and group homes (not private residences)

Given that powers of entry are potentially far reaching, we believe it prudent that you go back to Cabinet and signal your intention on this issue.

- 40 We have consulted MoJ on the recommended option and they are in broad agreement with the proposal. We have also engaged with Oranga Tamariki and the Office of the Ombudsman on this issue and at the time of writing have not received comment from them.

Power of entry within the wider information sharing and access framework – duty to facilitate access

- 41 The power to enter (with notice) does not mean that the monitor has an (automatic) right to interview individuals on site.
- 42 When the monitor wants to speak to individuals, especially children and young people, it will not usually be appropriate for the monitor to have their personal details and make direct contact. This will require someone (e.g. Oranga Tamariki or a contracted provider) with that information to act on the monitor's behalf and/or be a go between. The Bill will (therefore) contain a specific duty on Oranga Tamariki and contracted providers to facilitate timely access to individuals.
- 43 Facilitating access to individuals is a first step in enabling the monitor to speak to people within the Oranga Tamariki system. Actual informed consent⁴ of the individual the monitor wishes to speak to is also required before the monitor can conduct an interview. Individuals retain rights to refuse consent at any point prior to or during throughout the engagement process either on their own or on their behalf.
- 44 If 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.
- 45 Operational procedures to support safe and ethical engagement with individuals will be provided for in a Code of Conduct developed jointly by oversight bodies in consultation with external advice on ethics.

Ombudsman's relationship with the Code of Conduct

- 46 The Code mentioned in the previous paragraph will provide protocols to guide the conduct of oversight body staff and support safe and ethical engagement with individuals (particularly vulnerably children and young people). The Ombudsman has noted that:

"On the question of the safe and ethical engagement with children, we are proposing that we develop parallel procedures on the engagement with children and other parties, informed by the need to preserve safety and avoid harm. Clearly the proposed code will be of considerable assistance in drafting those procedures, but to preserve the Ombudsman's statutory independence the final form of the procedures will need to be determined by the Ombudsman"

- 47 We do not agree that the proposed Code of Conduct will necessarily constrain the Ombudsman's independence, and to the extent that it may, ensuring the safety of children and young people is more important. Part of ensuring safe and ethical engagement is ensuring consistency and certainty for children, young people and

⁴ Informed consent means that permission is granted by an individual in full knowledge of the possible consequences

other individuals that oversight bodies will engage with. Therefore, it is important that a single Code be developed by oversight bodies.

- 48 We will continue to work through this issue (and other boundary issues between the Ombudsmen Act 1975 and the Bill) during drafting.

Other matters that may be raised during consultation

OCC individual-level advocacy function and power to require information

- 49 The Children's Commissioner has indicated that he wishes to retain an individual-level advocacy function with associated powers to require information from agencies (investigative powers). The Commissioner sees this as an essential back-stop for system advocacy, and that inquiries from individual children often inform wider systems issues.
- 50 The power to require information, which the Commissioner currently has under the Children's Commissioner Act 2003, has never been used but (the 'threat' of its use) is considered useful in motivating agencies to provide information.
- 51 Subsequently, the OCC has indicated that the reason the power to require information has not been used is because they have not been adequately resourced to provide the (individual-level) advocacy function.
- 52 In March 2019, Cabinet decided that the OCC should focus on systemic advocacy. Other agencies will be better placed to perform the individual advocacy role (eg. VOYCE – Whakarongo Mai). The individual advocacy function with associated investigative powers is more closely associated with complaints resolution. As such, this should be the remit of the Ombudsman in accordance with previous Cabinet decisions.
- 53 MSD's view is that the OCC can still provide advice to individuals to, for instance, help navigate complaints pathways, as well as make enquiries on behalf of an individual (with their consent) without the need for formal investigative powers.⁵

OCC system-level advocacy function and information needs provided for through general information access provisions

- 54 OCC's information requirements to effectively fulfil its systemic advocacy role are proposed to be provided for in the Bill through general information access provisions.
- 55 Under these proposed provisions, the Commissioner would have the power to require information, but there would be restrictions on what information can be obtained. The Commissioner would not be able access personal information, court records or require agencies to provide certain sensitive information (draft ministerial and Cabinet material, pre-budget material and commercially sensitive material).
- 56 The Children's Commissioner would only be able to require information related to the discharge of its functions. This is the same approach that will be taken with the independent monitor and the Ombudsman.
- 57 The Children's Commissioner will have broader access to information than other, similar, system advocates. Discussions with Health and Disability Commissioner (HDC) and Human Rights Commission (HRC) officials confirm that neither has the

⁵ Other similar system advocates (e.g. the Health and Disability Commissioner) do not have these investigative powers

power to require the provision of information to support their advocacy functions and that they mainly rely on the Official Information Act to obtain information.

- 58 This may prompt a debate as to whether other advocates should have similar abilities to access information.
- 59 We have consulted with the Ministries of Health (MoH), Education (MoE), Justice and Oranga Tamariki on this proposal. MoJ is supportive of the proposal. However, Oranga Tamariki considers that the OCC does not need information access to this extent to effectively conduct its advocacy role and that reliance on 'soft levers' for gathering information should be sufficient. MoH stresses that protections should be in place (i.e. restrictions on data access) if the OCC were to be able to access information through general information access provisions.
- 60 We have also consulted with OCC on the information sharing provisions and they are comfortable with this.

Requiring a response to reports or recommendations made by the Children's Commissioner

- 61 Under the current legislation, and the proposed new legislation, the Children's Commissioner has the ability to develop and publish reports.
- 62 Recently, the OCC has indicated that its systemic advocacy function would be enhanced if relevant agencies would be required to provide a response to its reports, or through the ability to table reports in Parliament at its discretion.
- 63 The OCC considers that the power to require a response would help the future Children's Commissioner's ability to effectively advocate and promote children's welfare, rights, and interests. They have indicated that a response may take many forms, including a noting response and that they would not require agencies to action recommendations.
- 64 As a less stringent alternative to the ability to require agencies to respond to reports, the OCC has suggested that they could be given the ability to table reports in parliament⁶ - the Scottish Commissioner for Children and Young People currently has the ability to table reports in parliament at his discretion.
- 65 MSD has considered whether having a power to require a response would enhance the OCC's ability to effectively advocate for, and promote, children's rights and interests and consider that this power would not substantively add to the OCC's ability to advocate for children and young people based on the following:
- the OCC already has the ability to go to the media if an agency does not respond to its reports/recommendations: this is a powerful tool - especially if the publicity created causes the Government to take note
 - if an agency is not required to follow up on recommendations made by the OCC and may simply note/acknowledge that they have received a report, then this power does not seem to perform a useful function
 - comparable overseas organisations/advocates (e.g. Advocate for Children and Young People, NSW and Family and Child Commission, Queensland) do not have the ability to require agencies to respond to recommendations contained in reports.
- 66 Under current legislation, as well as under the proposed oversight legislation, the Children's Commissioner has the ability...to report, with or without request, to the

⁶ At present only the OCC's Annual Reports are tabled in parliament.

Prime Minister on matters affecting the rights of children (Section 12(1)(k) of the Children's Commissioner Act 2003).

- 67 We do not consider that the ability to table reports in parliament (as per OCC's suggestion) would add value over and above this provision.

Governance of the Office of the Children's Commissioner

- 68 In March 2019, Cabinet noted that if monitoring is transferred to the OCC, it would also need strengthened governance.
- 69 The State Services Commission (SSC) is of the opinion that the Government should take the opportunity to update the governance of the OCC from the current corporation sole model, independently of Cabinet's intention to transfer the independent monitoring function to the OCC. As this is different from what Cabinet decided, additional Cabinet approval is required.
- 70 SSC has developed options for the future governance arrangements for the OCC. A report on governance options (attached) has been sent to Minister Hipkins for consideration.
- 71 A key consideration they have been working through is how to ensure an appropriate level of separation between the advocacy and monitoring function.
- 72 The attached SSC report sets out three possible governance options for the OCC; whether or not the independent monitoring function should transfer there in the future.
- 73 All options consist of a board, taking the following three primary considerations into account:
- ensuring a partnership approach with Māori
 - managing potential tensions between functions undertaken within the Office (eg. advocacy and systems monitoring)
 - supporting flexibility and ensuring the Commission has the necessary mana to hold government to account.
- 74 SSC's preferred model (Model A in the attached paper) would see:
- a board of 2-6 members, collectively possessing a range of relevant skills and attributes that will enable them to publicly and credibly hold government to account for the outcomes it achieves for all children and specifically children in care
 - (if Ministers wish to take a partnership approach) at least half the board being appointed through a Māori-led nominations and appointments process to both give effective representation to the population affected by the care system and in recognition of the Treaty
 - when the monitoring function is transferred to the OCC, the board being responsible for making arrangements within the organisation to manage the tensions between the advocacy and monitoring roles.
- 75 Minister Hipkins has, in principle, agreed with SSC's preferred option but specifically wishes to further discuss the implications of a Māori partnership approach with SSC officials.
- 76 SSC has worked with MSD and MSD's Kāhui and Māori Lawyers Technical Advisory Groups in developing the proposal. MSD is broadly supportive of this structure but still has concerns about the level of functional separation. We have included this option in the early draft cabinet paper.
- 77 We note that providing for effective functional separation must primarily occur within the management, staffing structure and policies, procedures and

infrastructure (i.e. IT) within the Office. Therefore, while the proposed governance model supports functional separation, it does not on its own sufficiently address the need for clear separation between advocacy and monitoring.

- 78 The information access and sharing, and ministerial relationship arrangements proposed in the Bill will further support functional separation. However, ultimately decisions made by the Board and the future CE will determine the extent to which effective functional separation is provided within the OCC.

Next steps

- 79 We are aiming to have the Cabinet paper considered by the Cabinet Social Wellbeing Committee (SWC) on 16 October. Bearing this date in mind, we seek your agreement to consult with agencies on the early draft cabinet paper by 23 September.
- 80 You may wish to wait until after the Ministers' meeting on 23 September to consult on the early draft paper but that this may put (planned) SWC consideration of the paper in October at risk.
- 81 Following consultation and your meeting with Ministers on 23 September, we will make any required changes to the Cabinet paper and will provide you with advice on the need and nature of further consultation.
- 82 We will provide you with a set of A3s on the independent children's monitoring function, information access and sharing, hui engagement and the establishment timeline for the Independent Children's Monitor, along with presentation slides to facilitate your meeting on 23 September.

Aide-mémoire



MINISTRY OF SOCIAL
DEVELOPMENT
TE MANATŪ WHAKAHIATO ORA

Meeting

Date: 16 September 2019 **Security Level:** IN CONFIDENCE

For: Hon Carmel Sepuloni, Minister for Social Development

File Reference: A11994312 REP/19/9/844

Meeting with the Kāhui Group – Independent Oversight of the Oranga Tamariki system and Children's Issues

Meeting/visit details 9:00am-9:45am, 19 September 2019, Executive Wing Room 5.1

Expected attendees Druis Barrett, member, Kāhui group
Eugene Ryder, member, Kāhui group
Donna Matahaere-Atariki, Māori Advisor, Chair, Kāhui Group

Purpose of meeting/visit You will be meeting with some members of the Kāhui Group to discuss the ongoing work to strengthen independent oversight of the Oranga Tamariki system and hear their feedback on key components of the system (in particular the role of the independent monitor, governance of the Office of Children's Commissioner and information sharing), including feedback from hui.

Background The Kāhui Group (the 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 Druis Barrett, Katie Murray, Eugene Ryder and Sir Mark Solomon. Katie Murray and Sir Mark Solomon give their apologies as they are not available to attend the meeting. The four members have been 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. In particular, they:

- endorsed the Māori engagement approach
- provide overall support and direction for the engagement process and work programme
- review and provide feedback on draft papers.

Donna Matahaere-Atariki will be attending the meeting. Donna is the lead Māori Advisor that MSD has contracted to support Māori engagement during the development of the Strengthening Independent Oversight work programme.

MSD and the Kāhui Group have held hui nationwide since July 2019

To date, 22 hui have been held in eight centres across New Zealand with a range of individuals and organisations who are active in and have knowledge of the Oranga Tamariki system. These have been positive and informative, and participants expressed their support for the Kāhui group in their role of providing oversight on the work programme.

Ongoing role and involvement of the Kahui Group

There is a desire from MSD to continue the role and involvement of the Kāhui Group, particularly as we start to engage with the broader sector on the Independent Children's Monitor function – including development of the monitoring assessment framework and operating model. Donna is in the process of gauging the members' views on this.

Key issues

The hui identified multiple key themes to consider

These themes relate to specific aspects of the work that are of interest to Māori who were consulted and are being reflected in the development of the independent oversight system. They include:

- the importance of placing tamariki within the context of their whānau, instead of the current approach of seeing the child as a singular entity
- a need for the legislation to have a strong commitment to the Treaty of Waitangi beyond simply giving regard to the Treaty, which is not seen as a sufficient level of recognition by hui participants, and having specific, practical and accountable duties for the oversight bodies to demonstrate their commitment to the Treaty
- concerns that the Monitor may not have sufficient powers to properly affect change, including the ability to hold government agencies publicly to account
- calls for the process to show integrity, transparency and honesty, with additional principles based on whakamana i te tangata, whanaungatanga and manaakitanga that should extend across the delivery arm of Oranga Tamariki
- recognising that iwi, hapū and other Māori organisations have an important role to play and are the point of difference when dealing with tamariki and whānau in the Oranga Tamariki system, as they are able to provide unique solutions to issues faced by the system
- that the system should be Māori-focused by default, and that building Māori trust in the Independent Monitor is crucial
- the importance of resolving underlying trust issues with Oranga Tamariki caused by a lack of whānau engagement
- concerns at the high level of coercive power afforded to Oranga Tamariki and the perceived disconnect between policy intent and practice within the organisation.

We anticipate the Kāhui group will want to discuss these areas of interest at your meeting.

These themes are being incorporated into the oversight work

Feedback from hui and other Māori engagement has informed the oversight work and will continue to be an integral aspect of decision making for the independent oversight work programme. The Kāhui group is an important vehicle for ensuring that these voices are considered at all stages of the

work, and will likely use this meeting to raise specific areas of interest or concern with you. In particular, there are three main areas where the Kāhui group has provided input that they may wish to raise with you.

Partnership

A recurring theme throughout the various hui was the need to ensure that partnership with Māori is treated as a core aspect of the Independent Children's Monitor and the work programme to develop it. This partnership extends across multiple areas of the work programme, including:

- involving iwi, hapū and other Māori organisations when dealing with tamariki, reflecting the child's role within the wider whānau and community context
- the mutual sharing of information between oversight bodies and Māori organisations to help achieve mutual outcomes
- reflecting tikanga and te ao Māori within organisational practices.
- partnership in the governance arrangements for the OCC

To help achieve these goals, we are proposing that oversight bodies have the power to share information with iwi, hapū and other Māori organisations where necessary, as well as having a duty to partner and engage with Māori.

Governance

Following on from the above views on partnership, many hui participants expressed a desire that Māori are included in the governance arrangements of the oversight bodies - and in particular the OCC given the in-principle intention to move the Independent Children's Monitor to that agency in the future. This is reflected primarily in the oversight agency itself understanding te ao Māori and adherence to the Treaty through duties and principles.

Work on the governance arrangements for OCC for the future is being led by the State Services Commission (SSC). The Kāhui group has had several discussions on governance (including with the SSC) and has done some initial thinking on detailed design, in particular reflecting partnership with Māori. The Kāhui Group last met with MSD officials (including the SSC) on 11 September 2019. This included an update from the SSC on its high-level governance work. SSC's advice to Minister Hipkins (a copy of SSC's advice is attached for your information) goes some way to reflecting the partnership and Māori representation concepts advocated by the Kāhui group.

Unresolved areas from the Kāhui group's point of view are likely to focus on the functional separation of the monitor and the advocate if they are within the same agency – and how best that can be achieved through either governance or structure or both. These issues were discussed with SSC at the 11 September 2019 meeting for them to take away and consider further.

At the time of writing this aide-memoire, the Kāhui group has not yet seen the SSC's written advice to Minister Hipkins.

Power of the Monitor

One of the primary concerns from Māori is that the Independent Children's Monitor would not have sufficient power to publicly hold Oranga Tamariki and other agencies in the system to account should the need arise. While some hui participants proposed that the Monitor be given powers beyond the ability to make recommendations (such as the power to impose penalties or

sanctions on Oranga Tamariki), we are proposing that the Independent Children's Monitor's ability to produce and publish independent reports and agency responses on findings, provide a sufficient level of transparency and accountability to affect change over time.

**Suggested
Talking
Points**

"I am pleased to hear about your level of involvement in the work - thank you for ensuring that Māori views are properly represented."

"I agree that having a strong partnership approach with Māori is important in this work, and expect that the progress which has been made in developing this will continue."

"I understand that you have done some initial thinking on governance options for the OCC. I am interested in your views on governance in particular how to achieve a partnership approach with Māori and ensure there is the appropriate level of separation between the Advocacy and Monitoring functions."

"I understand you are interested in what powers the monitor will have. It is important that the Monitor's powers to report independently and the duty on agencies to respond bring transparency and accountability to the system, and I think that this will encourage positive change over time."

"Thank you for bringing your feedback on the work to my attention. Your perspective is valuable and ensures the end result is as strong as possible."

Author: Out of scope, Graduate Policy Analyst, Independent Children's Monitor

Responsible manager: Megan Beecroft, Policy Manager, Independent Children's Monitor



Report

Date: 7 November 2019

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Draft Cabinet paper: Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill

Purpose of the report

- 1 This report provides you with a draft Cabinet paper, *Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, for ministerial consultation.
- 2 In order for this paper to be considered at the 4 December Social Wellbeing Committee meeting, it will need to be lodged by 10:00am on Thursday 28 November.

Recommended actions

It is recommended that you:

- 1 **note** that attached to this report is a revised version of the Cabinet paper *Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, incorporating comments received through departmental consultation
- 2 **note** that substantive feedback received from key departments and stakeholders (including the OCC and OPC) is summarised in this report
- 3 **agree** that the revised version of the paper be forwarded to Ministers for consultation

Agree/Disagree

Megan Beecroft
Acting General Manager
Employment and Housing Policy

Date

Hon Carmel Sepuloni
Minister for Social Development

Date

Feedback on the draft Cabinet paper was mostly positive

- 3 On 23 October 2019, we distributed a draft Cabinet paper for departmental consultation and a summarised version of the contents was sent to the Office of the Children's Commissioner (OCC) the Office of the Ombudsman, and the Kāhui Group.)¹
- 4 Feedback on the proposals was mostly positive and supportive. Most agencies either had no substantive comments, or only minor suggestions for clarification or correction.
- 5 Minor changes have been made in line with feedback from other agencies have been made throughout the paper. These have largely been made to clarify some sections or to provide further context to help inform decision-making.
- 6 More substantive comments were received from the OCC and the Office of the Privacy Commissioner (OPC). Those provided by the OCC repeated concerns previously relayed, while the OPC had concerns regarding information provisions.

The Children's Commissioner's feedback has previously been considered

- 7 The OCC provided a memo to MSD in response to a summary of the draft Cabinet paper, including a Statement of Position to be included in this report (attached as **Appendix 1**).
- 8 The memo reiterates OCC positions on various policy issues which MSD has discussed with them throughout the policy process, which informed the current draft Cabinet paper. While we have considered the OCC's perspective and arguments in these areas, we have decided, on balance, that the proposals presented in the draft Cabinet paper are better suited to achieve the desired policy intent. Issues raised by the OCC include:
 - 8.1 the lack of an overarching principle requiring oversight bodies to "give effect" to the Treaty of Waitangi / te Tiriti o Waitangi. The inclusion of an overarching principle within the legislation was considered, s9(2)(h)
 - 8.2 that the governance arrangements proposed (ie. a single Board responsible for both advocacy and monitoring, with decisions on functional separation to the decided by the Board) would be insufficient for the OCC and risk diminishing the mana of the current Children's Commissioner role. The OCC have proposed a model for their governance, which was considered during the SSC's development of governance options and incorporated into their 26 August report to the Minister for State Services. Governance work is ongoing, and some preliminary changes in the Cabinet have been made which seek to improve the governance model being proposed for the OCC. These have been outlined further in paragraphs 12-13
 - 8.3 the primary purpose of the independent Monitor, which the OCC believe should be "the welfare, rights, interests and wellbeing of children," is currently

¹ Agencies consulted on the full Cabinet paper include, in alphabetical order, Department of Prime Minister and Cabinet, Education Review Office, Ministry for Pacific Peoples, Ministry for Women, Ministry of Corrections, Ministry of Education, Ministry of Health, Ministry of Justice, Ministry of Youth Development, New Zealand Police, Office of the Privacy Commissioner, Office for Disability Issues, Oranga Tamariki, State Services Commission, Te Arawhiti, and Te Puni Kōkiri. The Office of the Children's Commissioner, Office of the Ombudsman, and The Kāhui Group were consulted on a summary of the Cabinet paper's contents.

inadequate. While exact wording is not finalised and will continue to be revised through the drafting process with PCO, ensuring that the rights, interests and wellbeing of children, young people and their families are protected and supported is proposed as a core purpose of the monitor, and will remain a key consideration of all aspects of the monitor. The OCC would also like to see revisions to the functions of the Monitor to preserve aspects of their current Act. Further refinements to the functions will continue to be made throughout the drafting process in consultation with the OCC.

- 8.4 that they see the proposed advocacy functions as weaker than what the OCC currently has, and that this is contrary to Cabinet decisions. This relates particularly to the decision that the OCC will not retain individual powers of inquiry and investigation into individual cases. While the OCC will no longer have functions to investigate decisions in respect of individual children, as this will be administered by the Office of the Ombudsman under the proposed Bill, the OCC will still be able to advocate for individual children, advise individuals how to navigate complaints pathways (in keeping with the 'no wrong door' model), 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. The OCC would also like the advocate to have the power to require a response from government agencies to its reports or recommendations, however on balance we believe that this would not be suitable as this is not consistent with the powers of other advocates.

The Office of the Privacy Commissioner has made comments on the proposed models of information sharing and the monitor's independence

- 9 The OPC has met with officials to share concerns regarding the information access and sharing provisions in the draft Cabinet paper. This primarily related to the extension of the monitor's ability to require personal information from Oranga Tamariki, service providers and other agencies.
- 10 Following our meeting with the OPC, we have made amendments to the information access provisions in Cabinet paper to clarify that:
- personal information will only be able to be collected when it is necessary and proportionate (paragraphs 41 and 43).
 - the information requirements the Monitor will need to enable it to complete its functions (paragraphs 43-46).
- 11 The Privacy Commissioner has provided the following comment for inclusion in the Cabinet paper:
- 11.1 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.

Further changes have been made to the governance proposals

- 12 During departmental consultation, further work has been carried out on the governance proposals within the Cabinet paper to provide further clarity:
- 12.1 we propose that separate Commissioners, appointed by the Governor-General, would each be assigned to one of the oversight functions that the OCC is responsible for under the Act (ie. advocacy and monitoring, should monitoring move to the OCC). The Commissioner for each function would speak publicly on the issues relating to the function they are assigned.

12.2 we have amended the proposed appointment process (paragraph 68), to clarify that there will be a single appointments process for all applicants and that this process will both incorporate te ao Māori and ensure Māori participation in the process.

- 13 These changes also reflect the desire expressed by the OCC to preserve the mana and voice of the Commissioner role, which allows the Commissioner to speak out as an independent voice on government policy relating to issues affecting Children and Young people.
- 14 Further detail on these arrangements will be outlined in the paper accompanying the draft Bill to the Cabinet Legislation Committee.

Next steps

- 15 Subject to your agreement, we propose that the draft Cabinet paper be sent out for Ministerial consultation, with feedback required by 21 November 2019. This timeframe allows for changes to be incorporated to the Cabinet paper and a revised version to be provided to your office in time to be lodged on 28 November 2019, to be considered at the Cabinet Social Wellbeing Committee on 4 December 2019.

Appendix

- 16 The draft Cabinet paper, *Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill*, is attached.
- 17 A memo from the OCC outlining their feedback is attached as **Appendix 1**.

Timeline for introducing the Bill in March 2020 (as at 23 October)

Step	Indicative Date
Agency consultation on Cab paper.	Wednesday 23 October –Thursday 31 October (6 working days)
Consult OCC, Ombudsman, Oranga Tamariki, Kahui	Wednesday 23 October –Thursday 31 October (6 working days)
Incorporate agency feedback, revised Cab paper to Minister for agreement to start ministerial consultation	Friday 1 November - Tuesday 5 November (internal sign out process: 6 November)
Revised paper to Minister's office for approval to start ministerial consultation	Thursday 7 November 9am
Ministerial consultation	Monday 11 November – Friday 21 November (2 weeks)
Incorporate feedback from ministerial consultation	Monday 25 November – Tuesday 26 November
Provide revised paper to Minister	Wednesday 27 November 9 am
Lodge Cabinet paper for SWC	Thursday 28 November
Paper considered at SWC	4 December
Further instructions to PCO	9 December 2019 (subject to Cabinet)
Consult on drafts of Bill with key agencies and departments - OCC, Kahui, Ombudsman, Oranga Tamariki, SSC	January 2020
PCO drafting on final policy issues	9 December 2019 to late January 2020
Drafting of LEG Cabinet paper	December 2019 – late January 2020
Minister to receive a draft LEG Cabinet Paper seeking approval to release the draft Bill, and approve for agency consultation	Late January 2020
Agency consultation on LEG paper	By 3 February 2020
Send bill to MOJ for BORA vetting and to the Office of the Clerk to check for Omnibus status	Early/mid February 2020
Minister to receive a revised LEG Cabinet Paper for Ministerial and coalition consultation	By 27 February 2020
lodge for LEG committee	12 March 2020
LEG Committee	17 March 2020 (sitting calendar tbc)
Introduction	Mid-March 2020
1 st reading and referred to select committee	Mid-March 2020
Select Committee process	Mid-March until mid-September (6 months)
2 nd reading	Feb 2021
Committee of the Whole	Mar 2021
3 rd reading and enactment	April 2021
In force	Various commencements from day after Royal Assent

Aide-mémoire

Date: 14 November 2019 **Security Level:** In confidence

For: Hon Carmel Sepuloni – Minister for Social Development

Hon Tracey Martin – Minister for Children

File Reference: Ministry of Social Development REP/19/11/1139

Oranga Tamariki REP-OT/19/11/332

Meeting with Judge Andrew Becroft, the Children's Commissioner

Meeting details 4.45 – 5.15 pm, Tuesday 19 November 2019, Executive Wing Room 5.1

Expected Attendees

- Hon Carmel Sepuloni, Minister for Social Development
- Hon Tracey Martin, Minister for Children
- Judge Andrew Becroft, Children's Commissioner
- Liz Kinley, Director Development, Monitoring and Investigations, Office of the Children's Commissioner
- Holly Walker, Acting Director Strategy, Rights and Advice, Office of the Children's Commissioner

Purpose of Event


The Children's Commissioner has requested a meeting to discuss the following items:

1. Out of scope
2. OCC's response to policy proposals to support the oversight of the Oranga Tamariki system and Children's Commission legislation Bill
3. Out of scope

Out of scope

Key issues

Out of scope



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OFFICIAL INFORMATION ACT

Item 2 - OCC's response to policy proposals to support the oversight of the Oranga Tamariki system and Children's Commission legislation Bill

Background

On 29 October 2019, MSD provided OCC with a summary of a draft Cabinet paper *Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill* (the Bill) for consideration. The paper seeks Cabinet agreement to proposals to strengthen independent oversight of the Oranga Tamariki system 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. This (draft) paper is currently out for Ministerial consultation and is due to be considered by Cabinet Social Wellbeing Committee on 4 December 2019.

OCC response to policy proposals

The OCC has provided MSD with a memo in response to a summary of the draft Cabinet paper. The memo reiterates OCC positions on various policy matters which MSD has discussed with them throughout the policy development process which informed the current draft Cabinet paper. Specific concerns raised include:

1. Failure to provide for an overarching commitment to te Tiriti o Waitangi in the Bill (i.e. a principle requiring oversight bodies to "give effect" to the Treaty of Waitangi)
2. The proposed governance model for the OCC is not fit for purpose

The OCC considers that the proposed single board model responsible for both advocacy and monitoring with decisions on functional separation to the decided by the Board poses a risk to both functions.

The OCC has proposed an alternative hybrid governance model that embeds the Te Tiriti partnership, provides for functional separation, and establishes clearly defined roles for national Children and Young People's Commissioner(s) and a Commissioner for Children and Young People in Care. OCC has requested it is considered as an alternative model to the one recommended by MSD and the State Services Commission (SSC).

3. Weakened purpose and functions of the monitor

The OCC believes that there is insufficient focus on the welfare, rights, interests and wellbeing of children in the proposed purpose and functions of the monitor. The OCC would also like to see revisions to the proposed functions of the Monitor to preserve aspects of their current Act.

4. Weakened purpose and functions of the advocate

The OCC considers that its future advocacy function will be weakened by the proposed removal of its power to inquire into any decision made by government or non-government actors impacting on individual children and young people.

Suggested talking points/response

- We appreciate the work the OCC is doing in helping develop the Bill.
- The inclusion of an overarching Treaty principle within the legislation was considered, however s9(2)(h) [REDACTED]
- We understand that your (OCC's) governance model was considered during the State Services Commission's (SSC) development of governance options and incorporated into their 26 August report to the Minister for State Services.
- Governance work is ongoing and some preliminary changes to the Cabinet paper have been made which seek to improve the proposed governance model for the OCC.
- In response to concerns about the perceived weakening of the monitoring function, exact wording around the purpose and functions of the monitor is not finalised and further refinements will continue to be made throughout the drafting process in consultation with the OCC.
- In March 2019, Cabinet decided that the OCC should focus on systemic advocacy and that individual investigations will be performed by the Ombudsman.
- The OCC can still provide advice to individuals to, for instance, help navigate complaints pathways, as well as make enquiries on behalf of an individual (with their consent) without the need for formal inquiry/investigative powers.

Out of scope

Out of scope

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OFFICIAL INFORMATION ACT

²⁹(2)(f)(iv)

Out of scope

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OFFICIAL INFORMATION ACT

Aide-mémoire



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Cabinet paper

Date: 29 November 2019 **Security Level:** Cabinet Sensitive

For: Hon Carmel Sepuloni, Minister for Social Development

File Reference: REP/19/11/1220

Social Wellbeing Consideration of – Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill

**Cabinet
Committee**

Social Wellbeing

Date of meeting

4 December 2019

Minister

Hon Carmel Sepuloni, Minister for Social Development

Proposal

This paper seeks further decisions/provides clarification on proposals to strengthen independent oversight of the Oranga Tamariki system 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*.

Key issues

**Why are further
Cabinet
decisions
required?**

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

1. provisions in the Bill to articulate the oversight bodies' duties in relation to the Treaty of Waitangi
2. the independent monitor's role, including the purpose, functions and reporting requirements
3. information access and sharing provisions
4. governance arrangements for the Office of the Children's Commissioner (OCC)
5. the OCC's role in the grievance panels associated with Youth Justice and Care and Protection Residences

6. a minor legislative amendment required to clarify the scope of arrangements for resolving historic complaints and claims

1. How will oversight bodies' duties in relation to the Treaty of Waitangi be articulated in the Bill?

In recognition of both the Crown's Treaty partnership with Māori and the high rates of Māori children and young people in the Oranga Tamariki system, Cabinet agreed in March 2019 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.

Following consultation with the OCC, Office of the Ombudsman, Te Puni Kōkiri, Māori lawyers, and the Kāhui group¹, a list of duties have been developed that will ensure that oversight bodies will give effect to the Treaty in a practical way in performing their roles. Proposed duties include that 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/young people
- Māori participation in the context of the oversight bodies discharging their 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 and iwi and Māori organisations enter into partnerships/arrangements
- complaints/investigations processes are accessible for Māori children and young people and their whānau, hapū, and iwi
- the complaints and investigations processes incorporate a tikanga approach.

2. What will the role of the independent Monitor be?

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.

Subsequent work has highlighted that greater specificity is required regarding the monitor's purpose, functions and reporting requirements to enable effective monitoring of the Oranga Tamariki system.

Purpose

In the Bill, greater clarity will be provided around the role and purpose of the monitor by incorporating the following objectives:

¹ 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. 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.

- 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 partnership with Māori and the significant proportion of tamariki Māori in care.

Functions

The duties of the independent monitor previously agreed by Cabinet have been clarified to ensure that they enable the fulfilment of its purpose and will incorporate the following components:

- effective systems performance monitoring
- recognising the interface between systems
- providing for the Crown's commitment to Māori.

Reporting requirements

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. For this purpose, the monitor will produce a range of reports on its findings. This will include:

- a three-yearly 'state of the Oranga Tamariki' system report
- an annual report on compliance with the National Care Standards (NCS) regulations
- an annual report on outcomes being achieved for Māori tamariki and whānau.

The monitor will also be able to report on any other topics it considers necessary to discharge its function. In addition, the Minister responsible for the Act, the Minister responsible for the Oranga Tamariki Act 1989, and the Prime Minister may request reports from the monitor on specific issues of interest or concern.

The Bill will stipulate that responses (from organisations subject to a report) may be required. Detail on what these reports must contain, publication and tabling requirements as well as requirements for responding to these reports, will be specified in regulations.

3. What access to information will the oversight bodies have?

To support the oversight bodies to be effective and to maintain their independence, there need to be strong provisions for the access to and sharing of information.

To facilitate access to information the Cabinet paper proposes that oversight bodies will have the power to:

- require the provision of information from organisations as far as it is required to perform a specific oversight function
- engage directly with individual children, young people and whānau, after obtaining informed consent
- share information with each other, or other parties that have a role with children, young people and their families within the Oranga Tamariki system to support their functions.

Oversight bodies would only be able to require information necessary to discharge their specific functions. However, some restrictions will apply to the advocate (e.g. no draft Cabinet and other ministerial papers, budget sensitive material).

To support the gathering of information from organisations and manage that information, it is proposed that oversight bodies develop a set of Information Management Rules (the Rules).

The Rules will be developed in consultation with 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 be drafted in accordance with the Privacy Act 1993 and specify matters such 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.

As oversight bodies will interact directly with individuals, it is important to ensure that engagement with individuals is done in a safe and ethical manner. The Bill will therefore require that oversight bodies develop codes.

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

4. What will the future governance arrangement for the OCC look like?

In March 2019, Cabinet agreed that the governance of the OCC would require updating before it would take on the independent monitoring function.

The Cabinet paper proposes that the governance of the OCC changes from a corporation sole (Commissioner) to a board of two to six members (Commission), regardless of whether the new independent monitoring function transfers to the organisation.

Within this Board, the paper proposes that there will be a Commissioner responsible for each of the oversight functions housed at the OCC. The State Services Commission's view is that the Commissioner title be extended to all Board members, however on balance we believe that the Board should be responsible for choosing their own title. MSD believes that the roles in charge of Advocacy and Monitoring should remain a distinct title to preserve the mana of the position and afford those in the role the ability to influence positive change.

To ensure Māori representation on the Board and in the appointment process, the legislation will have various provisions

to support a partnership model with Māori. The Board will be appointed through an appropriate process which will incorporate te ao Māori and ensure Māori participation. Board members should also collectively possess a range of relevant skills and attributes, including understanding of te ao Māori and te Tiriti o Waitangi, as well as experience of the care system, wider understanding of children's issues, and management skills.

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 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.

The Bill will impose a duty on the board to provide for functional separation between the monitoring and advocacy functions (if the monitoring role is transferred to the OCC).

5. What will the OCC's role be regarding grievance panels?

In March 2019, 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.

The OCC currently performs this (third-tier) review of complaints role but, as agreed to by Cabinet, will no longer be performing this function under the Bill.

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 decisions². It is proposed that the OCC retain these roles.

6. What amendment is proposed regarding arrangements for resolving historic complaints and claims?

You are seeking a minor amendment to schedule 1AA of the Oranga Tamariki Act 1989 to clarify that the scope of the Oranga Tamariki complaints mechanism applies to any act or omission that took place from 1 April 2017 onwards.

The current settings relating to Oranga Tamariki complaints were developed ahead of detailed work to establish claims arrangements between Oranga Tamariki and MSD.³ Since then, you and the Minister for Children have agreed to the development of new arrangements where MSD would be responsible for resolving claims about events prior to 1 April 2017, and Oranga

² 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.

³ When Oranga Tamariki was established, it was agreed that MSD would be responsible for resolving claims relating to abuse in state care prior to 1 January 2008. 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

Tamariki would be responsible for resolving claims about events from that date onwards. [REP/19/8/710 refers]

In line with these arrangements, your proposed amendment to schedule 1AA will help to ensure there is no duplication in MSD or Oranga Tamariki processes to respond to claims or complaints. This will provide more certainty for claimants and is likely to help manage potential litigation risk to the Crown. It also provides for alignment with the broader legislative proposals you are proposing for independent oversight.

Note that at this meeting, SWC is also considering a paper on the
Out of Scope

Regardless of the direction this work takes, the amendment you are proposing to schedule 1AA will provide certainty around current claims arrangements.

7. Other matters

Review of oversight arrangements

In March 2019, Cabinet agreed that there should be a statutory requirement to review the independent oversight arrangements in 2023.

Monitoring of all the NCS Regulations will not start 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.

It is now proposed 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.

Exploring phasing of monitoring to look at the wider children and young person's system

The draft Cabinet paper that was sent out for departmental and ministerial consultation contained a section on monitoring of the wider children and young person's system. This section has since been deleted so that the primary focus of the Cabinet paper is on the independent monitoring of the Oranga Tamariki system.

Talking points

- Back in March, following a review in 2018, we agreed to strengthen oversight of the Oranga Tamariki system and children's issues in three core areas: system-level advocacy, oversight and investigation of complaints and independent monitoring and assurance.
- This paper does not change any of these decisions but seeks some further decisions and clarifications that are needed to help with the drafting of the Bill.
- The purpose and functions of the independent monitor have been further refined to enable effective monitoring of the Oranga Tamariki system.
- To grow public trust and confidence in the Oranga Tamariki system, I also propose the monitor will produce a range of reports on its findings.
- This will include periodic reports on the state of the Oranga Tamariki system, compliance with the National Care Standards regulations and on outcomes being achieved for Māori.

Duties under the Treaty of Waitangi

- I seek Cabinet agreement on duties that require oversight bodies to make a practical commitment to the Treaty of Waitangi.
- The Treaty duties on oversight bodies are aimed at ensuring that Māori are properly engaged and involved in addressing Tamariki Māori and young people overrepresentation in the Oranga Tamariki system.

Information Access provisions

- For oversight bodies to be effective they need to have access to a wide range of information from Oranga Tamariki, contracted providers and other agencies.
- I therefore propose that oversight functions will have extensive access to information as long as this information is in line with their functions.
- Rules for gathering of information will be set out in Information Management Rules that will be developed in consultation with the Office of the Privacy Commissioner and the agencies required to provide information.
- It is important for the advocate to have access to information but I propose that some restrictions apply: the advocate will not have access to material such as draft Cabinet/ministerial papers and budget sensitive information.
- I also propose that the monitor have the power to enter premises (other than private homes) with notice to observe practice or observe places where children and young people live.

Governance of the OCC

- I propose that the governance arrangements for the OCC be updated regardless of whether the monitoring function transfers to it in future.
- The proposed updated governance arrangements will allow for enhanced Māori representation as well as flexibility in terms of incorporating the monitoring function or not (in light of the in-principle intention of moving the monitoring function to the OCC).
- The proposals ensure that there is sufficient functional separation between the advocate and the monitor (if they move to the OCC), while still maintaining the ability for a figure to lead the representation of each function from the Board.

Grievance Panels

- The Cabinet paper confirms a previous decision that complaints about decisions made by the grievance panels associated with Youth Justice and Care and Protection Residences will no longer be undertaken by the OCC but will only be performed by the Ombudsman.
- The paper clarifies that the OCC will retain 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.

Historic Claims amendment

- As part of the system of oversight of Oranga Tamariki, it is important to ensure there are accessible mechanisms through which people can make complaints or claims about events that took place in state care.
- Earlier this year, the Minister for Children and I agreed to the development of new arrangements in which MSD is responsible for resolving claims about events prior to 1 April 2017, and Oranga Tamariki is responsible for resolving claims about events from that date onwards.
- In line with the new arrangements, I am proposing a minor amendment to schedule 1AA of the Oranga Tamariki Act 1989 to clarify that the scope of the Oranga Tamariki complaints mechanism applies to any act or omission that took place from 1 April 2017 onwards.
- This will help to provide more certainty for claimants, will help to manage potential litigation risk to the Crown, and provides for alignment with the broader legislative proposals I am recommending in this paper.

Aide-mémoire



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Cabinet paper

Date: 13 December 2019 **Security Level:** Cabinet Sensitive

For: Hon Carmel Sepuloni, Minister for Social Development

File Reference: REP/20/1/010 A12256219

Social Wellbeing Consideration of – Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and Children's Commission Legislation Bill

Cabinet

Date of meeting 16 December 2019

Minister Hon Carmel Sepuloni, Minister for Social Development

Update on Cabinet paper

On Wednesday 11 December SWC considered the Clarification of Policy Matters to Support the Oversight of the Oranga Tamariki System and children's Commissioner Legislation Bill. SWC referred the paper to Cabinet for consideration. As a result of further discussions with your office, the Prime Minister's office and other Ministers, officials were advised that Cabinet was to consider the version that had been lodged on 28 November 2019. Some minor changes have been made to the 28 November Cabinet paper and agreed with your office.

The main differences in the version being considered by Cabinet on 16 December 2019, compared to the version considered at SWC on 11 December are:

- Further detail on the governance proposals (resulting from discussions with the Children's Commissioner) have been removed
- Details on the need to change the name of the OCC if the monitoring function transfers (resulting from discussions with the Children's Commissioner) have been removed
- A paragraph on phasing of monitoring has been reinserted
- The description of the Oranga Tamariki System has been further clarified with input from Oranga Tamariki
- The paper proposes the OCC Board have membership of 2-6 members

The following pages detail the information we provided to you for SWC consideration on 11 December.

Proposal

This paper seeks further decisions/provides clarification on proposals to strengthen independent oversight of the Oranga Tamariki system 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*.

This aide-memoire provides information on key issues contained in the Cabinet paper.

General Talking Points

- Back in March, following a review in 2018, we agreed to strengthen oversight of the Oranga Tamariki system and children's issues in three core areas: system-level advocacy, oversight and investigation of complaints and independent monitoring and assurance.
 - This paper does not change any of these decisions but seeks some further decisions and clarifications that are needed to help with the drafting of the Bill.
 - The purpose and functions of the independent monitor have been further refined to enable effective monitoring of the Oranga Tamariki system.
 - To grow public trust and confidence in the Oranga Tamariki system, I also propose the monitor will produce a range of reports on its findings.
 - This will include periodic reports on the state of the Oranga Tamariki system, compliance with the National Care Standards regulations and on outcomes being achieved for Māori.
-

Talking Points for oversight bodies' duties under the Treaty of Waitangi

- I seek Cabinet agreement on duties that require oversight bodies to make a practical commitment to the Treaty of Waitangi.
 - The Treaty duties on oversight bodies are aimed at ensuring that Māori are properly engaged and involved in addressing Tamariki Māori and young people overrepresentation in the Oranga Tamariki system.
-

Talking Points on Information Access provisions

- For oversight bodies to be effective they need to have access to a wide range of information from Oranga Tamariki, contracted providers and other agencies.
 - I therefore propose that oversight functions will have extensive access to information as long as this information is in line with their functions.
 - Rules for gathering of information will be set out in Information Management Rules that will be developed in consultation with the Office of the Privacy Commissioner and the agencies required to provide information.
 - It is important for the advocate to have access to information, but I propose that some restrictions apply: the advocate will not have access to material such as draft Cabinet/ministerial papers and budget sensitive information.
 - I also propose that the monitor have the power to enter premises (other than private homes) with notice to observe practice or observe places where children and young people live.
-

Talking points on the Governance of the OCC

-
- I propose that the governance arrangements for the OCC be updated regardless of whether the monitoring function transfers to it in future.
 - The proposed updated governance arrangements will allow for enhanced Māori representation as well as flexibility in terms of incorporating the monitoring function or not (in light of the in-principle intention of moving the monitoring function to the OCC).
 - To help ensure effective representation is given to the population affected by the care system and in recognition of the Treaty, legislation will provide for the board to embody a partnership with Māori.
 - This will be given effect to through the board being appointed through an appropriate process that ensures Māori participation and incorporates te ao Māori.
 - The board will be led by a chair and provision will be made for separate Commissioners for the advocacy and monitoring functions who would speak publicly on the issues relating to their assigned functions.
-

Talking Points on the Scope of the Monitor

- The policy intention has always been for the Monitor to be able to monitor the actions of other agencies, such as the Ministries of Education and Health, as far as they deliver early intervention services to children and young people who are at risk of entering the Oranga Tamariki system, as captured in the Oranga Tamariki Action Plan and through the rest of the Oranga Tamariki system.
 - I intend to clarify this intent in the paper accompanying the Bill for Cabinet LEG committee.
-

Talking Points on the OCC's role in Grievance Panels

- The Cabinet paper confirms a previous decision that complaints about decisions made by the grievance panels associated with Youth Justice and Care and Protection Residences will no longer be undertaken by the OCC but will only be performed by the Ombudsman.
 - The paper clarifies that the OCC will retain 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.
-

Talking Points on the Historic Claims amendment

- As part of the system of oversight of Oranga Tamariki, it is important to ensure there are accessible mechanisms through which people can make complaints or claims about events that took place in state care.
- Earlier this year, the Minister for Children and I agreed to the development of new arrangements in which MSD is responsible for resolving claims about events prior to 1 April 2017, and Oranga Tamariki is responsible for resolving claims about events from that date onwards.
- In line with the new arrangements, I am proposing a minor amendment to schedule 1AA of the Oranga Tamariki Act 1989 to clarify that the scope of the Oranga Tamariki complaints mechanism applies to any act or omission that took place from 1 April 2017 onwards.
- This will help to provide more certainty for claimants, will help to manage potential litigation risk to the Crown, and provides for alignment with the broader legislative proposals I am recommending in this paper.

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Key issues

Why are further Cabinet decisions required?

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

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

1. How will oversight bodies' duties in relation to the Treaty of Waitangi be articulated in the Bill?

Following consultation with the OCC, Office of the Ombudsman, Te Puni Kōkiri, Māori lawyers, and the Kāhui group¹, a list of duties have been developed. Proposed duties include that oversight bodies must ensure: setting strategic priorities, Māori participation, engagement and employment (policies and procedures), enter into partnerships/arrangements with iwi and Māori organisations, accessible complaints/investigations processes and that these processes incorporate a tikanga approach.

2. What will the role of the independent Monitor be?

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.

Subsequent work has highlighted that more specificity is needed regarding the monitor's purpose, functions and reporting requirements to enable effective monitoring of the Oranga Tamariki system.

Purpose

In the Bill, greater clarity will be provided around the role and purpose of the monitor by incorporating the following objectives:

- supporting the rights, interests and wellbeing of children, young people and their families
- improving public trust and confidence

¹ 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. 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.

- supporting systems learning and continuous systems improvement
- recognising the Crown's Treaty partnership with Māori and the significant proportion of tamariki Māori in care.

Functions

The duties of the independent monitor previously agreed by Cabinet have been clarified to ensure that they enable the fulfilment of its purpose and will incorporate the following components:

- effective systems performance monitoring
- recognising the interface between systems
- providing for the Crown's commitment to Māori.

Reporting requirements

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. For this purpose, the monitor will produce a range of reports on its findings. This will include a three-yearly 'state of the Oranga Tamariki' system report, and annual reports on compliance with the National Care Standards (NCS) regulations and outcomes being achieved for Māori tamariki.

The monitor will also be able to report on any other topics it considers necessary to discharge its function. In addition, the Minister responsible for the Act, the Minister responsible for the Oranga Tamariki Act 1989, and the Prime Minister may request reports from the monitor on specific issues of interest or concern.

The Bill will stipulate that responses (from organisations subject to a report) may be required. Detail on what these reports must contain, publication and tabling requirements as well as requirements for responding to these reports, will be specified in regulations.

3. What access to information will the oversight bodies have?

To support the oversight bodies to be effective and to maintain their independence, there need to be strong provisions for the access to and sharing of information. To facilitate information access the paper proposes that oversight bodies will have the power to:

- require the provision of information from organisations as far as it is required to perform a specific oversight function
- engage directly with individual children, young people and whānau, after obtaining informed consent
- share information with each other, or other parties that have a role with children and their families within the system.

To support the gathering of information and manage that information, it is proposed that oversight bodies develop a set of Information Management Rules (the Rules) in consultation with affected organisations and the Privacy Commissioner. These Rules will specify things like how information will be gathered and stored, for what purpose it is gathered and who may access information and for what purpose.

As oversight bodies will interact directly with individuals, it is important to ensure that engagement with individuals is done in a safe and ethical manner. The Bill will therefore require that oversight bodies develop codes.

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

4. What will the future governance arrangement for the OCC look like?

In March 2019, Cabinet agreed that the governance of the OCC would require updating before it would take on the independent monitoring function.

The Cabinet paper proposes that the governance of the OCC changes from a corporation sole (Commissioner) to a board of two to six members (Commission), regardless of whether the new independent monitoring function transfers to the organisation. This will enable effective representation of Māori, including within the Board and Commissioner roles.

The Cabinet paper proposes a duty in the Bill on the board to provide for functional separation between advocacy and monitoring if the monitoring function is transferred there. This will include separate Commissioners for each function, such as a Children's Commissioner with responsibility for the advocacy function, a separate Commissioner with responsibility for the monitoring function, and a chair of the Board.

The Cabinet paper proposes a new approach that will help ensure effective representation is given to the population most affected by the care system within the governance of the OCC. The legislation will provide for the board to embody a partnership with Māori. This would be given effect to through the board being appointed through an appropriate process that incorporates te ao Māori.

Board members should also collectively possess a range of relevant skills and attributes, including understanding of te ao Māori and te Tiriti o Waitangi, as well as experience of the care system and a wider understanding of children's issues.

5. What will the OCC's role be regarding grievance panels?

In March 2019, 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.

The OCC currently performs this (third-tier) review of complaints role but, as agreed to by Cabinet, will no longer be performing this function under the Bill.

6. What amendment is proposed regarding arrangements for resolving historic complaints and claims?

You are seeking a minor amendment to schedule 1AA of the Oranga Tamariki Act 1989 to clarify that the scope of the Oranga Tamariki complaints mechanism applies to any act or omission that took place from 1 April 2017 onwards.

The current settings relating to Oranga Tamariki complaints were developed ahead of detailed work to establish claims arrangements

between Oranga Tamariki and MSD.² Since then, you and the Minister for Children have agreed to the development of new arrangements where 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. [REP/19/8/710 refers]

In line with these arrangements, your proposed amendment to schedule 1AA will help to ensure there is no duplication in MSD or Oranga Tamariki processes to respond to claims or complaints. This will provide more certainty for claimants and is likely to help manage potential litigation risk to the Crown. It also provides for alignment with the broader legislative proposals you are proposing for independent oversight.

Out of Scope

Regardless of the direction this work takes, the proposed to schedule 1AA will provide certainty around current claims arrangements.

7. Other matters

Review of oversight arrangements³

In March 2019, Cabinet agreed that there should be a statutory requirement to review the independent oversight arrangements in 2023.

Monitoring of all the NCS Regulations will not start 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.

It is now proposed 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.

Exploring phasing of monitoring to look at the wider children and young person's system

The draft Cabinet paper that was sent out for departmental and ministerial consultation contained a section on monitoring of the wider children and young person's system. This section has since been deleted so that the primary focus of the Cabinet paper is on the independent monitoring of the Oranga Tamariki system. This

² When Oranga Tamariki was established, it was agreed that MSD would be responsible for resolving claims relating to abuse in state care prior to 1 January 2008. 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

³ Separate from this, in accordance with March 2019 Cabinet decisions, MSD is to report to relevant Ministers, including the Minister for Social Development the Minister of Māori Development, the Minister for Whānau Ora and the Minister for State Services, in March 2021 on the plan, timeframes and readiness to transfer the monitoring function to an appropriate entity.

change has been discussed with your office and the Minister for Children's office.

Next steps: non-departmental stakeholder engagement

Following Cabinet consideration on the current Cabinet paper, there are a number of engagement options with non-departmental stakeholders, including the OCC, the Office of the Ombudsman and the Kahui group, on Cabinet decisions that we may wish to consider:

1. Officials provide a verbal briefing to stakeholders on key Cabinet decisions prior to the proactive release of the Cabinet paper and minute (preferred)
2. A copy of the (redacted) Cabinet paper and minute is provided to stakeholders prior to pro-active release
3. Share the full Cabinet paper and Cabinet minute (immediately) following Cabinet decisions.

Officials consider that option 1 strikes the best balance between keeping stakeholders most affected by the proposals informed and engaged while ensuring that potentially sensitive material does not inadvertently get shared.

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Report

Date: 17 December 2020

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development and Employment

Options for the long-term location of the Independent Monitor of the Oranga Tamariki System

Purpose of the report

- 1 This report discusses options for the long-term location of the Independent Monitor (the Monitor) function of the Oranga Tamariki system. It also seeks direction on next steps.

Executive summary

- 2 In March 2019, Cabinet agreed to strengthen independent monitoring¹ of the performance of the Oranga Tamariki system, with the primary policy intent being to support decision makers² to improve outcomes for children, young people and their whānau.
- 3 Cabinet agreed that, once the Monitoring function had been established by the Ministry of Social Development (MSD) it would, in-principle, be transferred to the Office of the Children's Commissioner (OCC) [CAB-19-MIN-0113 refers]. Confirmation of this decision is needed to ensure that the MSD and the Monitor have enough time to develop a transfer plan. The plan will need to address any issues and risks with the Monitor transferring to the new location, as well as considering any other issues (eg. funding) that may be required for the Monitor to transition.
- 4 In late 2018, MSD identified key success criteria that should be considered in the options analysis for the long-term home that the Monitor is transferred to [REP/18/11/1560 refers]. These have been updated and reflect that since the previous advice was provided, we have come to understand the following:
 - 4.1 the ability to build and maintain the trust and confidence of the public, in particular Māori, is a primary consideration;
 - 4.2 the ability to be independent from Oranga Tamariki and operate as a trusted advisor to decision makers, continues to be important; and
 - 4.3 a focus on the interests, rights and wellbeing of children and young people involved with the Oranga Tamariki System is desirable.

¹ Monitoring is comprised of two broad functions. The first is to monitor over time changes in key indicators that speak to outcomes being experienced by children, young people and their whānau. The second is to, from time-to-time, conduct reviews into specific matters relating to, for example, service mix, quality and/or practice.

² By decision makers we mean Ministers, the Chief Executive of Oranga Tamariki and care providers and other systems participants who have influence over service mix, quality and delivery practice.

- 5 We have explored eight options for the long-term home of the Monitor, specifically:
 - 5.1 MSD
 - 5.2 the OCC
 - 5.3 the Health Quality Safety Commission (HQSC)
 - 5.4 the Education Review Office (ERO)
 - 5.5 a new entity (recommended by MSD, Kāhui³ and other government agencies⁴).
 - 5.6 a new departmental agency hosted by MSD
 - 5.7 a new departmental agency hosted by ERO
 - 5.8 a new departmental agency hosted by Te Puni Kōkiri.
- 6 We consider that a new entity will best meet the criteria and to hold the trust and confidence of Māori. In deciding on the form of this entity, Ministers will need to weigh the need to balance the perception of the entity being sufficiently "independent" against the need for Ministers to maintain a degree of control over the nature of the monitoring arrangements. Ministers will also need to consider how the monitor will function within a wider system where the Children's Commissioner and the Ombudsman already have roles with a high degree of independence.
- 7 If Ministers are of a mind to agree further work will be required to determine the right form, for example, a new Crown entity, statutory officer.
- 8 Ministers may also want to consider a departmental agency hosted by the ERO. We consider there may be challenges with Māori, child's rights groups and other stakeholders accepting such an arrangement; due to perceptions of the Monitor being subject to too greater Ministerial direction, however, we consider this arrangement to be the next best option.
- 9 Additionally, if Ministers are not of the mind to establish any new institutional arrangements, we consider ERO to be the most preferable entity.
- 10 The Ministry of Justice are of the view that the Oranga Tamariki system monitoring function should be transitioned to the OCC. This is predicated on operational synergies between the monitoring role and the Optional Protocol to the Convention against Torture (OPCAT) monitoring function undertaken by the OCC. MSD considers OCC's OPCAT monitoring functions can still be effectively operationalised if the Oranga Tamariki system monitoring function sits in a different entity.
- 11 We recommend that, in January 2021 prior to making decisions, you share and discuss this briefing with Minister for Children, Ministers for the Public Service, Māori Development, Whānau Ora, and the Prime Minister as the Minister responsible for the Child Poverty Reduction portfolio.

3 Kāhui is the conduit through which MSD has partnered to assist us to obtain the views of Māori throughout the development of policy and the operation of the Monitor.

4 Public Service Commission, the Independent Children's Monitor, the Ministries of Health and Education, the Department of Corrections, the New Zealand Police and Te Puni Kōkiri.

- 12 If the preference is for a new entity or departmental agency, we will prepare further advice on the form and how this will be provided for within the draft Oversight Bill, including how it will be governed.
- 13 We will prepare a paper for you to take to the Cabinet Social Wellbeing Committee for the decision to approved in March 2021 and for transfer planning to be completed. The transfer will likely occur after the legislation is enacted in 2022.

Recommended actions

It is recommended that you:

- 1 **note** the primary purpose of independent monitoring is to support improvement in outcomes for children, young people and their whānau by strengthening accountability mechanisms and providing decision makers with information and trusted advice to support their decisions on matters of systems performance
- 2 **note** Cabinet previously agreed the in-principle intention is for the monitoring function to be transferred to the Office of the Children's Commissioner [CAB-19-MIN-0113 refers]
- 3 **note** the updated criteria for analysing the options for the long-term home for monitoring are:
 - 3.1 the ability to build and maintain the trust and confidence of the public, in particular Māori, is the primary consideration;
 - 3.2 the ability to be independent from Oranga Tamariki and operate as a trusted advisor to decision makers continues to be important; and
 - 3.3 a focus on the interests, rights and wellbeing of children and young people involved with the Oranga Tamariki System is desirable
- 4 **note** the options that have been explored for the long-term home of the monitor are:
 - 4.1 MSD;
 - 4.2 the Office of the Children's Commissioner;
 - 4.3 the Health, Quality and Safety Commission;
 - 4.4 the Education Review Office;
 - 4.5 a new entity (recommended by MSD, Kāhui and other government agencies);
 - 4.6 a new departmental agency hosted by MSD;
 - 4.7 a new departmental agency hosted by ERO;
 - 4.8 a new departmental agency hosted by Te Puni Kōkiri

Fiscal Implications

- 5 **note** leaving the Monitor within MSD is likely the most cost-effective option
- 6 **note** moving the function to an existing agency will incur one-off transition and integration costs which are yet to be determined
- 7 **note** the substantive cost associated with building and operating the monitor has already been agreed by Cabinet in previous Budgets additional costs associated with housing the function in a new entity will require further exploration if Ministers prefer this option.
- 8 **note** detailed costings will be prepared once Ministers have confirmed their preferred option

Options for the long-term location of the Independent Monitoring function of the Oranga Tamariki System

Confirmation of the long-term home

- 9 **agree** to discuss options for the long-term home of the independent monitor in January 2021 with the Minister for the Public Service, the Minister for Children, the Minister for Māori Development, the Minister for Whānau Ora, and the Prime Minister as the Minister responsible for Child Poverty Reduction, in accordance with the March 2019 Cabinet directive [CAB-MIN-19-0113 refers]

☒ agree / disagree

- 10 **note** that if a new entity or departmental agency is preferred, we will provide further advice on its establishment within the Bill, including how it will be governed

- 11 **agree**, subject to discussion with Ministers, to seek Cabinet approval to the long-term home for the Monitor

☒ agree / disagree


Molly Elliott
General Manager
Social Development Child and Youth Policy


Date


Hon Carmel Sepuloni
Minister for Social Development and Employment


Date

Background

Strengthening independent oversight of the Oranga Tamariki system

- 14 In March 2019, Cabinet agreed to support improvement in outcomes for children, young people and their whānau, by strengthening the independent oversight of the Oranga Tamariki system with a focus on:
 - 14.1 *Systemic advocacy* – to be strengthened within the Office of the Children’s Commissioner (OCC), including reviewing and refreshing the Children’s Commissioner Act 2003 and updating the governance of the Office from a Commissioner Sole to a Board.
 - 14.2 *Complaints and investigation* – to be strengthened via a dedicated focus from the Ombudsman, including the development of a more child-centric and te ao Māori approach to handling complaints and conducting investigations.
 - 14.3 *Systems performance monitoring* – functionality to be built by MSD, including a focus on how outcomes are changing over time and the ability to conduct reviews into matters of particular interest.
- 15 At the time, Cabinet agreed that oversight would focus on children, young people and their whānau who were engaged with Oranga Tamariki. Oversight would also extend to other sectors and systems such as Health, Education, Justice, social housing and welfare, to the extent services were being provided to children, young people and/or whānau engaged with Oranga Tamariki.
- 16 Cabinet also agreed in March 2019 that:
 - MSD be appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the in-principle intention 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 recommendation 11 refers].
 - Officials will report to the Minister for Social Development and other key Ministers, including the Minister of Māori Development, the Minister for Whānau Ora, and the Minister for State Services, in March 2021 on the plan, timeframes, and readiness for the transfer of the monitoring function [CAB-19-MIN-0113 recommendation 17 refers].
- 17 MSD was appointed as the interim Monitor on 9 April 2019 under the Oranga Tamariki Act 1989 by the Minister for Children, to commence monitoring from 1 July 2019. Initially, it established monitoring of regulation 69 and 85. From December 2020, it will expand its function to monitor the remaining National Care Standards (NCS) Regulations [CAB-19-MIN-0113 refers].
- 18 MSD was provided funding in Budget 2019 and 2020 to establishment and operate the monitor. At the time, it was noted that this funding explicitly excluded the transfer of the function to a new entity and funding to establish full monitoring of the Oranga Tamariki system.
- 19 This report provides options and advice for discussion on the long-term location of the Monitor.

Development of advice in this briefing

- 20 The advice in this briefing is informed by discussions with the Kāhui Group, the Office of the OCC, the Education Review Office (ERO), Public Service Commission (formerly the State Services Commission), Oranga Tamariki, the Independent Children’s Monitor, Te Puni Kōkiri, Te Arawhiti, the Police, Department of Corrections, the Health

and Disability Commissioner, the Ministries of Justice, Education and Health, the HQSC and the Department of the Prime Minister and Cabinet.

Why the decision to transfer the Monitor to the OCC was “in-principle”

- 21 In November 2018, MSD and the Public Service Commission provided options and advice to joint Ministers on the long-term home for the Monitor. The advice was that the Education Review Office (ERO) was the best placed entity to assume the external monitoring function; you agreed with this advice at the time [REP/18/11/1560 recommendation 2 refers].
- 22 On 12 December 2018, the interim-Tomorrows Schools report was released, putting into question the future of ERO. At that time, six new Crown entities were also in the process of being established and it was made clear that a new Crown entity was not an option given this context.
- 23 Given the uncertainty surrounding ERO and the lack of support for a new entity, Ministers at the time considered the OCC to be the most suitable candidate for the long-term home of the monitor. The OCC would deliver a focus on children and young people that are part of the Oranga Tamariki system, drawing on its established experience and expertise in engagement with children and whānau [CAB-19-MIN-0113].
- 24 Ministers noted that the OCC did not have the capability or capacity to build the monitoring function and agreed that this would occur within MSD with the in-principle intention for the function to transition in the future.
- 25 The in-principle intention reflected that there were several social sector reviews and other developments underway that could generate new monitoring requirements. If a decision on where monitoring is transferred to were made at a later date, new opportunities for a joined-up approach to social sector monitoring, and/or a specialised social sector monitor, could be explored [CAB-19-MIN-0113].

A Cabinet decision on the long-term location of the Monitor is required in March 2021

- 26 A decision on the permanent location is required to enable MSD to work with the Monitor (as well as the entity that it is going to) to consider any transition work that may be required, ⁵(2)(f)(iv)
- 27 Should Ministers wish to progress the establishment of a new entity or departmental agency, its establishment will need to be confirmed by Cabinet in March 2021 to enable the Bill to be finalised for introduction.

The independent monitoring and assurance function

- 28 The policy intent and high-level functions for the Monitor were agreed by Cabinet in 2019 [CAB-19-MIN-0113 and CAB-19-MIN-0687 refer]. The policy intent is to support an improvement in outcomes for children, young people and their whānau by providing decision makers⁶, with trusted advice (eg. findings on what is working,

⁵ The transfer is likely to occur in the first half of 2022, following Royal Assent of the legislation.

⁶ By decision makers we mean Ministers, the Chief Executive of Oranga Tamariki and care providers and other systems participants who have influence over service mix, quality and delivery practice.

what is not and why) on the performance of the Oranga Tamariki system. Monitoring will support decision makers to make informed decisions regarding policy settings, service mix and quality and practice, that improve outcomes for children, young people and whānau.

- 29 Monitoring will also support accountability of decision makers by publishing its findings, providing evidence and insights that can be drawn upon to hold Government and systems participants to public account. The advocate may choose to utilise monitoring to support the making of specific recommendations for change.
- 30 Monitoring will include assessing and reporting on the:
 - 30.1 nature and degree of compliance with the Oranga Tamariki Act 1989 and associated regulations;
 - 30.2 identifying areas of high performance and areas for improvement;
 - 30.3 assessing quality of care services and practice; and
 - 30.4 assessing change in outcomes for children, young people and their whānau over time.
- 31 Since the policy intent and high-level functions were first developed, we have undertaken engagement with a wide range of government agencies and Māori⁷. Consequently, we have developed a greater understanding of the key elements required for the Monitor to successfully discharge its functions and achieve the policy intent.

There are several key elements that we considered are necessary for monitoring to successfully achieve the policy intent

- 32 In 2018, advice from officials considered key success criteria that should be present in the entity that the Monitor is transferred to [REP/18/11/1560 refers]. Work over the past 20 months has led to further development of the criteria and identification of other considerations to analyse the options for the long-term home of the Monitor.⁸
- 33 We have used this updated set of criteria to assess our options, including:
 - 33.1 the ability to build and maintain the trust and confidence of the public, in particular Māori, is the primary consideration
 - 33.2 the ability to operate as a trusted advisor to decision makers continues to be important
 - 33.3 a focus on the interests, rights and wellbeing of children and young people involved with the Oranga Tamariki System is desirable.
- 34 A full explanation of the criteria is provided below.

Criteria 1 - the ability to build and maintain the trust and confidence of the public, in particular Māori

- 35 It will be necessary to consider an appropriate institutional form that supports the attainment of the primary policy objective – to support the monitor to provide trusted

7 Including 21 hui around New Zealand and the establishment of a Māori Kāhui group.

8 For example, given the work underway within MSD to build the Monitor's capability, we no longer consider capability to be a necessary criterion when determining where the monitoring function should reside.

advice to Ministers and systems participants so they can make informed decisions that improve outcomes for children, young people and whānau.

- 36 Through our collaboration to develop the Oversight Bill, we have also come to understand the need for the Monitor to be positioned to maintain the trust and confidence of the public, with an emphasis on maintaining the confidence of Māori.
- 37 We consider any entity that undertakes monitoring that does not hold the trust and confidence of the public is unlikely to be valued highly by Ministers.
- 38 We have also come to understand that, if Māori do not trust or have confidence in the Monitor, it will be difficult for the Monitor to freely engage and present an accurate picture of how the system is impacting on Māori.
- 39 It will be important to choose an institutional form that strikes the right balance in regard to its independence from the Oranga Tamariki system and Ministers, to support trust and confidence of the public, while still being able to hold fulfil the role of being a trusted advisor to systems participants and Ministers.

Criteria 2 – the ability to operate as a trusted advisor to decision makers

- 40 To operate as a trusted advisor to decision makers, the Monitor will provide evidence, make findings, and publish reports setting out what is and is not working.
- 41 The Monitor will not form a view or advocate for changes to policy, services or practice. This ensures clarity that responsibilities for decision making remains with Ministers and service providers, along with accountability for the impact of those decisions on the outcomes for children, young people and their whānau.
- 42 Not recommending or advocating for specific changes also avoids the risk or perception that the Monitor may be criticising existing settings and in doing so, risk damaging the Monitor's relationship with Ministers and systems participants.

Criteria 3 – a focus on the interests, rights and wellbeing of children and young people involved with the Oranga Tamariki System

- 43 It is desirable for the entity which houses the Monitor to understand and have a focus on the interests, rights and wellbeing of children and young people, particularly in the care and protection system.
- 44 A dedicated focus reflects the importance of supporting improved outcomes for this cohort of New Zealand's most vulnerable children and young people. In forming this criterion, we have reflected on the decision to separate oversight of mental health issues in New Zealand from the Health and Disability Commissioner and establish a dedicated Mental Health Commission in recognition of the importance of this issue in New Zealand society.
- 45 Consultation has highlighted a strong desire, particularly among Māori, to place the function permanently with an entity that has a focus on children and young people, or the Oranga Tamariki system to ensure dedicated focus, resources and support.

Building towards greater Māori involvement in the care and custody of children and young people

- 46 There is a strong desire for Māori to have greater control over the decisions relating to at-risk tamariki Māori. This has recently been evidenced by the urgent Waitangi Tribunal review into uplifts of tamariki Māori, and public statements made by the Minister for Children supporting a move towards a 'for-Māori, by-Māori' operating approach.
- 47 As the system moves towards greater Māori involvement, criteria 1 will become an even more important consideration. As well as monitoring government agencies and

Options for the long-term location of the Independent Monitoring function of the Oranga Tamariki System

non-government organisations, the Monitor will also monitor the impact approved iwi and Māori service providers⁹ are having in meeting the needs of their tamariki and whānau.

We have explored eight choices for the long-term home of the Monitor

48 Following on from advice that we provided back in 2018, we have explored eight possible choices for the long-term home of the Monitor, specifically:

- the Ministry of Social Development (MSD)
- the Health Quality Safety Commission (HQSC)
- the Office of the Children's Commissioner (the OCC)
- the Education Review Office (ERO)
- a new entity (recommended by MSD, Kāhui and other government agencies)
- a new departmental agency hosted by either MSD, ERO or Te Puni Kōkiri

49 Further analysis of each option is provided below against the existing criteria. See **Appendix two** for a table of advantages and disadvantages of each option.

We do not recommend the Monitor be placed in MSD

50 Cabinet agreed to appoint MSD as the interim independent monitor from 1 July 2019 to establish the monitoring function, with the "in-principle" intent that it would be transferred to the OCC once a robust monitoring function was established and a new legislative framework was in place (CAB-19-MIN-0113 refers).

51 Remaining in MSD would be the most cost-effective option as it does not require any one-off transfer funding or ongoing governance costs.

52 However, MSD provides services that support children and young people already in the care and protection and the youth justice system, and to children and young people at risk of future involvement in the statutory system or who are transitioning from care. As such, MSD will be subject to monitoring itself in due course and as a result cannot act as the independent Monitor in the long-term.

53 Hui facilitated by the interim Monitor throughout the country also highlighted significant concerns with MSD's role as the Monitor, which were mitigated by the expectation the Monitor would transition out of MSD eventually. The concerns stem from the expectation that being part of a department will enable Ministers to broadly direct the Monitor. This risk is mitigated by the Oversight Bill limiting Minister's ability to direct the Monitor to undertake reviews into specific issues.

54 However, Māori have been clear that despite the limitations provided for in the Bill, simply being housed in a department is likely to increase the perception that the Monitor could be unduly directed. As such Māori have told us that should the

⁹ Approved under s396 and s403 of the Oranga Tamariki Act.

monitoring function be housed in a department, their trust and confidence in its monitoring, findings, and reports would be compromised.

- 55 There are also concerns that MSD's close working relationship and shared history with Oranga Tamariki may compromise the Monitor's ability to be impartial and objective.
- 56 While considering the interests, rights and wellbeing of children, young people and their whānau remains a priority for the MSD, it is not its only focus and there are many other competing priorities as its focus is on the wellbeing of all New Zealanders of all age groups.

We do not recommend the Monitor be placed in HQSC

- 57 The HQSC was considered in 2018. At the time, it presented advantages being a Crown entity and because it had an operational approach that positions it as a trusted advisor to decision makers, particularly when conducting and providing assessments on investigations of compliance.
- 58 However, following conversations with HQSC's chief executive, it was decided that the organisation was not the right fit for the Monitor. This was primarily because the nature of the monitoring work envisaged for the Oranga Tamariki system was materially different to the work performed by HQSC.
- 59 We also consider that placing the monitoring function with HQSC may not realise the desire for a function focused on children and young people in the Oranga Tamariki system.

We do not recommend the Monitor be placed in the OCC

- 60 In March 2019, Cabinet agreed that in-principle the intention is that the monitoring function will be transferred to the OCC [CAB-19-MIN-0113 refers]. The OCC has indicated their continued interest in taking on the monitor function, in addition to their existing functions.
- 61 We recognise that there are advantages in the Monitor going to the OCC, including the OCC's genuine long-term prioritisation of the interests, rights and wellbeing of children and young people in New Zealand.
- 62 At the time advice was provided to Ministers in 2018, concerns were raised that the purpose of monitoring (to provide trusted advice to Ministers to support decisions that improve performance of the Oranga Tamariki system) sat in conflict with the role of an advocate (to publicly challenge and influence decision makers to change systems settings to those the advocate considers will generate more positive outcomes).
- 63 Hui facilitated by MSD while developing the Bill have confirmed that this concern is held by various stakeholders. This has led Ministers and other stakeholders to request strong measures or firewalls be put in place in the Bill to mitigate a conflict between advocacy and monitoring functions. The need for such provisions has been acknowledged by the OCC.
- 64 Significant work has gone into considering how the governance of the OCC could provide separation between the two functions, should they reside in the same entity [REP/20/3/266 refers]. This advice went into detail around the roles and responsibilities of members of the board, the composition of the board, as well as the appointments process. The advice included provisions to have a separate

Independent Monitoring Commissioner, who would be responsible for the Monitor function within the Commission.

- 65 However, MSD, Public Service Commission and other stakeholders continue to have concerns that governance alone is insufficient to address the conflict between the purpose of each function. ^{9(2)(f)(iv)}

- 66 In response to recent consultation on the long-term home of the Monitor, the OCC stated:

"We do, however, agree that the advocacy function may conflict with the policy intent as currently stated, to be an advisor to the Minister."

- 67 The operating models for an advocate and a monitor are very different. Advocacy is focused on holding decision makers to account publicly for their performance – it necessitates taking of a position on what policy, service, and practice settings should be and requires promoting that position publicly. Monitoring is intended to support decision makers, such as Ministers and service providers, to make decisions to improve policy, services and practice. Monitoring evidence and insights may also be utilised by the advocate to support them in holding decision makers to account publicly and advocating for change.
- 68 Finally, the OCC's is New Zealand's primary advocate for children. MSD considers that to maintain this standing and to argue effectively for the maintenance and promotion of rights for all children, it is important for the Commissioner and the OCC to maintain distance from the "trusted advisor" role of the Monitor.
- 69 For the above reasons we believe the Commission should retain a central focus as an advocate for all children's issues, without the constraints that achieving the purpose of monitoring will bring.

We are neutral on whether the Monitor is placed within ERO

- 70 ERO remains open to taking on the monitoring function, given enough resourcing. ERO have reaffirmed their work to develop their care and youth justice sector knowledge and invest further into specific capabilities to carry out the role.
- 71 As part of their legislative role, ERO has a responsibility to monitor and review all institutions, owned or operated by the Crown, which provide educational services. This includes evaluating the quality of education provisions for entities that work in the care and youth justice areas.
- 72 As a government department ERO will face the same issues as MSD (highlighted in paragraphs 53 and 54 above) regarding perceptions of broad Ministerial influence. This may pose challenges for ERO when attempting to balance the expectations of independence desired by child's rights groups, Māori and the public. ERO is also a Children's Agency and part of the wider Oranga Tamariki system.
- 73 Advice from ERO is that historically they have managed to maintain their independence from Ministers. However, we note that the nature and challenges associated with the Oranga Tamariki system are quite different from those experienced within the education sector.
- 74 ERO have established working relationships with Māori communities. These relationships have stemmed from working through te ao Māori approaches and frameworks in relation to the provision of Māori medium education (kōhanga reo and

kura kaupapa Māori). ERO would be able to utilise these relationships to support monitoring of the Oranga Tamariki system.

- 75 MSD and the Public Service Commission consider that ERO's independence from the Oranga Tamariki system may go some way in alleviating concerns of child's rights groups and the public. However, as noted above, ERO is and will remain a government department and as such, is subject to broad direction from Ministers.

A new entity is the most suitable option

- 76 The establishment of a new entity provides the opportunity to create a home for the Monitor that best satisfies all the criteria.

A new entity is preferred

- 77 The critical criteria when considering the most appropriate type of entity is criteria 1 (maintaining trust and confidence of the public, in particular Māori). This is because, in order for monitoring to be successful, it must hold the trust and confidence of the public, with an emphasis on Māori. We also consider a monitor that does not hold the trust and confidence of Māori may struggle to be valued by decision makers. We consider a new entity is most likely to be able to strike the right balance.
- 78 We consider a new entity will be best placed to meet the needs of systems monitoring as the system evolves to recognise the need for greater Māori involvement in decision regarding tamariki and rangatahi Māori.
- 79 If this option is preferred further work will be required on an appropriate form for the new entity (i.e. a Crown entity, statutory officer, etc). The Bill will subsequently need to be updated to provide for the new entity.

A new departmental agency may be an option

- 80 A new departmental agency offers several benefits specifically the ability to build an entity with a dedicated focus on monitoring the Oranga System, and an appropriate monitoring operating approach.
- 81 The greatest challenge with a departmental agency is supporting the Monitor to maintain the trust and confidence of the public, in particular Māori. This is due to the perception of the relationship a departmental agency has to Ministers, and their discretion to direct a departmental agency.

Choice of host agency will also impact on levels of trust and confidence

- 82 Through our consultation we have received a clear view that a monitor hosted by MSD is likely to be viewed as too close to Ministers and also likely to be viewed as having too close a working relationship with Oranga Tamariki. Stakeholders have informed us that, in their view, this may compromise the Monitor's ability to be independent.
- 83 Another option might be for Te Puni Kōkiri to host the Monitor. This arrangement would explicitly acknowledge the importance of this function for Māori and Te Puni Kōkiri's wider role in monitoring the compliance of Government agencies with specific Treaty of Waitangi commitments. However, feedback from Te Puni Kōkiri suggests that hosting a departmental agency may not fit with their current strategic direction.
- 84 Another possibility may be for an agency such as ERO to host a departmental agency. This may enable the monitor to build its capability faster via leveraging the complementary monitoring approach within ERO. Having the departmental agency at a distance from the Oranga Tamariki system may also assist with issues of trust and

confidence. If Ministers are not of a mind to establish a new Crown entity, a departmental agency hosted by ERO would likely be the next best option.

Public Service Commission supports the criteria outlined in this paper as a basis for viewing the design of the oversight system as a whole

- 85 An additional criterion for consideration is whether Ministers consider that the monitor should operate within the legal Crown or not, and therefore determine the relationship between the monitor and the government of the day. It is possible to address perceptions of "independence" through legislation, but this would need to be carefully managed to ensure the trust and confidence of stakeholders.
- 86 The Public Service Commission also note that this decision should take into account the wider system, where the Children's Commissioner and the Ombudsman are both freely able to challenge government policy and practice relating to the children's system. The Monitor's role is to systematically and regularly assess and report on whether government departments are delivering according to the policy and standards established by the government of the day: this is not a function of any current Crown entity.

Financial implications

- 87 As noted above, retaining the monitoring function within MSD would be the most cost-effective option.
- 88 Moving the monitoring function to another existing entity (including a departmental agency hosted by an agency other than MSD) will result in one-off transition and integration costs which would be determined once the destination agency is known.
- 89 If a new entity would continue a shared services arrangement with MSD (as the Office of the Children's Commissioner currently does) there is likely little difference in cost between establishing a new entity and maintaining the function within MSD.
- 90 The substantive cost associated with building and operating the monitor has already been agreed to by Cabinet with MSD receiving funding in 2018/19 and 2019/20 budget rounds. The material additional cost associated with an entity will require further explanation if a new entity is preferred.
- 91 Once Ministers have indicated a preference, more detailed work will be undertaken on costing to be provided in the Cabinet paper to be considered in March 2021.

A decision on the location of the Monitor may have implications for the current location of the OPCAT monitoring functions

- 92 As a designated 'National Preventive Mechanism' (NPM), the OCC is currently responsible for examining and monitoring the treatment of children and young people detained in care and protection and youth justice residences for the purposes of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).¹⁰
- 93 On 2 July 2020, the then Minister of Justice designated the Children's Commissioner the purpose of examining and monitoring the treatment of children and young persons in:
- care and protection and youth justice residences established under section 364 of the Oranga Tamariki Act 1989

10 The monitoring of places of detention is an international obligation and is required under the Crimes of Torture Act 1989. Other National Preventive Mechanisms (NPMs) for the purposes of OPCAT include the Options for the long-term location of the Independent Monitoring function of the Oranga Tamariki System

- community based remand care homes
 - health and disability places of detention established specifically for the care of children and young people, including youth forensic units and child and adolescent mental health units.¹¹
- 94 The Ministry of Justice have indicated their preference is for the OCC to undertake the independent monitoring function given their existing role with OPCAT.
- 95 MSD considers it may be desirable, but not essential, that the entity that undertakes the monitoring function also undertake the OPCAT function. This is because of the overlap in the monitored population and the need to minimise the burden on children, whānau and staff associated with monitoring visits.
- 96 If Ministers consider the two functions should be undertaken together, there are two broad options for how this may occur, depending on the institutional arrangements chosen:
- 96.1 a government department may not be designated an NPM; if Ministers prefer a departmental form for the Monitor, operational agreements may be put in place with the OCC such that the Monitor conducts site visits on the OCC's behalf. This would enable a continuation of the current state ensuring a single site visit can provide information to support both functions while minimising the burden on children, whānau and staff involved.
- 96.2 if Ministers prefer different institutional arrangements, for example, some form of a new entity, then consideration will need to be given to whether operational arrangements are sufficient, whether the current NPM designation remains with the OCC or whether it is transferred to the new entity to be conducted alongside the Oranga Tamariki system monitoring function.

Next steps

- 97 We recommend that prior to making a decision you share and discuss this briefing, with Ministers for Children and the Public Service, Ministers of Māori Development, Whānau Ora, and the Prime Minister as the Minister responsible for the Child Poverty Reduction portfolio.
- 98 To enable decisions, and indicative costings, to feed into the March Cabinet Social Wellbeing Committee paper, we would advise you to meet with your colleagues in January 2021 to agree on a preferred approach.
- 99 Once we know your preferred approach, we will provide you with a draft Cabinet paper.
- 100 If a new entity is preferred, we will provide further advice on its establishment within the Bill, in particular how it will be governed.
- 101 To support progression of a budget bid and transition planning, ahead of the passing of the Oversight Bill, we will incorporate your preference on the preferred long-term home in the Cabinet paper planned for Cabinet Social Wellbeing Committee in March

Ombudsman and the Independent Police Conduct Authority. Each NPM has designated responsibility for monitoring particular places of detention.

11 <https://gazette.govt.nz/notice/id/2020-go2845>

2021. This paper will also provide an update on progress with the Oversight Bill and seek final technical policy approvals to enable the Bill to be finalised.

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Appendix one: Previous Cabinet decisions in relation to the independent monitoring and assurance function

March 2019 Cabinet Paper (CAB-19-MIN-0113)

9 **noted** that the depth and breadth of independent monitoring that will be required for Oranga Tamariki's new operating approach will be a major new undertaking, particularly with the independent monitoring requirements set out in the new Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (NCS Regulations);

10 **agreed in principle**, subject to funding being made available in Budget 2019, to the role of the independent monitor as set out at paragraphs 50-52 of the paper under [CAB-19-SUB-0113];

11 **agreed** that MSD be appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the intent that it is transferred to the Office of the Children's Commissioner (OCC), once a robust monitoring function is established and a new legislative framework is in place;

12 **noted** that MSD's role will be to design and establish the framework for the independent monitoring of compliance with the NCS Regulations, information that is disclosed on abuse or neglect in state care and how Oranga Tamariki is responding (NCS Regulations 69 and 85), and establish the broader monitoring frameworks and conduct full monitoring for a period from December 2020 (or earlier if possible) to refine the operation of the function before it is transferred;

13 **agreed** that MSD will work with Te Puni Kōkiri and Te Arawhiti, in line with the Māori Crown relations Engagement Framework and Guidelines, to:

13.1 ensure appropriate Māori and iwi engagement during the establishment of the monitoring function, and to support improvement of MSD's te ao Māori capability;

13.2 support official's advice on the transfer of the function;

14 **noted** that MSD and relevant agencies, including Oranga Tamariki, the Ombudsman, the OCC and the SSC will work together to effectively progress the establishment and transfer of the monitoring function;

15 **agreed** that officials report regularly to the Minister for Social Development and other key Ministers, including the Minister of Māori Development and the Minister for Whānau Ora, on the progress of the establishment of the monitoring function, including a substantive update in mid-2020;

16 **agreed** that in principle the intention is that the monitoring function will be transferred to the OCC;

17 **agreed** that officials will report to the Minister for Social Development and other key Ministers, including the Minister of Māori Development, the Minister for Whānau Ora, and the Minister for State Services, in March 2021 on the plan, timeframes, and readiness for the transfer of the monitoring function;

18 **noted** that transferring the monitoring function to the OCC along with existing advocacy and Optional Protocol on the Convention Against Torture (OPCAT) monitoring functions would fundamentally change the organisational structure and operating approach of the OCC;

19 **agreed** that the Bill provide for appropriate governance for a monitor, and for an entity undertaking oversight functions that may be in conflict;

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20 **noted** that the decision in paragraph 19 above will ensure strengthened governance for the OCC, should the monitoring function transfer to it post-establishment;

21 **noted** that, from time-to-time, it would be appropriate for the responsible Minister to provide direction in respect of matters that relate to monitoring and assurance functions;

22 **agreed** that the Bill provide for the responsible Minister to provide direction in respect of monitoring matters, but not in respect of systemic advocacy;

23 **agreed** that, to allow sufficient time to progress wider legislative change and to enable MSD to develop, design and build the monitoring function alongside the phased roll-out of Oranga Tamariki's new operating model, the new independent monitoring function should be phased in, with:

23.1 MSD developing the NCS assessment framework in consultation with Oranga Tamariki, the Children's Commissioner, Te Puni Kōkiri, Te Arawhiti and others from 1 July 2019;

23.2 MSD monitoring information that is disclosed on abuse or neglect in state care and how Oranga Tamariki is responding (NCS Regulations 69 and 85) from 1 July 2019;

23.3 full monitoring of all NCS Regulations to commence on or before 31 December 2020;

December 2019 Cabinet paper (CAB-19-MIN-0687)

4 **agreed** 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 **agreed** 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 **agreed** 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 **agreed** that the Bill contain a provision to enable the monitor to discharge its reporting

function, including specifying that the monitor will produce and publish the types of reports mentioned in paragraph 6 above and that responses by those who have been subject to or a party to the report may be required;

8 **agreed** 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;

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Appendix two: High-level advantages and disadvantages of each option for the long-term location for the Independent Monitor

Options	Advantages	Disadvantages
The Monitor remains in the Ministry of Social Development (MSD)	<ul style="list-style-type: none"> The most cost-effective option, as it requires no transfer funding. May be able to realise some economies of scale through sharing back office costs with other MSD functions 	<ul style="list-style-type: none"> MSD is part of the system being monitored (perceived or real conflict of interest) Public perceptions of the lack of independence from Ministers and the Oranga Tamariki system may compromise the trust and confidence of some stakeholders (Māori groups, child rights and advocacy groups, systems participants, Office of the Privacy Commissioner has also raised concerns) There are other competing interests for resources and supports that may hinder the Monitor
The Monitor transfers to the Office of the Children's Commissioner (OCC)	<ul style="list-style-type: none"> Consistent with Government's in-principle decision Child focused – is focused on the interests, rights and wellbeing of children and young people, including those in the care and protection system Provides alignment and operating efficiencies with OPCAT functions 	<ul style="list-style-type: none"> There is a risk that their responsibility to advocate for children and young people will conflict with the policy intent for a monitoring function that provides trusted advice to decision makers Their strong advocacy approach may not support attainment of the policy intent. May impact negatively on advocacy function
The Monitor transfers to the Health and Quality Safety Commission (HSQC)	<ul style="list-style-type: none"> Maintains confidence – strong operational approach consistent with the policy intent, due to its existing arrangement as a Crown Entity 	<ul style="list-style-type: none"> The work of the Monitor is very different from the work of HSQC Health services are included in the Oranga Tamariki system (perceived or real conflict of interest) Not specifically focused on the interests, rights and wellbeing of children and young people
The Monitor transfers to the Education Review Office (ERO)	<ul style="list-style-type: none"> Has a responsibility to monitor and review all institutions owned or operated by the Crown, which provide educational services, including entities that work in the care and youth justice areas A track record in maintaining their ability to balance their independence and trusted advisor to Ministers roles Their independence from the Oranga Tamariki may alleviate concerns of child's rights groups and the public 	<ul style="list-style-type: none"> As a government department that can be directed by Ministers, it may not realise Cabinet's original intention to establish an <i>independent</i> monitor A lack of perceived independence may compromise the trust and confidence of some stakeholders (Māori groups, child rights and advocacy groups, system participants, Office of the Privacy Commissioner has raised concerns) May result in the focus broadening to all children, with loss of focus on the dedicated cohort of children within the Oranga Tamariki system

<p>The Monitor transfer to a new entity (preferred option)</p>	<ul style="list-style-type: none"> ▪ Provides an opportunity to create a location for the Monitor that could: <ul style="list-style-type: none"> ○ determine the new entity's institutional arrangement to best balance the diverse interests of stakeholders ○ establish a dedicated focus on the interests, rights, and wellbeing of children and young people specifically in the care or custody system ○ continue the development of an operational approach that supports the policy intent, rather than attempting to integrate the operating approach currently being developed within the Monitor into an existing organisation • Could future proof monitoring in the event the system provides for greater Māori involvement in the future • Could also house the OPCAT function (if an Independent Crown Entity) 	<ul style="list-style-type: none"> • Likely the most costly option
<p>Departmental agency</p>	<ul style="list-style-type: none"> • Second most cost-effective option after MSD • Depending on the choice of host agency this form may assist to alleviate some of the perceptions held by stakeholders that Ministers may unduly direct the Monitor • Will enable the development of an entity with a dedicated focus on children and young people in the Oranga Tamariki system. 	<ul style="list-style-type: none"> • Feedback from Māori suggests there is a risk that a departmental agency may not mitigate perceptions that Ministers may broadly direct the Monitor and as such, may not support the Monitor to gain and hold the trust and confidence of Māori.



Report

Date: 31 March 2020

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Implications of COVID-19 on progressing the Children's Commission and Independent Oversight of the Oranga Tamariki System Legislation Bill

Purpose of the report

- 1 This report provides you with information relating to the impact of COVID-19 Alert-Level 4 on progressing the above Bill.

Recommended actions

It is recommended that you:

- 1 **note** that due to the COVID-19 alert level 4, the Children's Commission and Independent Oversight of Oranga Tamariki System Legislation Bill is no longer likely to be introduced into the House prior to the 2020 General Election.
- 2 **note** the Ministry of Social Development (the Ministry) is expecting to be able to continue monitoring Regulations 69 and 85 of the National Care Standards Regulations.
- 3 **note** that at the time of writing, the Ministry expects to be in a position to meet its regulatory obligation to monitor all National Care Standards Regulations by December 2020.

Molly Elliott

31/03/2020

Molly Elliott

Date

General Manager

Social Development, Child and Youth Policy

Hon Carmel Sepuloni
Minister for Social Development

Date

Background

- 2 The Ministry of Social Development (the Ministry) is working with Parliamentary Council Office (PCO) to draft the Children's Commission and Independent Oversight of the Oranga Tamariki System Legislation Bill (the Bill).
- 3 An early draft of the Bill has been circulated to key stakeholders and the Ministry's Kahui Group and at the time of writing feedback had been received from all stakeholders, other than the Ombudsman.
- 4 The Ministry is in the process of monitoring Regulation 69 and 85 of the National Care Standards Regulations (NCS Regulations), building towards monitoring all NCS Regulations by December 2020.
- 5 On 23 March 2019 the Prime Minister announced New Zealand is to move to alert level 4 in New Zealand's COVID-19 response, this will have implications for this work.

It is unlikely the Bill will be introduced before the 2020 election...

- 6 Current timeframes would see the Bill introduced into the House in June 2020, prior to the scheduled 2020 election. With the need to work differently, because of alert level 4, we now consider this is unlikely.
- 7 This alert level will mean officials ability to meet with key stakeholders or PCO is limited as we are aware that the Offices of the Ombudsman, PCO and Oranga Tamariki are all presently engaged with the response effort.
- 8 We are currently working through the feedback received from stakeholders on the early draft of the Bill. We will attempt to progress using teleconferencing and email. However, progress is likely to be significantly hampered due to the inability to meet and discuss complex drafting issues and the potential for key knowledge holders to be unavailable. This is already happening with the Ombudsman, and we expect other stakeholders to be increasingly impacted.

... but monitoring the National Care Standards will continue

- 9 The Independent Children's Monitor (ICM) commenced monitoring of Regulation 69 and 85 of the NCS Regulations on 1 July 2019. The ICM is required by law to commence full monitoring of NCS Regulations by December 2020.¹ A delay to the introduction of the Bill will mean that the interim arrangements under existing legislation may need to continue for longer but there is no regulatory barrier to this occurring.
- 10 At the time of writing, the ICM expects to meet its regulatory obligations. However, due to the uncertainty associated with alert level 4, there is the possibility that the ICM may not be able to:
 - build capacity and capability and undertake monitoring as intended by December 2020
 - access the necessary information held by other agencies due to pressures on their resources associated with responding to the alert level 4.

- 11 A change to NCS regulations would be required if this timeframe becomes unrealistic.

Next steps

- 12 Officials will work to address the initial feedback provided on the early draft Bill over the next two weeks and subsequently issue further drafting instructions to PCO.

¹ Regulation 77 of the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018

- 13 A further iteration of the Bill will be circulated to stakeholders for comment prior to it being finalised. Timing will be dependent on PCO resource availability. At this point, we expect delays in progressing any un-resolved issues.
- 14 Throughout the lockdown we will provide you with updates on progress and the impact of any delays as this becomes apparent.
- 15 Once we have more certainty regarding how disruptive new ways of working are likely to be and for how long, we will provide an updated timeline on progressing the Bill to introduction.
- 16 We will also be progressing further work, and seek decisions from you, regarding two substantive issues:
 - 16.1 the structure of the Bill
 - 16.2 assessing options for where the independent monitor may reside long-term.

File ref: A12417280

Author: Out of scope, Contractor, Social Development, Child and Youth Policy

Responsible manager: Lachlan, Policy Manager, Social Development, Child and Youth Policy



Report

Date: 15 April 2020

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Governance arrangements for the proposed Children's Commission

Purpose of the report

- 1 This report outlines details on the governance arrangements for the proposed Children's Commission (the future Commission) to advocate for the interests, rights and wellbeing of all children in New Zealand, and to make sure they have opportunities to participate and have their voices heard. It seeks your decisions on the roles and responsibilities of members of the board, the composition of the board, partnering effectively with Māori, and the appointments process. These decisions will then be incorporated into the *Children's Commission and Oversight of Oranga Tamariki System Legislation Bill* (the Bill).

Executive summary

- 2 Cabinet has agreed that the governance of the Children's Commissioner should be updated [CAB-19-MIN-0013 and CAB-19-MIN-0687 refer]. The purpose of updating the governance arrangements of the current Children's Commissioner is to ensure diversity of perspectives which cover the necessary mana, skills, knowledge and expertise expected of an oversight body responsible for advocating for children and young people in New Zealand.
- 3 We are recommending that legislation reinforces functional separation of the advocacy and independent monitoring functions (monitor function), to recognise that there are clear tensions between these. We will provide advice on the governance structure for the monitor function in March 2021. Our advice in this paper focuses on the advocacy function as a result. Further changes will need to be made to the governance arrangements if the monitor function moves to the future Commission. This is in-line with Cabinet's in-principle decision to move the monitor function to the Children's Commission.
- 4 We propose that the Commissioner for advocacy be called the Children's Commissioner and that they be appointed up to a full-time basis. Employing up to full time ensures that there is enough flexibility for the Children's Commissioner to structure the role in a way that is appropriate to them (for example, if they need to continue practising within their profession). This approach also preserves at least some of the agility and mana provided by the current commissioner-sole model, while also allowing for the benefits that diversity of experience and expertise that a good board can provide. The Children's Commissioner would derive their authority from the board as a whole, and the executive

leadership of the Commission would report to the board rather than a single Commissioner.

- 5 Increasing the minimum board size from two to three members will also help to mitigate the potential risk that a full-time Children's Commissioner may dominate, and influence decisions made by the board.
- 6 The future Commission, including the Children's Commissioner, would be appointed by the Governor-General on the advice of the Minister responsible for the future Commission, following recommendations from a nominations panel convened by the Chief Executive of the Ministry of Social Development. To ensure that board nominations have support from the sector and Māori, we propose that all applications be accompanied by an endorsement from a relevant organisation.
- 7 We also propose that the future Commission partner effectively with Māori by requiring that at least 50 per cent of the board have experience of mātauranga Māori, and represent the interests of Māori, with the required skills and leadership expertise to reflect the needs of tamariki and rangatahi of interest to the Commission.

Recommended actions

It is recommended that you:

- 1 **agree** that the Commissioner for advocacy be called the Children's Commissioner

Agree / Disagree

- 2 **agree** that the Children's Commissioner role be advertised and appointed up to a full-time position

Agree / Disagree

- 3 **agree** that the remaining Commissioners (who are not allocated a specific oversight function) be advertised and appointed as part-time positions

Agree / Disagree

- 4 **agree** that the minimum board size be increased from two to three members

Agree / Disagree

- 5 **note** that we will provide detailed advice on the costs associated with the recommendations above in due course

- 6 **note** that legislation will also reinforce functional separation of the advocacy and monitoring functions

- 7 **agree** that on top of the usual competencies required for board members, the board must specifically have the capacity and capability to:

- have expertise and an understanding of children and young people's issues
- uphold the Treaty of Waitangi, including its articles and principles
- partner effectively with Māori
- understand te ao Māori and advocate from a basis of kaupapa Māori and mātauranga Māori (so that they can inform the basis of the work programme)
- take a tikanga Māori approach to meeting procedures and decision making.

Agree / Disagree

- 8 **agree** that at least 50 per cent of the board have experience of mātauranga Māori, and represent the interests of Māori, with the required skills and leadership expertise to reflect the needs of tamariki and rangatahi of interest to the Commission

Agree / Disagree

- 9 **agree** that candidates applying for a position on the board must have the endorsement of a relevant organisation that fulfils criteria to be contained in regulations

Agree / Disagree

- 10 **agree** that applications to the board be considered by a nominations panel convened by the Chief Executive of MSD

Agree / Disagree

- 11 **agree** to forward this report to the Minister for Children, the Minister for Māori Crown Relations: Te Arawhiti, the Minister for State Services, and the Minister for Māori Development

Agree / Disagree

Lachlan Cartwright

15 April 2020

Lachlan Cartwright

Date

Policy Manager – Child and Youth

Social Development, Child and Youth Policy

Hon Carmel Sepuloni

Date

Minister for Social Development

Cabinet has agreed to change the Children's Commissioner from a commissioner-sole to a Commission with a board

- 8 Cabinet agreed in March 2019 that changes would need to be made to the governance of the Children's Commissioner [CAB-19-MIN-0013 refers]. Following this agreement, further work with the State Services Commission (SSC), the Children's Commissioner and the Kāhui Group on potential governance proposals has made it clear that the governance of the current Children's Commissioner should change to take into account the future Commission's roles and responsibilities.
- 9 Members of the future Commission should collectively have a diversity of perspectives which provide the necessary mana, skills, knowledge and expertise expected of an oversight body responsible for advocating for children and young people in New Zealand. This includes but is not limited to; experience of the care system, understanding of children's issues, and understanding of te ao Māori.
- 10 The proposals agreed to by Cabinet in December 2019 were based on a model presented to Minister Hipkins by the SSC. Changes were incorporated to address feedback raised by the Children's Commissioner and Kāhui Group. The model agreed by Cabinet includes:
 - changing the Children's Commissioner from a corporation sole to a board of two to six members
 - the legislation providing for the Commission to embody a partnership approach with Māori, including through the appointments process.
- 11 This agreement forms the basic framework for the proposals in this paper, which provides further advice on how these high-level decisions should be implemented and reflected in the Bill.

Legislation should reinforce functional separation of the advocacy and monitor functions

- 12 There are clear tensions between the advocacy and monitor functions as a result of their respective ways of working, which cannot be addressed through governance alone. For example, the advocacy function needs to be agile, efficient, and representative of children and young people on a day to day basis. They are likely to need to pivot their focus on short notice to respond to emerging issues for children. This contrasts with the monitor function, whose work is likely to be far more certain and predictable as a result of their focus on systems performance assurance. While there will be elements of their work that will require them to adapt their focus at short-notice, we do not expect this to dominate their work programme in the same way.
- 13 Clearly defining the differences between these functions in legislation will provide an extra guarantee of functional separation should the monitor function be moved to the future Commission. We are undertaking this work based on the existing Cabinet agreement that we will provide for functional separation.
- 14 While we consider the model proposed provides sufficient flexibility to absorb and adapt to additional functions, we will provide you with further advice on our recommended approach as part of our March 2021 advice on the proposed transfer of the monitor function [CAB-19-MIN-0013 refers]. We will be in a stronger position to advise on what an effective governance model might look like as we establish the function. Our advice will cover (at a minimum):
 - the potential size of a commissioner role with responsibility for independent monitoring
 - how the governance model can be tailored to allow for functional separation, on top of reinforcing this in legislation.
- 15 Given we will provide further advice on the governance structure of the monitor function in due course, our advice in this paper focuses on our recommended approach for the advocacy function only.

A Children's Commissioner will be appointed...

- 16 While all board members will be Commissioners, Cabinet agreed in December 2019 that the Bill will include provisions for the Commission to have a separate Commissioner for each oversight function it is responsible for under the Act [CAB-19-MIN-0687 refers].
- 17 One of the key strengths of the current commissioner-sole model is the single statutory representative with authority to speak on issues affecting children. Stakeholders have highlighted the need for the Commissioner responsible for advocacy to have a strong connection to the day-to-day work of the Commission, as well as availability to meet with children, key stakeholders and media on a regular basis.
- 18 In order to preserve the mana of the current title of Children's Commissioner, and in recognition of their unique role representing the voice of children and young people, we recommend that the Commissioner responsible for advocacy have the title of Children's Commissioner. Other Commissioners would have titles that specifically relate to their function - for example the Commissioner for the monitor function could be called the Independent Monitoring Commissioner.
- 19 The Commission will need to consider how they promote the changes to their organisation to the public, including the new board structure. This will reduce the risk that continuing the use of the title 'Children's Commissioner' for one board member among a board of Commissioners could confuse the public, who may think the current corporation sole is continuing.

... but their role may need to differ slightly to ensure they are effective

- 20 To achieve the required level of connection, we recommend that the Children's Commissioner be appointed up to a full-time basis. Employing *up to* full-time ensures that there is enough flexibility for the Children's Commissioner to structure the role in a way that is appropriate to them - for example some commissioners may be part of a profession that requires them to continue practising.¹ Providing this flexibility will ensure they are able to provide the commitment necessary for the role. We do not believe this requirement applies in respect of the other Commissioners who could be appointed as standard, part-time board members.²
- 21 There are potential risks associated with a full-time Commissioner. These include:
 - the Commission may appear to be a commissioner-sole with a panel which is only engaged for bigger decisions
 - if the Commissioner wasn't Māori, the differences in time allocation, the responsibilities of their role and visibility in contrast to part-time board members may undermine the Commission's commitment to partnering effectively with Māori.
- 22 While this model does present a risk that the Children's Commissioner will dominate and influence decisions made on the board (this is particularly true of a small, new board), we consider that this can be mitigated through a number of mechanisms:
 - the Children's Commissioner will derive their authority from the board as a whole. Their representation of the Commission will therefore be confined to issues on which they have been given authority to speak by the board. We expect that one of the first steps (alongside confirming an executive structure to support them)

¹ For example, the former Children's Commissioner Dr Russell Wills continued practising as a Community Paediatrician in Hawkes Bay during his term as Children's Commissioner from 2011-2016.

² The time commitment for roles on the Commission will not be specified in legislation. Your decisions inform operational practice, but are sought now to provide sufficient certainty on the way the Commission will operate.

that the newly formed board will define the role and authority of the Children's Commissioner

- the executive structure established by the board to carry out the day-to-day business of the Commission will be accountable to the board, rather than to the Children's Commissioner
- if you agree to increase the minimum size of the board (as outlined below), there will be at least two other members to mediate all discussions of the Children's Commissioner.

- 23 The Children's Commissioner role would be appointed using the same process as for the other Commissioners. Minor changes would be made to reflect the different nature of the role when it is advertised, including that the role will be up to full-time.
- 24 If you decide not to proceed with the appointment of a Commissioner to represent the voices of all children and young people, we consider it likely that the board would do so themselves for the same reasons outlined in paragraph 17. If this were to be the case, there would be no direct relationship between the responsible minister and this advocate.

We recommend an increase to the minimum size of the board that was previously agreed by Cabinet

- 25 Cabinet agreed in December 2019 that the board would have two to six members. We recommend that the minimum board size be increased from two to three members. This will provide room for a chair to mediate discussion, while also helping to ensure that the minimum board size does not contribute to the board reaching a stalemate on votes. As outlined above, efficient and effective decision making will be vital to the operation of the advocacy function.
- 26 Cabinet has authorised the Minister for Social Development, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters. We consider that changing the minimum board size from two to three falls within this authority. However, we recommend clarifying the variation as part of the Cabinet paper to the Cabinet Legislation Committee seeking approval of the draft Bill.

These changes in governance will result in added costs

- 27 The total cost of governance and management for the proposed new structure will be between \$620,000 and \$680,000 per annum. The costs set out in the table below are not inclusive of operating costs (such as secretariat costs, travel and board meeting preparatory costs).

Governance and management costs of the proposed Children's Commission	Per annum (\$)
Full-time Children's Commissioner (1)	200,000
Part-time Commissioners (2-5)	40,000-100,000
Chief Executive remuneration	380,000
Total	620,000 – 680,000

- 28 The current budget for the Children's Commissioner is \$3.157m per year. The Children's Commissioner has entered a cost-pressure budget bid to secure funding to continue operating their existing Optional Protocol to the Convention against Torture (OPCAT) functions. The current budgeted amount assumes that the Children's Commissioner will be fully funded for their existing and proposed OPCAT functions, and that this funding is able to be transferred in the event that the OPCAT monitoring function is transferred.
- 29 We will provide further advice on detailed costings in due course. This will be linked to planned budget initiatives for transition and corporate shared services for the monitor function.

The legislation will specify how the future Commission will partner with Māori

- 30 Cabinet has agreed that legislation should provide for the board to embody partnerships with Māori, to be given effect by appointing the board through an appropriate process that incorporates te ao Māori and ensures Māori participation. This would both give effective representation to the population most affected by the care system and recognise the Treaty of Waitangi.
- 31 To give effect to Cabinet's decision we propose that the Bill stipulates that on top of the usual competencies required for board members, the board must have the capacity and capability to:
- have expertise and an understanding of children and young people's issues,
 - uphold the Treaty of Waitangi, including its articles and principles
 - partner effectively with Māori
 - understand te ao Māori and advocate from a basis of kaupapa Māori and mātauranga Māori (so that they can inform the basis of the work programme)
 - take a tikanga Māori approach to meeting procedures and decision making.
- 32 Board membership needs to support equity of outcomes for tamariki and rangatahi. We propose that at least 50 per cent of the board have experience of mātauranga Māori, and represent the interests of Māori, with the required skills and leadership expertise to reflect the needs of tamariki and rangatahi of interest to the Commission.
- 33 We also recommend that no specific provision is made for the appointment of a Māori Commissioner. A breakdown of the comparative risks and benefits of options considered is included below:

Option	Analysis
At least 50 per cent of the board have experience of mātauranga Māori, and represent the interests of Māori, with the required skills and leadership expertise to reflect the needs of tamariki and rangatahi. (recommended)	<p>Benefits</p> <p>This would allow the board, and the organisation, to better reflect and respond to tamariki and rangatahi Māori requiring support.</p> <p>Appropriately reflects the principle of active partnership as set out in the Treaty of Waitangi.</p> <p>Allows the board to be able to understand and reflect on the interests of Māori who are disproportionately disadvantaged. Therefore, the board are able to accurately and effectively advocate on behalf of their views.</p> <p>Risks</p> <p>The appointments process may fail to attract candidates with the required skills and leadership status. They may also not have experience of mātauranga Māori. A way of managing this risk is to promote the opportunity widely through established Māori networks.</p>
Legislation specifies the appointment of a Māori Commissioner (not recommended)	<p>Benefits</p> <p>This would ensure permanent Māori representation at the Commissioner level.</p> <p>The proposal reflects work underway by the Children's Commissioner to scope a Deputy Commissioner for Māori role.</p> <p>Risks</p>

	<p>It is not clear how the role would have a distinct mandate from the other Commissioners. It risks confusion as to which Commissioner would be responsible on many issues.</p> <p>Creates a perception that issues for Māori are somehow separate from issues related to the functions the future Commission is responsible for.</p> <p>Kāhui Group do not support this approach.</p>
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We advise that the nominations process be strengthened...

- 34 As the future Commission will be an Independent Crown Entity, all appointments to the board of the Commission will be made by the Governor-General following recommendations from the Minister. We propose an open applications process, led by the Ministry of Social Development (MSD) and considered by a nominations panel. A diagram outlining this process is attached as **Appendix 1**.
- 35 Cabinet agreed in December 2019 that this appointments process should incorporate te ao Māori and ensure Māori participation. We recommend that the appointment process has two key components to ensure this.

... to include a nominations panel convened by the Chief Executive of MSD...

- 36 The nominations panel will be convened by the Chief Executive of MSD and consist of people with the following expertise:
- Māori leadership
 - working with children and young people
 - governance experience at board level
 - appointment and recruitment experience.
- 37 Panel membership would be at the discretion of the Chief Executive of MSD, following consultation with key external stakeholders. The nominations panel would assess candidates and make recommendations to the Minister regarding appointments.

... and a requirement that candidates must have endorsements from relevant organisations

- 38 To ensure that potential applicants for the board have the support of the sector and relevant governance experience, we propose that candidates must have the endorsement of a relevant organisation. Relevant organisations would be defined in a list of categories contained in regulations. These categories could include:
- a national organisation which represents Māori, particularly Māori social sector issues
 - an organisation that has the mandate to represent an iwi
 - an organisation focused on improving outcomes for children and young people, and their rights
 - an appropriate professional governance organisation.

- 39 Further work is required to develop the way in which relevant organisations will be provided for in regulations. We will provide further advice on this as part of the developments of these regulations.

Next steps

- 40 Your decisions on the recommendations in this report will inform the drafting instructions provided to the Parliamentary Counsel Office, which will in turn be incorporated into the draft Bill currently being developed.

- 41 We intend to submit the draft Bill and the associated paper to the Legislation Committee for consideration by mid-July, following consultation and workshops with relevant stakeholders.

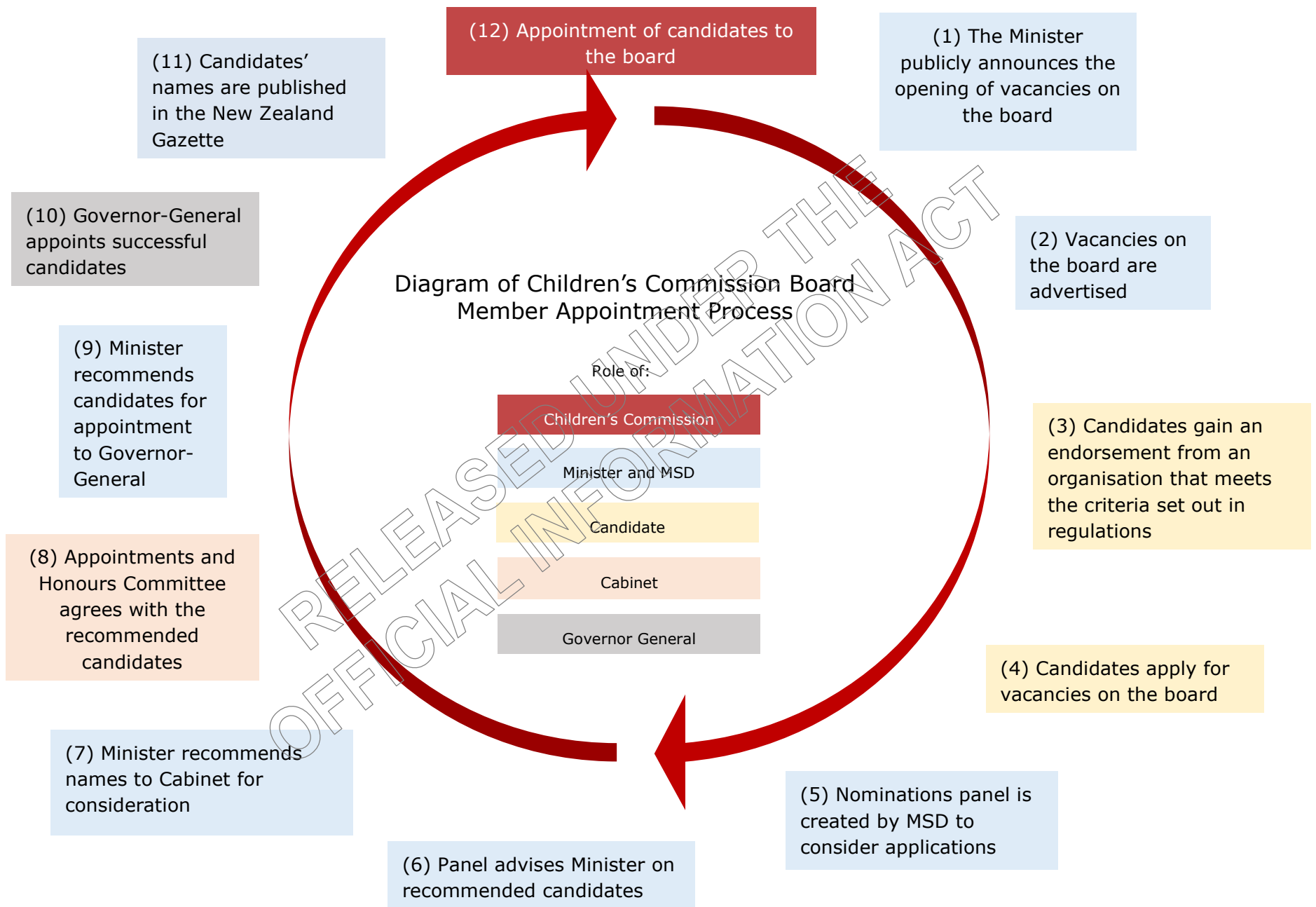
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Report

Date: 19 May 2020

Security Level: IN CONFIDENCE

To: Hon Carmel Sepuloni, Minister for Social Development

Proposed shape of the *Children's Commission and Oversight of Oranga Tamariki System Legislation Bill*

Purpose of the report

- 1 This report seeks your decision on two options for the shape of the legislation governing the oversight of the Oranga Tamariki system. There could be one overarching Act for the three functions of advocacy, monitoring and complaints (in line with the current Cabinet decision), or two separate Acts - one that would deal with the functions of the Children's Commissioner and another focussed on the monitoring and complaints functions.

Executive summary

- 2 In March 2019 Cabinet agreed to have one overarching Act that would bring together, in one place, the three oversight functions of:
 - system-level advocacy for all New Zealand children and young people
 - investigation of complaints in the Oranga Tamariki system
 - independent monitoring and assurance of the Oranga Tamariki system.
- 3 The main advantage of a single Act for the oversight of the Oranga Tamariki system (the Oversight Act) is that it will reflect the importance of having cohesive, independent oversight of the Oranga Tamariki system, with the common purpose of improving the wellbeing of children and young people. In addition, it would aid public understanding of the three functions and reduce the risk of various parts being diluted over time due to the ad-hoc amendment of different Acts.
- 4 Cabinet also agreed to repeal the Children's Commissioner Act 2003 (the CC Act) and to re-establish the Children's Commissioner and relevant provisions (with modifications) in the Oversight Act and associated regulations.
- 5 The repeal of the CC Act was previously considered to be relevant to the Children's Commissioner undertaking the monitoring role in future. Our previous advice was that the relationship between the Minister and the monitor would preferably be spelt out in the same Act that governs the Commissioner. s9(2)(h)
[REDACTED]
- 6 While the issue of repeal of the CC Act is a technical one, it does have symbolic and practical implications. Based on engagement with the Children's Commissioner and his staff on the draft Bill, we expect that the proposed repeal of the CC Act will draw significant push back at Select Committee stage from child rights groups, academics and NGOs. Transferring provisions (with modifications) of the CC Act into the Oversight Act is

likely to be seen as diminishing the overall status, focus and importance of the Children's Commission. This could delay progress of the Bill.

- 7 Further, constructing new legislation that brings together the respective roles, responsibilities and powers of the entities assigned the three oversight functions has proven to be challenging in practice.
- 8 The advantage of two Acts is that the independence of the status of the Children's Commission and its empowering legislation will be maintained and it will reduce opposition to the Oversight Bill. The main disadvantage is that users who have an interest in the Oranga Tamariki System and child rights will have to traverse more than one piece of legislation. Having two Acts will also mean a delay in enactment.
- 9 On balance we recommend the CC Act is not repealed, and is either be amended or repealed and replaced with a new CC Act (given the amendments are likely to be significant). A separate oversight Act would focus on the monitoring and complaints functions (and amending associated legislation), although some common provisions would apply to the Commission.
- 10 This could be achieved either through introduction of a Bill that would be divided at a later stage (at Select Committee or the Committee of the Whole), or we could introduce cognate Bills, one for Oversight of the Oranga Tamariki system and the other for the Children's Commission. We will seek further advice from the Parliamentary Counsel Office if a decision is made to have separate Acts for Oversight and the Children's Commission.
- 11 Cabinet has authorised you, in consultation with other Ministers as appropriate, to make decisions on related policy matters or determine additional policy matters to enable the progress of drafting in order to finalise the Bill. However, given the significance of our recommendation, it may be prudent for this item to be considered by Cabinet Social Wellbeing Committee so that our drafting instructions to Parliamentary Counsel Office can clearly reflect Cabinet decisions.

Recommended actions

It is recommended that you:

- 1 **note** we are currently working to a timeline that would see the Bill introduced before the election but have identified a risk with the current approach that may see the Bill delayed at Select Committee
- 2 **agree** that the Children's Commissioner Act 2003 either be amended, or repealed and replaced, and that the separate Oversight Act focus on the monitoring and complaints functions (recommended)

OR

- 3 **agree** that there be a single independent oversight Act covering all proposed oversight functions (in line with previous Cabinet agreement)

AGREE / DISAGREE

- 4 **note** that, if you agree with recommendation 2, there will be timing implications for the introduction of the Oversight Bill and the Bill for the Children's Commission, with a delay of approximately two to three months

- 5 9(2)(h) [REDACTED]
OIA [REDACTED]
[REDACTED]

AGREE / DISAGREE

AGREE / DISAGREE

6 **agree** to provide a copy of this paper to the Minister for Children and invite her comment before making your decisions


AGREE / DISAGREE

7 **agree** to discuss the contents of this report with officials.

AGREE / DISAGREE

Lachlan Cartwright
Policy Manager – Child and Youth
Social Development, Child and Youth Policy

Date



Hon Carmel Sepuloni
Minister for Social Development

26/06/20
Date

Cabinet has agreed to repeal the Children's Commissioner Act 2003

- 12 On 25 March 2019, Cabinet agreed (CAB-19-MIN-0113 refers) that oversight for the Oranga Tamariki system and children's issues should be strengthened 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 Oranga Tamariki Act and/or children in the care or custody of the State.
 - Independent monitoring and assurance of the operations and obligations delivered under the Oranga Tamariki Act and associated regulations.
- 13 Cabinet agreed that new primary legislation 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.
- 14 Cabinet also agreed that the Bill would repeal the CC Act and continue the provision of dedicated arrangements for the oversight of the Oranga Tamariki Act and children's issues. This included existing advocacy functions and powers, such as giving effect to the United Nations Convention on the Rights of the Child in New Zealand.

Repeal was considered relevant to the Children's Commission undertaking the monitoring function in the future

- 15 Cabinet has agreed in-principle that the monitoring function will transfer to the Commission, once a robust monitoring function is established and a new legislative framework is in place (CAB-19-MIN-0113 refers).
- 16 We advised at the time that, for the Children's Commissioner to undertake the independent monitoring function and have the close ministerial relationship envisaged, the relationship would preferably be spelt out in the same Act that governs the Commissioner - but this is not necessary. s9(2)(h)
- [REDACTED]

... but there are risks identified with this approach...

- 17 Cabinet directed MSD to consult with Oranga Tamariki, the Ministry of Justice, Te Puni Kōiri, Te Arawhiti, the Office of the Ombudsman and the OCC on the development of the legislative proposals in line with Cabinet's decisions on the paper under CAB-19-SUB-0113. This included releasing the draft paper for the Cabinet Legislation Committee and the draft legislation to them (recommendation 39 CAB-19-MIN-0113 refers).
- 18 MSD has now engaged with key stakeholders on the draft Bill. Discussions have focussed on how to best implement Cabinet's decisions, and most of the feedback relates to technical and drafting matters consistent with these previous Cabinet decisions.
- 19 However, discussions with the OCC and Children's Commissioner highlight that the repeal of the CC Act is likely to be a significant issue raised throughout the legislative passage of the Bill. The repeal of the CC Act is likely to attract opposition from child rights groups, academics and NGOs at public select committee hearings on the Bill. These stakeholders lobbied for many years to get the stand-alone Children's Commission focused on children. Further, merging the Commission into the combined Act is likely to be seen as diminishing the overall status, focus and importance of a Children's Commission. We note we have not had discussions on this matter directly with any of the groups mentioned above.
- 20 We noted the risk with the repeal of the CC Act in a report dated 16 August 2019 and recent engagement with the Children's Commissioner and his staff confirms this risk remains (REP/19/8/768, paragraphs 34 - 38 refer). This advice also sought your agreement to amend the title of the oversight Bill to include the Children's Commissioner. It is now understood that some sector groups are likely to view this move as tokenistic.

- 21 A further issue identified through consultation is that constructing new legislation, that brings together the respective roles, responsibilities and powers of the three primary oversight bodies, has proven challenging in practice. A key reason for this is that the remit of the Children's Commission is broader than the other two independent oversight functions. The former is focussed on the welfare, interests and rights of all children and young people in Aotearoa/New Zealand whereas the latter two are directed at children in the Oranga Tamariki system.
- 22 While some principles, duties and provisions work for complaints and monitoring functions, it has generally proven difficult to link the purpose for systemic advocacy with other purposes (that are more narrowly focused on just Oranga Tamariki system oversight) in the one Act. Stakeholders have commented that this has caused the Bill to be awkward in places. It has now become apparent that greater clarity for the overall system – the rationale for this approach – is unlikely to be achieved by having a single piece of legislation.
- 23 There is also a risk that the existing law contained in the CC Act, including the roles and responsibilities of the Children's Commissioner that are not directly related to the Oranga Tamariki system, will be overshadowed or inadvertently changed by the adoption of modern drafting conventions or drafting errors.
- 24 The Oversight Act would still have common provisions that may apply to the Children's Commission. We will need to do some work to identify these but expect they will include information sharing, the common principles and Treaty of Waitangi provisions.

... and we now consider that this is not necessary

- 25 It is now considered possible that the CC Act could simply be amended or repealed and replaced. The resulting legislation would focus on advocacy for children and governance matters. A separate piece of legislation would focus on the independent monitoring and complaints functions for the Oranga Tamariki system. The Children's Commission could be assigned additional purpose and functions by the Minister.
- 26 Given the breadth of the Children's Commissioner's responsibilities outside the Oranga Tamariki system¹ and the ability to achieve the policy intent associated with keeping the monitoring function autonomous while in a separate Act, the rationale for having one overarching Act can still be achieved with two separate Acts.

There are two options for legislative change...

- 27 During the policy development process two main options for legislative change were considered:
- Option 1 - the status quo option previously agreed by Cabinet. This option is to create a single independent oversight Act covering all proposed oversight functions.
 - Option 2 - to amend (not repeal) or repeal and replace the CC Act and have an Oversight Act that focuses on monitoring and complaints functions (and amending associated legislation) with some common provisions that apply to the Children's Commission. We could either introduce a Bill that would be divided at a later stage (at Select Committee or the Committee of the Whole), or we could introduce cognate Bills, one for Oversight of the Oranga Tamariki system and the other for the Children's Commission.
- 28 Both options require relatively minor amendments to the constitutionally significant Ombudsman's Act 1975 to ensure that the complaints function applies to the broader

¹ For example, the responsibility to advocate for all New Zealand children through UNCROC monitoring.

Oranga Tamariki system that includes NGOs and iwi authorities, and that it operates in a way that is sensitive to the needs of children.

29 There a number of pros and cons associated with both options, as outlined below:

Options	Pros	Cons
Option 1 - A single independent Oversight Act (status quo).	<p>Easier for users to navigate (for those who have an interest in how independent oversight is expected to work in New Zealand for children and young people).</p> <p>Easier to administer as it would reduce unintended overlap of functions, or gaps in the function and encourage collaboration.</p> <p>Easier to amend and review and reduce risk of separate acts being diluted overtime through ad hoc amendments as one Act will encourage proper consideration of the whole framework when amending it.</p>	<p>CC Act is considered by many stakeholders to be symbolic and its repeal is likely to attract opposition from the child rights groups, academics and NGOs at public select committee hearings on the Bill.</p> <p>Existing advocacy functions that are not directly related to the Oranga Tamariki system and children in state care may be overshadowed or inadvertently changed by the adoption of modern drafting conventions or drafting errors.</p>
Option 2 - Two Acts, the Children's Commissioner Act 2003 and a separate Oversight Act focussing on the monitoring and complaints functions (and amending associated legislation) with some common provisions that may also apply.	<p>The independence of status of the Children's Commission and its empowering legislation is retained.</p> <p>Will treat it in a manner consistent with that taken for the Ombudsman's Act.</p> <p>Reduce opposition to the Bill².</p>	<p>Users may have to traverse more than one piece of legislation to understand the legislative framework.</p> <p>Ad-hoc amendments may be made to the separate pieces of legislation over time, without proposer consideration of the whole framework.</p>

30 In preparing this advice we have consulted with Oranga Tamariki, the Interim Monitor, Office of the Children's Commissioner, the State Services Commission and the Office of the Ombudsman. We have also sought advice from the Legislation Design Advisory Committee. Almost all stakeholders have no objection to the structure of the legislation being re-considered, agree that the matter should be resolved before introduction and are generally supportive of refreshing rather than repealing the CC Act.

...and we now recommend that the Children's Commissioner Act 2003 is not repealed

31 Taking the above assessment of the comparative risks and benefits of the options into account - particularly a deeper appreciation of the symbolic nature of the CC Act and likely strong opposition to its repeal and re-establishment in the dedicated oversight Act - we do not believe benefits outweigh the risks in pursuing the current approach. Further, we consider that the form of the legislation is not as important as whether it can be implemented, and there are other examples of legislation where legislative functions of an entity reside in different statutes. For example, the Office of the Ombudsman has

² There would still likely be some opposition to amendments to the CC Act contained in the Bill.

functions and powers in the Ombudsmen Act 1975, the Official Information Act 1982 and the Protected Disclosures Act 2000.

- 32 We recommend that the CC Act be amended or repealed and replaced and that the separate oversight Act focus solely on monitoring and complaints functions (and amending associated legislation) with some common provisions that apply.
- 33 Provided you agree with this recommendation, we will work with PCO and the OCC on the best approach to progress the changes alongside the Oversight Bill. This approach will have implications for drafting and will delay introduction of the Bill by around two to three months. This delay will impact on the enactment of the legislation, although not significantly given the select committee considering the legislation is not likely to call for submissions until after the general election in any case.
- 34 We had intended to submit the draft Bill and the associated paper to the Legislation Committee for consideration by mid - July. However, as we will need to obtain Cabinet approval, issue further drafting instructions and consult with key agencies on the changes, there is likely to be a delay of around two to three months which means the Bill would not be ready for formal consultation until after the election and ready for introduction in early 2021. It is likely that the Oversight legislation will not be enacted until the end of 2021. If the early consultation identifies other issues that would benefit from consideration by that Committee, we could use the opportunity to do so.

The Ombudsman has raised concerns about the delay associated with this

- 35 The Chief Ombudsman has written to you expressing his concern for change in approach (letter of 12 May 2020 refers). Of particular concern is the expected delay to the introduction of the Bill from the proposal.
- 36 We note that even without a restructure of the Bill the timeframe is extremely tight due to recent and ongoing delays. We may not be ready to introduce the Bill until after the election regardless of whether the Bill is restructured.
- 37 We are continuing to progress the work in relation to the draft Bill as quickly as possible, however the ability of stakeholders to respond promptly within discussed timeframes has delayed our progress.
- 38 An example of this is the draft bill we are currently consulting on was provided to the Office of the Ombudsman on 9 March with feedback due with us by 20 March, so that drafting instructions could be provided to PCO by 23 March. Written feedback on the Bill was received from the Office of the Ombudsman on 1 May, and an initial meeting to discuss the feedback was held on 4 May. This has further delayed discussions to resolve issues that have been identified.

Next steps

- 39 Cabinet has authorised you, 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 drafter in order to finalise the Bill. However, given the significance of the decision it may be prudent for the item to be considered by Cabinet Social Wellbeing Committee.
- 40 Provided you agree with the recommendations in this paper, a Cabinet paper will be prepared for consideration and referral to the Cabinet Social Wellbeing Committee. Alternatively, you may wish to discuss this report with officials.

References: REP/20/5/537, A12523287

Author: Out of scope, Contractor, Child and Youth Policy

Responsible manager: Lachlan Cartwright, Policy Manager, Child and Youth Policy

Aide-mémoire



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Meeting

Date: 29 May 2020 **Security Level:** IN CONFIDENCE
For: Hon. Carmel Sepuloni, Minister for Social Development
File Reference: A12543288

Meeting with the Minister for Children

Meeting/visit details 4pm-5pm, 5 June 2020, Executive Wing 5.1

Expected attendees Hon. Carmel Sepuloni, Minister for Social Development
Hon. Tracey Martin, Minister for Children
Gráinne Moss, Chief Executive, Oranga Tamariki
TBC (Oranga Tamariki Official)
Debbie Power, Chief Executive, Ministry of Social Development
Simon MacPherson, Deputy Chief Executive Policy, Ministry of Social Development

Purpose of meeting/visit The Minister for Children has asked for a meeting to discuss progress of the *Children's Commission and Oversight of Oranga Tamariki System Legislation Bill* (the Bill)

Background In March 2019 Cabinet agreed to have one overarching Act that would bring together, in one place, the three oversight functions of:

- system-level advocacy for all New Zealand children and young people
- investigation of complaints in the Oranga Tamariki system
- independent monitoring and assurance of the Oranga Tamariki system.

Cabinet also agreed to repeal the Children's Commissioner Act 2003 (the CC Act) and to re-establish the Children's Commissioner and relevant provisions (with modifications) in the Oversight Act and associated regulations.

The “One Act” and the concerns/risks associated with repeal

We recently reported to you on the shape of the Bill (REP/20/5/537 refers). In short, there are two main risks with the approach previously agreed by Cabinet to have one Act:

- there is a high likelihood that there will be significant concerns expressed by stakeholders to the CC Act being repealed and this may delay the Bill at the select committee stage
- constructing new legislation that brings together the respective roles, responsibilities and powers of the entities assigned the three oversight functions has proven to be challenging in practice.

The report provided two options:

- Continue with a single Act (*current Cabinet decision*)
- Have two Acts – amend or repeal and replace the Children’s Commissioner Act 2003, and a separate Oversight Act focussing on the monitoring and complaints functions with some common provisions that may also apply (*our recommended option*).

The pros and cons of these options are summarised in **Appendix 1**.

If you agree with our recommended approach, the introduction of the Bill would be delayed by approximately two to three months. This allows for Cabinet approval of the revised approach and re-drafting of the Bill. This would most likely mean the Bill would not be introduced into the House until late in 2020 (however, continuing may mean a delay at a later stage).

We understand Oranga Tamariki support a delay as it allows additional time to work through minor policy and technical drafting matters that have been raised through the consultation process.

We are still working towards introduction of the Bill before the election and have confirmed with PCO our position on the legislative work programme.

Talking point: *I’m interested in hearing your thoughts on the options of either a single Act or two Acts.*

The decision on the location of the monitoring function

Cabinet has agreed that MSD would provide a plan, timeframes, and advice on the readiness for the transfer of the Monitoring function to its permanent location in March 2021 (CAB-19-MIN-0113 refers). The in-principle agreement is that the Monitor would transfer to the OCC once the function was established and a legislative framework was in place. Further Cabinet agreement will be needed to confirm the in-principle agreement as Cabinet did not delegate final authority for the decision to Ministers.

9(2)(g)(i)

to

Work is underway between MSD and the OCC to identify possible issues with the Monitor function being transferred, and to develop advice on how these issues can be mitigated/resolved. This will include advice on any potential alternative locations (noting that all options have a variety of trade-offs and considerations). These alternative locations include departmental options, such as the Education Review Office (ERO) or a new statutory entity which would require its own legislation to be established.

The draft Bill does not expressly confirm where the monitoring function is located (so as to be future proofed), and therefore a decision is not required now to inform the draft Bill. However, a decision on the location will be required to inform and support the implementation plan that we will provide in March 2021. We will be in a position to provide advice on this by the end of August.

Talking point: *Work is underway to look at the issues associated with the Monitoring function moving to the OCC and that advice is coming at the end of August including possible alternatives*

**Proposed
Governance
arrangements
for the future
Children's
Commission**

We understand that Oranga Tamariki consider the governance decisions should not precede a decision on the long-term home of the Monitor.

You recently agreed to the governance arrangements for the proposed Children's Commission (REP/20/3/266 refers). This included the roles and responsibilities of members of the board, the composition of the board, partnering effectively with Māori, and the appointments process. A summary of the decisions is attached in **Appendix 2**.

The new governance arrangements that you have agreed to relate to the Children's Commission's advocacy function only. These arrangements will be included in the legislation to reflect the State Services Commission's direction to move away from Commissioner sole models more generally.

Delaying a decision on the governance of OCC until a decision on the long-term home of the Monitor would delay introduction of the Bill unnecessarily. The governance arrangements as introduced can be refined at a later stage if necessary, should it be confirmed that OCC receive the Monitor function. The Children's Commissioner supports this approach.

The Bill will need to reinforce functional separation of the advocacy and monitoring functions (should both functions go to the OCC), to recognise existing tensions.

Talking point: *The decision to design the governance model around advocacy is a pragmatic one as it allows us to introduce*

the model into legislation, it can be refined later, should the Monitor move to the OCC in the future. It also allows for the opportunity to move away from the Commissioner-sole model.

How the Treaty obligations should be reflected in oversight legislation

In recognition of both the Treaty partnership 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 through the provision of specific duties on the oversight bodies. (CAB-19-SUB-0113).

To ensure that the oversight bodies give effect to the Treaty in a practical way, Cabinet agreed to a range of duties (subject to further developments during the process of drafting the Bill). These are outlined in **Appendix 3**.

The duties agreed by Cabinet (and reflected in the draft Bill) were developed in consultation with the OCC, Office of the Ombudsman, Te Puni Kōkiri, the Kahui group and technical advice from Māori lawyers. The duties were developed to align with section 7AA of the Oranga Tamariki Act 1989¹ where possible and will ensure the oversight bodies can demonstrate their commitment to the Treaty in a practical way.

We have received a significant amount of feedback on these provisions in the current draft of the Bill (however, they are minor technical and drafting issues that are consistent with the Cabinet minute). We have also received advice from LDAC and PCO on improving the draft provisions.

We are working with PCO on re-writing these provisions to address feedback. It is critical that, once we have a redraft, all stakeholders have the chance to review the wording proposed.

We recommend that these provisions are not discussed in the meeting given the need to ensure adequate stakeholder buy-in and workability of the new draft wording. In addition, the Treaty clauses have linkages with other provisions in the Bill, and therefore cannot be discussed in isolation.

Talking point: *Officials are working with PCO to resolve technical drafting issues, and I understand the new draft provisions will be shared with key stakeholders, including Oranga Tamariki, to ensure that they reflect the Cabinet decisions and are workable. I propose that we delay discussion on this for the time being.*

Any significant issues raised by stakeholders

Recent consultation on the draft Bill has raised a number of minor drafting and practical issues with the draft Bill. The issues raised are mostly consistent with Cabinet decisions.

¹ Duties of the Chief Executive of Oranga Tamariki in relation to the Treaty of Waitangi (Tiriti o Waitangi).

**in consultation
on the draft
Bill**

Jurisdiction of the Children's Commissioner

For children in care the Commissioner's jurisdiction currently includes those up to age 18. Cabinet has agreed that the three oversight functions apply to children and young people under 25 years, as appropriate (CAB-19-MIN-0113 refers).

Due to resource concerns, the OCC's preference is that the extended age jurisdiction – children and young people under 25 years – be limited to those people that are in state care (not *all* people in New Zealand). A Cabinet decision would be required to make any further change to the age jurisdiction.

Information sharing

Oranga Tamariki is primarily concerned that the information sharing provisions in the draft Bill are too broad, and that there are not enough protections and constraints on the Monitor in relation to the collection, protection and use of information obtained.

We understand that Oranga Tamariki may wish to use the meeting as a mechanism to advance a review of the information sharing and access provisions with a view to restrict them.

Conversely, the Monitor has stressed the importance of timely access to information. In addition, the Monitor has requested that some of the detail – originally proposed for the regulations – be included in the Bill. An example of this is that, for transparency, the Monitor would like to include a new provision in the Bill detailing tools and approaches that the Monitor can use.

We note the current information sharing and access provisions are enabling and consistent with the principles of the Privacy Act.

The majority of issues relate to how information sharing occurs in practice. This will be governed by information sharing rules and codes of practice that will be developed by the oversight bodies and Oranga Tamariki. Both an operational and legislative PHRaE² are in development to support this and Oranga Tamariki will be involved. Oranga Tamariki have now received a draft version of the operational PHRaE for comment.

The Privacy Commissioner will be consulted on the next iteration of the Bill, and we will continue to work closely with Oranga Tamariki and the Interim Monitor to address their respective concerns.

Legal and technical issues

A number of detailed legal and technical issues have been raised in feedback from the Ombudsman on 1 May. These matters

² The Privacy, Human Rights and Ethics Framework

largely relate to how the Bill reflects and dovetails with the Ombudsmen Act 1975.

We are continuing to progress the work in relation to the draft Bill as quickly as possible, however the ability of stakeholders to respond promptly within discussed timeframes has delayed our progress.

Talking points: *I understand COVID-19 has delayed stakeholders, such as the Ombudsman and the Ministry of Justice, providing feedback on the Bill, but that our officials are working constructively together to resolve issues.*

I understand that Oranga Tamariki officials have raised some concerns around the information sharing provisions in particular, and that many of these issues will be addressed either in the next iteration of the Bill, or through the operational rules that will be developed between Oranga Tamariki and the Oversight bodies.

Other issues likely to be raised at the meeting

We understand that Oranga Tamariki may raise the issue of the additional cost associated with meeting monitoring obligations. In particular, Oranga Tamariki may seek a verbal commitment from you (and MSD) to assist them in meeting these obligations, including seeking additional funding.

The Monitor is committed to working with Oranga Tamariki so that information from their assurance system can be shared efficiently. The Monitor will also involve Oranga Tamariki in the planning of fieldwork, which is used to validate data from Oranga Tamariki, and better understand performance metrics. Field work will include visits to Oranga Tamariki sites (at least once every three years), but also to other service providers such as schools, health providers etc.

MSD will continue to work with Oranga Tamariki to ensure that monitoring requirements are clear, practical and workable. The monitoring obligations are aligned with Oranga Tamariki's existing legislative functions. How Oranga Tamariki resources are allocated to meet their legislative obligations is an operational matter for Oranga Tamariki.

Talking point:

I understand that Oranga Tamariki may incur more costs to facilitate Monitoring. However, the resourcing of this is an operational matter for Oranga Tamariki.

REP/20/5/604

File ref: A12543288

Author: Out of scope, Graduate Policy Analyst, Social Development, Child and Youth Policy

Responsible manager: Lachlan Cartwright, Policy Manager, Social Development, Child and Youth Policy

Appendix 1: Options for the Oversight legislation

Options	Pros	Cons
Option 1 - A single independent Oversight Act (<i>Cabinet agreed approach</i>).	<p>Easier for users to navigate (for those who have an interest in how independent oversight is expected to work in New Zealand for children and young people).</p> <p>Easier to administer as it would reduce unintended overlap of functions, or gaps in the function and encourage collaboration.</p> <p>Easier to amend and review and reduce risk of separate acts being diluted overtime through ad hoc amendments as one Act will encourage proper consideration of the whole framework when amending it.</p>	<p>CC Act is considered by many stakeholders to be symbolic and its repeal is likely to attract opposition from the child rights groups, academics and NGOs at public select committee hearings on the Bill.</p> <p>Existing advocacy functions that are not directly related to the Oranga Tamariki system and children in state care may be overshadowed or inadvertently changed by the adoption of modern drafting conventions or drafting errors.</p>
Option 2 - Two Acts, the Children's Commissioner Act 2003 and a separate Oversight Act focussing on the monitoring and complaints functions (and amending associated legislation) with some common provisions that may also apply.	<p>The independence of status of the Children's Commission and its empowering legislation is retained.</p> <p>Will treat it in a manner consistent with that taken for the Ombudsman's Act.</p> <p>Reduce opposition to the Bill³.</p>	<p>Users may have to traverse more than one piece of legislation to understand the legislative framework.</p> <p>Ad-hoc amendments may be made to the separate pieces of legislation over time, without proposer consideration of the whole framework.</p>

³ There would still likely be some opposition to amendments to the CC Act contained in the Bill.

Appendix 2: Governance arrangements for the proposed Children's Commission

You agreed to the following governance recommendations:

- the Commissioner for advocacy will be called the Children's Commissioner. Other Commissioners would have titles that specifically relate to their function - for example the Commissioner for the monitor function could be called the Independent Monitoring Commissioner
- the Children's Commissioner role will be advertised and appointed as up to a full-time position, and they would derive their authority from the board, and the executive leadership of the Commission would report to the board rather than a single Commissioner
- the remaining Commissioners (who are not allocated a specific oversight function) be advertised and appointed as part-time positions
- the minimum board size is increased from two to three members, with the maximum board size at six members (as previously agreed)
- on top of the usual competencies required for board members, the board must have the capacity and capability to:
 - uphold the Treaty of Waitangi, including its articles and principles
 - partner effectively with Māori
 - understand te ao Māori and advocate from a basis of kaupapa Māori and mātauranga Māori (so that they can inform the basis of the work programme)
 - take a tikanga Māori approach to meeting procedures and decision making
- at least 50 per cent of the board have experience of mātauranga Māori, and represent the interests of Māori, with the required skills and leadership expertise to reflect the needs of tamariki and rangatahi of interest to the Commission
- candidates applying for a position on the board must have the endorsement of a relevant organisation that fulfils criteria to be contained in regulations
- applications to the board will be considered by a nominations panel convened by the Chief Executive of MSD

Appendix 3: duties agreed in December 2019 (CAB-19-MIN-0687 recommendation three refers)

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

Aide-mémoire



**MINISTRY OF SOCIAL
DEVELOPMENT**
TE MANATŪ WHAKAHIATO ORA

Cabinet Committee Oral Item

Date: 16 July 2020

Security Level: Cabinet Sensitive

For: Hon Carmel Sepuloni, Minister for Social Development

REP/20/7/810

Shape of the Children's Commission and Oranga Tamariki System Oversight Legislation

Cabinet Committee Social Wellbeing Committee

Date of meeting 22 July 2020

Minister Hon Carmel Sepuloni, Minister for Social Development

Proposal This aide memoire supports your oral update at the Social Wellbeing Committee (SWC) on 22 July 2020 concerning your decision to retain provision for a Children's Commission and advocacy for all children in a dedicated Act and provide for oversight of the Oranga Tamariki system in separate legislation.

Cabinet previously agreed to a single Act which would repeal the existing Children's Commissioner Act 2003 On 25 March 2019 Cabinet agreed to have one overarching Act that would bring together, in one place, the three functions of:

- system-level advocacy for all New Zealand children and young people
- investigation of complaints in the Oranga Tamariki system
- independent monitoring and assurance of the Oranga Tamariki system [CAB-19- MIN-0113 refers].

At the time, it was noted that the main advantage of a single Oversight Act (the Act) is that it would reflect the importance of having cohesive, independent oversight of the Oranga Tamariki system and children's issues with the common purpose of improving the wellbeing of children and young people in New Zealand. In addition, the Act would aid public understanding of the three functions and reduce the risk of various parts being diluted over time due to the ad-hoc amendments of different Acts.

Cabinet agreed to repeal the Children's Commissioner Act 2003 (the CC Act) and to re-establish the Children's Commissioner and relevant provisions (with modifications) in the Act and associated regulations [CAB-19-MIN-0113 recommendations 36.1 and 37 refers].

Key issues

You have agreed to amend the CC Act and to have a separate Oversight Act

Cabinet has authorised you, in consultation with other Ministers as appropriate, to make decisions on related policy matters or determine additional policy matters to enable the progress of drafting in order to finalise the Bill.

On 19 May 2020 you agreed that the Children's Commissioner Act 2003 either be amended, or repealed and replaced, and that the separate Oversight Act focus on the monitoring and complaints functions, as recommended by MSD.

Advice from consultation supports the retaining of a dedicated legislation for the Children's Commissioner

MSD has engaged with key stakeholders on the draft Bill. Discussions have focused on how to best implement Cabinet's decisions, and most of the feedback relates to technical and drafting matters consistent with Cabinet decisions.

Through consultation on the development of detailed policy to enable strengthening of oversight of the Oranga Tamariki system, the importance of retaining a dedicated legislation for the Children's Commissioner has become clear.

It has also become clear that the child's rights sector put in considerable effort to having the Children's Commissioner separated from the Oranga Tamariki Act 1989, and the value they see in a dedicated legislation for the Children's Commissioner and an Act focused on advocating for and giving effect to the realisation of rights for all New Zealand's children.

A further issue identified through consultation is that constructing new legislation, that brings together the respective roles, responsibilities and powers of the three primary oversight bodies, has proven challenging in practice. A key reason for this is that the remit of the Children's Commission is broader than the other two independent oversight functions. The former is focused on the welfare, interests and rights of all children and young people in Aotearoa/New Zealand whereas the latter two are directed at children in the Oranga Tamariki system.

In proposing this change, MSD consulted with key agencies including Oranga Tamariki, the Interim Monitor, Office of the Children's Commissioner, the State Services Commission and the Office of the Ombudsman. We have sought advice from the Legislation Design Advisory Committee (LDAC). LDAC's primary considerations have been to ensure that there is role clarity for each of the three functions within legislation. Almost all stakeholders have no objection to the structure of the legislation being re-considered, agree that the matter should be

resolved before introduction and are generally supportive of refreshing rather than repealing the CC Act.

The Ombudsman is the only stakeholder who has objected, largely on the basis of the expected delay to the introduction of the Bill from the proposal.

While this approach will have implications for drafting and will delay introduction of the Bill by around two to three months, this delay will not be significant. Also, a delay now is likely to reduce the likelihood of a delay at the Select Committee stage of the Bill.

Having one Act would risk the functions of the Children's Commissioner being overshadowed by those of the oversight of the Oranga Tamariki system

There is a risk that the focus of the Children's Commissioner's role with all New Zealand's children¹ may be overshadowed by providing for this important function within legislation predominantly focused on the Oranga Tamariki system.²

Given the breadth of the Children's Commissioner's responsibilities outside the Oranga Tamariki system³ and the ability to achieve the policy intent associated with keeping the monitoring function autonomous while in a separate Act, the rationale for having one overarching Act can still be achieved with two separate Acts.

See **Appendix A** for a full breakdown of the analysis for progressing with the one Oversight Act or amending the CC Act and having a separate Oversight Act.

Legislative implications

There are various options for progressing the legislation. MSD officials will work with Parliamentary Counsel Office and the Office of the Children's Commissioner on the best approach to progress the Bill. This decision will be confirmed in a future Cabinet paper prior to the introduction of the Bill.

The legislation will be ready for formal consultation after the election and ready for introduction in early 2021. It is likely that the Oversight legislation will be enacted before the end of 2021.

Financial implications

There are no financial implications associated with the proposal as the proposal does not extend the scope of the March 2019 Cabinet decisions.

1 Section 12 of the CC Act provides the functions of the Children's Commissioner and includes a broad remit for all New Zealand's children.

2 The prescribed functions in section 13 of the Act also has a focus on children in care and custody in the Oranga Tamariki System.

3 For example, the responsibility to advocate for all New Zealand children through UNCRC monitoring.

Talking points

Original agreement to repeal the CC Act

- In March 2019, Cabinet agreed to have one Act that would bring together, in one place, three oversight functions including: system-level advocacy for all New Zealand children and young people, complaints, and independent monitoring in the Oranga Tamariki system.
- The main advantage of having a single Act for the oversight of the Oranga Tamariki system was that it could reflect the importance of having cohesive, independent oversight, with a common purpose of improving the wellbeing of children and young people.
- As part of bringing together the three functions into one Act, Cabinet also agreed to repeal the existing Children's Commissioner Act 2003, and to re-establish the Children's Commissioner in the Oversight Act and associated regulations.

No longer repealing the CC Act

- I now consider that the Children's Commissioner Act should not be repealed and subsumed into one oversight Act. I consider that having one Act would risk the functions of the Children's Commissioner being overshadowed by those of the oversight of the Oranga Tamariki system.
- Advice that MSD has received from consultation has supported the division of functions into two separate Acts.
- I have agreed that the Children's Commissioner Act 2003 either be amended and that there would be a separate Oversight Act focused on the monitoring and complaints functions, as recommended by MSD.

Legislative timeframes

- Legislation will be ready for formal consultation after the election and will be ready for introduction in early 2021. It is likely that legislation will be enacted before the end of 2021.

Progress on the independent monitor

- Cabinet has agreed in-principle that the permanent home for the Monitor would be the Office of the Children's Commission (OCC).
- Further Cabinet agreement will be needed to confirm the in-principle decision as Cabinet did not delegate final authority for the decision to Ministers.
- Because the Oversight Bill does not expressly confirm where the Monitor function is located (so as to be future proofed), a decision on the final location of the Monitor is not required now to progress the Bill.
- That said, work is underway, led by MSD, to provide best advice in relation to the in-principle decision to transfer the Monitor function to the OCC.

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Appendix one – Options for progressing legislative changes

Options	Pros	Cons
Option one - A single independent Oversight Act (status quo).	<p>Easier for users to navigate (for those who have an interest in how independent oversight is expected to work in New Zealand for children and young people).</p> <p>Easier to administer as it would reduce unintended overlap of functions, or gaps in the function and encourage collaboration.</p> <p>Easier to amend and review and reduce risk of separate Acts being diluted overtime through ad hoc amendments as one Act will encourage proper consideration of the whole framework when amending it.</p>	<p>Children's Commissioner Act is considered by many stakeholders to be symbolic and its repeal is likely to attract opposition from the child rights groups, academics and NGOs at public select committee hearings on the Bill.</p> <p>Existing advocacy functions that are not directly related to the Oranga Tamariki system and children in state care may be overshadowed or inadvertently changed by the adoption of modern drafting conventions or drafting errors.</p>
Option two - Two Acts, the Children's Commissioner Act 2003 and a separate Oversight Act focussing on the monitoring and complaints functions (and amending associated legislation) with some common provisions that may also apply.	<p>The independence of status of the Children's Commission and its empowering legislation is retained.</p> <p>Will treat it in a manner consistent with that taken for the Ombudsman's Act.</p> <p>Reduce opposition to the Bill.⁴</p>	<p>Users may have to traverse more than one piece of legislation to understand the legislative framework.</p> <p>Ad-hoc amendments may be made to the separate pieces of legislation over time, without proposer consideration of the whole framework.</p>

⁴ There would still likely be some opposition to amendments to the CC Act contained in the Bill.