



Report

Date: 5 November 2020

Security Level: IN CONFIDENCE

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

Update briefing – Legislation to strengthen the oversight of the Oranga Tamariki System

Purpose of the report


- 1 The Ministry of Social Development (MSD) is leading the development of legislation to strengthen the oversight of the Oranga Tamariki system. This report outlines key aspects, including the different Ministerial responsibility arrangements for this work, and sets out next steps.
- 2 This report is to be read in conjunction with REP/20/11/1042 *Briefing on the establishment and operation of the Independent Children's Monitor* which provides an overview of the development of the Independent Children's Monitor since its establishment in July 2019, its current operations and priorities.

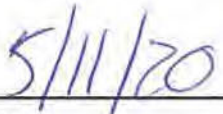
Recommended actions

It is recommended that you:


- 1 **Note** the Minister for Children appointed MSD as the Monitor (from 1 July 2019) under the Oranga Tamariki Act 1989 which includes monitoring functions under the National Care Standards (NCS) Regulations which the Minister for Children is responsible for
- 2 **Note** the Minister for Social Development is responsible for the development of the Oversight of Oranga Tamariki Systems Bill and the establishment of the Independent Monitor
- 3 **Note** that the administrative responsibilities relating to the Office of the Children's Commissioner have been allocated from the Minister for Children to the Minister for Social Development

- 4 **Refer** and **discuss** this briefing to the Minister for Children, as the Minister responsible for Oranga Tamariki, the core agency to be monitored through the Oversight Bill, for his information


Molly Elliott
General Manager
Social Development Child and Youth Policy


Date


Hon Carmel Sepuloni
Minister for Social Development and
Employment


Date

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A review of oversight arrangements for Oranga Tamariki found that strengthened oversight is needed

- 3 The Expert Advisory Panel which reviewed care and custody arrangements under Child, Youth and Family recognised that Ministers were overly reliant on the word of agencies providing services within the care and protection system. There was no trusted, independent source of information on matters of compliance and system performance.
- 4 In 2017, the Government agreed to strengthen independent monitoring of the system. Following the 2017 general election the Government agreed to continue this work and extend it to also strengthen systemic advocacy and independent complaints handling and investigations.
- 5 On 26 March 2019, Cabinet agreed to strengthen the system of independent oversight of the Oranga Tamariki system and children's issues in three core areas [CAB-19-MIN-0113 recommendation 4 refers].
 - 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 the application of the Oranga Tamariki Act 1989 and / or children in the care or custody of the State, which (following subsequent approval by the Offices of Parliament Commission) will be undertaken by the Office of the Ombudsman
 - Independent monitoring and assurance of the operations and obligations delivered under the Oranga Tamariki Act 1989 and associated regulations. The Minister for Children appointed MSD the Independent Monitor from 1 July 2019 to establish the function and made an in-principle decision to transfer the Monitor permanently to the OCC, once a robust function is established and a new legislative framework is in place.

Each of the three core areas has a different responsible agency

Systemic level advocacy

- 6 The systemic advocacy function will continue to be performed by the OCC. However, Cabinet has agreed that the governance of the OCC, currently a corporation sole with no deputy arrangements, should be updated irrespective of Cabinet's decision that the new independent monitoring function should transfer to it, as intended in principle [CAB-19-MIN-0687 recommendation 33 refers].
- 7 Broadly this is in recognition that it is no longer desirable for a single individual to be across the broad scope of children's issues, the Commissioner Sole model will be replaced with a Children and Young People's Commission.

Oversight and investigation of complaints

- 8 The Officers of Parliament Committee has agreed that the Ombudsman will conduct the complaints and investigations function. The Ombudsman's office is building dedicated capability to enable them to conduct their activities in a child-centred way.

Independent monitoring

- 9 In March 2019, Cabinet made an in-principle decision for the independent monitoring function to be transitioned to the OCC once it is established and a new legislative framework is in place [CAB-19-MIN-0687 refers]. Cabinet will need to make a final decision on the long-term home of the Monitor. MSD will provide you with further advice on this in the coming weeks.

There are responsible and delegated Ministers

- 10 The Minister for Children is specified in the Children's Commissioner Act 2003 as the responsible Minister for the Office of the Children's Commissioner. However, in

recognition of the conflicts that exist with this Minister also being responsible for Oranga Tamariki, responsibility has been allocated by the Minister for Children to the Minister for Social Development. We recommend you discuss the continuation of this arrangement with the Minister for Children. Because this allocation is specific to individual Ministers, a new allocation will need to be put in place if there is a desire for this arrangement to continue.

- 11 In March 2019, Cabinet decided 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 OCC, once a robust monitoring function is established and a new legislative framework is in place; [CAB-19-MIN-0113 recommendation 11 refers].
- 12 On 9 April 2019, the Minister for Children appointed MSD as the Monitor (from 1 July 2019) under the Oranga Tamariki Act 1989 which includes monitoring functions under the National Care Standards (NCS) Regulations which the Minister for Children is responsible for. This arrangement will be in place until new arrangements set out in the Bill come into force and the long-term home of the Monitor is confirmed. No further action is needed for this arrangement to continue.
- 13 We recommend you discuss these arrangements with the Minister for Children. Officials will be available to support this discussion.

Function	Responsible Minister	Arrangements	Rationale
Advocacy	Minister for Children	Allocated responsibility for administrative oversight (eg appointments, output agreements, appropriations management) to the Minister for Social Development. Continues to be responsible for receiving reports.	Potential conflict of interest with Minister for Children's responsibility for Oranga Tamariki
Independent monitoring	Minister for Children	The Minister for Children is responsible for all aspects of the monitor, including the appointment and performance of the monitor.	Under section 447A of the Oranga Tamariki Act 1989 the Minister for Children has statutory responsibility to appoint a monitor that is "independent of the department."
Development of the Bill	Minister for Social Development	The Minister for Social Development continues to be responsible for the development of the Oversight of Oranga Tamariki Systems Bill.	Potential conflict of interest with Minister for Children's responsibility for Oranga Tamariki

There has been considerable interest and extensive engagement to date

- 14 To support our engagement with Māori, MSD appointed a Kahui Group of respected, senior Māori figures. We conducted 21 hui around New Zealand with a broad spectrum of iwi and Māori individuals with a deep knowledge of and lived experience in, the care system.
- 15 We have continued to work closely with the Kahui Group in the development of all aspects of the Bill, but in particular to ensure the Crown's commitment to the Treaty

is provided for in a practical manner that recognises the context within which the Ombudsman and monitor will be working.

- 16 The Oranga Tamariki system is wide-reaching, therefore, the development of the legislation requires MSD to work closely with several key stakeholders, particularly the OCC, the Office of the Ombudsman, the Independent Monitor (hosted by MSD while it is being built and tested), Oranga Tamariki and Te Kawa Mataaho Public Service Commission. We have also engaged with the Department of the Prime Minister and Cabinet, Ministries of Health, Education and Justice at various points throughout the development process.
- 17 We are currently working with the Parliamentary Counsel Office and stakeholders on the draft legislation and aiming for introduction of the Bill in the first half of 2021, with enactment in early 2022.
- 18 We are anticipating public interest in oversight arrangements as the Bill progresses through the Select Committee process.

As Minister for Social Development, you agreed to divide the functions into two separate Acts

- 19 MSD engaged with key stakeholders during drafting of the Oranga Tamariki system Oversight Bill, with discussions focused on how to best implement Cabinet's decisions. It became clear from consultation that there was broad support for the retention of dedicated, separate legislation for the Children and Young People's Commission. In particular, this reflects that the role of the Children and Young People's Commission is for all New Zealand's children, not just those engaged with the Oranga Tamariki system.
- 20 On 29 July 2020, you took an oral item seeking support from the Cabinet Social Wellbeing Committee to retain an amended Children's Commissioner Act 2003 and separate oversight legislation which focuses on the monitoring and complaints functions. No concerns were raised, and the changes were noted.

Clarity is required on the scope of independent monitoring

- 21 Consultation on the Bill has highlighted that there is some uncertainty about the definition of the Oranga Tamariki System (and as a consequence, confusion about the scope of the monitoring function).
- 22 Cabinet should be re-engaged to provide clarity on the intended scope of monitoring. This is also an important consideration when Cabinet comes to consider the implications for the long-term home of the monitoring function (see further comment below).
- 23 Additionally, agencies likely to be substantively affected by a modified scope have not been consulted on the implications for them and their sectors.
- 24 We propose to report to you shortly on this issue and are seeking approval to undertake consultation on the scope of monitoring in November 2020, with a view to provide you with further advice by the end of 2020. We propose that this decision then be included in a paper to Cabinet (along with other minor amendments), before formal agency consultation on the Bill is undertaken.

Cabinet will need to make a decision on the Monitor's long-term home

- 25 In March 2019 Cabinet agreed that:
 - MSD be appointed the independent Monitor from 1 July 2019 to establish the monitoring function, with the in-principle intent that it is transferred to the OCC once a robust monitoring function is established and a new legislative framework is in place [CAB-19-MIN-0113 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 Services¹, in March 2021 on the plan, timeframes, and readiness for the transfer of the monitoring function [CAB-19-MIN-0113 recommendation 17 refers].
- 26 The immediate next step in terms of this work is for MSD to carry out consultation with key stakeholders, to inform our advice to you by the end of 2020. We will report to you shortly with more detail about the consultation we wish to undertake.
- 27 In keeping with Cabinet's directive, before making a decision on the long-term home of the monitor, you will need to discuss options with the Minister for Children, the Minister for the Public Service, Minister of Māori Development, the Minister for Whānau Ora, and the Prime Minister as the Minister responsible for the Child Poverty Reduction portfolio.
- 28 Following your discussions and a decision, Cabinet approval will be required before we can begin work on a transfer plan for the Monitor to its long-term home.

Next steps

- 29 The next steps for the development of the Bill includes decisions on:
- 29.1 residual policy matters (to be decided by you as Minister for Social Development)
 - 29.2 the long-term home of the Monitor function (to be decided by Cabinet)
 - 29.3 formal agency consultation on the Bill (to be agreed by you as Minister for Social Development, following final Cabinet decisions)
- 30 We have recently completed consultation with key stakeholders on the draft Bill. The immediate next step is to carry out further consultation with key stakeholders on the long-term home of the monitor and definition of the Oranga Tamariki System. We will report to you shortly with more detail on these issues prior to consulting widely.
- 31 We expect to report to you by the end of 2020 summarising technical amendments to the Bill arising from this consultation and seeking policy decisions.
- 32 Subject to your agreement and subsequent Cabinet approval, we will carry out formal agency consultation on the draft Bill early 2021, so that the Bill can be introduced in the first half of 2021.

Author: Out of scope Principal Analyst, Child and Youth

Responsible manager: Melissa Cathro, Policy Manager, Child and Youth

¹ Now the Minister for the Public Service.



Report

Date: 13 November 2020

Security Level: IN CONFIDENCE

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

Approval to consult on aspects of independent oversight of the Oranga Tamariki system

Purpose of the report

- 1 This report seeks your agreement to consult on proposals for the:
 - 1.1 statutory definition of the 'Oranga Tamariki system' for the purposes of inclusion in the Independent Oversight of the Oranga Tamariki System Bill.
 - 1.2 long-term home of the independent monitor.

Executive summary

- 2 In 2019, Cabinet made a range of high-level decisions designed to strengthen independent oversight of the Oranga Tamariki system. This included defining the scope of independent monitoring and an in-principal decision that, once built and tested by the Ministry of Social Development (MSD), the independent monitoring function would transfer to the Office of the Children's Commission.
- 3 In December 2019, further Cabinet Policy approvals were sought [CAB-19-MIN-0687 refers]. That Cabinet paper contained, in a footnote, a revised definition of the Oranga Tamariki system which extended the scope of independent monitoring. MSD considers Cabinet was not given advice on extending the scope; the change to the scope was also not formally minuted, therefore, the scope agreed in March 2019 stands. Lack of formal Cabinet consideration of a changed scope has caused confusion among agencies, therefore, we consider it is necessary for Cabinet to clarify and confirm the scope of monitoring. Table 1 proposes three options for the scope including:
 - 3.1 the current scope agreed by Cabinet in March 2019;
 - 3.2 an extension to the current scope that would also see systems that directly impact on children (eg health and education) more intensively monitored;
 - 3.3 a further extension which would also see systems that indirectly impact on children via directly impact on their family, (eg justice, immigration, social housing, unemployment, etc) more intensively monitored.
- 4 Further, with the benefit of further work and consultation undertaken over the past 20 months, MSD considers it is now time for Cabinet to confirm where it would like the long-term home of the independent monitor (the Monitor) to be. This paper presents five institutional options for the long-term home of the Monitor including:
 - 4.1 keeping the function within MSD;
 - 4.2 transitioning the function to the Office of the Children's Commission;
 - 4.3 transition the function to the Education Review Office;
 - 4.4 transitioning the function to the Health Quality and Safety Commission; or

4.5 establishing a new entity.

- 5 The purpose of this report is to seek your agreement to targeted consultation with interested and affected agencies, over November and early December 2020. Consultation would be on the proposals for the definition of independent oversight and proposals for institutional arrangements to provide the long-term home for the independent monitor.
- 6 We will provide you with a further report following consultation recommending a preferred approach to the scope for independent oversight and a preferred set of institutional arrangements for the long-term home of the Monitor. This report will be accompanied by a draft Cabinet paper, for Cabinet consideration in February/March 2021.

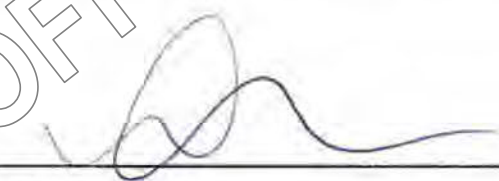
Recommended actions

It is recommended that you:


- 1 **note** there is a lack of clarity over the scope for independent oversight of the Oranga Tamariki system
- 2 **note** the need to confirm a long-term home for the independent monitor
- 3 **agree** to consult on the options set out in Table 1 of this report

agree / disagree
- 4 **agree** to consult on the options set out in Table 2 of this report

agree / disagree
- 5 **note** we will provide you with further advice, including recommendations for the scope of independent oversight, the long-term home of the Monitor and any remaining policy issues which require Cabinet consideration, in December 2020
- 6 **note** the intention to confirm your decisions at Cabinet in February/March 2021


Melissa Cathro
Policy Manager, Child and Youth Policy
Ministry of Social Development

13 / 11 / 20
Date


Hon Carmel Sepuloni
Minister for Social Development and
Employment

14 / 11 / 20
Date

Background

- 7 In March 2019, Cabinet agreed to high-level policy to underpin the strengthening of independent oversight of the Oranga Tamariki system [CAB-19-MIN-0113 refers]. As part of Cabinet's considerations, they agreed that-

Over time the [monitoring function] could extend to cover intake, referral and assessment, processes and monitoring the delivery of services within, and outcomes achieved, by the Oranga Tamariki system, across their core operating model. This could encompass monitoring, for example, the effectiveness of early intervention practices, successful transition from care, Family Group Conferences, and the State's use of powers to remove children from their families.

... monitoring and assurance will also apply to other agencies providing services (e.g. health and education services). [CAB-19-MIN-0113 recommendation 10 refers].

- 8 At the time, Cabinet also agreed that:

8.1 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 [CAB-19-MIN-0113 recommendation 11 refers].

8.2 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].

- 9 Over the last 20 months MSD has conducted extensive consultation with Māori, including holding 21 hui around New Zealand and working closely with our Kahui Māori reference group and key agency stakeholders to inform the policies that underpin the independent oversight of the Oranga Tamariki system.

- 10 The first part of this report deals with the matter of clarifying the scope of independent monitoring. The second part of the report deals with the need to finalise proposals for the long-term home of the Monitor.

Clarity is required on the scope of independent monitoring

- 11 In December 2019, Cabinet gave further consideration to a range of policy matters relating to the development of the Independent Oversight of the Oranga Tamariki Systems Bill (the Bill) [CAB-19-MIN-0687 refers]. The December 2019 paper contained a footnote which stated:

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

- 12 The unhighlighted portion of the above is consistent with Cabinet's decisions in March 2019. The underlined aspect of the systems description was added in the December 2019 Cabinet paper. The extension of scope does not impact on the Ombudsman or Children's Commissioner given they already have a broad remit, however, the change represents a significant extension in scope for the independent monitor. This definition was not minuted and has not been confirmed by Cabinet; meaning the original scope in the March 2019 Cabinet paper stands.

- 13 The inclusion of the footnote has led to confusion as to the intended scope of monitoring and set expectations, particularly with Oranga Tamariki, that the scope of monitoring is now intended to be broader than what Cabinet originally agreed.
- 14 MSD considers Cabinet have not received adequate advice on the implications associated with the extension in scope and should be re-engaged. Ensuring the scope of monitoring is well understood and agreed will also be important when Cabinet comes to consider institutional arrangements for where the monitoring function should reside over the long-term.

The purpose of monitoring

- 15 The 2015 Expert Advisory Panel (EAP) report recommended greater oversight of New Zealand's child protection system, including independent monitoring to provide assurance to New Zealanders and Ministers that the care and protection system is meeting the needs of the most vulnerable children.
- 16 This was followed by the 2018 Sandi Beattie review that highlighted the need to support "the evolution of the care and protection system through the monitoring and evaluation of its practices and the experiences of those who either come in contact with it, or are placed in its care, or who work within it."
- 17 Both gave direction to the government's view of independent monitoring in the March 2019 Cabinet paper. The paper emphasised that independent monitoring would provide assurance over, and support the resilience of, the Oranga Tamariki system and subsequently contribute to the improvement of the wellbeing of tamariki and their whānau who come into contact with the system.

Proposals for the scope of monitoring

- 18 In order to provide clarity on the scope of monitoring, there are a range of factors to consider. Options for the scope of monitoring are not mutually exclusive; the options present a choice as to how far Government wishes to go in monitoring outcomes for children who are at risk of engaging with the Oranga Tamariki system.

Table 1 – Options for the scope of independent monitoring

Options	Scope
Option 1: (the current scope)	Under this option monitoring focuses on Oranga Tamariki's operating model - intake, referral and assessment, early intervention, intensive intervention, care and youth justice, transition. Monitoring also focuses on services provided by other systems such as health and education, to the extent they are provided to children or families who are engaged with one of the services above.
Option 2: Option 1 + systems that provide services directly to children and young people	Under this option, monitoring would go further to focus on how systems such as education and health (as systems that provide services directly to children and young people) are improving outcomes for the cohort of children who are identified as being at risk of engagement with the Oranga Tamariki system. For example, how well these systems are identifying and dealing with children who have risk factors - such as those who may have suffered abuse, have behavioural issues or who have drug or alcohol addictions, etc.
Option 3: Option 1 and 2 + systems that provide services to family	Under Option 2, the focus is on those systems that provide services directly to children and young people.

	<p>Option 3 is broader to recognise that the wellbeing of a child or young person is directly impacted by the wellbeing of their wider family.</p> <p>Under this option monitoring would focus on how systems that provide services to families, such as criminal justice, social housing, employment support, immigration and other systems are improving outcomes for the cohort of children and young people who are identified as being at risk of engagement with the Oranga Tamariki system. For example, children in homes where drugs, alcohol or domestic violence, unemployment, homelessness, poor quality housing etc.</p>
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Implications of extending the scope of monitoring

- 19 Any change to the current scope of monitoring will require an extended phased approach and additional resources.
- 20 The Monitor is currently monitoring regulation 69 of the National Care Standards Regulations (NCS). From the end of 2020 the Monitor will commence monitoring of the remaining NCS Regulations.
- 21 Once the Bill passes, the Monitor will commence monitoring of the wider Oranga Tamariki system based on the current agreed scope of monitoring. It is yet to be decided how quickly the Monitor will scale up to monitor under the Bill, however, it is likely that monitoring will scale up incrementally. Any extension to the current scope would require additional resourcing and consideration as to how it would be phased in.
- 22 There will also be jurisdictional implications. Presently other agencies such as the Health and Disability Commissioner and the Education Review Office have responsibilities for monitoring the impact of services delivered to children and their families in the health and education system. Consideration will, therefore, need to be how arrangements might operate to acknowledge overlapping responsibilities.
- 23 Further advice on how the implications of extending the scope of monitoring are addressed will be provided in December 2020.

In alignment with previous advice, MSD's view is that the initial focus of monitoring should be option 1

- 24 MSD's initial view is that, for the short to medium term, the scope of monitoring should continue to focus on that agreed by Cabinet in March 2019 (option 1).
- 25 We recognise that contact with the Oranga Tamariki system is often a consequence of failures in upstream systems to effectively identify and address risk factors for children and families.
- 26 The Health and Education systems have monitoring functions within the Health and Disability Commissioner, Mental Health Commission and Education Review Office, however, we note that monitoring of children at risk of contact with the Oranga Tamariki system is not a primary focus for these entities. We also note that monitoring of children's issues across the social sector is fragmented and inconsistent.
- 27 We therefore recognise the value in monitoring how these upstream systems are impacting on risk factors for children and families who may come into contact with the Oranga Tamariki system. Subject to consultation, it may be appropriate to consider extending the scope of monitoring to options 2 or 3 over the medium-long term. Initial discussion with Oranga Tamariki officials suggests that option 2 or 3 may be their preference. As noted above, this will be a significant undertaking.

Confirming the long-term home of the Monitor

- 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]. At that time Cabinet also agreed that the function would be established and tested by MSD with an in-principal decision for the function to transition to the Office of the Children's Commissioner in the future. We consider it is now time to confirm Cabinet's intent for the long-term home of the Monitor.
- 29 The policy intent is to provide Ministers with trusted advice on the performance of the Oranga Tamariki system and to support systems participants to learn and improve outcomes for tamariki and whānau.
- 30 The main function of the Monitor is to undertake systems performance monitoring (this will include assessing compliance, the nature and degree of compliance and identifying areas of high performance and areas for improvement, assessing quality of care and assessing change in outcomes) of the Oranga Tamariki system (this includes health, education, housing and justice providers, to the extent they provide services to tamariki and whānau in contact with the Oranga Tamariki system).
- 31 The Monitor will also undertake reporting on compliance to relevant Ministers and CE's of departments subject of reports, do reviews on request from relevant Ministers and CE of Oranga Tamariki, and undertake self-initiated reviews.
- 32 Since the policy intent and high-level functions were first developed, we have undertaken extensive engagement with a wide range of stakeholders. As a consequence, 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 should be present in the entity that the monitoring function is transferred to

- 33 In 2018, officials developed criteria to guide our advice on where the Monitor should be housed. The criteria highlighted elements that should be present in the entity that the Monitor is transferred to [REP/18/11/1560 refers]. Work over the past 18 months has led to further development of the criteria and identified other considerations to ensure the eventual location is still the most suitable option for the Monitor.¹
- 34 This work and our engagement with stakeholders have highlighted the need for the interests, rights and wellbeing of children to be a priority focus for the entity.
- 35 Hui facilitated by the Monitor throughout the country confirmed the need for a te ao Māori approach from the beginning. For the monitoring function to have the confidence of Māori, they believe it should maintain a degree of independence from Government, while still balancing the need to achieve policy objectives. There were strong views that the governance of the entity also needs to reflect partnership with Māori where Māori have an input into the appointments process. Māori were also of the view that should the monitoring function transfer to the OCC there be appropriate firewalls in place between the advocacy and monitoring functions.
- 36 It is important to have a monitoring culture that is impartial and objective. We still consider this is critical and have further refined the criteria to ensure this.

¹ For example, given the work underway within MSD to build the monitors capability, we no longer consider capability to be a necessary criterion when determining where the Monitor function should reside.

Criteria 1 - The location should have a focus on the interests, rights and wellbeing of children and young people involved in the Oranga Tamariki system

- 37 It is important for the entity which ultimately receives the Monitor to understand and have as a central focus, the interests, rights and wellbeing of children and young people, particularly in the Oranga Tamariki system.
- 38 Placing the function with an entity that has a focus on priorities other than children and young people would likely see the Monitor having to compete for resources and support. The result would detract from the Monitor's ability to develop the specialist culture and capability required to effectively monitor the performance of the Oranga Tamariki system and the outcomes being achieved for tamariki and whānau.

Criteria 2 - The entity must operate in an impartial and objective way to support Ministers' understanding and enable service providers to learn and improve the performance of the Oranga Tamariki system

- 39 Advice provided in 2018 was that the entity undertaking monitoring needed a strong culture of impartial, objective monitoring. This reflects the Monitor's primary purpose to be a trusted advisor to Ministers and service providers to support systems learning and improvement within the Oranga Tamariki system and ultimately improve outcomes. It was noted in 2018 that, for the Monitor to achieve this objective, it would not be an advocate for systems change in the public domain; this view has not changed.
- 40 It is important that the Monitor can assist Ministers, Oranga Tamariki and other service providers in the Oranga Tamariki system and the public to understand existing systems performance and the outcomes being achieved through identifying areas of good practice and areas for improvement. Using data and the lived experiences of children, young people, whānau and staff is important for providing a well-rounded and evidence-based view of the system that does not require advocating for specific systems change.
- 41 The oversight functions for the Oranga Tamariki system (advocacy, monitoring and complaints) by their nature have similar responsibilities in supporting the rights, interests, and wellbeing of children, young people and their families. However, the degree of impartiality and objectivity required to be effective differs for each function.
- 42 The Monitor needs to be independent from Oranga Tamariki system but also be able to carry out its obligations to report to Ministers. Appropriately the advocacy and complaints functions have a higher level of independence from Ministers and government reflecting that an advocate should not be subject to Ministerial influence nor should a body with responsibility for investigating and determining complaints.

Criteria 3 - The ability to maintain the confidence of a diverse range of stakeholders including Ministers, systems participants, Maori, child's rights advocates and the general public.

- 43 Collaboration undertaken to develop the Bill, highlights the clear need for the Monitor to be able to work effectively with key stakeholders. To do this, it will need to have the trust and confidence of a diverse range of stakeholders.
- 44 These stakeholders include, but may not be limited to, Ministers, government agencies including Oranga Tamariki, NGOs and individuals involved in the system, iwi and Māori organisations who provide services or have a strong interest and are active in the social services sector, child's rights advocates and advocacy organisations and the general public.
- 45 The Monitor's reports need to be based on qualitative and quantitative information to ensure the findings are evidence-based. This enables Oranga Tamariki and other agencies providing services within the Oranga Tamariki system to respond effectively and take the appropriate action without unnecessary recourse or undue delay. Such reports and responses will evoke, public and other system participants trust and confidence in the Monitor and the system.

Table 2 – Options for the long-term home of the independent monitor

Options	Advantages	Disadvantages
Option 1 - the Monitor remains in the Ministry of Social Development	<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) Child focussed - is not specifically focused on the interests, rights and wellbeing of children and young people Maintain confidence - public perceptions of the independence from the Oranga Tamariki system May be too close to government and 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
Option 2 – the Monitor transfers to the Health and Quality Safety Commission (HSQC)	<ul style="list-style-type: none"> Maintain confidence - strong operational culture of impartiality and objectivity, due to its existing arrangement as an ACE 	<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
Option 3 – the Monitor transfers to the Office of the Children's Commission (OCC)	<ul style="list-style-type: none"> Consistent with Cabinet's in-principle decision Child focussed - is focused on the interests, rights and wellbeing of children and young people, including those in the care and protection system Has indicated an interest in taking on the Monitor function, and would like to be involved with co-constructing the function within their organisation Combining the Monitor and the Advocacy functions into 	<ul style="list-style-type: none"> May be too independent of government to achieve the policy intent There is a risk that their responsibilities to advocating for children and young people will conflict with their need to be impartial and objective when performing the monitoring function Given their strong advocacy culture and approach are likely to hold the confidence of some systems participants (eg the public) but potentially

	<p>one agency would be more cost effective than Option 5</p> <ul style="list-style-type: none"> • Could provide a platform for extending social sector monitoring of outcomes for children and young people (as defined within the jurisdiction of the Commission) more broadly in the future (eg health, education, criminal justice, etc) • Proven to be objective and impartial. 	<p>will not have the confidence of others.</p>
<p>Option 4 – The Monitor transfers to the Education Review Office</p>	<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 • Track record in maintaining their ability to be objective • Their independence from the Oranga Tamariki may alleviate concerns of child rights groups and the public 	<ul style="list-style-type: none"> • May be too close to government and compromise the trust and confidence of some shareholders (Māori groups, child rights and advocacy groups, system participants, Office of the Privacy Commissioner has raised concerns). • Intend on remaining a government department moving forward despite recommendations from the Tomorrow's Schools report • Not specifically focused on the interests, rights and wellbeing of children and young people
<p>Option 5 – the Monitor transfer to New institutional arrangement</p>	<ul style="list-style-type: none"> • Provides an opportunity to create a location for the Monitor that could: • determine the new entities 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 culture that is impartial and objective, rather than attempting to integrate the culture currently being developed within the Monitor into an existing organisation • Would provide the opportunity to extend 	<ul style="list-style-type: none"> • The least cost-effective option as it will require addition capital to establish new facilities, on top of the transition funding as required by options 2,3 and 4 (however some economies of scale could be achieved through continued sharing of back office costs with MSD in the way that OCC and SWA do currently). • Depending on the form may not be sufficiently independent from Govt for Maori groups

	monitoring into other social sectors in the future	
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MSD's initial view is that an Autonomous Crown Entity is the institutional forms most likely to provide for the characteristics to enable successful, trusted monitoring of the Oranga Tamariki system

- 46 In March 2019, Cabinet agreed in-principle that the monitoring function would be transferred to the Office of the Children's Commissioner (OCC) once established by MSD. The March 2019 Cabinet paper noted that the OCC was chosen as it would deliver a focus on children and young people that are part of the Oranga Tamariki system, drawing on the OCC's established experience and expertise in engagement with children and whānau [CAB-19-MIN-0113].
- 47 At the time, Ministers were considering the option of the function to transition to the Education Review Office, however, at the same time as the decision was taken, the interim report into Tomorrow's Schools was released.
- 48 It was also acknowledged that there were a number of social sector reviews and other developments underway that could generate new monitoring requirements and that if a decision on where monitoring is transferred to is 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].
- 49 Striking the right balance between the monitor as a trusted advisor to Ministers and the sector, and the monitor as an independent entity not unduly influenced by Ministers or the sector, has been identified as key to the success of monitoring. The choice of institutional form is likely to have an impact in this regard.
- 50 For example, if a form such as a department, departmental agency, functional CE or Crown Agent is chosen, child's rights groups and Māori are likely to consider the monitor is not sufficiently independent and may lose trust and confidence in the Monitor's findings. Conversely, an institution such as an Independent Crown Entity may be seen by Ministers as too far removed, which may lead Ministers to undervalue the monitors findings (although we note that the Commerce Commission and the Law Commission, who are trusted advisors to Ministers, are Independent Crown Entities).
- 51 We also note that, should the scope of monitoring be extended to option 2 or 3, a Crown entity is likely the only feasible option to enable stable, long-term monitoring across the social sector.

Consultation to support final decisions and next steps

- 52 In order to clarify the scope of independent monitoring, we consider consultation with affected agencies would be appropriate prior to providing our advice and determining which option to take to Cabinet. Consultation would occur with:
 - 52.1 children's agencies specified in the Children's Act 2014;²
 - 52.2 the Children's Commissioner;
 - 52.3 the Health and Disability Commissioner and the Mental Health Commission;
 - 52.4 the Ombudsman;

² The Ministry of Justice, the Ministry of Education, School Boards of trustees, the Chief Education Reviewer, the Ministry of Health, District Health Boards, Oranga Tamariki, approved providers of care and/or custody, New Zealand Police, Ministry of Social Development. (In the case of school boards of trustees, we will consult with the New Zealand School Trustees Association and in the case of District Health Boards new will consult with the Ministry of Health.)

52.5 the Ministries of Housing and Urban Development (ie social housing) and Business, Innovation and Employment (ie immigration);

52.6 Te Puni Kokiri and Te Arawhiti.

53 We also propose consultation on institutional arrangements for the long-term home of the Monitor with:

53.1 the Public Services Commission;

53.2 the Department of Prime Minister and Cabinet;

53.3 Oranga Tamariki;

53.4 the Office of the Children's Commissioner;

53.5 the Education Review Office;

53.6 Te Puni Kokiri and Te Arawhiti;

53.7 the Ministries of Justice, Education, and Health.

54 Consultation on both the scope of monitoring and long-term home of the Monitor would be undertaken over the course of November and early December 2020, prior to a report being provided on the outcome of consultation for your consideration on December 2020. Decisions on these issues will be confirmed in a Cabinet paper planned for February/March 2021, a draft Cabinet paper will also be provided for your consideration in December along with the report on the outcome of consultation.

File ref: REP/20/11/1068

Author: Out of scope Principal Advisor, Policy

Responsible manager: Melissa Cathro, Manager, Policy

Aide-mémoire



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

Meeting

Date: 23 November 2020 **Security Level:** IN CONFIDENCE

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

File Reference: REP/20/11/1113

Meeting with Minister Davis

Meeting/visit details	8am, Tuesday 24 November 2020
Expected attendees	Hon Kelvin Davis, Minister for Children
Purpose of meeting/visit	<ul style="list-style-type: none">To discuss the status of the proposed legislation to strengthen the independent oversight of the Oranga Tamariki System (the System) and children's issues more generally.

Out of scope

Background Officials have recently provided you with update briefings on the legislation to strengthen the independent oversight of the Oranga Tamariki system, the status of the Monitor and the Children's Convention work programme.

Agenda for discussion with the Minister for Children	<p>1. Strengthening independent oversight of the Oranga Tamariki system</p> <p><i>A. Update on legislation development</i></p> <ul style="list-style-type: none">Work is underway to improve independent oversight of the System in three core areas; advocacy, complaints handling and investigation, and independent monitoring. We are making progress on the Children and Young People's Commission and Oversight of the Oranga Tamariki System Bill (the Bill).Development of the policy that underpins the independent oversight of the System and children's issues has been controversial and complex. We have engaged extensively with Māori¹ and affected agencies over the past 20 months.
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¹ Through 21 hui, a Kahui group and a technical Māori lawyers group.

- We are carrying out further consultation with key stakeholders on the long-term home of the Monitor and definition of the "Oranga Tamariki system."
- MSD officials will report back to you on the long-term home of the Monitor and residual policy matters by the end of 2020 with the view of going to Cabinet for clarification on outstanding policy matters in February/March 2021.
- We anticipate introducing the Bill in the first half of 2021.

B. Update on the development of the Independent Children's Monitor since its establishment in July 2019

- The establishment of the Monitor is one of the fundamental changes to improve the oversight of the System. The Monitor carries out its role by monitoring, assessing and providing assurance of the extent and quality of compliance under the Oranga Tamariki Act 1989 and the associated National Care Standards (NCS) Regulations.
- The Monitor is presently focused on monitoring Regulation 69 (notifications of abuse and neglect in care) of the National Care Standards Regulations. The Monitor will monitor all the NCS Regulations from the end of 2020.
- The Executive Director of the Monitor leads this work and has been formally delegated the functions, powers and duties of the Independent Monitor by the Chief Executive of the Ministry of Social Development (MSD).
- The Monitor reports to the Minister for Social Development and Employment on establishment of the Monitor, and reports to the Minister for Children on agencies'² compliance with the NCS.
- The Monitor has consulted widely and developed its operating model and outcomes framework since its establishment in July 2019. Its functions are being developed over time in a three-phased approach (more in detail in *Appendix Two*).

C. You were delegated Ministerial responsibility for the Children's Commissioner, but action is required to continue this arrangement

- Administrative responsibility for the Children's Commissioner was transferred to you to avoid potential conflicts of interest with the Minister for Children's responsibility for Oranga Tamariki. These delegations include responsibility for appointing the Commissioner, the budget of the Office of the Children's Commissioner and oversight of reporting.
- This delegation is specific to individual Ministers. A new delegation will need to be put in place if there is a desire for this arrangement to continue. More detail on the other arrangements for the System are set out in *Appendix One*.
- The mechanism for this arrangement is a letter from Minister for Children to Minister for Social Development and Employment.

2. Arrangements for the responsible minister for the Children's Convention work programme need to be revisited

² The four agencies are Oranga Tamariki, Barnardos, Open Home Foundation and Dingwall Trust.

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- While MSD is the lead agency for the Children's Convention work programme, you allocated responsibility of the work programme to the Minister for Children in 2017. This arrangement is separate to the oversight arrangement mentioned above.
 - Officials recommend you discuss with the Minister for Children whether you would like this arrangement to continue.
 - The responsible Minister for this work programme will receive advice relating to the Children's Convention, including initial advice on the Labour Party Manifesto commitments to ratify the Optional Protocol on a Communications Procedure and to withdraw reservations to the Convention by the end of 2020.

Out of scope

Next steps

Based on your discussion at this meeting, by the end of 2020, MSD will provide advice to the relevant responsible Ministers on:

- the long-term home of the Monitor
- residual policy matters relating to the Oversight of the Oranga Tamariki System Bill, with a view of going to Cabinet for clarification in February/March 2021
- Out of scope

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

Responsible manager: Melissa Cathro, Policy Manager, Child and Youth Policy

Appendix One – Ministerial Responsibility for Oversight of the Oranga Tamariki System

Function	Responsible Minister	Arrangements	Rationale	Action required
Office of the Children's Commissioner	Minister for Children	Allocated responsibility for administrative oversight (eg appointments, output agreements, appropriations management) to the Minister for Social Development and Employment. Continues to be responsible for receiving reports.	Potential conflict of interest with the Minister for Children's responsibility for Oranga Tamariki	To continue with the current arrangement, a new delegation through a letter from the Minister for Children to the Minister for Social Development is required.
Independent Children's Monitor	Minister for Children	The Minister for Children is responsible for all aspects of the Monitor, including the appointment and performance of the Monitor. MSD has been appointed the Monitor.	Under section 447A of the Oranga Tamariki Act 1989 the Minister for Children has statutory responsibility to appoint a monitor that is "independent of the department."	No further action is needed for this arrangement to continue.
Development of the Oversight Bill	Minister for Social Development and Employment	The Minister for Social Development and Employment continues to be responsible for the development of the Oversight of Oranga Tamariki Systems Bill.	Potential conflict of interest with the Minister for Children's responsibility for Oranga Tamariki.	No further action is needed for this arrangement to continue.

Appendix Two – The Monitor’s Three-Phased Approach to Develop its Function

The Monitor’s function		Status
Phase One	The Monitor’s function is solely focused on regulations 69 and 85 of the NCS Regulations.	<p>Recently completed.</p> <p>The Monitor has produced two reports under Phase 1 and has just completed its third report. This third report provides an overview of 12 months of data from 1 July 2019 to 30 June 2020 and completes Phase One of the Monitor’s initial monitoring programme.</p>
Phase Two	The Monitor’s function is focused on all aspects of the NCS Regulations.	<p>Commences from 31 December 2020.</p> <p>Since September 2020, the Monitor has increased the size of the Operations Team ahead of starting Phase Two monitoring to help the Monitor grow and develop relationships with local communities.</p> <p>In preparation for Phase Two, the Monitor has also been working with agencies and communities to undertake a pilot programme to test aspects of the Assessment Approach.</p>
Phase Three	The Monitor’s function is broadened to cover the entire Oranga Tamariki system.	<p>This is the intended longer-term expansion of the Monitor.</p> <p>This will broaden the scope of monitoring of compliance to the entire Oranga Tamariki system once the new legislation to strengthen the oversight system is passed (the Bill is anticipated to be introduced in the first half of 2021).</p>



Report

Date: 17 December 2020

Security Level: IN CONFIDENCE

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

Strengthening Independent Oversight of the Oranga Tamariki System: 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 that the Ministry of Social Development (MSD) has undertaken with key stakeholders, including remaining areas of difference on policy matters
 - 1.2 seek your agreement on some matters required to progress the draft *Children and Young People's Commission*¹ and *Oversight of Oranga Tamariki System Bill* (the Bill)
 - 1.3 update you on the remaining issues that require further work
 - 1.4 seek your decision to take these matters to the Cabinet Social Wellbeing Committee in March 2021.

Executive summary

- 2 On 25 March 2019, Cabinet agreed independent oversight of the Oranga Tamariki system and children's issues should be strengthened in three core areas:
 - 2.1 System-level advocacy for all New Zealand children and young people.
 - 2.2 Oversight and investigation of complaints.
 - 2.3 Independent monitoring and assurance [CAB-19-MIN-0113 refers].
- 3 On 16 December 2019, Cabinet made further policy decisions to assist with the drafting of the Bill [CAB-19-MIN-0687 refers].
- 4 On 27 July 2020, you took an oral item to Cabinet to rescind the decision to repeal the Children's Commissioner Act 2003, and to re-establish the Children's Commissioner as the Children and Young People's Commission (the Commission) and relevant provisions in a new Act [CAB-20-MIN-0352].
- 5 Since then, we have focused on how best to implement this decision and there has been further work undertaken to separate out the Commission provisions from the

¹ The Children's Commission will be renamed the Children and Young People's Commission on enactment of the Bill

oversight provisions of the Bill. This split has made us reconsider the common provisions such as the principles, duties and powers for the Ombudsman, the Independent Children's Monitor (the Monitor), and the Commission.

- 6 MSD has also been working closely with key agencies² on the refinement of the legislative proposals, and consulting with a wider set of agencies on the issue of the scope of monitoring and long-term home of the Monitor. **Part 1** of this report describes our work to date, including the results of our engagement.
- 7 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 Bill. These areas include:
 - Amendments to the principles.
 - Interaction of the Bill with the Ombudsmen Act.
 - The scope of monitoring.
 - Removal of provision of an independent reviewer from the Oranga Tamariki Act.
 - System investigations/inquiries and access to information.
 - Governance of the Commission.
- 8 Advice on the long-term home of the Monitor is contained in a separate companion report (REP/20/11/1158 refers).
- 9 Due to the high level of complexity, we are continuing to work through with stakeholders on the detail of te Tiriti o Waitangi (te Tiriti) provision. Decisions in this area are fundamental to how the independent oversight system will operate in practice. **Part 3** of the report provides an update on this issue.
- 10 Given the significance of some of the decisions in paragraph 7, it would be prudent for them to be considered by Cabinet Social Wellbeing Committee (SWC). We propose they be included in the draft SWC paper due with you in January 2021, for Cabinet consideration in March 2021.
- 11 In March 2020, you agreed to governance arrangements for the Commission [REP/20/3/266]. We recommend that these items are also considered by SWC.
- 12 An updated proposed timeframe for introducing the Bill in the first half of 2021 is attached as **Appendix 1**. A summary of engagement, and remaining areas of difference on policy matters is attached as **Appendix 2**.

Recommended actions

It is recommended that you:

Part 1 – engagement to date

- 1 **note** that since the 27 July 2020 Cabinet decision to review and refresh the Children's Commissioner Act 2003 rather than repeal it; MSD has been working closely with key agencies to separate the draft legislation into two separate parts, to be split into two Bills following Select Committee [CAB-20-MIN-0352 refers].

Part 2 – decisions required to assist drafting of the Bill

- 2 **note** that following further work since Cabinet decisions in March and December 2019, some policy proposals have been refined and now require further decisions to assist with drafting the Bill
- 3 **note** that in December 2019 Cabinet authorised the Minister for Social Development, in consultation with other Ministers as appropriate, to:

² Key agencies in this paper means Oranga Tamariki, the Ombudsman, the Office of the Children's Commissioner and Monitor.

- 3.1 make decisions on related policy matters or determine additional policy matters to enable the progress of legislative drafting in order to finalise the Bill
- 3.2 make any decisions on minor and technical matters required to finalise the Bill [CAB-19-MIN-0687 recommendations 46 and 47 refer].

Amendments to the principles in the Bill

- 4 **note** in March 2019, Cabinet agreed that the Bill reflect the bodies responsible for oversight, which should be guided by a set of core principles, [CAB-19-MIN-0113 recommendation 34 refers]
- 5 **note** the Ombudsman will seek to give effect to the purpose and principles of the Bill when conducting investigations and performing other functions under the Bill
- 6 **note** further work has been done, in consultation with stakeholders, on the purpose and principles for the Bill as set out in paragraph 29
- 7 **agree** that the principles in paragraph 29 apply to a person who performs a function or duty or exercises a power under the Act

agree / disagree

Interaction of the Bill with the Ombudsmen Act

- 8 **note** the Ombudsman will conduct investigations under the Ombudsmen Act 1975 [CAB-19-MIN-0687 recommendation 27 refers]
- 9 **note** the Ombudsman's powers under the Ombudsmen Act 1975 are sufficient to ensure they safely undertake the investigations and will not need additional requirements in the Bill to maintain the safety of children and young people, including the need to:
 - 9.1 gain consent before engagement with a child or young person
 - 9.2 provide transparency and assurance regarding how information will be managed
 - 9.3 develop a Code of Ethics when engaging with children and young people.

The scope of monitoring

- 10 **note** there is lack of clarity over the scope of the independent monitoring of the Oranga Tamariki system, and we have recently completed further targeted consultation on this matter [REP/20/11/1068 refers]
- 11 **agree** that the scope of monitoring should continue to be what was agreed by Cabinet in March 2019 with a focus on:
 - 1.1 compliance with the Oranga Tamariki Act and regulations and standards made under that Act, including services, practice and changes in outcomes for tamariki
 - 1.2 intake assessment and referral, early support, intensive response, care and youth justice and transition
 - 1.3 other agency services provided to children and young people under the Act (for example health, education and disability services, including by NGOs).

agree / disagree

- 12 **note** we are continuing to work with the Independent Children's Monitor, Oranga Tamariki and other stakeholders on the boundary of monitoring in regard to early support
- 13 **note** we recommend this decision be noted and confirmed by the Cabinet Social Wellbeing Committee to ensure clarity of decision
- 14 **note** consultation with agencies and the Kāhui Group found agreement that there is value in extending monitoring to children at risk of coming into contact with Oranga Tamariki but that this is outside the scope of the Oversight work
- 15 **note** the Independent Children's Monitor and Cabinet may wish to consider extending the scope of monitoring in the future

Removal of the independent reviewer for complaints from the Oranga Tamariki Act

- 16 **note** the Oranga Tamariki Act 1989 provides for the Minister responsible for the Act to appoint a person or organisation that is independent from the department to review outcomes of complaints
- 17 **note** the Ombudsman's role under the Bill and the Ombudsmen Act will make provision for an independent reviewer under the Oranga Tamariki Act 1989 redundant
- 18 **agree**, in consultation with the Minister for Children, that the Oranga Tamariki Act 1989 be amended to remove provision for an independent reviewer

agree / disagree

- 19 **note** that under the Oranga Tamariki Act a complainant is required to exhaust all levels of the complaints process (i.e. site, Oranga Tamariki, Ombudsman) before they may go to court
- 20 **note** agencies agree that this is an unnecessary constraint on individuals' rights and should not be retained
- 21 **agree** that a complainant should not be required to have to take their complaint through the Ombudsman's process before they may go to court

agree / disagree

System inquiries and information

- 22 **note** the Children's Commissioner currently has a statutory function in relation to investigating decisions in respect of individual children or young people under the Oranga Tamariki Act 1989 as well as for all children and young people in New Zealand
- 23 **note** that on 25 March 2019, Cabinet agreed to recommend to the Officers of Parliament Committee (OPC) that the Ombudsman be appointed to carry out the complaints oversight and investigations function for the Oranga Tamariki Act by 31 December 2020
- 24 **note** the main systems (e.g. health, education, immigration, justice) are already serviced with complaints services in addition to the Ombudsman providing an independent complaints mechanism for these systems
- 25 **note** that while the Commission will no longer have a statutory role in investigating an individual's complaint, the Commissioner will have a function to undertake 'general inquiries' for the purposes of advocating for systemic issues
- 26 **note** that to effectively perform the 'general inquiry' function the Commission will need the ability to require the provision of information from agencies, including information pertaining to individuals
- 27 **note** that this power is consistent with the Children's Commissioner's existing powers when conducting an investigation
- 28 **agree** to seek Cabinet agreement to enable the Commission to require the provision of information, including personal information about individuals, from agencies for the purpose of supporting their function of general inquiry into systemic issues relating to children and young people

agree / disagree

Governance - Children and Young People's Commission

- 29 **note** in December 2019, Cabinet made decisions on governance of the Commission, which included agreeing that the governance arrangements should be a board of two to six members, appointed by the Governor-General, and collectively possessing a range of relevant skills and attributes including experience of the care system, wider understanding of children's issues, understanding of te ao Māori and management skills [CAB-19-MIN-0687 recommendation 34 refers]

- 30 **note** in March 2020, you made further policy decisions about the governance arrangements for the Commission, including making a decision that the minimum size of the board be increased from two to three members
- 31 **note** this amendment needs to go to the Cabinet Social Wellbeing Committee for approval, and we will include this in the draft Cabinet paper along with the other governance decisions you have agreed to [REP/20/3/266 refers]
- 32 **note** that following further consultation with key agencies, we consider some of the competencies of the board you agreed to in March are too detailed and may be difficult to implement in practice
- 33 **agree** that the capabilities you agreed to in March 2020 and set out in paragraph 71 of this report be replaced with the provision that, in addition to the normal competencies required of board members, at least 50 percent of members should have experience of Māori knowledge and be able to represent the interests of Māori
- 34 **note** the appointments process you have also agreed to, which provides for Māori involvement in selecting individuals for the Minister's consideration, will enable this to occur

Further work - how the oversight bodies' commitment to te Tiriti o Waitangi will be articulated in legislation

- 35 **note** on 25 March 2019, Cabinet agreed that the Bill explicitly recognise the Crown's relationship with Māori, and the need for the Crown to be more responsive to the high rate of Māori children in the Oranga Tamariki system, through the provision of specific duties on parties who have designated oversight roles provided in the Bill [CAB-19-MIN-0113 paragraph 35 refers]
- 36 **note** on 26 December 2019, Cabinet agreed that the Bill provide for a number of duties (to be further developed during drafting) for oversight bodies to demonstrate a practical commitment to te Tiriti o Waitangi [CAB-19-MIN-0687]
- 37 **note** Cabinet also agreed that oversight bodies and iwi and Māori organisations will enter into partnership arrangements [CAB-19-MIN-0687]
- 38 **note** that we are continuing to work through the detail of how to recognise the Crown's commitment to te Tiriti o Waitangi [Parts 1 (Oversight) and 7 (Children and Young People's Commission) of the Bill] and an update is provided in paragraphs 81 – 89 of this report
- 39 **note** we will provide you with further advice and seek decisions on these matters by 30 January 2021 so that they can be included in the draft Cabinet paper
- 40 **note** there are additional requirements for the Commission, in terms of the governance arrangement, that give effect to te Tiriti partnership set out in paragraphs 65 – 74 of this report

Consideration by Cabinet Social Wellbeing Committee

- 41 **note** that given the nature of some of the more detailed work that has been undertaken since 25 March and 16 December 2019 Cabinet approvals, we recommend having the items outlined in this report considered by Cabinet Social Wellbeing Committee before finalising the draft Bill
- 42 **note** that MSD will prepare a draft Cabinet paper on the matters outlined in this report for Cabinet Social Wellbeing Committee

Timeframes for introducing the Bill

- 43 **note** that to meet an introduction date of mid-2021, Cabinet decisions will be required by March 2021 at the latest
- 44 **note** we have instructed the Parliamentary Counsel Office to draft the Bill on the basis of these decisions

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

agree / disagree

46 **agree** to forward this report to the Ministers for Children, Māori Development, Whānau Ora, and Public Services, and the Minister of Justice.

agree / disagree



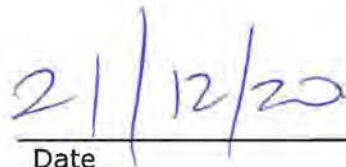
Molly Elliott
General Manager
Social Development Child and Youth



Date



Hon Carmel Sepuloni
Minister for Social Development and
Employment



Date

Background

Context

- 13 In August 2017, in recognition of the historical systemic failings in New Zealand's care and youth justice system and a desire to improve outcomes for children, young people and whānau who come into contact with that system, the Cabinet Social Policy Committee (SOC) agreed to a review. The review focused on the independent monitoring, complaints review, investigation and advocacy functions for the new vulnerable children's system be led by MSD with support from SSC (Public Service Commission / PSC). [SOC-17-MIN-0115 refers]
- 14 In March 2018, SWC:
 - 14.1 agreed to a targeted consultation process to test preliminary work identifying overlaps and gaps in current independent oversight arrangements for the Oranga Tamariki system and children's issues, and potential options to improve the independent oversight model
 - 14.2 invited the Minister for Social Development to seek final policy decisions from SWC following the consultation. [SWC-18-MIN-0025]
- 15 From May 2018 to August 2018, an independent lead reviewer, Sandi Beattie QSO, led the engagement with a range of stakeholder groups, including iwi and Māori service providers, other service delivery NGOs, and groups representing children, caregivers and others involved with the Oranga Tamariki system. In August 2018, she provided her post-consultation report, which highlighted that there was strong consensus on the need to strengthen independent oversight to support improvements in outcomes for children, young people and their whānau.
- 16 The Review highlighted that independent oversight has a vital role in improving practices and processes. Independent oversight can provide assurance and strengthens the resilience of systems. It can promote transparency and build public trust and confidence that the wellbeing and safety of children and young people is paramount.
- 17 Independent oversight of the care, protection, and youth justice system is particularly critical, because the government has coercive powers (such as the power of Oranga Tamariki to remove children and young people from their whānau or to place young people in secure residences) and the State has specific responsibilities for those in their care. The establishment of the Royal Commission of Inquiry into the historical abuse of individuals in State care (from 1950 – 1999) highlights the need to safeguard those in State care and ensure that abuse in care is less likely, and dealt with more effectively, for children and young people today.

Previous decisions

- 18 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:
 - 18.1 system-level advocacy for all New Zealand children and young people, which will continue to be undertaken by the Commission
 - 18.2 oversight and investigation of complaints of matters related to the 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
 - 18.3 independent monitoring and assurance of the operations and obligations delivered under the Oranga Tamariki Act and associated regulations. The Ministry for Social Development (MSD) was appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the intent that it is transferred to the Commission once a robust monitoring function is established and a new legislative framework is in place [CAB-19-MIN-0113 refers].
- 19 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 [CAB-19-MIN-0113 refers], now provisionally titled the Children and Young People's Commission and Oversight of Oranga Tamariki System Bill (the Bill).

- 20 In December 2019, Cabinet authorised the Minister for Social Development, in consultation with other Ministers as appropriate, to:
- 20.1 make decisions on related policy matters or determine additional policy matters to enable the progress of legislative drafting in order to finalise the Bill
 - 20.2 make any decisions on minor and technical matters required to finalise the Bill [CAB-19-MIN-0687 recommendations 46 and 47 refer].
- 21 Cabinet made further decisions in December 2019. In July 2020, Cabinet rescinded the decision to repeal the Children's Commissioner Act 2003, and instead agreed that the Children's Commissioner Act 2003 should be reviewed and refreshed [CAB-19-MIN-0687 and CAB-20-MIN-0352 refer].

Part 1 – Engagement to date

MSD has been engaging with key agencies on the development of the Bill

- 22 Since Cabinet decisions in March 2019, MSD has consulted with stakeholders Oranga Tamariki, the Office of the Ombudsman, the Independent Children's Monitor (the Monitor), and the Office of the Children's Commissioner (the OCC) on the draft Bill.
- 23 Recent consultation has:
- 23.1 extended to include consultation on implementing a new Act
 - 23.2 supported MSD to further flesh out the complex functions, roles and purpose of the oversight system
 - 23.3 helped MSD refine Te Tiriti provisions to turn aspirational statements agreed to by Cabinet into practical actions that the oversight bodies will be expected to do.
- 24 While some areas require decisions to assist drafting, the policy intent has remained intact. We have given each of the stakeholders the opportunity to input into this work individually and as a group through a series of workshops. Whilst we have not always all agreed, the process of engagement has enabled MSD and all key stakeholders to develop an understanding of each other's perspectives and supported strong relationships, which have in turn enabled robust and constructive discussions.
- 25 A summary of recent consultation as well as remaining areas of difference on policy matters is contained in **Appendix 2**.
- 26 The outcome of consultation on the long-term home of the Monitor and MSD's advice is contained in a separate companion briefing.

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

- 27 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:
- principles to guide the oversight functions of the Monitor and Complaints functions
 - interaction of the Bill with the Ombudsmen Act
 - the scope of monitoring
 - removal of provision of an independent reviewer from the Oranga Tamariki Act
 - system investigations/inquiries and access to information
 - governance of the Children's Commission.

Amendments to the principles

28 In March 2019, Cabinet considered principles that will guide the operation of oversight bodies. Following recent conversations with the Ombudsman's Office, it is apparent that these will be particularly important for the complaints and investigation functions and are, therefore, worthy of further attention and refinement.

29 Following extensive consultation with stakeholders and the Kāhui Group, we have arrived at the following principles, which we recommend are considered by Cabinet.

A person who performs a function or duty or exercises a power under this Act must have regard to:

- (a) the wellbeing, interests and voices of children, young people and their families and whānau;*
- (b) the need to respect and uphold the rights of children and young people in New Zealand law (including their rights in New Zealand law that are derived from the Children's Convention and the United Nations Convention on the Rights of Persons with Disabilities);*
- (c) the importance of relationships and connections of children and young people with their families, whānau, hapū, iwi, and community.*

Interaction of the Bill with the Ombudsmen Act 1975

30 It is proposed that the Monitor will be required to meet certain minimum requirements to give assurance that children, young people and their families will be protected from harm. These requirements include:

- a) gaining consent from a child, young person or care giver prior to directly engaging with the child or young person
- b) developing and maintaining Information Management Rules
- c) developing and operationalising a Code of Ethical Engagement.

31 However, the intention is that the Bill will not impose the same requirements on the Ombudsman to the extent the Ombudsman is conducting an investigation under the Ombudsmen Act 1975. Instead the Ombudsman's investigations will only be subject to the purpose and te Tiriti duties, and guided by the principles, in the Bill.

32 The Ombudsman's Office has expressed the view that they consider being subject to the minimum requirements would constrain their use of powers under the Ombudsmen Act during an investigation.³

33 MSD agrees that being required to gain consent from a child or young person prior to engagement would constrain the Ombudsman's current power to, for example, "summon before him and examine on oath any complainant".

34 MSD does not consider that being required to promulgate and operate under information management rules or to promulgate and operate under a Code of Ethics necessarily constrains the Ombudsman's powers under the Ombudsmen Act.

35 However, we note that the Ombudsman has given assurances that critical operating policies, such as their trauma-based approach to handling complaints and conducting investigations involving children and young people, will be published on the Ombudsman's website. While this does not provide a strong assurance that these practices will necessarily endure, we are comfortable that, for the time being, the minimum requirements provided for in the Bill need not apply.

The scope of monitoring

36 In March 2019, Cabinet agreed to high-level policy to underpin the strengthening of independent oversight of the Oranga Tamariki system [CAB-19-MIN-0113 refers]. As part of Cabinet's considerations, they agreed that:

³ Under the Ombudsmen Act 1975, the Ombudsman has the powers of a Commission of Inquiry.

...the independent monitoring function should initially focus on monitoring compliance with the National Care Standards Regulations, but should not be limited to these areas

Over time the [monitoring function] could extend to cover intake, referral and assessment, processes and monitoring the delivery of services within, and outcomes achieved by, the Oranga Tamariki system, across their core operating model. This could encompass monitoring, for example, the effectiveness of early intervention practices, successful transition from care, Family Group Conferences, and the State's use of powers to remove children from their families.

... monitoring and assurance will also apply to other agencies providing services (e.g. health and education services). [CAB-19-MIN-0113 recommendation 10 refers].

- 37 In December 2019, Cabinet gave further consideration to a range of policy matters relating to the development of the Bill [CAB-19-MIN-0687 refers]. The December 2019 paper contained a footnote, which stated:

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

- 38 The underlined aspect of the system's description represents a significant extension in scope of monitoring from what was agreed to in March 2019. The extension of scope does not impact on the Ombudsman or Children's Commissioner given they already have a broad remit. However, the change represents a significant extension in scope for the independent Monitor. This definition was not minuted and has not been confirmed by Cabinet.
- 39 This has led to confusion as to the intended scope of monitoring and the agreed expectations, particularly with Oranga Tamariki.
- 40 To ensure you and Cabinet have adequate advice on the implications associated with the extension of scope, we have done further work with stakeholders.

The purpose of monitoring

- 41 The 2015 Expert Advisory Panel (EAP) report recommended greater oversight of New Zealand's child protection system, including independent monitoring to provide assurance to Ministers and New Zealanders that the care and protection system is meeting the needs of the most vulnerable children.
- 42 This was followed by the 2018 Sandi Beattie review that highlighted the need to support "the evolution of the care and protection system through the monitoring and evaluation of its practices and the experiences of those who either come in contact with it, or are placed in its care, or who work within it".
- 43 Both gave direction to the Government's view of independent monitoring in the March 2019 and December 2019 Cabinet papers. 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].
- 44 The policy intent of monitoring is to support the improvement in outcomes for children, young people and their whānau by providing decision makers, ie Ministers and systems participants, with trusted advice (ie findings on what is working, 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.

Proposals for the scope of monitoring

- 45 Following your agreement [REP/20/11/1068 refers] we have consulted on the scope of monitoring. Consultation has shown broad support, including from DPMC, for the scope of monitoring to continue to focus on that agreed by Cabinet in March 2019.
- 46 This would see monitoring focus on compliance with the Oranga Tamariki Act and regulations and standards made under that Act, it would also assess services and practice and changes in outcomes for tamariki.
- 47 The scope would capture intake assessment and referral, early support, intensive response, care and youth justice and transition.
- 48 We continue to work with the Independent Children's Monitor, Oranga Tamariki and other stakeholders on the boundary of monitoring in regard to early support.
- 49 We understand that Oranga Tamariki recommends that monitoring include services provided to children, young people and their whānau in other systems such as health and education, where there is a risk of coming into contact with Oranga Tamariki. This is due to the substantive impact these services have on whether children and young people require Oranga Tamariki intervention.
- 50 Consultation with other agencies noted support for such monitoring. However, there was broad agreement that turning the Monitor into a broader social sector 'uber-monitor' was not the right approach. To go down this path would likely result in the creation of an unwieldy agency and would also need to reconcile the existing roles of entities in other sectors. If Cabinet wished to consider how to effectively monitor the impact of wider social services on vulnerable children, young people and their whānau, consideration will have to be given to which agency leads work to scope the monitoring approach and appropriate institutional arrangements.
- 51 We propose to clarify in the Bill that the scope of monitoring reflect the March 2019 Cabinet decision, which is to cover intake, referral and assessment, processes and the delivery of services within, and outcomes achieved by, the Oranga Tamariki system. This limits monitoring to include children and young people who are receiving early intervention assistance as they have been identified as having early risk factors for future involvement in the statutory care, protection and youth justice systems under the Oranga Tamariki Act 1989.

Removal of provision for an independent reviewer from the Oranga Tamariki Act 1989

- 52 The Oranga Tamariki Act 1989 (the OT Act) provides for the responsible Minister to make regulations to appoint an independent reviewer whose role is to review decisions made by Oranga Tamariki's internal complaints handling mechanism.
- 53 Subsequent to the passing of the OT Act, the work to strengthen independent oversight of the Oranga Tamariki system has led to the positioning of the Ombudsman as the independent review mechanism for complaints and investigations within the wider system. In doing so, the need for the Minister to appoint an independent reviewer under the OT Act has become redundant, i.e. were the Minister to now appoint an independent reviewer under the OT Act this individual or organisation would duplicate the role Cabinet has agreed for the Ombudsman.
- 54 The OT Act also requires a complainant to first take their complaint through the independent reviewer, before they can take a matter to court. In removing provision for the independent reviewer from the OT Act we do not propose to provide for a complainant to have to take their complaint through the Ombudsman's process before they may go to court. MSD, the Ombudsman, Oranga Tamariki, and the OCC all agree that this is an unnecessary constraint on an individual's liberty.
- 55 We consider that, so long as the Ombudsman's processes are visible and user friendly, complainants are likely to utilise the Ombudsman's process before going to court.

System inquiries, facilitating resolution to individual issues and access to information

- 56 On 25 March 2019, Cabinet agreed to recommend to the Officers of Parliament Committee (OPC) that the Ombudsman be appointed to carry out the complaints oversight and investigations function for the Oranga Tamariki system on or by 31 December 2020. Amendments to the Children's Commissioner Act will formally remove the Children's Commissioner's role in handling individual complaints, as this will no longer be necessary, and focus the Commissioner as a 'systemic advocate'.
- 57 In December 2019, Cabinet further agreed that, to support the Commissioner to discharge their functions, the Commissioner should have the power to require the provision of information, other than identifiable personal information, without the need to initiate a formal investigation.
- 58 Following consultation with the OCC further consideration has been given to the need for access to personal identifiable information. Consequently, we now consider that the Commission may require access to this information for the purpose of discharging their specific function relating to inquiring into systemic children's issues.
- 59 This is because, in order to inform their understanding of the systemic issue, it may be necessary for the Commissioner to hold an understanding of specific events. For example, investigating matters pertaining to the cohort of children uplifted into care or custody, or those involved in police pursuits, or the treatment of children in a sports code, or the treatment of children in educational institutions.
- 60 The Commission will also maintain a function to facilitate resolutions of children's issues. This function is not a pre-cursor to the need for a formal complaint and investigation and reflects the current practice of the OCC. It is proposed that the Commission will be able to obtain personal information relating to the issues confronting the individual with the individual's informed, written consent.
- 61 Where resolution cannot be facilitated, the Commission will refer the matter to the Ombudsman (or another complaints body) for a formal investigation. We note the Commissioner and Ombudsman already work together in this regard, hence proposed legislative changes simply reflect current practice.
- 62 The Commissioner has noted that having the power to 'investigate' is a useful tool for incentivising agencies to resolve issues for children in a timely way. The Commissioner is concerned that removing this tool may see resolution to children's issues delayed. However, we consider that this tool continues to exist, albeit held by the Ombudsman. We note the extensive work underway within the Ombudsman's Office to develop a child-centred approach to complaints handling and investigations and the existing working relationship between the Commissioner and the Ombudsman's Office.
- 63 The Commissioner has also expressed a concern that removing the power to investigate individual issues will remove a valuable source of information that supports the instigation of systemic inquiries. We agree it is important that the Commission is able to retain access to this information and note that this will still be possible as a consequence of their resolution facilitation function.

Governance of the Children and Young People's Commission

- 64 In March 2019, Cabinet agreed that the governance of the Children's Commission should be updated [CAB-19-MIN-0113 refers]. The need to update governance reflects that it is no longer feasible for a single individual to effectively stay across and advocate for the broad range of issues facing New Zealand's children.
- 65 In December 2019, Cabinet agreed to high-level parameters for governance, including that:
- 65.1 the new governance arrangement should be a board of two to six members, appointed by the Governor General, and collectively possessing a range of relevant skills and attributes including experience in the care system, wider understanding of children's issues, understanding of te ao Māori, and management skills

65.2 to give effective representation to the population of the most affected by the care system and in recognition of te Tiriti, the legislation should provide for the board to embody partnerships with Māori, to be given effect through the board being appointed through an appropriate process that incorporates te ao Māori and ensures Māori participation. [CAB-19- MIN-0687 recommendations 34 and 35 refer]

- 66 Further work was required, post-December, to flesh out the detail of how governance would work in practice, particularly in regard to the matters outlined in paragraph 65.2 above.
- 67 MSD has worked with the Public Service Commission, the OCC and MSD's Kahui Group in developing the further detail of the governance arrangements.
- 68 In March 2020, you made further policy decisions about the governance arrangements for the Children's Commission, including that the minimum board be increased from two to three members. The rationale for this change was to 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 [REP/20/3/266 refers]. This amendment will need to be considered by the Cabinet Social Wellbeing Committee
- 69 In March 2020, you also agreed to additional competencies that should be held by board members. Following workshops with our key stakeholders, including our Māori Kahui Group, further refinement is required.
- 70 We recognise that getting the governance arrangements correct is proving to be an iterative process. This is because the Children and Young Person's Commission is the first crown entity to have new governance arrangements developed that seek to reflect partnership with Māori.
- 71 Following our hui, we consider the capabilities you agreed to in March may be too detailed. Given the lack of precedent in their operation there is a risk that the current capabilities may be difficult to operationalise in practice, our rationale for the removal of each capability is set out below.

Capability agreed in March	Rationale for change
Uphold te Tiriti, including its articles and principles	It is not clear how this would be given effect. Ultimately, the way in which governance is being structured as a whole seeks to achieve this end.
Partner effectively with Māori	This objective should be achieved at an operational level. At a governance level, this objective is achieved through the requirement for at least 50 percent of the board have experience of Māori knowledge and represent the interests of Māori. It is also achieved through the proposed involvement of Māori in the appointments process.
Understand te ao Māori and advocate from a basis of kaupapa Māori and matuaranga Maori	Further conversations have highlighted that there is not a clear understanding of how this would be given practical effect in the governance of an advocate.
Take a tikanga Māori approach to meeting procedures and decision making	As above, further conversations have highlighted that there is not agreement on exactly what this might look like in practice for the governance of an advocate.

- 72 Our hui have helped us to understand that it may be best to focus on providing for the key knowledge/ capability that members should have without being overly prescriptive. To that end we have agreed, with key stakeholders and our Kāhui Group that, in addition the normal competencies required of board members, at least 50

percent of members should have experience of Māori knowledge and be able to represent the interests of Maori.

- 73 The appointments process you also agreed to in March 2020, which provides for Māori involvement in selecting individuals for the Minister's consideration, will enable this to occur.
- 74 We also note that the functions of the Commission have a strong focus on supporting improvements for Māori tamariki.

Part 3 – matters requiring further work

We are continuing to work through how the oversight bodies' commitment to te Tiriti will be articulated in legislation

- 75 We note that work is still ongoing to finalise advice concerning te Tiriti provisions. This section provides you with an insight into where these matters have moved since we last engaged with you on them. We will ensure this is finalised for inclusion in the Cabinet paper to be considered by SWC in early 2021.
- 76 In recognition of both the Crown's special relationship with Māori and the high rates of tamariki and rangatahi Māori in the Oranga Tamariki system,⁴ Cabinet agreed that the Bill would require oversight bodies to make a practical commitment to the principles of the Treaty of Waitangi [CAB-19-MIN-0113 refers].
- 77 In December 2019 Cabinet agreed to the provisions that will be included in the Bill and give effect to the Treaty [CAB-19-MIN-0687 recommendation 3 refers].
- 78 It was agreed that oversight bodies must ensure:
- 78.1 that in setting strategic priorities and in the development of the work programme they have as a key priority the need to support improved outcomes for Māori children and young people
 - 78.2 Māori participation in the context of the oversight bodies discharging their functions
 - 78.3 their employment, engagement and other policies, procedures and practices must give effect to tikanga, mana tamaiti (tamariki), whakapapa of the Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū and iwi.
- 79 Oversight bodies and iwi and Māori organisations may enter into partnerships or arrangements to:
- provide opportunities to, and invite proposals on how to improve oversight of the Oranga Tamariki system and in doing so, outcomes for Māori children, young persons, and and their whanau who come into contact with the Oranga Tamariki system
 - enable the robust, regular, and genuine exchange of information between those oversight bodies and those iwi and Māori organisations (supported by information sharing provisions)
 - agree on any action both or all parties consider is appropriate
 - the complaints and investigations processes are accessible for Māori children and young people and their whanau, hapū and iwi or any other Māori organisation supporting them
 - the complaints and investigations processes incorporate a tikanga approach, and the whanau, hapū and iwi of the child or young person are engaged with, where possible, during the complaints and investigations

⁴ The term 'Oranga Tamariki system' is used in this report 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.

processes, unless to do so would be impracticable or risk harm to a child or any other person.

- 80 Following further discussion with the Ombudsman, the Monitor, the Kahui Group, the Department of Prime Minister and Cabinet and other key stakeholders, we concluded that further work was required. This work is ongoing.

Entering into partnerships or arrangements

- 81 Further consideration and discussion has highlighted that it may be appropriate for the Ombudsman and monitor to enter into 'arrangements' with Iwi or Māori organisations, however, neither agency should be required to 'partner'.
- 82 Discussion with the Ombudsman, Monitor and Kahui Group have highlighted that:
- 82.1 For the Ombudsman to be required to partner with iwi or Māori organisations may constrain the independence of their complaints handling and investigations functions.
- 82.2 There is equally a risk of compromising the independence of monitoring should the Monitor be required to partner with a particular Iwi or Māori organisation. For example, a partnership could result in the Monitor directing a large portion of its resource towards understanding the impact of the system on a particular Iwi rather than leaving the Monitor free to move its focus and resource to where the evidence suggests they are needed.
- 83 For these reasons, we have proposed removing the duty relating to entering into 'partnerships' from the Bill, while retaining the duty regarding entering into 'arrangements'.

Reflecting Māori concepts as part of the Crown's commitments

- 84 One of the particular challenges we have faced in constructing the Tiriti commitments that are meaningful in the context of complaints and investigation handling and monitoring is ensuring the appropriate, meaningful use of Māori concepts and terminology.
- 85 In the current agreed commitments, we have used concepts and terminology such as "mana tamaiti (tamariki), the whakapapa of Māori children and young people and the whanaungatanga responsibilities of their whānau, hapū and iwi".
- 86 Further discussions with the Kahui Group have highlighted that these concepts are appropriate in a service delivery context, for example where agencies are providing services directly to children, young people and their whānau. It is appropriate in these circumstances that consideration should be given to matters such as the whakapapa of those children and young people, for example when making decisions on where to place an uplifted child.
- 87 However, the Kahui Group agree that matters such as whakapapa and whanaungatanga responsibilities of their whānau, hapu and iwi may not be as relevant for an entity whose focus is on providing services to decision makers on systems performance, or investigating or determining a particular complaint at a particular point in time.
- 88 Should Cabinet decide to include some of these terms, considerable work will be required to support interpretation to reduce the risk of future legal challenge.

Implications for the Commission

- 89 We propose the provisions that apply to the Monitor will apply to the operation of the Commission. In addition to being operable in the context of the Commission's work we also note that this would mitigate the risk of the Commission having to operationalise two different sets of the Tiriti duties should Cabinet confirm the long-term home of the monitor to be with the Commission.

Timeframes for introducing the Bill

- 90 We have been working towards a deadline for introduction of the Bill to the House by mid-2021. To meet this timeframe, final decisions are needed on these matters, and the long-term location of the Monitor (detailed in the companion report REP/20/1158), by the end of March 2021.
- 91 Following final Cabinet decisions, we will carry out formal agency consultation on the Bill.
- 92 An updated proposed timeframe for introducing the Bill by mid-2021 is attached as **Appendix 1**. Officials are available to discuss the contents of this report, including timeframes for introduction as required.

Next steps

- 93 We will continue engaging with key agencies in the system of oversight, including Oranga Tamariki, the OCC, the Office of the Ombudsman, the Independent Children's Monitor and the Kahui Group on the proposals to date and the remaining issues outlined in this report.

File Ref: TBC

Report Number: REP/20/11/1159

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Responsible manager: Melissa Cathro, Policy Manager, Child and Youth Policy

Appendix 1: Proposed Timeframes for SWC, LEG and Introduction

Step	Indicative Timing
Draft SWC paper to Minister	Late January 2021
Paper lodged for SWC	4 March 2021
Paper considered at SWC	10 March 2021
Paper considered at Cabinet	15 March 2021
Draft LEG paper and Bill to Minister approval for release of the draft Bill(s), and LEG paper for formal agency consultation	End of March 2021
Revised LEG paper and Bill to Minister / Ministerial consultation on revised LEG paper and Bill (residual policy issues following formal consultation)	End of April 2021
Ministerial consultation (2 weeks)	Early May 2021
Revised LEG paper and bill to Minister– seeks approval to lodge paper	May 2021
Lodge LEG paper	May 2021
LEG Committee	June 2021
Cabinet	June 2021
1st reading and referred to Select Committee	June 2021
Advice on the long-term monitor transfer goes to Cabinet (transition advice)	July 2021
Select Committee process underway (6 months)	From June 2021
2nd reading	March 2022
Committee of the whole House	April 2022
3rd reading and enactment	April 2022
Regulations enacted	April 2022

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Report

Date: 17 February 2021
Security Level: IN CONFIDENCE
To: Hon Carmel Sepuloni, Minister for Social Development and Employment

Options to establish new arrangements for the long-term home of the Independent Children's Monitor

Purpose of the report

- 1 This report provides options for establishing new arrangements for housing the Independent Children's Monitor and seeks your decision on which arrangements to progress to Cabinet, for consideration in March/April 2021.

Executive Summary

- 2 On 17 December 2020, Ministers were provided with advice on high-level options for long-term institutional arrangements for the independent monitor for the Oranga Tamariki system [REP/20/11/1158 refers]. Officials' advice was that:
 - 2.1 maintaining the trust and confidence of the public, in particular Māori, is the most important consideration for any potential new arrangements for the long-term home of the Monitor
 - 2.2 the primary purpose of independent monitoring is to support improvement in outcomes for children, young people and their whānau. Monitoring does this by:
 - 2.2.1 strengthening accountability mechanisms for decision makers and the public, and by providing decision makers with information and trusted advice to support their decisions on matters of system performance
 - 2.2.2 supporting learning and improvement in service provision and practice
 - 2.3 the purpose of systemic advocacy is to publicly challenge existing government policies and system settings and advocate for change
 - 2.4 given the conflicting purposes of monitoring and advocacy in this context, the monitoring and systemic advocacy for children functions should not be placed in the same entity
 - 2.5 consequently, despite Cabinet's in-principle intention that the function should transition to the Office of the Children's Commissioner (OCC), this option was not recommended.
- 3 Officials further advised that establishing new arrangements would be the most appropriate way forward. The Ministry of Social Development (MSD) in collaboration with MSD's Māori Kāhui Goup¹, developed and assessed four options for possible new arrangements:

¹ The Kāhui are a group of Māori leaders with expertise in the care sector who were convened to assist officials to obtain the views of Māori throughout the development of policy and the operation of the Monitor. Membership includes, Sir Mark Solomon, Donna Matahaere-Atariki, Eugene Ryder, Druis Barrett and Katie Murray.

- 3.1 Option 1 – a new Autonomous Crown Entity
- 3.2 Option 2 – a statutory officer supported by a new departmental agency with legislative provision made for Māori to be appointed to the Public Service Commission-led Appointments Panel.
- 3.3 Option 3 – a statutory officer within a central agency
- 3.4 Option 4 – a business unit within a central agency
- 4 Options 3 and 4 are not recommended on the grounds that such arrangements may not hold the trust and confidence of the public, and in particular Māori. Option 2 is preferred by Kāhui on the basis that statutory provision can be made for Māori to be involved in the Public Services Commission-led appointments panel for a Statutory Officer. This would be consistent with the current policy intention for the proposed new governance arrangements for the OCC to have a legislative requirement for Māori involvement in the selection and appointment process for the Board. Option 1 continues to also be a feasible option.
- 5 There will be costs associated with transitioning the existing monitoring function out of MSD. However, we do not consider the operating costs associated with placing the function in a new Crown Entity or departmental agency are likely to be significantly more than the current costs budgeted for by the Monitor while hosted within MSD.
- 6 It is also worth considering the future home for monitoring against the Optional Protocol to the Convention against Torture (OPCAT), currently undertaken by the Office of the Children's Commissioner. While it is not critical that OPCAT and Oranga Tamariki systems monitoring are undertaken together, there are operational efficiencies associated with doing so. If you desire both monitoring functions to exist within the same entity, Option 1 is likely the only viable choice given the requirement that OPCAT monitoring be kept operationally independent from Government.

Recommended actions

It is recommended that you:

- 1 **note** that on 17 December 2020, Officials recommended establishing new arrangements for the long-term home of the independent monitor for the Oranga Tamariki system
- 2 **note** that the following four options have been considered that provide new arrangements for supporting the monitoring function:
 - 2.1 Option 1 – a new Crown Entity
 - 2.2 Option 2 – a statutory officer supported by a new departmental agency, with legislative provision made for Māori to be appointed to the Public Service Commission-led Appointments Panel.
 - 2.3 Option 3 – a statutory officer within a central agency
 - 2.4 Option 4 – a business unit within a central agency
- 3 **note** that if Ministers wish to align the monitoring under OPCAT with monitoring of the Oranga Tamariki system, then Option 1 is likely the only feasible option
- 4 **agree** to proceed with recommending to Cabinet to rescind the decision that in principle the intention is for the monitoring function to be transferred to the OCC

Agreed / Not Agreed

- 5 **agree** to proceed with recommending to Cabinet that the permanent home of the Monitor be, either:

5.1 Option 1 – a new Autonomous Crown Entity

or

Agreed / Not Agreed

5.2 Option 2 – a statutory officer supported by a new departmental agency, with legislative provision made for Māori to be appointed to the Public Service Commission-led Appointments Panel

or

Agreed / Not Agreed

5.3 Option 3 – a statutory officer within a central agency

or

Agreed / Not Agreed

5.4 Option 4 – a business unit within a central agency

Agreed / Not Agreed

- 6 **agree** to forward this report to the Prime Minister and other Ministers including the Minister for State Services, Minister for Children, Minister for Whānau Ora and Minister for Māori Development.

Agreed / Not Agreed


Melissa Cathro

Policy Manager, Child and youth policy

17/2/21

Date


Hon Carmel Sepuloni

Minister for Social Development and
Employment

21/2/21

Date

Background

- 7 On 17 December 2020, following consultation with the Ministry of Social Development's (MSD's) Kāhui Group and relevant government agencies, MSD provided advice on high-level options for the long-term home of the Independent Monitor (the Monitor) [REP/20/11/1158 refers].
- 8 We continue to hold the view that the systemic advocacy and monitoring functions cannot be effectively provided for within the same organisation, and therefore, despite Cabinet's in-principle intention that the function should transition to the Office of the Children's Commissioner (OCC), a permanent home in the OCC is not recommended.
- 9 A system-level advocate has a very different operating culture when compared to the operating culture envisaged for the Monitor. Specifically, it is the role of the advocate to challenge Ministers and decision makers over existing Government policy and systems settings and to advocate for change. This is in contrast to the role of the Monitor who provides trusted advice to Ministers and decision makers on the performance of existing Government policy and systems settings. Housing the two functions within the same entity creates an inherent conflict that cannot be easily resolved.
- 10 In our December advice we noted that establishing new arrangements was the most suitable option. This remains the recommended approach and is supported by Kāhui, the Public Service Commission and the Ministries of Education and Health. Should you wish to establish a new home for the Independent Monitor, this report provides further advice on how these new arrangements could work.
- 11 We propose to take your preferred option to Cabinet for consideration in March/April 2021.

The critical consideration when settling on new arrangements – what will enable the public, in particular Māori, to have trust and confidence in the monitor and its work?

- 12 The role of the monitor is to strengthen accountability mechanisms for decision makers and the public, to support learning and improvement in service provision and practice, and to provide trusted advice to decision makers (in particular Ministers) to support them to make decisions that improve outcomes for children, young people and their families. Critical to the success of the monitor is its ability to build and maintain trusted relationships with Ministers and other decision makers.
- 13 Our December 2020 report noted that for decision makers (in particular Ministers) to value the work of the monitor, the monitor must be able to demonstrate it holds the trust and confidence of the public, in particular Māori.

Four options have been identified for new arrangements:

- 14 The options for new arrangements are:
 - 14.1 Option 1 – a new Crown Entity
 - 14.2 Option 2 – a statutory officer supported by a new departmental agency, with legislative provision made for Māori to be appointed to the Public Service Commission-led Appointments Panel.
 - 14.3 Option 3 – a statutory officer within an existing public service department
 - 14.4 Option 4 – a business unit within an existing public service department
- 15 The advantages and disadvantages of the four options are assessed in the appendix to this report.
- 16 MSD's recommended options are either the establishment of a new Autonomous Crown Entity (Option 1) or a Statutory Officer supported by a new departmental agency (Option 2), so long as legislative provision can be made for the inclusion of Māori on the appointment panel for the Statutory Officer.

- 17 MSD does not recommend any institutional form that would see the monitor set up within an existing government department (Options 3 or 4). This would not meet the expectations of the public and Māori who, through our engagement, have identified independence as a key requirement for the Monitor. Any option that includes the Monitor as part of a public service department would be seen as not independent enough, and likely undermine trust and confidence in the monitor and its work.
- 18 Below we set out how a new Autonomous Crown Entity or statutory officer supported by a departmental agency might work in practice.

An Autonomous Crown Entity (ACE) in practice

Governance

- 19 An ACE must 'have regard to government policy' when discharging its functions. MSD considers this is appropriate given the Monitor is established to provide advice on how Government policies and system settings generally are performing for children, young people and their families.
- 20 A board would be appointed by the Governor-General on the recommendation of the responsible Minister. The Children and Young People's Commission and Oversight of Oranga Tamariki System Bill (the Bill) will specify the skills, knowledge and experience board members must have, including those relevant to ensuring the board has strong Māori knowledge and influence.
- 21 The Bill would provide for an Appointments Advisory Panel to be established. The Panel would be comprised of Māori, Public Service Commission officials and officials from the 'parent' agency.
- 22 The Bill would provide that the parent agency would identify senior, well respected, Māori to participate on the Panel. The Panel would provide recommendations to the responsible Minister on who should be appointed.
- 23 The greatest advantage of this option is the ability to legislate and provide for substantial Māori input into both the appointment of the board, the board itself and the focus of monitoring.

Resourcing and support

- 24 Existing operational arrangements (i.e. staff, policies and procedures, monitoring approaches, etc) being built within MSD would transition and form the foundations of the operational arrangements for the ACE.
- 25 Monitoring resources would be focused on supporting the fulfilment of the Monitor's functions, without the risk of being re-prioritised to other things, which is the greatest risk associated with monitoring being hosted by a government agency.
- 26 There are several options for which agency may serve as the Monitor's parent agency. This agency must be sufficiently independent of the Oranga Tamariki system; likely candidates could include the Education Review Office (ERO) or the Ministry of Justice. We would not recommend MSD given the agency's historical connection to Child, Youth and Family and the fact that, as a Children's agency, MSD's activities will be within scope for monitoring.
- 27 The disadvantage of this option is that a Crown Entity's budget bids are reliant on the 'parent' agency to progress. In practice, a Crown Entity may find its needs de-prioritised as the 'parent' agency seeks to progress funding for other priorities.

A Statutory Officer supported by a new departmental agency with legislative provision made for Māori to be appointed to the Public Service Commission-led Appointments Panel

- 28 Subject to providing for Māori input into the appointment of the statutory officer, this option is the preference of MSD's Kāhui Group. This is because a new departmental agency will provide greater assurance that funding and resources provided to support monitoring will be used for that purpose.

Governance

- 29 Under current arrangements a Statutory Officer, as the chief executive of the new departmental agency, would be appointed in accordance with the Public Services Act.
- 30 If this option is preferred, MSD recommends that the Statutory Officer be appointed in accordance with the Public Services Act and the proposed Bill, which will include additional skills, knowledge and experience criteria and appointments process requirements.
- 31 The additional appointments process requirements would see explicit provision made for Māori participation and input into who is ultimately recommended for appointment as the statutory officer. This would align with the current policy intention for the proposed new governance arrangements for the OCC to have a legislative requirement for Māori involvement in the selection and appointment process for the Board. This arrangement would enable the individual to be both the Statutory Officer, discharging the functions, powers and duties under the Bill, and the Chief Executive of the new departmental agency.

Resourcing and support

- 32 There is a risk that a new departmental agency may not be seen as sufficiently independent by the public, and by Māori in particular. However, a departmental agency addresses the concern held by Kāhui that the Monitor should have greater control over the submission and consideration of budget bids and thus reduce the risk of monitoring being under-resourced.
- 33 Existing operational arrangements being built within MSD would form the foundation of the new departmental agency. A departmental agency requires a host agency to provide 'back office' services, i.e. human resources, Information Technology, finance, procurement, etc.
- 34 As in the Crown entity option, MSD considers the Education Review Office (ERO) and the Ministry of Justice (MoJ) are the most appropriate agencies to host a new departmental agency.
- 35 Like MSD, ERO is considered a children's agency for the purposes of the Children's Act 2014. However, ERO is a monitoring and review agency and does not deliver services directly to children, young people or their families and as such does not have a direct and immediate impact on outcomes. For this reason we consider that ERO remains an option to host a new departmental agency.
- 36 ERO brings an existing focus on children, and existing systems and service monitoring and review capability. Positioning the Monitor close to ERO also provides the opportunity for sharing of data and insights which may support Government to better understand the issues facing children more generally and how Government could respond. ERO have previously expressed their support for hosting the Monitor.
- 37 While the possibility of housing a new departmental agency has not yet been canvassed with MoJ, we consider they may be another option.
- 38 Like ERO, MoJ also provides synergies with the work of the Monitor through the data and insights it collects in respect of youth justice. While MoJ has a connection to the Oranga Tamariki system it is still sufficiently independent that we do not consider stakeholders would be opposed to it hosting the Monitor as a departmental agency. We also note MoJ has experience in supporting Crown entities and systems monitors including the Inspector General for Intelligence and Security.

Financial implications

- 39 Work was done in 2018 to assess the costs of governance (i.e. a board and Chief Executive), however, work has not yet been undertaken to assess the operational costs associated with the institutional options set out above.
- 40 However, the Monitor is already in the process of being established within MSD. This arrangement provides for the monitor to purchase shared services from MSD at a cost of \$2.277m in 2019/20.

- 41 We expect there will be some initial transition cost that would be incurred under any option that sees the Monitor moved from MSD to a new or existing agency.
- 42 Regardless of whether the Monitor is placed in a new entity or a new hosted departmental agency, we do not consider the additional ongoing operating cost is likely to be significantly higher than the Monitor presently incurs within MSD. There also may be non-financial benefits. In the case of a departmental agency hosted by ERO or MoJ, these may be in the form of shared data, insights and monitoring expertise. In the case of both a new departmental agency and an ACE, non-financial benefits may also include not having to compete for resources, which may be the case if monitoring is undertaken within an existing department such as MSD, ERO or MoJ.

Implications for monitoring the Optional Protocol to the Convention Against Torture

- 43 As noted in our December 2020 report, there is a further consideration to the future placement of this function depending on the arrangements decided upon for the home of the Monitor. While the OPCAT monitoring and monitoring of the Oranga Tamariki system can be undertaken in separate entities, there are clear operational efficiencies to having them in the one organisation. For this to occur, monitoring of OPCAT must be operationally independent².
- 44 There is no hard rule on what 'operational independence' means in practice. However, it is unlikely that housing the monitor in a departmental agency hosted by a central agency would be considered sufficiently operationally independent. If Ministers do wish to keep the two monitoring functions together and assure New Zealand's continued compliance with OPCAT, the best option would be for the Monitor to be supported by an Autonomous Crown Entity.

Next steps

- 45 We intend for Cabinet to consider your preferred option for the long-term home, as well as some residual policy issues, in March/April 2021.
- 46 Following Cabinet direction, the Bill will be finalised with the aim of being introduced to the House in mid-2021.

Appendix

- 47 An assessment of the pros and cons of the institutional options is attached as an appendix.

File ref: REP/21/2/105

² As per the Guidelines on National Preventive Mechanisms, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Twelfth session, Geneva, 15–19 November 2010, CAT/OP/12/5

Appendix – pros and cons of institutional options

Option 1 - A new Autonomous Crown Entity (ACE) - Recommended

- 48 MSD considers the most appropriate form would be an ACE, as it does not have to give effect to, but must have regard to, government policy. It is important that the Monitor have regard to Government policy as its ultimate purpose is to monitor the impact this policy is having on outcomes for children, young people and families. The Public Service Commission and MSD are in agreement that if a new Crown Entity is established it should have regard to existing government policy.
- 49 While an Independent Crown Entity (ICE) could be considered, we note that an ICE does not have to have regard to Government policy and there is a risk that the Monitor may choose to look into matters within the system that may not necessarily be of value in testing the effectiveness of the policies of the Government of the day.
- 50 In coming to MSD's view that this is an appropriate form to support trust and confidence of decision makers, the public and in particular Māori, MSD has considered existing arrangements for systems monitors (such as the Climate Change Commission) and reviewers (such as the Commerce and Productivity Commissions). While these agencies may have different purposes to that of the Monitor, they have similar functions that enable comparisons. We note that independence is critical to the high levels of public trust and confidence held in these monitor/reviewers and their work. We also note that it is, in large part, as a consequence of the public's trust and confidence that Ministers also value the work of these entities.
- 51 One advantage of Crown Entities is the transparent process for appointing members of the board, who are appointed by the Governor-General on the recommendation of the Minister. The legislation sets out the skills, experience and knowledge required of board members and the appointments process. This provides the opportunity to legislate to ensure the individuals providing governance have the requisite skills; in particular, relevant knowledge of the care system and te ao, tikanga and matuaranga Māori. It also provides the opportunity for Māori involvement in the selection of board members.
- 52 Because Crown Entities are generally governed by boards, there is the opportunity for the Monitor to be informed by a broad spectrum of skills, experience and knowledge which will assist the monitor to identify areas of focus within a large and complex system.
- 53 Where hosting the Monitor in an existing department may see them compete for resourcing, under a Crown entity structure the Monitor would hold dedicated, specialist resources.
- 54 The greatest disadvantage of a Crown entity is that it is reliant on its monitoring agency to progress Budget bids for additional funding. In the past some Crown entities have found that their needs have been 'traded off' by their monitoring agency as the agency attempts to secure funding for other priority areas.
- 55 If a new Crown Entity is preferred by Ministers, the Kāhui group's recommendation is for an Independent or Autonomous Crown Entity.

Option 2 - A statutory officer supported by a departmental agency – Recommended and preferred

- 56 Like a Crown Entity board, a statutory officer provides a physical focal point, and thus visibility, for the monitoring function and its work. A dedicated position sends stronger signals of independence, which will be critical to the Monitor's success in gaining the trust and confidence of Māori.
- 57 Advantages of having a statutory officer supported by a departmental agency are similar to those associated with a Crown entity (i.e. ringfenced, specialist resourcing). However, there is an additional advantage that a departmental agency is not reliant on a 'parent' agency to progress budget bids.
- 58 As noted in the attached A3, statutory officers are appointed by the Public Service Commissioner in accordance with the appointments process set out in the Public

Service Act 2020. For this option to be acceptable to Māori, legislation would need to provide that the statutory officer is appointed following input from Māori through the appointments process. Legislation would also need to set out some additional skills, experience or knowledge that the statutory officer must have. This would be a departure from the usual process for appointing such individuals.

- 59 In addition, to ensure the operation of the monitor is informed by a broad range of perspectives and to provide Māori with greater input into the Monitor's operation, it may be prudent for legislation to provide that a Māori advisory committee to be established to advise the statutory officer. While this could be left to operational practice, legislating would provide Māori with a greater degree of confidence. Legislative provision is Kahui's preference.

Option 3 - A statutory officer supported by a department - Not recommended

- 60 MSD does not consider a statutory officer within a department is likely to be acceptable to the public, particularly Māori, due to perceptions of a lack of independence.
- 61 A statutory officer could be appointed to reflect the skills, knowledge and experience required in the Bill and in accordance with the appointments process set out in the Bill, this would support greater Maori involvement and influence over monitoring.
- 62 However, the statutory officer would be beholding to the Chief Executive of the department for their resourcing. Resources would not be ring-fenced and could be diverted to support other departmental priorities. Seeking funding through budget processes for monitoring could also be de-prioritised in the face of other agency priorities.

Option 4 - A business unit within a department - Not recommended

- 63 This reflects the current arrangements within MSD to enable monitoring to be established. Both MSD and the Public Services Commission agree that this is not a viable long-term option to support trust and confidence of the public, and in particular Māori.
- 64 It also presents the same operational/resourcing challenges and risks found in Option 3.



Design of the Oranga Tamariki Monitor within the Education Review Office

Date: 8 March 2021

Security Level: IN CONFIDENCE

Report No: 2021/0047

Contact: Hannah Cameron, Assistant Commissioner, Strategy and Policy

Telephone: Hannah Cameron, s9(2)(a)

	Actions Sought	Due Date
Hon Chris Hipkins, Minister for the Public Service	Confirm decisions to be sought at Cabinet for Oranga Tamariki Oversight Bill	12 March 2021
Hon Carmel Sepuloni, Minister of Social Development and Employment	Confirm decisions to be sought at Cabinet for Oranga Tamariki Oversight Bill	12 March 2021

Enclosure: Yes – A3 attachment to summarise the options

Minister's Office Comments

Comments:

Date returned to Te Kawa Mataaho:

Executive Summary

- 1 You met on 24 February 2021 and sought further advice on your preferred option of establishing the permanent home for the Oranga Tamariki monitoring function within the Education Review Office (ERO). This advice will inform upcoming Cabinet decisions on the *Children and Young People's Commission and Oversight of Oranga Tamariki System Bill* (Oversight Bill). Your decisions are sought this week on institutional form to ensure the Oversight Bill can be introduced by June 2021.
- 2 The meeting on 24 February:
 - a. Discussed shifting away from the in-principle decision to move the monitoring function to the Children's Commissioner due to the tension between advocacy and monitoring functions.
 - b. Indicated that Ministers were interested in providing the monitor with appropriate independence while locating it within the public service through links to ERO. The choice of ERO is based on its experience in balancing independent monitoring and advice roles as well as its existing monitoring expertise that is already respected and sought after across other jurisdictions, and
 - c. Considered that ERO has the basis for a potential wider role as the Child Wellbeing Monitor, as discussed at the end of this report.
- 3 This report recommends establishing the monitor of the Oranga Tamariki system as a statutory officer within ERO and separate to the Chief Executive because it:
 - a. Provides for more flexibility in establishing legislative requirements on the appointment process than would be desirable for a Chief Executive appointment under the Public Service Act. This contributes to supporting trust from Māori as it will enable a statutory requirement for a Māori voice in the appointment process.
 - b. Prevents public sector fragmentation now and supports the potential for the longer-term alignment of child monitoring functions within a Child Wellbeing Monitor in the future, and
 - c. Has the potential to leverage existing ERO capability for monitoring and expertise in te Ao Māori.
- 4 This is compared with alternative options for the statutory officer to be the Chief Executive of ERO or for a new departmental agency of ERO to be established where the departmental agency chief executive is also a statutory officer (see **Appendix One**).
- 5 The Kāhui group¹ have sought a greater degree of independence for the monitor from Ministers and are likely to consider that a departmental agency is required to achieve trust and confidence. Our view is that any of the options can achieve public trust and confidence if implemented and communicated appropriately. The proposed statutory requirements on the monitor in the Oversight Bill also provide a high degree of independence from Ministers and a strong focus on the care system in the execution of the monitoring functions.
- 6 This report also seeks agreement to the detailed design choices required to inform legislation.

¹ The Kāhui group is made up of key Māori leaders that provide MSD with advice on the development of the Oversight Bill. The Kāhui is chaired by Donna Matahaere-Atariki and the other members are: Tā Mark Solomon, Druis Barrett, Katie Murray and Eugene Ryder.

- 7 A consequence of establishing the monitor within the public service is that it is not able to undertake the monitoring of the Optional Protocol to the Convention against Torture (OPCAT). We understand that the Ministry of Justice will provide further advice about where this monitoring function could shift.

Recommended Action

We recommend that you:

- a **note** that there is an inherent tension for one organisation to act as both an advocate that recommends policy changes and a monitor who assesses compliance and quality of services against current policy
- b **agree** to recommend to Cabinet that the Children's Commissioner should be focused on advocacy and that Cabinet agree a different location for the monitoring of the Oranga Tamariki system

Agree/disagree

Agree/disagree

Recommended Option for the Monitor within ERO

- c **note** that the Public Service Commission has assessed three options for establishing a permanent home for the Children's monitor within ERO (see appendix A)
- d **note** that we recommend the option of a statutory officer within ERO as balancing the need for trust from the public, Māori, decision makers and the ability to reduce public sector fragmentation and support the potential longer-term direction for a consolidated Child Wellbeing Monitor
- e **note** that the Kāhui group may be in favour of the Departmental Agency option (option 3), as they will perceive that this provides for greater autonomy and independence
- f **agree** to recommend to Cabinet that a statutory officer be housed within the Education Review Office with responsibility for the functions, powers and duties of the monitor as set out in the *Children and Young People's Commission and Oversight of Oranga Tamariki System Bill* (Oversight Bill)

Agree/disagree

Agree/disagree

Legislative requirements

- g **agree** to recommend to Cabinet that the Oversight Bill require that:
- a statutory officer be established in a Government Department, to be determined by Order in Council
 - the details for the scope of statutory independence for the statutory officer are confirmed following officials doing further consultation with the Parliamentary Counsel Office
 - the statutory officer for monitoring the Oranga Tamariki system can provide advice directly to the responsible Minister, independent of the agency chief executive
 - the Chief Executive of the relevant Department must establish an advisory panel for the purpose of providing for a Māori voice in the appointment process of the statutory officer
 - that the provisions in the Public Service Act that provide for delegation by chief executives apply to the statutory officer for the purpose of delegating their statutory responsibilities except for the

statutory powers to enter premises and to require information where a bespoke delegation framework is already in place

Agree/disagree

Agree/disagree

EITHER

- h **agree** that the mechanism for ensuring the statutory officer has the appropriate capability will be the Chief Executive consulting the Māori advisory panel on the job description, experience sought and appointment criteria as part of the appointment process

Agree/disagree

Agree/disagree

OR

- i **agree** to recommend to Cabinet that the Oversight Bill further require that when appointing a statutory officer the Chief Executive must require the person to have knowledge or experience in tikanga and te Ao Māori in addition to consulting the Māori advisory panel on the job description

Agree/disagree

Agree/disagree

Funding and implementation

- j **note** that the transfer of the interim monitoring function from the Ministry of Social Development (MSD) to its permanent location will occur by the end of 2022, once the legislation has passed

- k **note** that MSD and ERO will prepare a bid for Budget 2022 in relation to the costs for the transfer and an option to expand the scale of the monitor to ensure it can monitor the full range of services under the Oranga Tamariki Act as the interim monitor was set up with a narrower scope

- l **agree** to recommend to Cabinet to establish a separate appropriation for the purpose of monitoring the Oranga Tamariki system based on the requirements in the Oversight Bill as part of the Budget 2022 process

Agree/disagree

Agree/disagree

Next steps

- m **note** that we understand the Ministry of Justice will be providing further advice on the agency that will monitor services for children and young people under the Optional Protocol to the Convention against Torture, which is currently the responsibility of the Children's Commissioner

- n **indicate** whether you want further advice on progressing a wider change to create a Child Wellbeing Monitor

Agree/disagree

Agree/disagree

- o **refer** this briefing to the Minister for Children, and the Associate Minister of Education with responsibility for ERO for their information.

Refer/not referred

Refer/not referred

- p **agree** that Te Kawa Mataaho release this briefing once final Cabinet decisions have been made on the Oversight Bill with redactions of the material on the Child Wellbeing Monitor under s9(2)(f)(iv)

Agree/disagree

Agree/disagree

Hon Chris Hipkins
Minister for the Public Service

Hon Carmel Sepuloni
**Minister for Social Development and
Employment**

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Te Kawa Mataaho Report: Oranga Tamariki Monitor within the Education Review Office

Purpose of Report

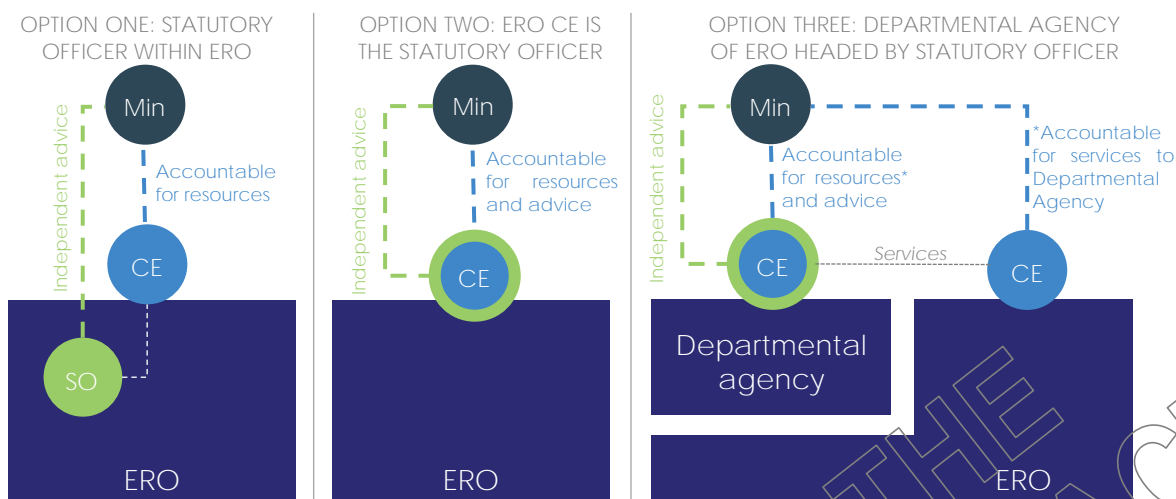
- 1 Following discussion between Ministers, this report provides advice on the detailed design for establishing a permanent home for the Oranga Tamariki monitoring function within the Education Review Office (ERO). These decisions will support proposals to Cabinet for the final stage of legislative drafting.

Previous advice on the Children's Commissioner and the long-list of options for the monitor

- 2 In 2019 the Government made an in-principle decision to shift the Monitor to the Children's Commissioner once the Oversight Bill is in place. We provided you with advice on 5 February 2021, ahead of your 24 February meeting, recommending that the Monitor should have regard to government policy and should be kept separate from the entity that is doing the system advocacy role. This report seeks a confirmation of that decision in line with what was discussed at your meeting.
- 3 We provided advice on 5 and 23 February on the longer-list of options for the permanent home for the monitor, including a new Autonomous Crown Entity or a statutory officer within the public service – either within an agency or as a new departmental agency. Based on your direction this report focuses on the details for providing appropriate statutory independence for the role while locating it within the public service.

Policy objectives and the three options for a statutory officer linked to ERO

- 4 The monitoring function will carry out impartial and evidence based monitoring to provide insights and findings regarding compliance with the Oranga Tamariki system, regulations and standards, the quality of services and practice and how the Oranga Tamariki system is impacting on outcomes for children, young people and their families, and to support continuous improvement in the delivery of services.
- 5 The policy objectives for the institutional design for the monitor are to:
 - a. Effectively monitor the Oranga Tamariki system to support decision makers to make decisions that improve outcomes for children, young people and families,
 - b. Provide for public trust and confidence, particularly from Māori,
 - c. Act as a trusted advisor for decision makers within the Oranga Tamariki system, and
 - d. Reduce the fragmentation of the public sector and leverage existing capability where appropriate.
- 6 The Oversight Bill specifies the purpose, objectives, functions, duties, powers and reporting requirements for the monitor as well as setting the context within which the monitor will work with other entities and requiring the monitor to set out the tools and monitoring approaches it will use in its operations. **Appendix One** sets out three options that have been considered for housing these statutory responsibilities within ERO.
- 7 The recommended proposal (**Option One**) is to establish the monitor as a statutory officer within ERO and separate from the Chief Executive. The alternative options are to establish the statutory officer as either the Chief Executive of ERO (**Option Two**) or the Chief Executive of a new departmental agency of ERO (**Option Three**).



Recommended Option One: statutory officer within ERO, separate from Chief Executive

- 8 The statutory officer is an employee of the Chief Executive but they exercise the statutory functions and powers of the monitor independent of the Chief Executive. The statutory officer would be accountable to the responsible Minister, not the Chief Executive, for their monitoring to ensure the monitor can act as a trusted advisor to decision makers, including Ministers.
- 9 The Chief Executive is accountable to the responsible Minister for the use of appropriated funds that support the function and has discretion over whether and how to delegate resourcing and employment decisions to the statutory officer. The statutory officer would be accountable to the Chief Executive in relation to how their unit has used the agency resources and how they have exercised any resourcing and employment delegations made by the Chief Executive.
- 10 To increase the public trust and confidence in the monitor, particularly from Māori, the Chief Executive's appointment process could include the establishment of an advisory group to advise the CE on their process.
- 11 Ministers may also want to require in legislation that the monitor has capability in tikanga and te Ao Māori. The alternative is that the Chief Executive, in consultation with the advisory group, can design the position description including the experience and capability sought and the criteria to be used for the selection of the monitor.

Alternative Options: establish the statutory officer as a chief executive

- 12 The two alternative options are based on having a Chief Executive as the statutory officer. In Option Two this is the ERO Chief Executive and in Option Three it is a new Departmental Agency Chief Executive.
- 13 The key differences between these options and the recommended option are:
 - a. The Public Service Commissioner appoints the statutory officer under the chief executive appointment process set out in the Public Service Act in both Option Two and Three. Option One provides more flexibility for a bespoke appointment process, and also allows for the statutory officer to be appointed as a permanent public servant.
 - b. The same person has accountability for the functions and powers of the monitor and for the resources used to support the monitor. Given the extensive legislative requirements on the monitor and the proposal for a ring-fenced appropriation for the monitor's resources we do not think this will create a significant difference in practice. Although the Kāhui group perceive that a departmental agency is required to maintain the priority and focus on the monitoring function.

- c. Option Three requires the establishment of a new entity which has additional costs and reduces the ability for the monitor to leverage the existing expertise of ERO, while Option Two may reduce the longer-term flexibility for expanding the role of ERO into the Child Wellbeing Monitor.

Evaluation of the options

- 14 The Public Service Commission recommends Option One, a statutory officer within ERO who is separate from the Chief Executive as a way to:
 - a. Provide for more flexibility in establishing legislative requirements on the appointment process than would be desirable for a Chief Executive appointment under the Public Service Act. This contributes to supporting trust from Māori,
 - b. Prevent public sector fragmentation now and support the potential for longer-term alignment of child monitoring functions within a Child Wellbeing Monitor in the future, and
 - c. Create the potential for ERO and monitor to share and develop capability for monitoring and expertise in te Ao Māori, where that may be relevant across both statutory functions.
- 15 **Appendix One** provides a summary of the design features of the three options and an evaluation of how they achieve the policy objectives. All the options ensure that there is a statutory officer to achieve an appropriate independence for the monitor in making assessments. All the options support the monitor to act as a trusted advisor to decision makers by providing for a direct line of advice to Ministers and through the association with ERO that already fulfils that role.
- 16 The key difference is the degree to which the options support the objectives of achieving public trust and confidence and reducing the fragmentation of the public sector.

We consider that all options have the potential to achieve public trust and confidence
- 17 Providing for public, and particularly Māori, trust and confidence is supported through non-institutional features in the existing draft legislation that require the monitor to:
 - a. Ensure it has as a key priority the need to support improved outcomes for Māori children and young people when developing its work programme,
 - b. Establish a code of ethics to ensure culturally safe and ethical engagement that provides assurance that the voices of individuals, particularly children and young people, are heard,
 - c. Disseminate information that is accessible to individuals, families and whānau, and
 - d. Report annually on the outcomes for Māori children, young people and whānau within the Oranga Tamariki system, report annually on the compliance with National Care Standards and report every three years on the overall state of the Oranga Tamariki system.
- 18 In addition, MSD will provide further advice in the upcoming Cabinet paper to require the monitor to establish a Māori advisory committee for the purpose of consultation on the monitor's work programme, priorities, and monitoring approach.
- 19 When it comes to public perceptions the key differences between the options relate to the appointment process for the statutory officer and perceptions from the Kāhui group that a stand-alone entity form is required to preserve the priority and operations of the monitoring function.

- 20 The Public Service Commission does not recommend establishing a new departmental agency of this size. The perception of increased control over the operating model for the monitoring function is unlikely to realise gains compared to the ability to share wider organizational capability that a departmental agency may otherwise need to build or refine beyond what the Independent Children's Monitor within MSD has developed including:
- a. Data management and analytics,
 - b. Information management including privacy assessments and Official Information Act responses,
 - c. Chief Executive Office, and
 - d. te Ao Māori capability.
- 21 Option One prevents increased fragmentation of the public sector now. It also best preserves the option for further expanding the role of ERO to become a high performing Child Wellbeing Monitor in the future. For instance ERO has invested in expanding its te Ao Māori capability, it already visits residential care facilities to monitor educational services and ERO supported the initial establishment of the interim monitor through the provision of material such as practice guidelines and position descriptions that helped inform the monitor approach.

Ultimately trust and confidence will depend on how the activity is implemented and communicated.

- 22 We consider that ERO can implement the Oranga Tamariki monitoring role alongside its education role in a way that will be able to achieve what we understand stakeholders are seeking.
- 23 The ability for the monitor to operate at the scale envisioned by legislation and expected from stakeholders will depend on Budget 2022 funding decisions that are independent of the institutional choice. Currently the monitor employs 36 FTEs for the purposes of monitoring compliance with the National Care Standards Regulations. Once the Bill passes the scope of monitoring will expand significantly. Estimates prepared in 2018 suggested the monitor would eventually scale up to between 70 and 80 FTEs to monitor the whole Oranga Tamariki system, including early support, intensive response, and transition services.
- 24 Regardless of the chosen institutional arrangements, we recommend that you seek Cabinet agreement to establish a separate appropriation for resources related to monitoring the Oranga Tamariki system to ensure Ministerial decisions are required for any reprioritisation of funds.
- 25 Stakeholders will need to see this function be given priority, dedicated resource and an appropriate operating model developed in a consultative manner in line with the statutory requirements of the Oversight Bill and the existing body of work from the monitor.

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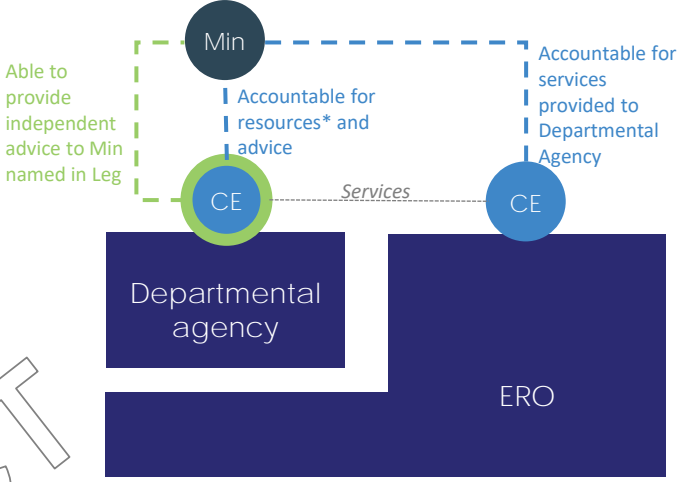
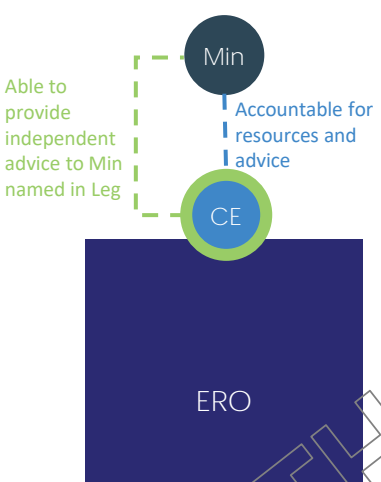
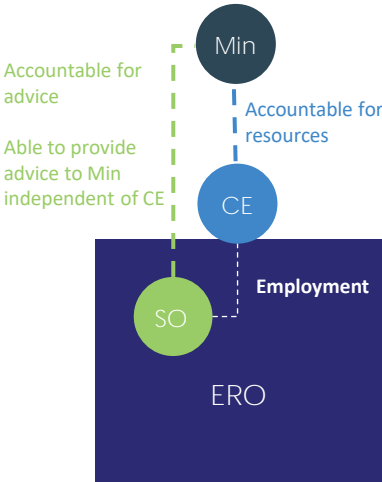
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Next Steps

- 31 The decisions on the institutional design of the monitor are to support final Cabinet decisions ahead of the Oversight Bill being introduced by June 2021. Introduction of the Bill will signal the end of what has been a multi-year piece of work to strengthen independent oversight of the Oranga Tamariki system. Given the extensive stakeholder engagement on this work there is a public interest in getting certainty about how the proposed system will operate to ensure effective and independent oversight, including monitoring, is in place.
- 32 Following your decisions on this paper, the Ministry of Social Development will provide a draft joint Cabinet paper for your considerations on the following timeframe:
- a. Cab paper to Ministers: 15 March
 - b. Departmental consultation: 17-19 March
 - c. Ministerial consultation: 22-26 March
 - d. SWC: 7 April
 - e. Cabinet: 12 April
- 33 The transfer of the monitoring function is expected to happen by the end of 2022 subject to legislation passing and Budget 2022 decisions on the costs for the transfer and any additional funding in relation to expanding the scope of monitoring activities beyond what the interim monitor is doing. Officials will work with ERO on initial costings subject to confirmation from Ministers about the preferred option.



		Option 1 – Statutory officer within ERO and separate to the CE	Option 2 – ERO CE as the Statutory Officer	Option 3 – Departmental Agency of ERO
Distinguishing design features	Appointment of Monitor	Appointed by ERO CE Oversight Bill will require CE to establish Māori advisory panel for appointment process EITHER: require monitor to have te Ao Māori capability OR: CE, in consultation, to determine criteria and experience requirements	Appointed by Public Service Commissioner Legislative process set out in the Public Service Act. We do not recommend making any further legislative requirements to this well established process. Nick Pole is current CE, appointed for 2017 – 2022.	Appointed by Public Service Commissioner Legislative process set out in the Public Service Act. We do not recommend making any further legislative requirements to this well established process.
	Accountability for resources when there is a ring-fenced appropriation	ERO CE accountable for using resources for the purpose set out in the appropriation Monitor is accountable to CE for the use of resources in how they do their role The operating model will depend on both the monitor and the Chief Executive. The Chief Executive can decide what resource to delegate to the statutory officer or invest in cross-agency functions that support the Oranga Tamariki monitoring e.g. information management systems or te Ao Māori expertise	The ERO CE / monitor is accountable for both the monitoring assessments and the use of resources.	ERO is the appropriation administrator but the responsible Minister can direct the departmental agency to use the appropriation and be accountable for what is achieved with those funds. Departmental agency chief executive will make decisions about their operating model subject to fixed costs for corporate services from the host. There will be choices for the departmental agency agreement e.g. which agency provides the IT for specific information management requirements.
	Costs for transfer (Note Budget 2022 bid will also seek funds to ensure the monitor can do roles not covered by ICM)	Appointment process for statutory officer IT system transfer for staff, current website, finance and info management On-boarding staff (currently 36FTE) and any extra property or IT costs The job-sizing of the Chief Executive role will be re-evaluated. This may or may not have implications for remuneration	Same as Option One Minus Initial appointment process	Same as Option One Plus Salary costs for new chief executive Salary for office to support the chief executive which may include strategic advisors and in-house corporate resource
	Delegation framework	Statutory officer to be given ability to delegate statutory responsibilities as if they were a CE, except in relation to statutory powers	General CE delegation framework in Public Service Act Oversight Bill restricts delegations in relation to the statutory powers.	Same as Option Two
Policy objectives	Effectively monitor the Oranga Tamariki system	● Statutory officer ensures the monitor can effectively provide advice about what is needed to improve outcomes that is independent of Oranga Tamariki and Ministers	● Same as Option One	● Same as Option One
	Provide for public trust and confidence, particularly from Māori	● Some will perceive this as lacking focus on the care system and lacking sufficient independence We consider the monitor can build trust through how it operates in an environment with substantive legislative and financial safeguards	● Same as Option One	● The Kāhui group will perceive this option is best placed to maintain the priority and focus on the Oranga Tamariki monitoring function because it has a dedicated agency
	Trusted advisor for decision makers	● Decision makers have trust in ERO and the statutory officer model	● Same as Option One	● Similar to Option One, but with weaker link to ERO
	Reduce public sector fragmentation	● Best achieves this aim by preventing fragmentation now and preserving options for ERO to become the Child Wellbeing Monitor	● Prevents fragmentation now but has less flexibility for longer term change to ERO	● Increases the public sector fragmentation through establishing a new entity for a relatively small function

Recommended by the Public Service Commission

Not recommended: less flexibility for appointment process and longer-term change

Not recommended: more costs for transition and in the long-run, plus increased fragmentation in the public sector
However, will have greater support from the Kāhui group



Report

Date: 28 June 2021

Security Level: IN CONFIDENCE

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

Confirming the proposed jurisdiction of the Ombudsman set out in the Oversight of the Oranga Tamariki System Bill prior to Legislation Committee

Purpose of the report

- 1 This report seeks your agreement to confirm the extent of the Ombudsman's jurisdiction set out in the draft Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill (the Bill) and the process for confirming this decision.

Executive summary

Clarifying earlier Cabinet agreement

- 2 The high-level policy intent of strengthened complaints and investigation oversight was outlined in the March 2019 Cabinet paper [CAB-19-MIN-0113 refers], including the need to ensure complainants have the option to seek independent, timely, child-centred and easy to navigate complaint resolution processes.
- 3 There are differences in agency views, however, about whether there is a clear Cabinet mandate for the Ombudsman's jurisdiction to extend to all providers delivering services through the Oranga Tamariki System¹. This would include providers who are approved under Section 396 of the Oranga Tamariki Act 1989 to take custody or provide care for children, community service providers approved under Section 403, and a wide range of other services delivered to children, young people and their families under the Act (see Attachment A for more detail about these categories of provider).
- 4 The Chief Ombudsman considers that the Cabinet mandate for broadening their jurisdiction to include all providers delivering services through the Oranga Tamariki System is sufficiently clear from the March 2019 Cabinet paper.
- 5 Oranga Tamariki do not agree that the Ombudsman's jurisdiction has been explicitly considered or agreed by Cabinet. MSD notes that while the high-level intent has been agreed, including that the extent of the Ombudsman's jurisdiction should be broadened beyond Oranga Tamariki, there is no explicitly minuted decision about the *extent* to which it should be broadened. MSD considers that, given the differences in stakeholder views, and the

¹ The Oranga Tamariki System is defined to mean services and supports provided to children, young people and their families under or in connection with the Oranga Tamariki Act 1989.

significant implications of this decision for providers, then it is advisable to clarify and confirm the agreed jurisdiction with Cabinet.

Policy considerations

- 6 MSD and Oranga Tamariki agree that:
 - 6.1 the Ombudsman's jurisdiction should, at a minimum, extend to include those service providers, approved under Section 396 of the Oranga Tamariki Act 1989, providing custody to children and young people
 - 6.2 individuals receiving services through the Oranga Tamariki system who are not *known* to Oranga Tamariki, should not be able to complain directly to the Ombudsman about these services
 - 6.3 if Section 396 care providers are to be included in the Ombudsman's jurisdiction then only care provider organisations, and not individual foster parents, should be subject to direct investigation by the Ombudsman
 - 6.4 the Ombudsman's jurisdiction should only extend to organisations to the extent they are providing services under the Oranga Tamariki Act, and not in relation to any other private or charitable purposes that these organisations may have.
- 7 Oranga Tamariki sees merit in broadening the Ombudsman's jurisdiction to include Section 396 care providers (including whānau care providers) but are concerned about the lack of consultation on the specific issue of the extent of the Ombudsman's jurisdiction, lack of partnership, and potential non-financial burdens (especially for smaller providers and whānau care providers).
- 8 Oranga Tamariki would expect there to be further consultation with Treaty partners and with care providers to gauge their views prior to introducing the Bill to the House. However MSD considers there is a risk that consultation will delay progress towards introducing the Bill in the House in September as planned and that the Select Committee process provides a sufficient opportunity for care providers and Treaty Partners to raise any concerns they may have with this proposal. The chair of MSD's Kāhui group has tested this approach with a small group of Section 396 care providers and they are supportive of not delaying the Bill to undertake further consultation prior to Select Committee.
- 9 Oranga Tamariki do not support further broadening the Ombudsman's jurisdiction to include Section 403 community service providers or other services provided under the Oranga Tamariki Act 1989. In addition to the concerns raised above, they are concerned about difficulties in clearly operationalising those services that would be subject to the Ombudsman's jurisdiction and the potential reluctance of providers to provide services to Oranga Tamariki because of the perceived burden.

Recommended next steps and process for confirming Cabinet agreement to the jurisdiction

- 10 MSD expects this issue may be a key point of discussion and consideration through the Select Committee Process – regardless of the extent to which the jurisdiction is broadened in the Bill that is introduced in the House.
- 11 The key decision needed now is about whether the Bill that is introduced in the House provides for either a limited broadening (396 custody and care only) or wider broadening (all providers) of the Ombudsman's jurisdiction. There is a further question about whether any policy work to better understand the implications of wider broadening is undertaken prior to introducing the Bill in the House (which would delay progress of the Bill) or as part of the Select Committee process itself.
- 12 MSD recommends that you propose to Cabinet, through the August paper to Legislation Committee (LEG), that the Bill provide for a limited broadening to

include Section 396 custody and care providers, noting that further policy work can be undertaken through the Select Process to consider the merits and operational feasibility of broadening the Ombudsman's jurisdiction to include Section 403 Community Services and potentially other services provided through the Oranga Tamariki System. Any subsequent decision to further broaden the jurisdiction, informed by this work, could be considered by Social Wellbeing Committee (SWC) following Select Committee.

- 13 MSD do not recommend the alternative options of providing for a wider broadening within the Bill that is introduced in the House – with further policy work undertaken either before or during the Select Committee process. Further work to resolve the policy questions associated with wider broadening before the Bill is introduced risks delaying the Bill. Alternatively, introducing the Bill with a wider jurisdiction, while acknowledging that further policy work is needed through Select Committee to support this widening, risks creating stakeholder uncertainty.

Recommended actions

It is recommended that you:

- 1 **agree** to discuss with officials the Ombudsman's jurisdiction issue, and the process for confirming a decision on what is included in the Bill that is introduced in the House **agree/ disagree**
- 2 **note** that there are two main options for how the Ombudsman's jurisdiction can be defined in the Bill that is considered at LEG for introduction in the House:
 - 2.1 **option 1 – limited broadening:** Section 396 care providers and custody providers only
 - 2.2 **option 2 – wider broadening:** Section 396 care and custody providers, Section 403 community service providers and other services provided to children, young people and their families, under or in connection with the Oranga Tamariki Act 1989 (to the extent they are providing services under this Act)
- 3 **note** that Oranga Tamariki are supportive of option 1, but consider that consultation with Treaty partners and care providers on the specific jurisdiction issue should be undertaken prior to introducing the Bill in the House
- 4 **note** that if option 1 is preferred then MSD considers the Select Committee process provides a sufficient opportunity for providers and Treaty partners to outline any concerns they may have. On this basis MSD does not propose undertaking consultation on option 1 prior to introducing the Bill in the House, thereby avoiding any delays.
- 5 **agree** that the Bill considered by LEG for introduction in the House, and the process for considering wider broadening, provides for **either**:
 - 5.1 **option 1** - limited broadening, with further work to assess the merits and feasibility of wider broadening undertaken during the Select Committee process (**MSD recommended**)

agree/ disagree

OR

- 5.2 **option 2a** wider broadening subject to further policy work and agreement by SWC undertaken before the Bill is introduced, thereby delaying the Bill

agree/ disagree

OR

5.3 option 2b wider broadening but with the expectation that the merits and feasibility of wider broadening is considered as part of the Select Committee process

agree/ disagree

- 6 **agree** to forward this report to the Minister for Children, the Minister of Justice, and the Speaker as the Chair of the Officers of Parliament Committee

agree/ disagree

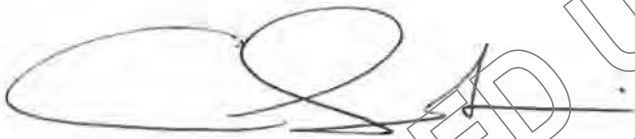
- 7 **note** that depending on your preferred approach to resolving this issue, and the considerations relating to ministerial consultation outlined in paragraphs 57-58 of this report, you may wish to discuss this issue with some or all of the Ministers listed in recommendation 6.



Molly Elliott
General Manager
Social Development, Child and Youth Policy

28/06/21

Date



Hon Carmel Sepuloni
Minister for Social Development and
Employment

8/7/21

Date

Background

- 14 In March 2019 Cabinet agreed to strengthen oversight of the Oranga Tamariki System in three areas: independent complaints and investigation, monitoring and advocacy [CAB-19-MIN-0113 refers]. At that time, Cabinet agreed the policy intent of strengthened complaints and investigation oversight and that the Ombudsman was best placed to take on this role.
- 15 In May 2021 MSD provided an aide memoire noting that the *extent* to which the Ombudsman's jurisdiction should be broadened needs to be confirmed to finalise the Bill (REP/21/5/436 refers) but this issue was not considered by Cabinet at that time.
- 16 In June 2021, MSD provided a memo responding to a request from your office seeking further information on the potential impacts of broadening the Ombudsman's jurisdiction given Oranga Tamariki's proposed strategic direction towards devolving care to Māori and iwi organisations. This advice included information on available data about the number and nature of complaints about providers.
- 17 A decision on the extent of the Ombudsman's jurisdiction is needed now to finalise the Bill that is introduced in the House. It is planned that the Bill will be considered by LEG and introduced in the House in September – although this timeline depends in part on your preferred option for resolving the issues outlined in this report.

The Ombudsman's current jurisdiction does not extend to providers delivering services through the Oranga Tamariki System

- 18 Currently the Ombudsman's complaint oversight jurisdiction in relation to the Oranga Tamariki system is largely limited to investigations of Oranga Tamariki itself (under the Ombudsman's Act 1975). There are a range of service providers delivering services through the Oranga Tamariki system that cannot be directly investigated by the Ombudsman, including:
 - 18.1 **Section 396 custody providers: 3 providers** approved under Section 396 of the Oranga Tamariki Act who take custody of children and young people
 - 18.2 **Section 396 care providers: ~60 providers** approved under Section 396 of the Oranga Tamariki Act who are responsible for overseeing care arrangements. This includes ten "whānau care providers" (who are either approved or working towards accreditation) with responsibility for overseeing arrangements providing care for tamariki within their own whānau
 - 18.3 **Section 403 Community Services providers: ~500 providers** approved under Section 403 of the Oranga Tamariki Act. Some of the services delivered by these providers and funded by Oranga Tamariki are provided to individuals who may self-refer to these services and so may not be "known" to Oranga Tamariki
 - 18.4 **"Other services" provided under the Oranga Tamariki Act.** There are thousands of services provided by individuals and organisations as part of each child's care plan.
- 19 Attachment A provides more detail about these categories of provider.
- 20 Currently, complainants can complain to Oranga Tamariki about these service providers and, if they are dissatisfied with Oranga Tamariki's handling of the complaint then they can complain to the Ombudsman about Oranga Tamariki's alleged mishandling of the complaint about the provider. As part of this process, the Ombudsman may require providers to provide information – but they cannot investigate, or make recommendations to the provider directly.

- 21 There are currently few and limited alternative options for resolving these complaints independently of Oranga Tamariki or the provider. Complainants can complain to:
 - 21.1 the Office of the Children's Commissioner who has very wide powers to investigate "any decision" in respect of "any child" under Section 12(1)(a) or Section 13(1)(a) of their Children's Commissioner Act 2003. However, in practice this power is seldom exercised and this power to investigate matters relating to individual children and young people will be removed under the proposed Bill
 - 21.2 the Social Worker Registration Board. This is limited to complaints relating specifically to social workers who have breached social worker competency standards and does not extend to actions or decisions taken by non-social workers or by provider agencies themselves
 - 21.3 the Social Sector Accreditation Advisory Board. Any complaints received by this group relating to the quality of services are referred back to Oranga Tamariki.

MSD recommends seeking Cabinet agreement to confirm the proposed jurisdiction

- 22 Although the March 2019 Cabinet paper confirmed the broad policy intent and rationale for strengthened complaints and investigation oversight, there was no explicit, minuted agreement about which categories of service provider should be included in the Ombudsman's jurisdiction.
- 23 Paragraph 37 of the body of the March 2019 SWC paper (which were not referred to in the recommendations) included the following statement suggesting the intended scope was broad:

The proposals for both the monitoring and assurance function, and complaints oversight and investigations function covers obligations and services provided under the Oranga Tamariki Act 1989. These latter oversight roles would apply to Oranga Tamariki, its contracted providers, other agencies that have custody of children and other government agencies with roles and responsibilities under that Act to provide services to these children (e.g. health, education and disability services) (underlining added for emphasis)

- 24 The Chief Ombudsman advises that he understood from the March 2019 Cabinet paper that it is sufficiently clear that Cabinet intended that his jurisdiction would be broadened to include at least section 396 care providers and section 403 Community service providers but would also include other services provided under or in connection with the Oranga Tamariki Act 1989. Oranga Tamariki do not consider the Cabinet mandate is sufficiently clear and do not consider that Ministers have had the opportunity to fully consider the implications of this decision.
- 25 Given these differences of opinion, and the lack of an explicitly minuted Cabinet decision we recommend seeking Cabinet agreement to clarify and confirm the Ombudsman's jurisdiction. The process and options for seeking Cabinet agreement will be discussed later in this paper.

Policy objectives of strengthened complaints oversight and rationale for a broadened jurisdiction

The policy objective is to ensure there is a timely, independent, child-friendly and easy to navigate complaints pathway

- 26 The broad policy rationale for strengthening the complaints and investigation function within the Oranga Tamariki system is to ensure complainants have the option to access a timely, independent, child friendly and easy-to-navigate complaints pathway.

- 27 This reflects previous reviews of the Oranga Tamariki System, including the Review of Child Youth and Family Complaints System (2013), the Beattie Review (2018), and the recent Waitangi Tribunal report, *He Pāharakeke, he Rito Whakakīkinga Whāruarua*. These reports emphasise the need for independent complaint handling mechanisms – especially given that complainants are often reluctant to raise concerns with people or organisations with responsibility for their care.
- 28 It is also important to emphasise that the policy objective is to ensure there is the *option* for complainants to complain directly to the Ombudsman about these providers. Complainants may choose to complain directly to the service provider or with the organisation directly should they wish. This “no wrong door” approach aligns with the policy objective of being child friendly and easy to navigate.

Rationale for broadening the Ombudsman’s jurisdiction

- 29 Broadening the Ombudsman’s jurisdiction to be able to directly investigate providers supports the policy objectives of providing a timely, independent and easy to navigate complaints pathway.
- 30 MSD is of the opinion that Oranga Tamariki, by itself, cannot provide independent complaints oversight of services provided through the Oranga Tamariki system. This is because complainants may be dependent on Oranga Tamariki for their care and so may not wish to raise complaints about providers with them. Oranga Tamariki also has existing contractual relationships with complainees that may create a perceived or real conflict of interest. Although there is an option for complainants to indirectly seek independent complaints resolution through the Ombudsman (by complaining about Oranga Tamariki’s alleged mishandling of a complaint) – this indirect process is less timely and harder to navigate.
- 31 The Chief Ombudsman has also cited specific instances where their existing powers have not been sufficient to adequately resolve complaints about providers through the indirect process of investigating Oranga Tamariki’s complaints handling. He notes a case in which an individual complained about Oranga Tamariki’s handling of a complaint by a provider: the Chief Ombudsman recommended to Oranga Tamariki that they require the provider to apologise to the complainant, however neither Oranga Tamariki nor the Ombudsman was able to enforce this recommendation.
- 32 The Ombudsman has provided a series of other specific examples where he has received complaints about providers but was unable to remedy the situation. The Ombudsman further notes that a broader jurisdiction would align more closely with the proposed scope of the monitoring function (which encompasses the Oranga Tamariki System) and therefore maximise the cohesiveness of the relationship between the oversight agencies.
- 33 The Ombudsman notes that broadening his jurisdiction to include all providers delivering services through the Oranga Tamariki System reflects the Legislative Design Advisory Committee’s guidance, which states: ‘All bodies that exercise public functions should be subject to the Ombudsmen Act 1975 unless compelling reasons exist for them not to be’. The Committee’s guidance represents an important constitutional principle that entities performing a public function – whatever the status of the body – should be subject to the same accountability mechanisms that apply to public sector bodies. It is for this reason that the Ombudsmen Act already applies to a number of entities which carry out a public function despite being ostensibly private or quasi-private in nature. One example is the Te Urewera Board, the Tūhoe post-settlement governance entity which provides governance to, and acts on behalf and in the name of, Te Urewera, established under section 16 of Te Urewera Act 2014.

MSD and Oranga Tamariki agree the Ombudsman's jurisdiction should be broadened to include Section 396 custody providers

- 34 MSD and Oranga Tamariki agree the Ombudsman's jurisdiction:
- 34.1 should include Section 396 providers who have custody of children at a minimum
 - 34.2 should not include services provided to children, young people or families who are not "known" to Oranga Tamariki (e.g. individuals who self-refer to a service provided under the Oranga Tamariki Act, but are otherwise not subject to a report of concern or some other intervention that has brought them to the attention of Oranga Tamariki²)
 - 34.3 should not extend to direct investigations of individual foster parents, but rather the organisations with responsibility for overseeing the foster care arrangement
 - 34.4 should only extend to organisations to the extent that they are providing services under the Act, and not in relation to any other private or charitable purpose that these organisations may have.
- 35 There is disagreement between MSD and OT, however, about the extent and process through which the Ombudsman's jurisdiction should be further broadened to include other categories of service provider set out in Attachment A.

Oranga Tamariki sees merit in a limited further broadening, but only after consultation with providers, which would likely delay the Bill

- 36 Oranga Tamariki consider there is merit in further broadening the Ombudsman's jurisdiction to include Section 396 care providers, but they have a number of concerns with this approach and would expect to see consultation with Treaty partners and affected providers prior to Select Committee to more fully consider and assess any potential impacts.
- 37 Oranga Tamariki note the following broad concerns with including Section 396 care providers within the jurisdiction of the Ombudsman:
- 37.1 Lack of a partnership approach** - Oranga Tamariki notes that providers are likely to be supportive in-principle of independent complaints investigation. However there may be a perception, particularly from whānau care providers, that the Ombudsman's investigative powers are not undertaken in partnership with providers. To the extent this is a significant concern of current or potential future whānau care Partners, this may hamper progress towards Oranga Tamariki's strategic shift towards devolving care to Māori and Iwi organisations through whānau care Partner organisations.
- The Chief Ombudsman considers that this concern is misguided. As an Officer of Parliament performing independent complaints oversight the Ombudsman is not undertaking monitoring by the Crown. The Treaty and tikanga are nonetheless at the heart of his oversight of all agencies. This means his Office must apply the Treaty and tikanga in its processes, and his practices and decisions must be consistent with the Treaty and its principles. To support this work the Ombudsman has established an advisory panel comprising prominent Māori members who support the Ombudsman's role in carrying out his work. The Bill will codify and

² Note, further work is needed to clarify more precisely how individuals who are "known" to Oranga Tamariki is best defined to align with the policy intent.

underscore this obligation as it relates to the Ombudsman's oversight of the Oranga Tamariki system and it will be at the heart of his engagement with Oranga Tamariki providers. This will include a requirement to operate in a culturally competent way and to endeavour to develop arrangements with iwi and Māori organisations to support the Ombudsman with complaints and investigations under the Bill.

37.2 Administrative burden - especially for smaller providers. Oranga Tamariki note that many approved providers, including whānau care Partners, are small organisations with as few as three staff members. Although these providers can pass on financial costs associated with an investigation by the Ombudsman to the Crown, there is concern about whether small organisations would have the capacity and capability to engage with an investigation undertaken by the Ombudsman. The Chief Ombudsman notes that he intends to engage with affected agencies to support them with complaints handling and help them understand their role, both generally and in response to individual complaints. He would draw on his experience of managing complaints and engaging with other small organisations, including those that are not part of the public service, such as aged care facilities and school boards of trustees. He would seek to achieve quick, practical and culturally appropriate resolutions to complaints and other issues, including referring complaints back to the service provider in the first instance where possible, and would only investigate formally where that is both necessary and resolution cannot be achieved.

37.3 Lack of consultation about the scope of jurisdiction - There has been extensive consultation with stakeholders to date about the new oversight arrangements, including that the Ombudsman would have responsibility for complaints and investigations. However there has not been any specific consultation with Section 396 care providers, or other providers, about the specific proposal to broaden the Ombudsman's jurisdiction to include their services. Oranga Tamariki are concerned that service partners and Treaty partners will consider it inappropriate, and not in the spirit of partnership, to have to argue their points of view on the impacts of this proposal at Select Committee, and that attempts should be made to gauge their views before the Bill is introduced to the House.

38 These issues appear to reflect a perceived concern that the Ombudsman's considerable powers to investigate under the Ombudsman's Act 1975 (which are stronger than the powers of a Royal Commission of Inquiry) are disproportionate to the scale and level of risk associated with many complaints. There may be a perception that involving the Ombudsman, especially for more minor complaints, will lead to slower and less effective complaints resolution and that complaints best practise recommends resolving complaints as close to "source" as possible.

39 However, the Chief Ombudsman considers this perception misconstrues his role. Major investigations are not the norm, and he uses his powers proportionately according to the nature of the complaint. His existing practice is to ensure complaints are resolved at source wherever possible, noting that of the complaints against Oranga Tamariki completed so far in the July 2020 to June 2021 year, only 17% were investigated. Thirty two percent were referred back to Oranga Tamariki for consideration in the first instance, and a further 11% were resolved without investigation. Over 70% of complaints were completed within three months.

Oranga Tamariki does not support broadening the jurisdiction to include Section 403 Community service providers or other providers

40 Oranga Tamariki does not support extending the Ombudsman's jurisdiction to include Section 403 Community service providers or other services provided

under the Oranga Tamariki Act 1989 to families, children or young people. In addition to the concerns raised above, they believe:

- 40.1 there is a risk that some providers may choose not to provide community services to Oranga Tamariki because of the perceived risk of investigation and the burden associated with this
- 40.2 the risk of serious complaints relating to these providers is likely to be lower than for custody holders or care providers
- 40.3 it would be difficult to operationalise and may create inequities and confusion on the part of providers and complainants. For example, some Section 403 services are delivered to children or families who are not known to Oranga Tamariki. This could mean that some families receiving a service could complain to the Ombudsman while others receiving the same service could not. MSD considers these differences are justifiable given the overall greater risk and vulnerability faced by individuals who are known to Oranga Tamariki. However MSD acknowledges that further work would be needed to confirm how best to operationalise broadening of the Ombudsman's jurisdiction to include Section 403 Community service providers, and in particular how to appropriately define those children who are "known" to Oranga Tamariki in a way that appropriately balances equity concerns.

Further factors to consider

The number of complaints about providers appears to be small, but data is limited

- 41 MSD notes that complaints about providers appear to be relatively uncommon, but the lack of centralised complaint monitoring data limits any firm conclusions that can be drawn. Available data suggests:
 - 41.1 the Oranga Tamariki Partnering for Outcomes team has provided five examples of complaints received by regional teams about provider organisations. However it is unclear over what time period these complaints were received and there is no centralised recording to know how many complaints are typically received by regions.
 - 41.2 the Oranga Tamariki Complaints and Feedback team received five complaints about partner organisations over a fifteen-month period: one about a S396 custody holder; one about a S396 care partner; and 2 about a Section 403 provider. However the Complaints and Feedback Team do not resolve or routinely receive complaints received about providers and so this data does not provide a clear indication of the magnitude of the issue.
 - 41.3 the Ombudsman has provided a number of examples of complaints about Oranga Tamariki's handling of complaints about providers. However the Ombudsman's systems are not currently set up to routinely record this information in a manner that can be aggregated, and a manual search of their text records was not able to reliably identify the information sought on complaints relating to providers categorised by the statutory provision under which they were engaged.

Ministry of Justice would like further information about the need for the change

- 42 MSD has sought the views of the Ministry of Justice, which has responsibility for the Ombudsman Act 1975, on this issue. Justice agrees there is a need for robust and accessible complaints and investigation processes within the Oranga Tamariki system. It would like more information about the problems the Ombudsman currently experiences with complaints against care providers and how this situation differs from others in which a public sector agency contracts a private entity to provide services. It is particularly interested in any broader implications of explicitly extending the Ombudsman's jurisdiction to a large number of private providers.

- 43 MSD intends to work further with the Ministry of Justice and the Ombudsman in the coming weeks to clarify these concerns before any potential consideration of this matter at LEG.

Options analysis: MSD recommends the Bill introduced in the House provide for a limited broadening of the Ombudsman's jurisdiction to include Section 396 custody and care providers

- 44 We have considered two key options for defining the Ombudsman's jurisdiction in the Bill that is introduced in the House.
- 44.1 **Option 1: limited broadening** to include Section 396 care and custody providers only
- 44.2 **Option 2: wider broadening** to include all providers delivering services through the Oranga Tamariki system.
- 45 In considering these options, MSD has tried to balance the need to:
- 45.1 align with the policy intent and public expectation that complainants should have access to a timely, independent, child centred and easy to navigate pathway for resolving complaints about providers delivering services through the Oranga Tamariki System
- 45.2 minimise any delays in progressing the Bill
- 45.3 limit unexpected impacts on providers and wider stakeholder uncertainty
- 45.4 ensure the jurisdiction can be readily operationalised and clearly understood by stakeholders.

Recommended option: seeking agreement at LEG to limited broadening and undertaking further analysis on wider broadening through Select Committee

- 46 MSD recommends that the Bill that is introduced in the House provides for a limited broadening of the Ombudsman's jurisdiction to include Section 396 custody and care providers.
- 47 MSD notes Oranga Tamariki's view that it is unreasonable to expect care providers to have to raise their concerns through the Select Committee process without prior consultation.
- 48 MSD considers that the Select Committee Process provides an adequate opportunity for care providers and Treaty partners to raise any concerns and that further consultation would likely delay the Bill and may not identify a clear way of resolving any concerns that are raised in any case. MSD notes that the chair of MSD's Kāhui group has recently met with 14 Section 396 care providers and confirmed that these providers were supportive of MSD's recommended approach.
- 49 We consider that a limited broadening to include Section 396 custody and care providers could be confirmed at LEG. We do not consider agreement at SWC is needed given that Oranga Tamariki are supportive of the policy intent to broaden the Ombudsman's jurisdiction to include Section 396 custody and care providers.
- 50 MSD considers there is merit in contemplating wider broadening of the Ombudsman's jurisdiction to include Section 403 community service providers and "other" services provided to families, children and young people under the Oranga Tamariki Act 1989. However we consider that further policy work should be undertaken to:
- 50.1 clarify how this wider broadening would work in practise, including the feasibility of limiting the jurisdiction to include only those individuals "known" to Oranga Tamariki and the equity issues this may raise
- 50.2 further assess whether the rationale for broadening to include the large number of Section 403 providers (more than 500) and the thousands of

"other" providers delivering services under the Act is proportionate given the level of risk involved and the adequacy of existing complaint resolution mechanisms

50.3 further assess to what extent this wider broadening of the Ombudsman's jurisdiction to include these providers is consistent with the approach adopted in other sectors

50.4 better understanding any impacts for these organisations and implications for the sector more generally.

- 51 If the limited broadening option is preferred then we would recommend this further policy work to assess the merits of wider broadening outlined above be undertaken through the Select Committee process. Depending on the outcomes of this work, any agreement to further broadening of the Ombudsman's jurisdiction could be agreed at SWC, after Select Committee.

Alternative option: seeking agreement at SWC to include all providers, prior to going to LEG and introducing the Bill in the house

- 52 The alternative option would be to provide for a wider broadening within the Bill that is introduced in the House.
- 53 One advantage with this option is that a wider jurisdiction aligns with wider public expectations that the Ombudsman's jurisdiction should be substantially broadened – especially given that the Children's Commissioner's current broad powers to undertake investigations relating to "any child" (under the Children's Commissioner Act) will not continue under the new Children and Young People's Commission Bill.
- 54 However, given the significant policy uncertainties with this option MSD would need to undertake further policy work outlined in paragraph 50 before seeking agreement at SWC and then LEG to introduce the Bill in the House. This would significantly delay progress on the Bill.
- 55 A variation on this option could be to note the policy uncertainties associated with wider broadening at LEG and to seek agreement that consideration be given at Select Committee to the merits and feasibility of this wider jurisdiction. MSD is concerned this is likely to create stakeholder uncertainty and does not recommend this approach.

Consultation with Ministers and next steps

- 56 MSD would appreciate the opportunity to meet with you to discuss how best to resolve this issue. There are a number of factors that need to be weighed up and there are minor variations on the main options we have set out that could be considered.
- 57 You may also wish to discuss this issue with s the Minister of Justice and the Minister for Children, noting the concerns raised by Oranga Tamariki about the need for consultation with care providers and Treaty partners before introducing the Bill in the House.
- 58 The Chief Ombudsman has advised that the Speaker, in his role as chair of the Officers of Parliament Committee, was consulted on and agreed to the policy proposals in the Cabinet paper as it related to the enhanced role of the Ombudsman. The Chief Ombudsman has recommended that the Speaker should be consulted on any proposal to limit the Ombudsman's jurisdiction to not include all providers delivering services through the Oranga Tamariki System.
- 59 Subject to your agreement to the jurisdiction of the Ombudsman included in the draft Bill, and the process for confirming this decision, MSD will work with your office to update the timeline for progressing the Bill (if needed) and instruct Parliamentary Counsel Office to update the draft Bill to reflect your decision.

File ref: REP/21/6/670

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

Responsible manager: Molly Elliott, General Manager, Social Development, Child and Youth Policy

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Attachment A: Services provided to children, young people and their families under or in connection with the Oranga Tamariki Act 1989 (the Act)

Service Category	Numbers
Section 396 (Custody) Section 396 (Care)	<ul style="list-style-type: none"> • Around 80 organisations are approved to provide services under section 396 of the Act. <ul style="list-style-type: none"> ◦ At any given time between 55 and 60 approved organisations deliver care services for children in the custody of Oranga Tamariki (s396 Care), including around 25 providers that have self-identified as iwi or Māori organisations. In early June 2021, there were 10 Whānau Care providers either currently accredited (included here) or working towards accreditation as a s396 Care provider. ◦ Three approved organisations take custody (s396 Custody). These are Dingwall Trust, Open Home Foundation, and Barnardos.
Section 403 (Community Services)	<ul style="list-style-type: none"> • Over 500 organisations are approved to provide community services under section 403 of the Act, including over 100 Iwi or Māori organisations. <ul style="list-style-type: none"> ◦ Of these, around 60 are also approved to provide s396 services • Section 403 services include: <ul style="list-style-type: none"> ◦ Early support services such as SWiS (Social Workers in Schools), Family Start, Strengthening Families, and a range of community-led services ◦ Services for children witnessing family violence ◦ Therapeutic services – e.g. Primary Level Mental Health Services for children in care, to meet mental health needs (behavioural and/or emotional) identified through Gateway Assessment ◦ Transitions support workers, including 20 organisations with approximately 40 FTE
Other services (not s396 or s403)	<ul style="list-style-type: none"> • Thousands of individuals and organisations provide additional services to children, including psychological services, dental services, out of school activities (e.g. dance lessons, holiday programmes, riding lessons, etc.). These are provided as part of each child's care plan and purchased on a "fee for service" basis. • Some organisations are contracted to provide services that do not require s396 or s403 approval.



Report

Date: 16 September 2021

Security Level: IN CONFIDENCE

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

Cabinet paper: Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill

Purpose of the report

- 1 This paper:
 - 1.1 updates you on the outcomes of agency consultation on the draft paper for consideration by Cabinet Legislation Committee (LEG) for the Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill (the Bill)
 - 1.2 seeks your agreement on four minor policy decisions needed to finalise the Bill
 - 1.3 seeks your agreement to commence Ministerial consultation on the attached LEG paper and draft Bill (Appendix 1 and 2 respectively) for two weeks, beginning 20 September 2021.
- 2 Following the incorporation of any Ministerial feedback, we will provide a follow-up report seeking your agreement to lodge the LEG paper on 14 October 2021 for consideration by LEG on 21 October 2021.

Executive summary

- 3 The Ministry of Social Development (MSD) undertook agency consultation on the attached LEG paper and version 21.1 of the Bill.
- 4 Agencies provided feedback on the LEG paper seeking to clarify a number of matters including:
 - 4.1 the scope of the Monitor
 - 4.2 the relationship between the Bill and the Privacy Act 2020
 - 4.3 the governance of the Children's and Young Person's Commission (CYPC or the Commission),
 - 4.4 fiscal impacts of the oversight arrangements.
- 5 Agency feedback on version 21.1 of the Bill mostly covered minor, technical wording issues that have been addressed by the Parliamentary Counsel Office (PCO). In previous versions of the Bill, some concerns were raised about the "serious harm" threshold for the Monitor's direct engagement with children and young people, but these have since been resolved by making the Monitor's obligations to engage with children more explicit in its Code of Ethics.
- 6 Police sought clarification on whether it was intended that the Monitor's scope included Police responses to offending by children and young people under Part 4 (Youth Justice) of the Oranga Tamariki Act 1989. Further discussions with Police, the Independent Children's Monitor (the Monitor), and Ministry of Justice (MoJ) have highlighted the need to ensure there is a shared understanding of the intended scope

of the Monitor including whether the Monitor should be empowered to monitor Police compliance with the Oranga Tamariki Act 1989. This was implied, but not explicitly noted in previous Cabinet minutes [CAB-19-MIN-0113, 10 refers].

- 7 MSD recommends that the Bill be drafted in a way that enables the Monitor to assess Police compliance with the Oranga Tamariki Act but does not prescribe the extent to which this is a core function of the Monitor for the greatest level of flexibility.
- 8 There are four outstanding minor and technical policy and process issues that you have authority to decide to finalise the Bill. These are noted in the LEG paper.

8.1 Demonstrating regard to the Māori Advisory Group's (MAG) views - MSD has included a requirement in the Bill that the Monitor must demonstrate how it has had regard to the MAG's views. This aligns with, but goes beyond, Cabinet's earlier agreement that the Monitor must have regard to the views of the MAG [CAB-21-MIN-0153-01 refers]. MSD considers this change is important for ensuring a high level of transparency in how the views of the MAG have been considered.

8.2 Ministerial requests for reports from the Monitor - version 21.1 of the Bill allows multiple Ministers (including the Prime Minister) to request reviews, as agreed by Cabinet [CAB-21-MIN-0153-01 refers]. There is a risk this process could lead to difficulties prioritising and coordinating requests. We therefore seek your agreement to amend the Bill so that only the Minister responsible for the Monitor may request reviews. We note that other Ministers would still be able to request reviews through the Minister Responsible for the Monitor, thereby upholding the policy intent while minimising coordination issues.

8.3 Ombudsman's jurisdiction - You previously agreed that the scope of the Ombudsman's jurisdiction written into the Bill should be limited to Section 396 Oranga Tamariki Act 1989 care providers and custody providers and that agreement to this should be sought at LEG [REP/21/6/670 refers]. We now consider that this matter should be noted at LEG. However, Cabinet agreement should be sought to consider the merits and feasibility of a further broadening of the Ombudsman's jurisdiction through the Select Committee process.

8.4 Review of the Act - Cabinet has previously agreed that a review of the effectiveness of the oversight arrangements should be undertaken within five years after commencement [CAB-19-MIN-0687, recs 40-41 refer]. The Ombudsman has indicated it would be constitutionally inappropriate to be subject to a Minister initiated review. To address this issue, we are seeking your agreement to remove references to reviews of the Ombudsman's own performance while retaining the ability to review how the Monitor works with the Ombudsman. The Ombudsman has also agreed to review their own operations and for this to be noted in the LEG paper. This aligns with the agreed policy intent to review the effectiveness of the oversight arrangements rather than oversight bodies.

Recommended actions

It is recommended that you:

- 1 **note** that the version 24.2 of the Bill attached to this report is still subject to minor amendments. We will send through an updated version (with track changes) as soon as possible next week for Ministerial consultation

Scope of Monitor

- 2 **confirm** whether the Monitor should be empowered to monitor Police responses to offending by children and young people under Part 4 (Youth Justice) of the Oranga Tamariki Act 1989, as implied by CAB-19-MIN-0113, 10

yes / no

- 3 **agree**, subject to your confirmation at recommendation 2, that the Bill:

- 3.1 enables, but does not prescribe, the extent to which the Monitor is expected to monitor Police responses to offending by children and young people under Part 4 of the Oranga Tamariki Act 1989. This provides flexibility for the nature and extent of this monitoring to evolve, subject to Ministerial direction, to the Monitor's discretion, and regulations setting out the minimum content that must be included in the Monitor's reporting under the Oversight Act
(Recommended option)

agree / disagree

OR

- 3.2 explicitly prescribes that monitoring Police responses to offending by children and young people under Part 4 of the Oranga Tamariki Act 1989 is a core function of the Monitor

agree / disagree

OR

- 3.3 explicitly provides that the Monitor will not monitor Police responses to offending by children and young people under Part 4 of the Oranga Tamariki Act 1989 unless directed to by Ministers, or if the Monitor chooses to on its own accord

agree / disagree

- 4 **note** following consultation, neither Police and the Monitor indicated sought to advocate for a particular policy position on what the Monitor's scope should be

- 5 **note** that you may wish to discuss the implications of the proposed options on the scope of the Monitor through the Ministerial consultation process to confirm Ministers' understanding and expectations of the Monitor's scope

- 6 **note** if you agree to options 3.2 or 3.3, we will likely require further policy approval from SWC prior to LEG

Māori Advisory Group

- 7 **agree** that the Bill include a requirement for the Monitor to annually publish how it has had regard to the views of the Māori Advisory Group

agree / disagree

Ministerial direction and requests

- 8 **agree** that the Bill allow only the Minister Responsible for the Monitor to request reviews, noting that any other Minister may request a review through the Minister Responsible for the Monitor

agree / disagree

Matters relating to the Ombudsmen

- 9 **note** you previously agreed to MSD's recommendation to a limited broadening of the Ombudsman's jurisdiction to include Section 396 care and custody providers and that explicit Cabinet agreement to this should be sought at LEG [REP/21/6/670 refers]
- 10 **note** we now consider it would be more appropriate that you agree that the Bill be amended to reflect your decision noted in recommendation 9, under your authority to make minor and technical policy decisions [CAB-19-MIN-0113, rec 52].
- 11 **agree** that the Bill be amended to reflect your decision noted in recommendation 9
- 12 **note** that, as you have previously agreed [REP/21/6/670 refers], Cabinet agreement will be sought through the LEG paper to consider the merits and feasibility of any further broadening of the Ombudsman's jurisdiction through the Select Committee process

Review of Act provisions

- 13 **note** that the Ombudsman has advised it would be constitutionally inappropriate for the Bill to require that the Ombudsman's operations be reviewed within five years after commencement of the Act, as previously agreed by Cabinet [CAB-19-MIN-0687, 40-41 refers]
- 14 **note** the Ombudsman have agreed that the review could consider how the Monitor works with the Ombudsman. They have also provided assurances that they will undertake a review into their operations and that this can be noted in the LEG paper. MSD is satisfied that these changes achieve the policy intent of Cabinet's earlier agreement [CAB-19-MIN-0687, 40-41 refers]
- 15 **agree** that the Bill should continue to provide for the review agreed by Cabinet but will no longer require that the review must directly consider the Ombudsman's operations

agree / disagree

Ministerial consultation

- 16 **agree** to circulate the attached LEG paper and latest version of the Bill for Ministerial consultation, with a view to it being considered at the 21 October LEG Committee meeting

agree / disagree

Molly Elliott

Molly Elliott
General Manager
Social Development Child and Youth Policy

16/09/2021

Date

Hon Carmel Sepuloni
Minister for Social Development and
Employment

Date

Background

- 9 We provided your office with a memo on 6 August 2021, summarising agency feedback on version 18 of the Bill and how we addressed this feedback. This resulted in version 21.1 of the Bill, which was distributed for further agency feedback alongside a draft of the LEG paper.
- 10 MSD sought feedback from the following agencies (key stakeholders in bold):
- 10.1 **Office of the Children's Commissioner (OCC), Oranga Tamariki-Ministry for Children, Te Kawa Mataaho Public Service Commission (PSC), Office of the Ombudsman, Independent Children's Monitor (ICM or the Monitor), Education Review Office (ERO), New Zealand Police,** Ministry of Health (MOH), Ministry of Education, Department of Prime Minister and Cabinet, Treasury, Police, Te Puni Kōkiri, Te Arawhiti, Ministry for Pacific Peoples (MPP), Ministry for Youth Development, Office for Disability Issues, Legislation Design Advisory Committee (LDAC), Oranga Tamariki's Māori Design Group, Ministry of Social Development's Te Kāhui Group, Office of the Privacy Commission, Ministry of Justice (MOJ).
- 11 The Independent Police Conduct Authority (IPCA) has been notified and provided a copy of the Bill and the LEG paper, but have not been provided sufficient time to provide feedback. MSD are working with the IPCA to identify any concerns they may have with the Bill or the LEG paper and will advise your office of any further feedback they may have.
- 12 MSD received approximately 30-40 pages of feedback on version 21.1 of the draft Bill. This feedback was collated into a 'line-by-line' document, and each recommendation responded to individually.
- 13 We also met individually with the Monitor, Police, Treasury, Oranga Tamariki to discuss feedback.

9(2)(g)(i)

14 9(2)(g)(i)

Safe and ethical gathering of personal information

- 15 Cabinet previously agreed that oversight bodies should develop a code of ethics (the Code) and have the power to engage with individual children, young people and whānau, after obtaining informed consent to support safe and ethical gathering and use of personal information [CAB-19-MIN-0687, 21 and 23 refer].
- 16 MYD and OT both raised concerns that the Bill does not include any consent requirements for the Ombudsman, particularly when exercising their existing investigation powers under the Ombudsman Act 1975 in the Oranga Tamariki System.¹ However, it was not specified that the Code or the consent provisions need to be in the Bill itself [CAB-19-MIN-0687].

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

- 17 The Ombudsman consider that legislative prescription as to how they should seek consent is at odds with the Ombudsman's unique constitutional position and would create a potentially problematic precedent for constraining the Ombudsman's powers.
- 18 The Ombudsman considers they are bound by a general principle to act in the best interests of a child and that they would routinely seek a child or young person's informed consent as part of any preliminary inquiry or investigation.
- 19 9(2)(g)(i)

Definition of "serious harm" when engaging directly with children or young people

- 20 Oranga Tamariki continued to provide feedback on the provision preventing the Monitor from engaging with children or young people where the engagement is likely to cause serious harm. They indicated their concern that the Monitor's direct engagement could still harm the child or young person, even if that does not meet the "serious harm" threshold.
- 21 MSD notes there is a risk that a threshold of "harm" could prevent the Monitor from seeking information from children or young people about distressing topics that are important for the Monitor know. This was not the intent or likely effect of the clause as previously worded. The clause was intended to prevent the Monitor from engaging with children unethically.
- 22 This issue has been resolved by making explicit the Monitor's obligations to engage with children in accordance with its Code of Ethics. MSD understands that Oranga Tamariki are satisfied with this change and the LEG paper consequently does not mention this issue.

Feedback from Treasury

- 23 The LEG paper reflects feedback from the Treasury to reiterate that there are likely to be fiscal implications of the Bill in respect of the Monitor's transition from MSD to the Education Review Office (ERO) and the operation of the Ombudsman and the Children's and Young People's Commission.
- 24 Their concerns centre around the fact that ERO is a small vote and has little capacity to absorb additional costs that may be required to establish the new departmental agency. Further, ERO does not have corporate services similar to MSD and therefore it is likely that the baseline MSD have been afforded as current hosts of the ICM would be unsustainable for ERO.
- 25 The transitional funding and funds for corporate services are built into the Monitor's existing budget and we continue to consult with Treasury, ERO and the Monitor on next steps.

References to specific population groups

- 26 Cabinet agreed that the Bill would require the Monitor to collaborate with, and have regard to the views of, a Māori Advisory Group [CAB-21-MIN-0153.01].
- 27 Both OCC and Te Arawhiti remain concerned about whether the Māori Advisory Group is sufficient to meet the need for greater involvement of Māori in decisions related to the Oranga Tamariki system.
- 28 We consider the requirements in the Bill will adequately support Māori participation of those with experience and knowledge of issues in the context of the Oranga Tamariki system and of tikanga Māori.
- 29 Some agencies continued to provide feedback that some specific population groups should be specifically referenced (e.g. Pacific children and young people). We have

reiterated to agencies that it may be difficult to future-proof the Bill by explicitly naming priority population groups that may change over time. Instead, we have focused on ensuring the Bill provides the necessary functions, powers and duties needed to consider the needs and aspirations of diverse groups as they evolve over time.

Confirming the intended scope of the Monitor's function and the youth justice system

- 30 Feedback from Police and DPMC highlighted some confusion as to the scope of the Monitor's function. In particular, there is uncertainty about whether Ministers understood and intended that the Monitor would be expected to monitor Police responses to offending by children and young people under Part 4 of the Oranga Tamariki Act 1989 in the youth justice system. Or, alternatively, whether they intended the Monitor to only monitor the exercise of Police powers where they intersect with Oranga Tamariki.
- 31 Evidence from earlier Cabinet papers notes that youth justice is part of the Oranga Tamariki System [CAB-19-SUB-0687 refers]. The Cabinet papers also note that the monitoring function would cover all obligations and services provided under the Oranga Tamariki Act 1989, including by government agencies (other than Oranga Tamariki) with roles and responsibilities under that Act [CAB-19-MIN-0113, para 37 refers].
- 32 Although this implicitly includes monitoring Police responses to offending by children and young people under the Oranga Tamariki Act 1989, monitoring Police compliance itself was not explicitly mentioned or discussed in the papers. This has created some uncertainties in the policy intention for the Monitor's function. Discussion in the papers is focused on monitoring of the Oranga Tamariki and the role that other agencies play in supporting Oranga Tamariki, such as services provided by Health and Education.
- 33 The Monitor's understanding of the intent of the oversight system is that their monitoring role would include Police actions to the extent they applied to children and young people at the point they are referred to Oranga Tamariki, through either a Youth Justice Family Group Conference or a report of concern. Although the Police play a role in supporting Oranga Tamariki (for example referring young people to Family Group Conferences), they also exercise powers under the Act (such as powers of arrest and caution) in respect of children that may never come into contact with Oranga Tamariki. Most Police responses to child and youth offending under the Oranga Tamariki Act 1989 apply prior to such a referral (see Appendix 4 for a diagram showing how agencies are involved in the youth justice system).

Rationale for including Police's responsibilities under the Act

- 34 There are two key rationales for including Police in the scope of the Monitor.
 - 34.1 The care and protection system and the youth justice system were intentionally designed to operate as parts of a cohesive, overarching system under the Oranga Tamariki Act 1989. Police therefore play a significant decision-making role in the Oranga Tamariki System when responding to offending by children and young people.
 - 34.2 There is a risk that excluding Police from the Monitor's scope will lead to a gap in oversight.
- 35 First, the Police are key decision-makers on whether and how young people become involved with Oranga Tamariki. For example, Part 4 of the Oranga Tamariki Act 1989 gives Police powers to detain young people for more than 24 hours, and/or take alternative action to divert children and young people from the Youth Courts where public safety is not at risk.

36 Second, if the Monitor cannot monitor Police responses to offending by children and young people under Part 4 of the Act, there is risk of a gap in monitoring that could undermine our work to strengthen oversight.

36.1 The Office of the Children's Commissioner's (OCC) current monitoring powers under section 13(1)(b)(ii) of the Children's Commissioner Act 2003 includes monitoring the policies and practices of Police in the youth justice system under the Oranga Tamariki Act 1989. We note this power does not require the OCC to regularly review Police but empowers them to do so.

36.2 These powers will not transfer over to the Children and Young People's Commission once the Bill is enacted. Given OCC's existing monitoring function was always intended to transfer to the Monitor, MSD is of the view that the Monitor should also be transferred the powers to monitor the Police in the youth justice system.

36.3 Transferring this power will *enable* the Monitor to consider Police practice. If these functions are not transferred, the Monitor may be unable to monitor at least 1200 children in the Oranga Tamariki System that are not "known" to Oranga Tamariki. Noting the significant role of Police conduct and practice under the Oranga Tamariki Act 1989 for these children as mentioned above, we consider this potential gap could undermine the intent to strengthen oversight of the Oranga Tamariki System.

There is little risk of duplication with existing monitoring

37 There has been some confusion about potential overlap if Police are part of the Monitor's scope and the role of the Independent Police Conduct Authority (IPCA).² We consider the risk of duplication is mitigated by clause 54 of the Bill, which requires the Monitor to consult with other agencies, including the IPCA, and if appropriate refer-on matters that are more appropriately dealt with by other agencies. This means that any issue of Police compliance could be managed by the Monitor, the IPCA or both groups, and others as appropriate. The Monitor is also required under the Bill to minimise the burden on agencies and individuals.

We recommend that the Bill enables the Monitor to monitor Police's responsibilities under the Act, but is not prescriptive about the nature and extent of this monitoring

38 PCO have already drafted the Bill to include Police's powers, based on their understanding of the policy intent.

39 We recommend that you confirm that it was intended that the Monitor should be empowered to monitor Police responses to offending by children and young people under the Oranga Tamariki Act 1989, noting that you may wish to discuss this issue with your Cabinet colleagues through the Ministerial consultation process.

40 Subject to your confirmation that the Monitor should be empowered to monitor Police compliance with the Oranga Tamariki Act 1989, we seek your further agreement needed to clarify the extent to which the Bill prescribes the nature and degree to which Police compliance is monitored.

² The IPCA handles complaints related to Police conduct under any Act, including the Oranga Tamariki Act 1989.

41 We have considered three main options to provide for this in the Bill:

Option 1: Enabling, but not prescriptive oversight of Police compliance (Recommended)	Option 2: Prescriptive focus on Police compliance as core function	Option 3: Explicit provision that monitoring Police compliance is optional
<p>The Bill would empower the Monitor to monitor Police compliance with the Oranga Tamariki Act 1989 but would be silent about the nature and extent of this monitoring. This would allow monitoring of Police's compliance and operations to the same extent that they are expected to monitor Oranga Tamariki, or to undertake relatively "light touch" systems monitoring and provide flexibility for this to change over time. This would be subject in part to Ministerial direction, to the Monitor's discretion, the views of the MAG, and in regulations within the Bill setting out the minimum content that must be included in the Monitor's reporting under the Oversight Act.³</p>	<p>The Bill would explicitly require the Monitor to include Police compliance under the Oranga Tamariki Act 1989 as part of their core function.</p> <p>This will have fiscal implications for the Monitor and operational impacts for Police.</p>	<p>The Monitor would not monitor Police compliance with their responsibilities under the Oranga Tamariki Act 1989 <i>unless</i> directed to by Ministers, or if the Monitor chooses to on its own accord.</p>

45 We recommend the first option as it provides the most flexibility.

46 Given that Cabinet has not provided any explicit direction about the nature and extent of the Monitor's monitoring function in relation to Police, we consider that Option 2 and Option 3 would likely require a policy decision from SWC, prior to LEG Committee being able to consider the Bill's introduction to the house. MSD would need to undertake further work to ensure this does not delay the Bill.

This issue is noted in the LEG paper and may be raised through the Ministerial consultation process

9(2)(a)(i)

³ Regulations relating to the content of the State of Oranga Tamariki system report.

Feedback from consultation drew attention to minor policy matters that require your decisions

- 50 These decisions are noted in the LEG paper as being exercised under your authority to take decisions on minor and technical matters required to finalise the Bill [CAB-19-MIN-0113 rec 52 refers].

Monitor required to demonstrate how they have had regard to views of a Māori Advisory group

- 51 Cabinet agreed that the Bill would require the Monitor to collaborate with, and have regard to the views of, a Māori Advisory Group [CAB-21-MIN-0153.01].
- 52 The purpose of the Māori Advisory group is to support meaningful and effective engagement with Māori to ensure the Monitor's activities are appropriately catering for Māori needs [CAB-21-MIN-0153.01 rec 15.2 refers].
- 53 MSD propose that the Bill includes a further requirement that the Monitor must demonstrate annually how they have had regards to the views of the Māori Advisory Group on their website. MSD notes that this change ensures there is a high level of transparency about how the MAG's views have been taken into account which may allay concerns by some stakeholders that are likely to be raised through Select Committee. For example, the Children's Commissioner has already publicly questioned whether the MAG is sufficient to ensure that Māori views are meaningfully reflected within the Monitor's operations. MSD notes that Te Kāhui advisory group are strongly supportive of this proposed requirement to demonstrate how the Monitor has had regard to the views of the MAG.
- 54 We note that PSC considers this change creates a risk that the Monitor may avoid robust discussions with the MAG on important and contentious issues out of concern these deliberations would be made public. However, MSD considers these risks are manageable given that documented deliberations of the group could be already requested under the Official Information Act 1982.
- 55 We consider the annual reporting requirement supports the need for transparency in how the group's views are taken into account and outweighs the risk identified by PSC.

Requests for reports need to come from the Minister responsible for Monitor

- 56 Version 18 of the Bill allowed a number of Ministers⁴ to request a review on any topic within the Monitor's scope from the Monitor. This was agreed to by Cabinet to balance the trust and confidence of Ministers and the public in the Monitor [CAB-21-MIN-0153.01 refers].
- 57 PSC raised some concerns that enabling multiple Ministers to request reviews could lead to overlapping or similar requests for the Monitor, which would be administratively burdensome and difficult to coordinate.
- 58 We consider that allowing other Ministers to request reviews through the Minister responsible for the Monitor will uphold the policy intent and minimise coordination issues. The Bill would only need to explicitly refer to the Minister responsible for the Monitor as being able to request reviews.
- 59 MSD recommends you agree to remove explicit references in relation to these provisions to other Ministers except for the Minister responsible for the Monitor.

⁴ Previously, the Prime Minister, the Minister responsible for the Monitor, and the Minister responsible for the administration of the Oranga Tamariki Act 1989 could request a review as long as it did not require the Monitor to cease its existing operations to prioritise the request.

We propose that the limited broadening of the Ombudsman's jurisdiction be noted, rather than agreed, in the LEG paper

- 60 You previously agreed to MSD's recommendation to a limited broadening of the Ombudsman's jurisdiction to include Section 396 care and custody providers and that explicit Cabinet agreement to this should be sought at LEG (REP/21/6/670 refers).
- 61 We now consider it would be more appropriate for you to agree, under your authority to agree minor and technical matters [CAB-19-MIN-0113 rec 52 refers], that the Bill be amended to provide for a limited broadening of the Ombudsman's jurisdiction to include Section 396 care and custody providers. This decision will be noted in the LEG paper, rather than included as an agree recommendation for Cabinet consideration.
- 62 You have also previously agreed that a potential further broadening of the Ombudsman's jurisdiction, to include Section 403 providers and other providers delivering services under the Oranga Tamariki Act 1989, be considered as part of the Select Committee Process. The LEG paper seeks Cabinet agreement to this.

Review of Act provisions should not include direct reviews of the Ombudsman's operations

- 63 The criteria for review of the Oversight Act were agreed to by Cabinet in December 2019 [CAB-19-MIN-0687, recs 40-41] and include review of provisions related to the operations of the Ombudsman under the Act.
- 64 The Ombudsman provided feedback that they were uncomfortable with the approach to review the Act at the direction of the Minister responsible for the Act. They noted it would not be appropriate for the executive to direct a review of an independent Officer of Parliament.
- 65 We have consulted with PCO and the Office of the Clerk on other options to address this concern.
- 66 The Office of the Clerk suggested removing references to reviews of the Ombudsman's own performance but retaining the ability to review how the Monitor works with the Ombudsman (i.e. not direct review of the Ombudsman's own performance). This maintains the policy intent to review the effectiveness of the oversight arrangements rather than oversight bodies themselves [CAB-19-MIN-0687, recs 40-41].
- 67 Further, the Office of the Clerk notes that the Ombudsman may wish to agree to undertake a review of their own operations. The Ombudsman has agreed to this approach and that the Ombudsman's undertaking to review their operations will be noted in the LEG paper. MSD considers that this approach achieves the same policy intent that has been agreed by Cabinet and can therefore be agreed by you under your authority to make minor policy decisions.

Next steps

- 68 The next steps for progressing the LEG paper are as follows:

Ministerial consultation (two weeks)	20 September – 5 October
Feedback and report to Minister seeking agreement to lodge LEG paper and Bill	7 October
Lodge LEG paper	14 October
LEG consideration	21 October

- 69 We seek your feedback and agreement to commence Ministerial consultation on the LEG paper and draft Bill (and pending any further minor changes to the Bill that we will provide to your office prior to the commencement of Ministerial consultation).

70 We will also work with your office to support Ministerial and Government caucuses consultation as required.

Papers and appendices

71 Please find enclosed the following papers and appendices:

- Appendix 1 (separate document) – LEG paper for Ministerial consultation
- Appendix 2 (separate document) – Version 24.2 of the Bill
- Appendix 3 – Summary table of key themes
- Appendix 4 – Youth Justice system diagram

File ref: REP/21/8/893

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

Responsible manager: Melissa Cathro, Policy Manager, Child and Youth Policy

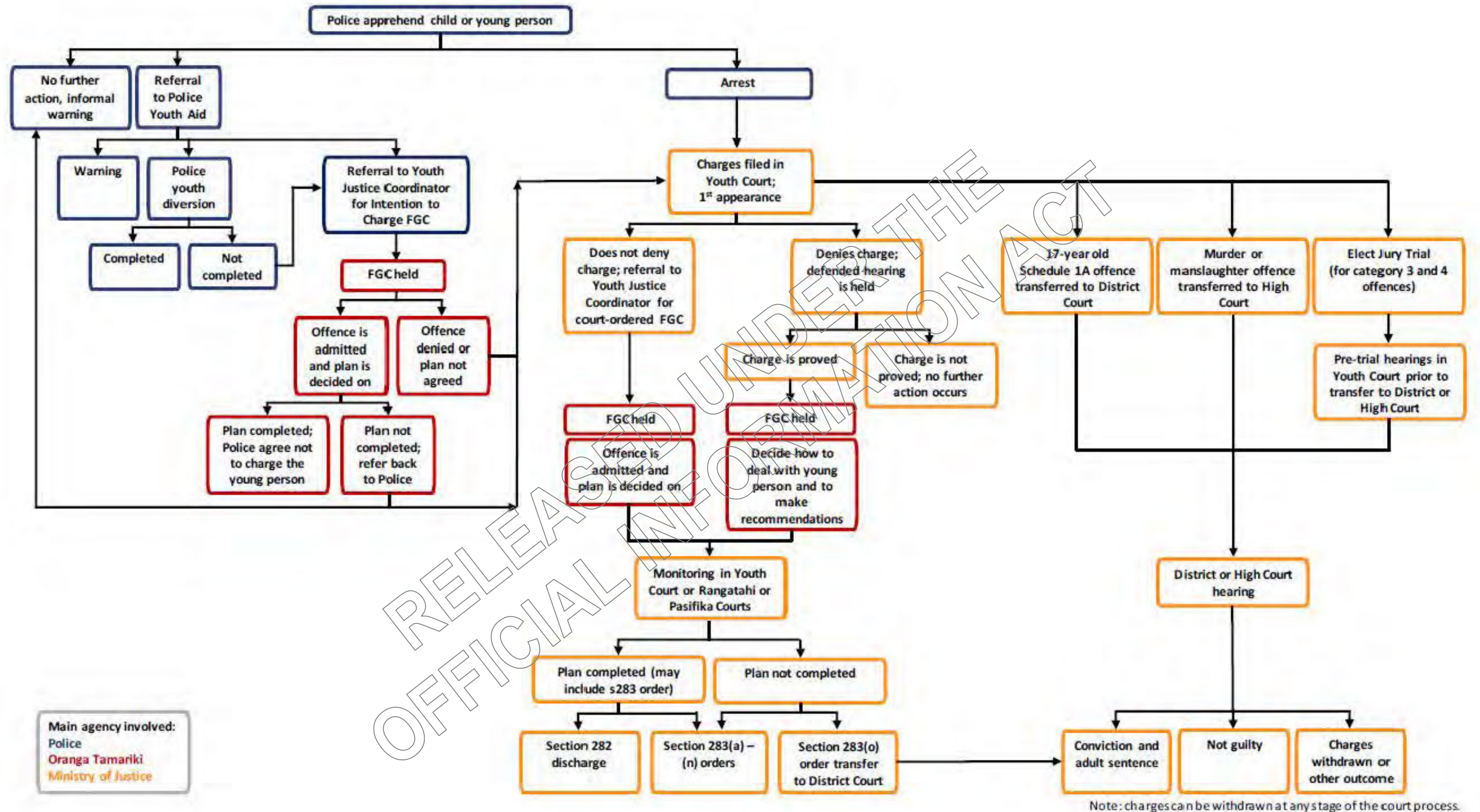
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Appendix 3 – key themes from agency consultation

This list is not exhaustive and officials can provide more detailed information as needed.

	Agencies involved	Issue addressed?	9(2)(g)(i)
Scope of Monitor in relation to Police and Youth Justice	IPCA MOJ Police Monitor	✓ Subject to your decision	
Safe and ethical engagement by Ombudsman not provided for in Bill	Ministry for Youth Development Oranga Tamariki Ombudsman	✓	
Lack of reference to specific population groups	Office of the Children's Commissioner Ministry for Pacific Peoples Te Arawhiti Te Kawa Mataaho	✓ No change	
Fiscal implications	Treasury	✓	
Māori Advisory Group	Te Arawhiti Te Kawa Mataaho	✓ Subject to your decision	
Requests for reports from Minister responsible for Monitor	Te Kawa Mataaho	✓ Subject to your decision	
Further broadening the Ombudsman's jurisdiction	Ombudsman Oranga Tamariki	✓ Subject to your decision and Select Committee	
Review of Act provisions	Ombudsman	✓ Subject to your decision	

Appendix 4 – Youth Justice system diagram





Report

Date: 8 October 2021

Security Level: IN CONFIDENCE

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

Agreement to minor policy decision to finalise Oversight Bill

Purpose of the report

- 1 This report seeks your agreement to a further minor and technical policy decision needed to finalise the Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill (the Bill).
- 2 We recommend you agree to exempt the Ombudsman from Cabinet's previous decision that the Bill requires oversight agencies to develop information rules [CAB-19-MIN-0687, 19-20 refers] because the rules are not needed and may impinge on the Ombudsman's existing powers.

Recommended actions

It is recommended that you:

- 1 **agree** that the Bill should not require the Ombudsman to develop information rules

Agree/ disagree

Melissa Cathro
Policy Manager
Child and Youth Policy

8/10/2021

Date

Hon Carmel Sepuloni
Minister for Social Development

Date

Exempting Ombudsman from requirement to develop information rules

- 3 We have become aware that Cabinet's previous decision that the Bill require oversight agencies to develop information rules [CAB-19-MIN-0687, 19-20] should not apply to the Ombudsman.
- 4 The Bill itself has been drafted to reflect this, but your agreement to this is needed under your authority to make minor and technical policy amendments to the Bill [CAB-19-MIN-0113, 52 refers].
- 5 The rationale for exempting the Ombudsman from having information rules is that:
 - 5.1 the Ombudsman has strong existing safeguards for ensuring that information is gathered, stored and used safely. All Ombudsman staff are bound by an oath of confidentiality. The Ombudsman also routinely collects, stores and uses highly sensitive information and they have very well-established internal information management policies and processes
 - 5.2 the Ombudsman's information gathering activities to support their oversight function is supported by a hybrid of powers provided under the Ombudsman Act (1975) and the Bill. It would not be practical or appropriate to have information rules that apply to information collected under the Bill, but not the Ombudsman Act
 - 5.3 there is a risk such rules would impinge on their existing powers under the Ombudsman Act.
- 6 MSD and Oranga Tamariki have also met with the Ombudsman to discuss these processes in detail. We are satisfied these processes uphold Cabinet's intent which is to ensure that information will be gathered, stored and used in a way that protects people's privacy.
- 7 Subject to your agreement to this change, the LEG paper will be amended to note this as a minor and technical policy decision that you have made under your authority outlined at point 4 above.

Next steps

- 8 We expect to receive any feedback received through Ministerial consultation from your office by 8 October. We will endeavour to update the Bill and LEG paper to reflect this feedback and provide a cover report early next week seeking agreement to lodge the LEG paper by 14 October for consideration by LEG on 21 October.

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

Responsible manager: Molly Elliott, General Manager, Social Development Child and Youth Policy

REP/21/10/1097



Report

Date: 12 October 2021

Security Level: IN CONFIDENCE

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

Cabinet paper – Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill: Approval for Introduction

Purpose of the report

- 1 This report seeks your agreement to lodge the attached Cabinet paper (Appendix 1) for the next Cabinet Legislation Committee (LEG) on 21 October 2021 seeking Cabinet agreement to introduce the Oversight of the Oranga Tamariki System and Children and Young People's Commission Bill.

Recommended actions

It is recommended that you:

- 1 **agree** to lodge the attached LEG paper by 14 October 2021

agree / disagree

- 2 **note** the draft Departmental Disclosure Statement for the Bill has been attached in Appendix 2 and will be lodged as part of the Cabinet Paper.

Molly Elliott
General Manager,
Social Development, Child and Youth Policy

Date

Hon Carmel Sepuloni
Minister for Social Development and Employment

Date

The Bill and LEG paper have undergone Ministerial consultation and are ready for lodgement

- 2 Ministerial consultation ended 8 October 2021 on the LEG paper and version 24.2 of the draft Bill.

9(2)(g)(i)

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

The issue of further broadening the Ombudsman's jurisdiction can be considered through Select Committee process

- 9 We note that recommendation 7 of the LEG paper also seeks Cabinet agreement that the merits and feasibility of a potential wider broadening of the Ombudsman's jurisdiction (beyond the limited broadening that is provided for in the Bill) be considered through the Select Committee Process.
- 10 This broadening would impact a much wider range of providers delivering services under the Oranga Tamariki Act 1989 (the Act). This would include some or all the iwi (approximately 500) and community partners delivering community services under Section 403 of the Act and potentially thousands of other partners delivering services under the Act.
- 11 We expect that Select Committee may wish to consider how best to ensure the views of this much wider group of providers are taken into account as part of their deliberations.

The Children's Commissioner continues to communicate his concerns

- 12 The Children's Commissioner raised concerns about two issues with the Bill in a letter to MSD Policy on 30 September 2021.
- 13 He requests consideration of the retention of the current power (under Section 12(1)(a) of the Children's Commissioner Act 2003) to investigate decisions, recommendations, or acts and omissions in respect of individual children.

- 14 MSD is responding to this concern noting that the removal of the Commissioner's investigation function in respect of individual children is a policy decision that was considered by Cabinet in 2019 and noted again in 2021 [CAB-19-MIN-0113, CAB-19-MIN- 0687, CAB-21-MIN-0153.02 refers].
- 15 Cabinet has agreed that the Commission will retain its general inquiry powers with additional information request provisions to support its systemic advocacy role. Individual complaints will be the responsibility of the Ombudsman – recognising their existing capability and capacity in this area. This feedback from the Commissioner and MSD's response is briefly noted in the appendix to the LEG paper.
- 16 The Children's Commissioner is also concerned the Bill does not explicitly provide for their role to advocate for change specifically in relation to the Oranga Tamariki system – noting that this was envisaged to be a key part of the oversight system.
- 17 MSD is responding to this concern by noting that the Bill enables the Commission to undertake this specific advocacy – but it does not explicitly prescribe this. By drafting the Bill in a way that is enabling, but not prescriptive, the Commission will be able to focus their advocacy effort where it is most needed and have flexibility for this to change over time. This approach aligns with best practice guidance on drafting legislation.

Next steps

- 18 Timeline of the next steps in this process is outlined below:

Pending your approval, MSD will lodge LEG paper and final version of the Bill	Thursday 14 October
LEG considers paper and Bill	21 October
Cabinet approval	Late October
Introduction to the House, first reading and referral to Select Committee	Early November (estimated)
Select Committee	Estimated to run between December 2021 to May 2022 (6 months)
Departmental Report on Submissions	Post May 2022 (estimated)

Appendices

Appendix 1: Cabinet paper

Appendix 2: Draft Departmental Disclosure Statement

REP/21/10/1105

Author: Out of scope, Policy Analyst, Regional Development Policy

Responsible Manager: Melissa Cathro, Policy Manager, Child and Youth Policy

Aide-mémoire



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

Cabinet paper

Date: 21 October 2021 **Security Level:** Cabinet Sensitive

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

File Reference: REP/21/10/1140

Introducing the *Oversight of Oranga Tamariki System and Children and Young People's Commission Bill*

Cabinet Committee	Cabinet Legislation
Date of meeting	21 October 2021
Minister	Hon Carmel Sepuloni, Minister for Social Development and Employment
Purpose	You are seeking Cabinet agreement to introduce the <i>Oversight of Oranga Tamariki System and Children and Young People's Bill</i> (the Bill).

Talking points

General overview

- This Bill provides a legislative framework to improve outcomes for children and young people by strengthening oversight of the Oranga Tamariki system and children's issues in three core areas:
 - independent monitoring and assurance of the Oranga Tamariki system,
 - oversight and investigation of complaints in the Oranga Tamariki system; and
 - system-level advocacy for all children and young people.
- I will be seeking approval from the Business Committee that the Bill be introduced as a single omnibus bill under Standing Orders 269, to be split into two Bills during the Committee of the Whole House.
- Parts 1 to 4 and Schedule 1 of the Bill will become the Oversight of the Oranga Tamariki System Bill. This Bill creates the legislative framework for the Monitor and incorporates new duties and powers for the Ombudsman to improve outcomes for children and young people in the Oranga Tamariki system.
- Part 5 and Schedules 2 to 4 will become the Children and Young People's Commission Bill. This Bill repeals the Children's Commissioner Act 2003 and reconstitutes the Office of the Children's Commissioner as the Children and Young People's Commission with a strengthened systemic-advocacy approach for all children and young people in Aotearoa.

-
- I propose the Bill is referred to the Social Services and Community Committee for consideration with a timeframe for report back of six months.
 - The Bill will then be enacted in late 2022 or early 2023.
 - I note that I have made a number of minor and technical policy decisions since we last met [back-pocket points in "Background" below].

I seek Cabinet agreement to recommend that Select Committee consider the merits of a further, wider broadening of the Ombudsman's jurisdiction

- In March 2019, Cabinet agreed that the Ombudsman's jurisdiction in the Oranga Tamariki system should be broadened but the precise extent of this broadening has not been explicitly considered.
 - The Bill already includes a limited broadening of the Ombudsman's jurisdiction to include approximately 60 providers who hold custody or have responsibility for overseeing care arrangements under Section 396 of the Oranga Tamariki Act 1989. Consultation with the Ombudsman and Oranga Tamariki has confirmed this would be operationally feasible.
 - However, the Bill does not provide for a further, wider broadening of the Ombudsman's jurisdiction (i.e. beyond Section 396 providers) which would incorporate approximately 500 additional iwi and community partners delivering community services under Section 403 of the Oranga Tamariki Act 1989 and potentially thousands of other partners delivering services under the Act.
 - While I see merit in including some or all of these providers, I recognise that further work is needed to assess the operational feasibility of doing so and the potential impacts on service partners.
 - The Select Committee process will provide an opportunity to more fully consider the views of stakeholders that may be impacted by the broadening of the Ombudsman's jurisdiction.
-

Background

A timeline of the policy development of this Bill from 2018 onwards is provided in Appendix One. It highlights key dates and events following Cabinet decisions.

You may wish to speak to the minor policy decisions you've made since May 2021

- There have been minor changes to the Bill that I wish to highlight:
 - The Bill requires the Monitor to demonstrate how they have had regard to the views of the Māori Advisory Group every year. This reporting requirement will support the need for transparency in how the Group's views are considered.

We previously discussed the need to ensure the trust of Ministers in the Monitor's findings in May 2021. It was agreed that the Prime Minister, the Minister responsible for the Bill and the Minister responsible for Oranga Tamariki could request a review from the Monitor, as long as doing so would not interfere with the Monitor's functions. Upon further discussion, I have agreed that only the Minister responsible for the Monitor will be able to request reviews by the Monitor to prevent duplication of requests and encourage coordination. Other Ministers will still be able to request reviews through the Minister responsible for the Monitor.

Additional information on concerns raised from agency and Ministerial feedback¹

A. The Bill avoids naming specific priority population groups

Some agencies, and the Minister for Pacific Peoples, provided feedback that some priority population groups should be specifically referenced (e.g. Pacific children and young people) in the Bill, and not just Māori (in the Treaty of Waitangi clauses).

Rather than explicitly identifying particular priority population groups in primary legislation, we have focused on ensuring the Bill provides the necessary functions, powers and duties needed to consider the needs and aspirations of diverse priority groups and flexibility for this to evolve over time.

There is also scope within regulations to, for example, ensure that the Monitor's reports focus on the needs of particular groups.

B. The scope of the Monitor includes all parts of the Youth Justice system under the Oranga Tamariki Act 1989

There has been some confusion about whether the Monitor's scope includes Police's responsibilities under Part 4 of the Oranga Tamariki Act 1989 in circumstances where Oranga Tamariki (the organisation) is not involved.

For example, instead of referring a young person who has committed an offence to a Family Group Conference and involving Oranga Tamariki, Police have some discretion to issue a warning or some other alternative action.

The Bill has been drafted to enable the Monitor to monitor Police responses under the Oranga Tamariki Act 1989, but it does not prescribe the nature and extent of this monitoring.

This flexibility is important because the care and protection and youth justice systems were intentionally designed to operate as parts of a cohesive, overarching system under the Oranga Tamariki Act 1989. Police therefore play a significant decision-making role in the Oranga Tamariki System when responding to offending by children and young people. There is a risk that excluding Police responses from the Monitor's scope will lead to a gap in oversight.

¹ MSD sought feedback from the following agencies (key stakeholders in bold): **Office of the Children's Commissioner (OCC), Oranga Tamariki-Ministry for Children, Te Kawa Mataaho Public Service Commission (PSC), Office of the Ombudsman, Independent Children's Monitor (ICM or the Monitor), Education Review Office (ERO), New Zealand Police**, Ministry of Health (MOH), Ministry of Education, Department of Prime Minister and Cabinet, Treasury, Police, Te Puni Kōkiri, Te Arawhiti, Ministry for Pacific Peoples (MPP), Ministry for Youth Development, Office for Disability Issues, Legislation Design Advisory Committee (LDAC), Oranga Tamariki's Māori Design Group, Ministry of Social Development's Te Kāhui Group, Office of the Privacy Commission, Ministry of Justice (MOJ).

C. Concerns about limited consultation with partners about broadening Ombudsman's jurisdiction

The Minister for Children noted he has no major concerns with broadening the jurisdiction of the Ombudsman but is keen to see more detail on how providers will be adequately and meaningfully consulted on any potential new powers.

While providers have been informed about the proposed role of the Ombudsman in overseeing complaints and investigations, there has not been extensive consultation on the specific proposal to broaden the jurisdiction to include them.

MSD's Kāhui group discussed this issue with a small group of Section 396 care providers, and they were supportive in-principle of the proposal and did not support delaying the Bill to allow time for further consultation, given the opportunity for care partners to provide their feedback through the Select Committee process.

You are also seeking Cabinet agreement that it be recommended to Select Committee that they consider a wider broadening of the Ombudsman's jurisdiction, to include Section 403 community service and other providers delivering services under the Act.

Wider broadening of the Ombudsman's jurisdiction would mean children and young people who are known to Oranga Tamariki could seek independent support to resolve their complaint directly from the Ombudsman without needing to go through Oranga Tamariki.

However, this wider broadening may be challenging to operationalise. For example, some Section 403 service providers may deliver services to individuals who are known to Oranga Tamariki – while other recipients of these same services may be members of the general public who self-refer. This would mean that the general public could complain directly to the Ombudsman about these services, but not about other, similar, services delivered by other agencies under other Acts.

Given these uncertainties, the Bill does not provide for this wider broadening. You are recommending instead that this issue may be considered by Select Committee, including possible further consultation with potentially affected providers.

D. the Bill does not require the Ombudsman to develop information rules or code of ethics, seek consent from children, or be subject to a review in five years

Cabinet previously agreed in March 2019 that the Bill require the Ombudsman to develop information rules. The Bill does not reflect this requirement because the Ombudsman has well established and strict confidentiality requirements under the Ombudsmen Act 1975. It would not be practical for separate rules to operate with respect to information obtained under each Act and would also risk impinging on the Ombudsman's general powers to require information.

The Bill does not include a requirement for the Ombudsman to seek consent when collecting information or to be subject to a code of ethics when undertaking investigations under the Ombudsmen Act 1975. While Cabinet did previously agree that the Ombudsman will

have the power to engage with children and young people subject to a consent process, and should develop a code of ethics in December last year, this agreement did not extend to a requirement that the Bill must explicitly provide for this.

- The Ombudsman already has a power under section 19 of the Ombudsmen Act 1975 to engage with individuals. The Ombudsman has advised that legislative prescription in the Bill as to how they should seek consent is at odds with the Ombudsman's independent statutory function and would create a potentially problematic precedent for constraining the Ombudsman's existing powers.
- However, the Ombudsman considers they are bound by a general principle to act in the best interests of a child and would routinely seek a child or young person's informed consent as part of any preliminary inquiry or investigation.

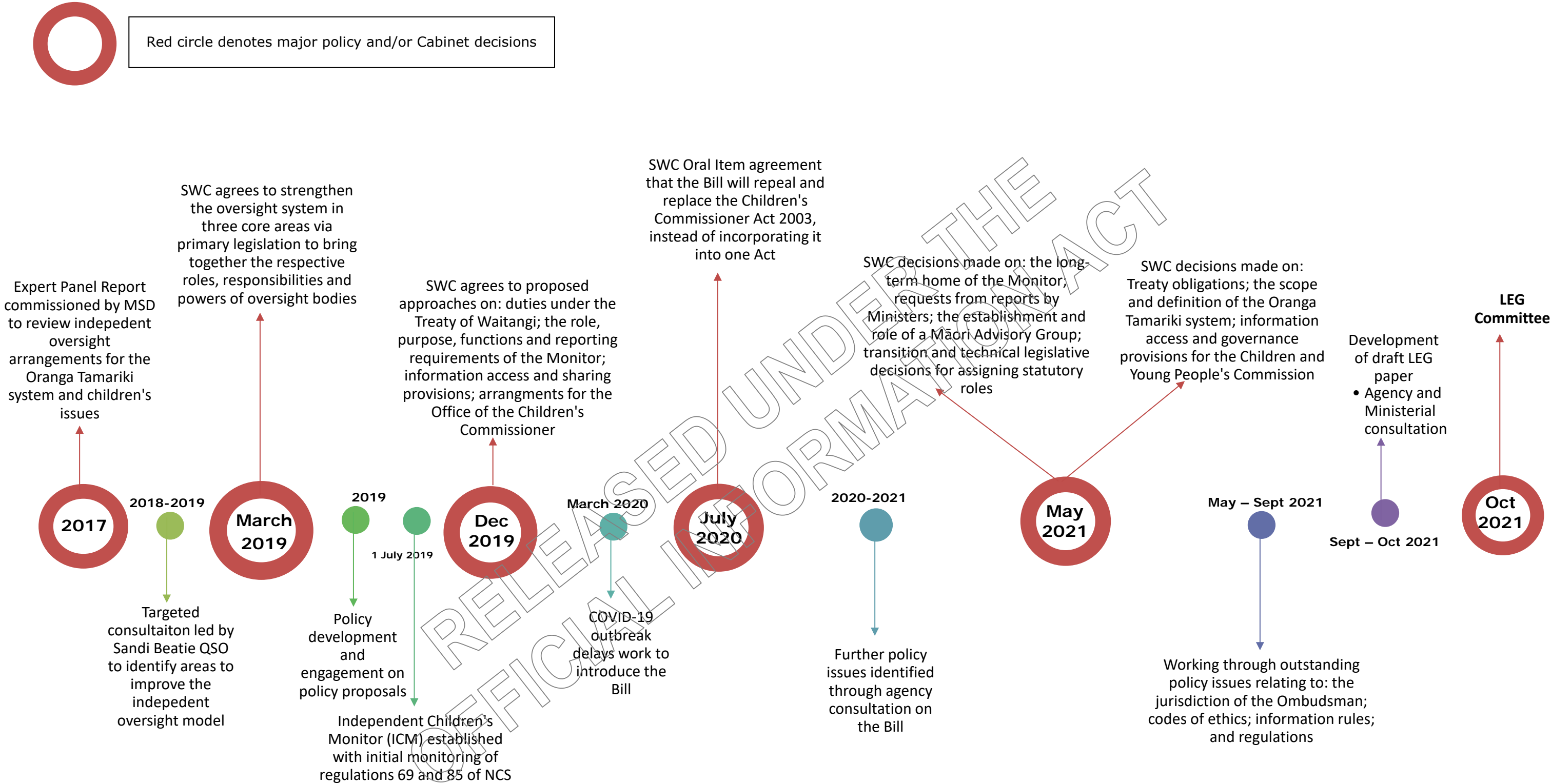
Cabinet agreed in December 2019 that the Ombudsman be subject to a review of the Bill within five years of its enactment. Owing to constitutional concerns raised by the Ombudsman about being subject to a Minister-initiated review, the Bill instead provides for a review of how the Monitor works with the Ombudsman. This approach maintains the intent to review the effectiveness of oversight arrangements without compromising the Ombudsman's independent constitutional position.

- The Ombudsman has committed to undertake a review of their own operations within five years in line with the Monitor's review requirements. Select Committee may wish to consider the merits of the Bill providing for this Ombudsman-initiated review to provide public assurance that this will be undertaken.

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

Responsible manager: Melissa Cathro, Policy Manager, Child and Youth Policy

Appendix One: timeline of policy development of the Bill since 2017





Report

Date: 18 November 2021

Security Level: IN CONFIDENCE

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

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

Purpose of the report

- 1 Provide context for sending the attached letter to Angie Warren-Clark, Chairperson of the Social Services and Community Committee.

Recommended actions

It is recommended that you:

- 1 **agree to** sign and send the attached letter to Angie Warren-Clark, Chairperson of the Social Services and Community Committee

Agree/ Disagree

Melissa Cathro
Policy Manager
Child and Youth Policy

18/11/2021

Date

Hon Carmel Sepuloni
Minister for Social Development and
Employment

Date

Background

- 2 The Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (the Bill) was introduced on 8 November 2021 and passed its first reading on 16 November 2021. The Bill was referred to the Social Services and Community Committee for consideration.
- 3 In March 2019, Cabinet agreed that the Ombudsman's complaints and investigation jurisdiction in the Oranga Tamariki system should be broadened, but the precise extent of this broadening was not confirmed [CAB-19-MIN-0113 refers].
- 4 Currently the Ombudsman's complaint oversight jurisdiction in relation to the Oranga Tamariki system is largely limited to investigations of Oranga Tamariki itself (under the Ombudsmen Act 1975). There are a range of providers delivering services through the Oranga Tamariki system that cannot be directly investigated by the Ombudsman, including:
 - 4.1 **Section 396 custody providers: three providers** approved under section 396 of the Oranga Tamariki Act who take custody of children and young people
 - 4.2 **Section 396 care providers: ~60 providers** approved under section 396 of the Oranga Tamariki Act who are responsible for overseeing care arrangements. This includes approximately ten "whānau care partners" (who are either approved or working towards accreditation) with responsibility for overseeing arrangements providing care for tamariki within their own whānau
 - 4.3 **Section 403 Community Services providers: ~500 providers** approved under section 403 of the Oranga Tamariki Act. Some of the services delivered by these providers and funded by Oranga Tamariki are provided to individuals who may self-refer to these services and so may not be "known" to Oranga Tamariki
 - 4.4 **"Other services" provided under the Oranga Tamariki Act.** There are thousands of services provided by individuals and organisations as part of each child's care plan.
- 5 The Bill has been drafted to provide for a limited broadening of the Ombudsman's jurisdiction to include care and custody providers authorised under section 396 of the Oranga Tamariki Act [REP/21/6/670 refers]. Cabinet has also agreed that it be recommended to select committee that a potential wider broadening of the Ombudsman's jurisdiction (to potentially include section 403 providers, and "other" service providers) be considered as part of the select committee process [LEG-21-MIN-0164 refers].

The attached letter invites the Chairperson to consider the Ombudsman's jurisdiction

- 6 The select committee process provides an opportunity to consider the merits of a potential wider broadening of the Ombudsman's jurisdiction and to consider the views of impacted stakeholders.
- 7 It is important for the Committee to be notified of this matter at the earliest possible stage, to allow the Committee to test the operational feasibility of potentially broadening the Ombudsman's jurisdiction and confirm an approach to engaging with impacted parties, if it so decides.
- 8 In the latest refresh of standing orders, provision was made for select committees to engage interested parties through alternative engagement (Standing Order 191). The Committee may wish to consider this approach to engaging with providers, specific organisations and other impacted parties.

- 9 MSD intends to discuss the matter in its initial briefing to the Committee, however, this may be too late for any meaningful engagement to be undertaken by the Committee.

File ref: REP/21/11/1263

Author: **Out of scope** Senior Policy Analyst, Child and Youth Policy

Responsible manager: Melissa Cathro, Policy Manager, Child and Youth Policy

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XX November 2021

Angie Warren-Clark
Chairperson
Social Services and Community Committee
Parliament Buildings

Tēnā koe Ms Warren-Clark

Oversight of Oranga Tamariki System and Children and Young People's Commission Bill

The Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (the Bill) passed its first reading on 16 November 2021 and was referred to the Social Services and Community Committee for consideration.

In March 2019, Cabinet agreed that the Ombudsman's complaints and investigations jurisdiction in the Oranga Tamariki system should be broadened but the precise extent of this broadening has not been confirmed. At present, the Bill provides for a limited broadening of the Ombudsman's jurisdiction to include approximately 60 providers who hold custody or who have responsibility for overseeing care arrangements under section 396 of the Oranga Tamariki Act 1989 (the Act).

Cabinet recommended that a potential further broadening of the Ombudsman's jurisdiction, beyond section 396 custody and care providers, should be considered as part of the select committee process [LEG-21-MIN-0164 refers]. A wider broadening of the Ombudsman's jurisdiction could incorporate approximately 500 additional iwi and community partners delivering community services under section 403 of the Act and potentially thousands of other partners delivering other services under the Act.

While I see merit in including all services or support delivered through the Oranga Tamariki system, I recognise that there are questions about the operational feasibility of such a change to consider in the first instance (outlined in **Appendix 1**). If these issues can be addressed then further consultation would be needed to better understand the potential impact on service partners.

If the Committee considers there is value in broadening the Ombudsman's jurisdiction, the select committee process provides an opportunity to consider the views of stakeholders impacted by the change. The Committee may wish to consider using powers under Standing Order 191 to undertake alternative engagement with

interested parties, and those impacted by the potential changes. This will allow the Committee to seek the views of specific organisations and parties that would be impacted.

The Ministry of Social Development will discuss this matter in its initial briefing to the Committee.

I thank the Committee in advance for its careful consideration of the Bill.

Yours sincerely

Hon Carmel Sepuloni
Minister of Social Development and Employment

Attachment:

- Appendix 1: Overview of Ombudsman's jurisdiction matter

Appendix 1: Overview of the Ombudsman's jurisdiction matter

- 1 Currently the Ombudsman's complaint oversight jurisdiction in relation to the Oranga Tamariki system is largely limited to investigations of Oranga Tamariki itself (under the Ombudsmen Act 1975). There are a range of providers delivering services through the Oranga Tamariki system that cannot be directly investigated by the Ombudsman, including:
 - 1.1 **Section 396 custody providers: three providers** approved under section 396 of the Oranga Tamariki Act who hold custody of children and young people
 - 1.2 **Section 396 care providers: ~60 providers** approved under section 396 of the Oranga Tamariki Act who are responsible for overseeing care arrangements. This includes a number of "whānau care partners" (who are either approved or working towards accreditation) with responsibility for overseeing arrangements providing care for tamariki within their own whānau
 - 1.3 **Section 403 Community Services providers: ~500 providers** approved under section 403 of the Oranga Tamariki Act. Some of the services delivered by these providers and funded by Oranga Tamariki are provided to individuals who may self-refer to these services and so may not be "known" to Oranga Tamariki
 - 1.4 **"Other services" provided under the Oranga Tamariki Act.** There are thousands of services (e.g. school holiday programme providers) provided by individuals and organisations as part of each child's care plan.
- 2 Broadening the Ombudsman's jurisdiction to be able to directly investigate providers supports the provision of a timely, independent and easy to navigate complaints pathway. The Chief Ombudsman has cited specific instances in which their existing powers have not been sufficient to adequately resolve complaints about providers through the indirect process of investigating Oranga Tamariki's complaint handling.
- 3 However, there are a number of potential issues with further broadening the Ombudsman's jurisdiction, including:
 - 3.1 It is unclear how a wider broadening would be operationalised. For example, section 403 providers may deliver services (e.g. a parenting programme) to families who may or may not be "known" to Oranga Tamariki. If these providers were included in the Ombudsman's jurisdiction then this would create anomalies in the ability for individuals to access complaints resolution through the Ombudsman. This is because providers delivering similar, or even identical, services under other Acts would not be subject to the Ombudsman's jurisdiction.
 - 3.2 The Ombudsman does not have a clear mechanism to hold providers to account. It is uncertain how responsive private organisations would be to the Ombudsman's non-binding recommendations - other than through

Oranga Tamariki's contracting lever which the Ombudsman is already empowered to make recommendations about.

3.3 The possibility of an investigation by the Ombudsman may discourage some organisations from contracting services to Oranga Tamariki.

4 There is limited data to understand the extent of this issue.

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

Cabinet paper

Date: 7 May 2021

Security Level: Cabinet Sensitive

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

File Reference: REP/21/5/463

Cabinet decision: arrangements for the Monitor of the Oranga Tamariki system and further policy decisions to progress legislation

Meeting	Cabinet
Date of meeting	10 May 2021
Minister	Hon Carmel Sepuloni, Minister for Social Development and Employment
Proposal	<p>This aide memoire provides talking points and summary of feedback received on the two related papers being considered by Cabinet:</p> <ul style="list-style-type: none">• Arrangements for the Monitor of the Oranga Tamariki system – this paper seeks agreement to rescind Cabinet’s previous in-principle decision to transfer the monitoring function to the Office of the Children’s Commissioner (OCC) and to establish a new departmental agency for monitoring hosted by the Education Review Office (ERO)• Oversight of the Oranga Tamariki System and Children and Young People’s Commission Bill – further policy decisions to progress legislation – this paper seeks Cabinet agreement to a number of proposals needed to finalise the Bill, including clarifying the practical commitments to the Treaty of Waitangi, the scope of monitoring and refining the governance arrangements for the children’s commission.
Talking Points Arrangements for the Monitor paper	<ul style="list-style-type: none">• I am seeking Cabinet agreement to confirm the long-term home of the Monitor of the Oranga Tamariki system and further policy matters needed to finalise the Bill. Cabinet Social Wellbeing Committee (SWC) considered two, related, papers outlining these proposals. SWC agreed to the proposals subject to the inclusion of a minor amendment to the recommendations.

-
- I have weighed up a range of factors that will impact on how the Monitor can best support the wellbeing of children, young people and their families within the Oranga Tamariki system. My key priorities are to ensure the arrangements enable the Monitor to maintain public confidence, particularly by Māori, while also ensuring the Monitor can provide trusted advice to decision makers. I also want to reduce public sector fragmentation and unnecessary cost.
 - I no longer recommend the monitoring function be placed within the OCC as previously agreed in principle by Cabinet in March 2019. Further work by officials, and discussions with stakeholders, has identified there is an inherent tension between providing effective public advocacy and providing trusted advice to decision makers. For this reason, these functions should not sit within a single organisation.
 - I have worked closely with the Minister for the Public Service to consider various alternative options for the long term home of the Monitor. I am recommending that a new Statutory Officer with responsibility for monitoring be established who would also be the CE of a new departmental agency of ERO. I believe this provides for a high level of statutory independence, which helps maintain public confidence, while minimising public sector fragmentation.
 - I recommend ERO as the host agency given its existing focus on children and young people and the opportunities for the Statutory Officer and the chief executive of ERO to work together on common issues.
 - I am also recommending additional provisions to help ensure the Statutory Officer can be responsive to ministerial requests while maintaining the trust and confidence of the public. I am proposing that ministers may not stop or prevent the Statutory Officer from undertaking monitoring activities. This provides a safeguard for ensuring the Monitor's work cannot be disrupted. However, I propose that Ministers should be able to positively request the Statutory Officer to undertake additional monitoring activities, in line with the Monitor's role as a trusted advisor to ministers.
 - Given the significant over-representation of Māori in the Oranga Tamariki System, I also want to ensure Māori views actively inform the Statutory Officer's work. I am therefore recommending the Bill provides that the Statutory Officer must establish a Māori Advisory Group and must collaborate with, and have regard to, the views of this Group.
-

**Talking Points –
Further Policy
Decisions paper**

- The second, related, paper seeks further policy decisions needed to finalise the Bill.
 - Cabinet had previously agreed that oversight agencies must enter into partnerships or arrangements with iwi and Māori organisations. Depending on the Māori community or organisation concerned, formal partnership arrangements may not always be appropriate (for example, there may be a conflict of interest if the Ombudsman has a partnership relationship with an organisation it is investigating). The paper therefore proposes greater flexibility in the requirements for engagement with Māori. I am recommending the Ombudsman and the Monitor be required to endeavour to develop arrangements with iwi and Māori organisations.
 - The paper also seeks to confirm that the scope of monitoring includes the Oranga Tamariki system as well as services provided by other government agencies (and their contracted partners) to children, young people and whānau who are known to Oranga Tamariki. This ensures that monitoring can provide a holistic understanding of the system itself and the interface with other, wider systems of support (e.g. health, housing and education).
 - I am proposing the Children and Young People's Commission should be able to request information about individuals from which identifying information has been removed from agencies to help support the Commission's function to enquire generally into systemic issues relating to children and young people.
 - To strengthen the governance of the Children and Young Person's Commission board I propose to increase the minimum board membership from two to three members. As part of the practical commitments to the Treaty of Waitangi set out in the Bill, I also propose additional capacity and capability requirements on the Children and Young Person's Commission board that aim to support appropriate Māori participation and representation.
 - SWC support the proposals in these papers subject to a minor change to the recommendations in the arrangements for the Monitor paper.
 - Recommendation 7 no longer explicitly refers to the "Prime Minister" as one of the Ministers who may not "stop or prevent the Statutory Officer from undertaking" a monitoring activity. This recommendation now just refers to "Ministers".
-

- A new noting recommendation has also been included that cross-references the further policy issues paper to indicate the two papers are related.
- A minor correction to the “funding implications” section of the paper has also been included. This clarifies that the OCC has a baseline of \$3.157m per year and received a \$1 million cost-pressure top up in 20/21 (rather than ongoing as stated in the paper to SWC). The OCC employed 40 FTE at 31 March 2021 (not 48 as stated in paper to SWC).

Background to the policy decisions in these papers

MSD provided you two reports with advice on: high-level options for the long-term home of the Independent Monitor [REP/20/11/1158 refers]; and a progress update on further policy decisions needed to progress the Oranga Tamariki System and Children and Young People’s Commission Oversight Bill (the Bill) [REP/20/11/1159].

In February 2021, Ministers met to discuss future arrangements for the long term home of the Independent Children’s Monitor. Ministers agreed to shift away from Cabinet’s in-principle decision to move the monitoring function to the Children’s Commissioner. Ministers indicated an interest in providing the Monitor with appropriate independence while locating it within the public service through links to ERO.

Since then the Public Services Commission (PSC) provided further advice to you and the Minister for the Public Service on the design of the Oranga Tamariki Monitor within ERO. You met with the Minister for the Public Service and verbally agreed to recommend to Cabinet that a departmental agency hosted by ERO be established, headed by a statutory officer and with responsibility for the monitoring function.

SWC met on Wednesday 5 May to consider the proposals and agreed to the recommendations subject to the changes noted in the talking points above.

Agencies Consulted

MSD officials circulated the draft Cabinet papers to: the Office of the Children’s Commissioner (OCC); PSC; Ministries of Justice, Health, and Education; ERO; Te Puni Kokiri (TPK); Te Arawhiti; Department of Prime Minister and Cabinet (DPMC); Office of the Privacy Commissioner; the Ombudsman; Oranga Tamariki; the Kāhui group and the Independent Children’s Monitor (ICM).

Changes to the Arrangements for the Monitor paper implemented since SWC meeting

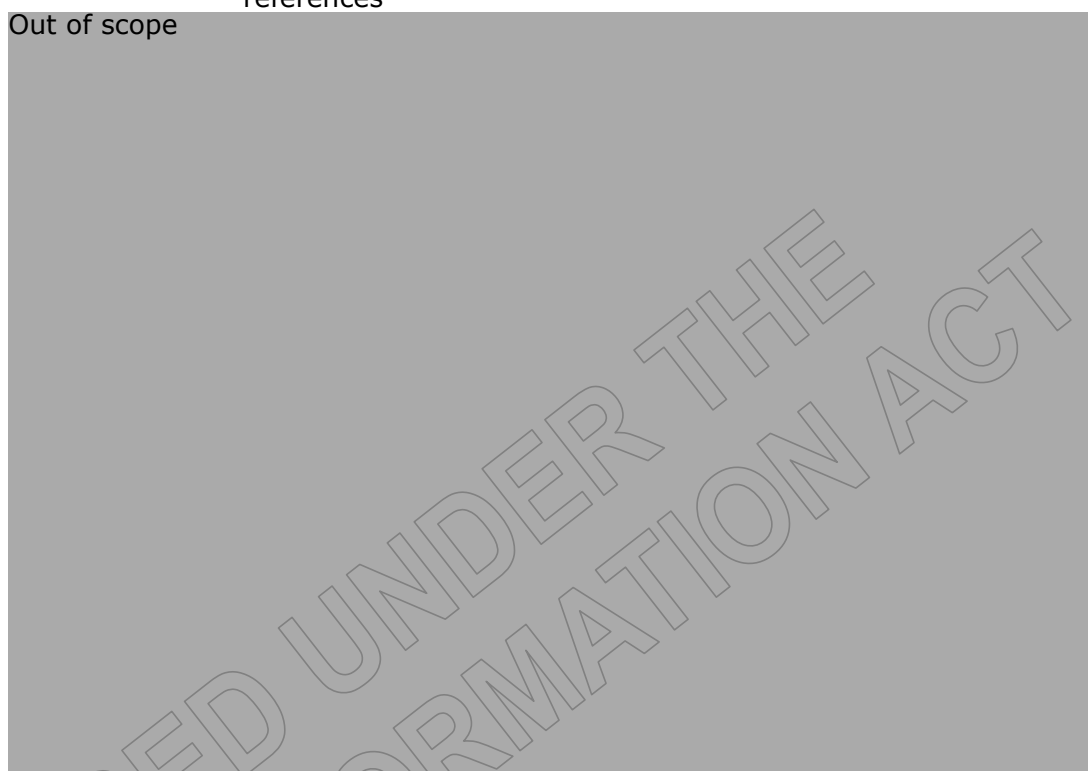
Two changes to the agree recs have been made, as noted in the talking points.

MSD provided a further note to your office prior to SWC clarifying the rationale for why the Prime Minister has the power to direct the Monitor to report on particular matters. This is consistent with Cabinet’s earlier decision on this matter in March 2019. Part of the purpose of providing this power to the Prime Minister is to ensure the Monitor is perceived to have sufficient mana, and “teeth”, when requesting information from agencies and providers when preparing their reports.

In addition to the changes to the recommendations, the following minor amendments have been made to the front section of the Arrangements for the Monitor paper:

- Paragraph 36 and Paragraph 37 corrected two cross references

Out of scope



Key changes to the Arrangements for the Monitor paper made prior to the SWC meeting in response to agency feedback

Changes to provisions around Ministerial independence

The paper considered by SWC did not include a recommendation included in earlier drafts that the Statutory Officer be independent from Ministers with respect to their functions, powers and duties. PSC were concerned that including such strong independence provisions would mean Ministers would have no power to direct the Statutory Officer, in line with the Monitor's "trusted advisor" role.

To achieve a better balance between independence and responsiveness to ministers, we have made changes to indicate, instead, that ministers could not stop or prevent the Statutory Officer from undertaking monitoring activities where the statutory officer considers the activity is necessary for them to discharge their functions or duties or exercise their powers. This guards against the risk that ministers could inappropriately constrain the Statutory Officer, while still allowing the Minister responsible for monitoring to request the Statutory Officer to undertake additional monitoring activities.

Clarifying the power of ministers to request reviews

The paper no longer recommends that further work be undertaken in relation to minister initiated reviews to ensure these requests do not unduly delay the Monitor's wider work programme. We now consider that the broader changes to the independence provisions noted above mitigate this risk.

Two technical recommendations have been added

On PSC's advice two technical recommendations have been added to the paper seeking authority for the Minister for the Public Service and Minister for Social Development and Employment to make further decisions to support the establishment of the new departmental agency.

Feedback from Kāhui, ERO and OCC

The paper now notes OCC's position that the monitoring function should be located within a Crown Entity (to ensure the Monitor is widely perceived as independent) and with a governing board that provides for greater Māori representation.

The paper also notes the Kāhui group's view that, although not their preferred approach, they are accepting of the decision to establish a departmental agency. 9(2)(g)(i)

9(2)(g)(i) OIA

Key changes to earlier versions of the Arrangements for the Monitor paper made prior to the SWC meeting in response to consultation feedback

Ombudsman and Monitor to endeavour to enter arrangements with iwi and Māori

Cabinet previously decided that oversight agencies must enter into partnerships or arrangements with iwi and Māori organisations.

Consultation on the draft paper suggested that greater flexibility is required. The Ombudsman in particular is concerned that it may not be practical to identify and build relationships with all iwi and Māori organisations that have an interest in the Ombudsman's work, and some organisations may not wish to enter into such relationships.

MSD proposes a best-efforts approach to engagement with Māori that is responsive to Māori desires for engagement. The proposed legislation will require that the Ombudsman and the Monitor must endeavour to develop arrangements with iwi and Māori organisations in order to give effect to the Treaty of Waitangi.

No longer recommending removal of Independent Complaints Reviewer provision

An earlier version of the paper proposed to remove provision for an independent complaints reviewer from the Oranga Tamariki Act 1989 because the Ombudsman will effectively take on the role of independent complaints review.

Agency feedback has highlighted that the Independent Complaints Reviewer provided for under the Oranga Tamariki Act 1989 has stronger powers than those of the Ombudsman. For example, the Reviewer could overturn a decision of the Chief Executive or provide financial compensation whereas the Ombudsman could only make recommendations.

MSD proposes undertaking further analysis on the design options for the Oranga Tamariki complaints process, informed by the findings of the Royal Commission of Inquiry into Abuse in Care. In the interim no change will be made to the provision for the Independent Complaints Reviewer in the Oranga Tamariki Act 1989.

Changes to the scope of the Monitor's role

The March 2019 Cabinet paper included a footnote suggesting that the "Oranga Tamariki system" may include "services provided to those children at risk of future involvement in statutory care". Further discussion with stakeholders confirmed that when applied to the scope of the Monitor, this definition was too broad, and risked diluting the focus of the Monitor.

To clarify the Monitor's scope, the initial version of the current SWC paper proposed that the scope of the Monitor's role should extend only to services provided under or in connection with the Oranga Tamariki Act 1989.

However, Oranga Tamariki have subsequently raised a concern that this definition was too narrow and excluded services provided by other government agencies (e.g. health and education services) to children young people and their whānau who are known to Oranga Tamariki. The recommendation on the scope of the monitor has therefore been amended slightly to include these wider agency services.

MSD is not proposing that the scope of the Monitor be extended to services provided by other government agencies delivered to tamariki, rangatahi and whānau who are not known to Oranga Tamariki.

Further advice on the jurisdiction of the Ombudsman – not included in Cabinet Papers

Consultation with agencies has highlighted a potential further policy issue relating to the Ombudsman's jurisdiction that will need to be resolved to enable the Bill to be finalised. Oranga Tamariki have raised concerns that extending the Ombudsman's jurisdiction to include Section 403 community service providers as part of the new oversight arrangements may be negatively perceived by these providers and would not be proportionate to the level of risk involved in these services.

MSD are working to resolve this issue as quickly as possible, but we note there is a possibility a further decision by Cabinet may be needed to confirm the jurisdiction of the Ombudsman in order to finalise the Bill. To avoid delaying the Bill, it may be possible for this issue to be included in the paper to Cabinet Legislation Committee (LEG) seeking agreement to introduce the Bill in the house.

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

Responsible manager: Molly Elliott, General Manager, Social Development Child and Youth Policy

Aide-mémoire



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

Cabinet paper

Date: 3 May 2021

Security Level: Cabinet Sensitive

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

File Reference: REP/21/5/436

Arrangements for the Monitor of the Oranga Tamariki system and further policy decisions to progress legislation

Cabinet Committee Social Wellbeing

Date of meeting 5 May 2021

Minister Hon Carmel Sepuloni, Minister for Social Development and
Employment

Proposal This aide memoire provides talking points and summary of
feedback received on the two related papers being considered
by Cabinet Social Wellbeing Committee (SWC):

- **Arrangements for the Monitor of the Oranga Tamariki system** – this paper seeks agreement to rescind Cabinet’s previous in-principle decision to transfer the monitoring function to the Office of the Children’s Commissioner (OCC) and to establish a new departmental agency for monitoring hosted by the Education Review Office (ERO)
- **Oversight of the Oranga Tamariki System and Children and Young People’s Commission Bill – further policy decisions to progress legislation** – this paper seeks Cabinet agreement to a number of proposals needed to finalise the Bill, including clarifying the practical commitments to the Treaty of Waitangi, the scope of monitoring and refining the governance arrangements for the children’s commission.

**Talking Points
Arrangements for
the Monitor
paper**

- I am seeking Cabinet agreement to confirm the long-term home of the Monitor of the Oranga Tamariki system.
- I have weighed up a range of factors that will impact on how the Monitor can best support the wellbeing of children, young people and their families within the

Oranga Tamariki system. My key priorities are to ensure the arrangements enable the Monitor to maintain public confidence, particularly by Māori, while also ensuring the Monitor can provide trusted advice to decision makers. I also want to reduce public sector fragmentation and unnecessary cost.

- I no longer recommend the monitoring function should be placed within the OCC. Further work by officials, and discussions with stakeholders, has identified there is an inherent tension between providing effective public advocacy and providing trusted advice to decision makers. For this reason, these functions should not sit within a single organisation.
- I have worked closely with the Minister for the Public Service to consider various alternative options for the long term home of the Monitor. I am recommending that a new Statutory Officer with responsibility for monitoring be established who would also be the CE of a new departmental agency of ERO. I believe this provides for a high level of statutory independence, which helps maintain public confidence, while minimising public sector fragmentation.
- I recommend ERO as the host agency given its existing focus on children and young people and the opportunities for the Statutory Officer and the chief executive of ERO to work together on common issues.
- I am also recommending additional provisions to help ensure the Statutory Officer can be responsive to ministerial requests while maintaining the trust and confidence of the public. I am proposing that ministers may not stop or prevent the Statutory Officer from undertaking monitoring activities. This provides a safeguard for ensuring the Monitor's work cannot be disrupted. However, I propose that Ministers should be able to positively request the Statutory Officer to undertake additional monitoring activities, in line with the Monitor's role as a trusted advisor to ministers.
- Given the significant over-representation of Māori in the Oranga Tamariki System, I also want to ensure Māori views actively inform the Statutory Officer's work. I am therefore recommending the Bill provides that the Statutory Officer must establish a Māori Advisory Group and must collaborate with, and have regard to, the views of this Group.

**Talking Points –
Further Policy
Decisions paper**

- This paper seeks further policy decisions needed to finalise the Bill.
 - Cabinet had previously agreed that oversight agencies must enter into partnerships or arrangements with iwi and Māori organisations. Depending on the Māori
-

community or organisation concerned, formal partnership arrangements may not always be appropriate (for example, there may be a conflict of interest if the Ombudsman has a partnership relationship with an organisation it is investigating). The paper therefore proposes greater flexibility in the requirements for engagement with Māori. I am recommending the Ombudsman and the Monitor be required to endeavour to develop arrangements with iwi and Māori organisations.

- The paper also seeks to confirm that the scope of monitoring includes the Oranga Tamariki system as well as services provided by other government agencies (and their contracted partners) to children, young people and whānau who are known to Oranga Tamariki. This ensures that monitoring can provide a holistic understanding of the system itself and the interface with other, wider systems of support (e.g. health, housing and education).
- I am proposing the Children and Young People's Commission should be able to request information about individuals from which identifying information has been removed from agencies to help support the Commission's function to enquire generally into systemic issues relating to children and young people.
- To strengthen the governance of the Children and Young Person's Commission board I propose to increase the minimum board membership from two to three members. As part of the practical commitments to the Treaty of Waitangi set out in the Bill, I also propose additional capacity and capability requirements on the Children and Young Person's Commission board that aim to support appropriate Māori participation and representation.

**Background to
the policy
decisions in
these papers**

MSD provided you two reports with advice on: high-level options for the long-term home of the Independent Monitor [REP/20/11/1158 refers]; and a progress update on further policy decisions needed to progress the Oranga Tamariki System and Children and Young People's Commission Oversight Bill (the Bill) [REP/20/11/1159].

In February 2021, Ministers met to discuss future arrangements for the long term home of the Independent Children's Monitor. Ministers agreed to shift away from Cabinet's in-principle decision to move the monitoring function to the Children's Commissioner. Ministers indicated an interest in providing the Monitor with appropriate independence while locating it within the public service through links to ERO.

Since then the Public Services Commission (PSC) provided further advice to you and the Minister for the Public Service on the design of the Oranga Tamariki Monitor within ERO. You met

	with the Minister for the Public Service and verbally agreed to recommend to Cabinet that a departmental agency hosted by ERO be established, headed by a statutory officer and with responsibility for the monitoring function.
Agencies Consulted	MSD officials have circulated the draft Cabinet papers to: the Office of the Children's Commissioner (OCC); PSC; Ministries of Justice, Health, and Education; ERO; Te Puni Kokiri (TPK); Te Arawhiti; Department of Prime Minister and Cabinet (DPMC); Office of the Privacy Commissioner; the Ombudsman; Oranga Tamariki; the Kāhui group and the Independent Children's Monitor (ICM).
Key changes to the Arrangements for the Monitor paper in response to feedback	<p><i>Changes to provisions around Ministerial independence</i></p> <p>The paper no longer includes a recommendation that the Statutory Officer be independent from Ministers with respect to their functions, powers and duties. PSC were concerned that including such strong independence provisions would mean Ministers would have no power to direct the Statutory Officer, in line with the Monitor's "trusted advisor" role.</p> <p>To achieve a better balance between independence and responsiveness to ministers, we have made changes to indicate, instead, that ministers could not stop or prevent the Statutory Officer from undertaking monitoring activities where the statutory officer considers the activity is necessary for them to discharge their functions or duties or exercise their powers. This guards against the risk that ministers could inappropriately constrain the Statutory Officer, while still allowing the Minister responsible for monitoring to request the Statutory Officer to undertake additional monitoring activities.</p> <p><i>Clarifying the power of ministers to request reviews</i></p> <p>The paper no longer recommends that further work be undertaken in relation to minister initiated reviews to ensure these requests do not unduly delay the Monitor's wider work programme. We now consider that the broader changes to the independence provisions noted above mitigate this risk.</p> <p><i>Two technical recommendations have been added</i></p> <p>On PSC's advice two technical recommendations have been added to the paper seeking authority for the Minister for the Public Service and Minister for Social Development and Employment to make further decisions to support the establishment of the new departmental agency.</p> <p><i>Feedback from Kāhui, ERO and OCC</i></p> <p>The paper now notes OCC's position that the monitoring function should be located within a Crown Entity (to ensure the Monitor is widely perceived as independent) and with a governing board that provides for greater Māori representation.</p> <p>The paper also notes the Kāhui group's view that, although not their preferred approach, they are accepting of the decision to establish a departmental agency. 9(2)(g)(i) OIA</p>

Key changes to earlier versions of the Arrangements for the Monitor paper in response to consultation feedback

Ombudsman and Monitor to endeavour to enter arrangements with iwi and Māori

Cabinet previously decided that oversight agencies must enter into partnerships or arrangements with iwi and Māori organisations.

Consultation on the draft paper suggested that greater flexibility is required. The Ombudsman in particular is concerned that it may not be practical to identify and build relationships with all iwi and Māori organisations that have an interest in the Ombudsman's work, and some organisations may not wish to enter into such relationships.

MSD proposes a best-efforts approach to engagement with Māori that is responsive to Māori desires for engagement. The proposed legislation will require that the Ombudsman and the Monitor must endeavour to develop arrangements with iwi and Māori organisations in order to give effect to the Treaty of Waitangi.

No longer recommending removal of Independent Complaints Reviewer provision

An earlier version of the paper proposed to remove provision for an independent complaints reviewer from the Oranga Tamariki Act 1989 because the Ombudsman will effectively take on the role of independent complaints review.

Agency feedback has highlighted that the Independent Complaints Reviewer provided for under the Oranga Tamariki Act 1989 has stronger powers than those of the Ombudsman. For example, the Reviewer could overturn a decision of the Chief Executive or provide financial compensation whereas the Ombudsman could only make recommendations.

MSD proposes undertaking further analysis on the design options for the Oranga Tamariki complaints process, informed by the findings of the Royal Commission of Inquiry into Abuse in Care. In the interim no change will be made to the provision for the Independent Complaints Reviewer in the Oranga Tamariki Act 1989.

Changes to the scope of the Monitor's role

The March 2019 Cabinet paper included a footnote suggesting that the "Oranga Tamariki system" may include "services provided to those children at risk of future involvement in statutory care". Further discussion with stakeholders confirmed that when applied to the scope of the Monitor, this definition was too broad, and risked diluting the focus of the Monitor.

To clarify the Monitor's scope, the initial version of the current SWC paper proposed that the scope of the Monitor's role should extend only to services provided under or in connection with the Oranga Tamariki Act 1989.

However, Oranga Tamariki have subsequently raised a concern that this definition was too narrow and excluded services provided by other government agencies (e.g. health and education services) to children young people and their whānau who are known to Oranga Tamariki. The recommendation on the scope of the monitor has therefore been amended slightly to include these wider agency services.

MSD is not proposing that the scope of the Monitor be extended to services provided by other government agencies delivered to tamariki, rangatāhi and whānau who are not known to Oranga Tamariki.

**Further advice on
the jurisdiction of
the Ombudsman
– not included in
Cabinet Papers**

Consultation with agencies has highlighted a potential further policy issue relating to the Ombudsman's jurisdiction that will need to be resolved to enable the Bill to be finalised. Oranga Tamariki have raised concerns that extending the Ombudsman's jurisdiction to include Section 403 community service providers as part of the new oversight arrangements may be negatively perceived by these providers and would not be proportionate to the level of risk involved in these services.

MSD are working to resolve this issue as quickly as possible, but we note there is a possibility a further decision by Cabinet may be needed to confirm the jurisdiction of the Ombudsman in order to finalise the Bill. To avoid delaying the Bill, it may be possible for this issue to be included in the paper to Cabinet Legislation Committee (LEG) seeking agreement to introduce the Bill in the house.

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

Responsible manager: Molly Elliott, General Manager, Social Development Child and Youth Policy



Report

Date: 28 April 2021

Security Level: IN CONFIDENCE

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

Cover report: agreement to lodge SWC papers on home of the ICM and residual policy issues

Purpose of the report

- 1 This report summarises feedback from agency consultation and seeks your agreement to lodge the following Cabinet papers for consideration by the Cabinet Social Wellbeing Committee (SWC):
 - 1.1 Arrangements for the Independent Monitor of the Oranga Tamariki system
 - 1.2 The Oversight of Oranga Tamariki System and Children and Young People's Commission Bill – further policy decisions to progress legislation.

Executive summary

- 2 MSD officials have circulated the draft Cabinet papers to: the Office of the Children's Commissioner (OCC); Te Kawa Mataaho, the Public Service Commission (PSC); Ministries of Justice, Health, and Education; the Education Review Office (ERO); Te Puni Kokiri (TPK); Te Arawhiti; Department of Prime Minister and Cabinet (DPMC); Office of the Privacy Commissioner; the Ombudsman; Oranga Tamariki; the Kāhui group and the Independent Children's Monitor (ICM).
- 3 MSD, the Public Service Commission and Te Puni Kokiri also attended a workshop to discuss the proposed independence provisions in the Arrangements for the Independent Monitor paper.
- 4 Agencies provided extensive feedback on both papers, including a number of substantive recommendations and points of minor clarification and correction.

Changes to the further policy decisions paper

- 5 The key substantive changes to the initial draft paper on the further policy decisions paper include:
 - 5.1 no longer proposing that oversight bodies 'must' enter into arrangements with iwi and Māori organisations - noting the potential difficulties in identifying appropriate iwi and Māori organisations and that these groups may not wish to enter into arrangements. It is instead proposed that oversight bodies must endeavour to develop arrangements with iwi and Māori organisations in order to demonstrate a practical commitment to the Treaty of Waitangi
 - 5.2 9(2)(f)(iv)
[REDACTED]
 - 5.3 minor changes to the proposed scope of monitoring. The paper now proposes that the scope of monitoring includes the interface of the Oranga Tamariki

system with systems of support provided by other government agencies and their contracted partners to children who are known to Oranga Tamariki.

Changes to the Arrangements for the Independent Monitor paper

- 6 The substantive changes to the initial draft paper on the Arrangements for the Independent Monitor paper include:
 - 6.1 no longer proposing that the Statutory Officer (i.e. the Monitor) be independent from Ministers with respect to their functions powers and duties. The paper now proposes that Ministers could not stop or prevent the Statutory Officer from undertaking monitoring activities. However the paper further proposes that the Minister responsible for monitoring could positively direct the Monitor to undertake additional monitoring activities, consistent with their role.
 - 6.2 no longer proposing that further work be undertaken in relation to Minister initiated reviews to ensure these requests do not unduly delay the Monitor's wider work programme. We now consider the proposal in 6.1 above adequately mitigates this risk.
- 7 The papers have also been revised to incorporate other minor changes.
- 8 We have included a brief statement in the paper on the Arrangements for the Independent Monitor paper outlining OCC's position that the monitoring function should be located within a Crown Entity and with a governing board that provides for greater Māori representation. You may wish to consider whether you would like this view to be included in the final paper that goes to Cabinet.
- 9 We further note that MSD's Kāhui group have raised concerns with the proposal for ERO to be the host agency of the departmental agency for the monitoring function.
9(2)(g)(i) [REDACTED]
[REDACTED] We have included a high level comment on this in the paper while noting that the host agency is unlikely to be widely perceived as closely affiliated with the Monitor.

Further policy work on the jurisdiction of the Ombudsman


- 10 Consultation with agencies has highlighted a potential further policy issue relating to the Ombudsman's jurisdiction that will need to be resolved to enable the Bill to be finalised. Oranga Tamariki have raised concerns that extending the Ombudsman's jurisdiction to include Section 403 community service providers as part of the new oversight arrangements may be negatively perceived by these providers and would not be proportionate to the level of risk involved in these services.
- 11 MSD are working to resolve this issue as quickly as possible, but we note there is a possibility a further decision by Cabinet may be needed to confirm the jurisdiction of the Ombudsman in order to finalise the Bill. To avoid delaying the Bill, it may be possible for this issue to be included in the paper to Cabinet Legislation Committee (LEG) seeking agreement to introduce the Bill in the house.

Recommended actions

It is recommended that you:

- 1 **note** the feedback provided on the two Cabinet papers following agency consultation and the changes that have been made to address these concerns
- 2 **agree** to lodge the attached Cabinet papers on 29 April 2021 for consideration by SWC on 5 May 2021.

Agree/ Disagree

pp. 
Molly Elliott
General Manager
Social Development, Child and Youth Policy

28/4/21
Date

Hon Carmel Sepuloni
Minister for Social Development and
Employment

Date

Background

- 12 On 17 December 2020, following consultation with the Ministry of Social Development's (MSD's) Kāhui Group and relevant government agencies, MSD provided you two reports with advice on: high-level options for the long-term home of the Independent Monitor (the Monitor) [REP/20/11/1158 refers]; and a progress update on further policy decisions needed to progress the Oranga Tamariki System and Children and Young People's Commission Oversight Bill (the Bill) [REP/20/11/1159].
- 13 On 24 February 2021, Ministers met to discuss future arrangements for the long term home of the Independent Children's Monitor. This included agreement to shift away from Cabinet's in-principle decision to move the monitoring function to the Children's Commissioner. Ministers indicated an interest in providing the Monitor with appropriate independence while locating it within the public service through links to the Education Review Office (ERO).
- 14 Since then the Public Services Commission (PSC) provided further advice to you and the Minister for the Public Service on the design of the Oranga Tamariki Monitor within ERO. You met with the Minister for the Public Service and verbally agreed to recommend to Cabinet that a departmental agency hosted by ERO be established, headed by a statutory officer and with responsibility for the monitoring function.
- 15 Officials initially prepared two draft Cabinet papers for agency and ministerial consultation on 23 March 2021, with a view to lodging on 8 April 2021:
 - 15.1 The first Cabinet paper seeks agreement to rescind Cabinet's earlier in-principle decision to transfer the monitoring function to the Office of the Children's Commissioner and to establish a departmental agency hosted by ERO, headed by a statutory officer with responsibility for the independent children's monitoring function.
 - 15.2 The second Cabinet paper seeks agreement to a series of policy decisions needed to finalise the draft legislation.
- 16 Owing to the large number of papers on the agenda at the time, the Cabinet office declined a request for these papers to be considered by SWC on 14 April 2021. It is now proposed, subject to your agreement, that these papers be lodged on 29 April 2021 for consideration by SWC on 5 May 2021.

There has been good engagement from agencies

- 17 Officials have circulated the draft Cabinet papers to MSD's Kāhui group and the following agencies:
 - Office of the Children's Commissioner (OCC)
 - Te Kawa Mataaho Public Service Commission (PSC)
 - Ministry of Justice
 - Ministry of Health
 - Ministry of Education
 - Education Review Office (ERO)
 - Te Puni Kokiri (TPK)
 - Te Arawhiti
 - Department of Prime Minister and Cabinet
 - Office of the Privacy Commissioner
 - The Ombudsman
 - Oranga Tamariki
 - The Independent Children's Monitor (ICM).

- 18 In addition, MSD and PSC jointly hosted a workshop involving the Independent Children's Monitor, Department of Prime Minister and Cabinet, and Te Puni Kokiri to discuss the proposed independence provisions in the Arrangements for the Independent Monitor paper.
- 19 Agencies also provided extensive written feedback on both papers. The feedback included a number of substantive recommendations as well as points of clarification and correction that are noted below. Agencies also proposed various more minor suggestions for consideration, some of which have been incorporated into the papers, but these are not discussed in this report.

Changes to the further policy decisions paper

Providing meaningful engagement with Māori

- 20 In December 2020 Cabinet [CAB-19-MIN-0687] agreed that oversight bodies must enter into partnerships or arrangements with iwi and Māori organisations. The paper notes that there may be times where 'partnership' is not appropriate (for example, where there is a risk of a conflict of interest) and the initial draft paper proposed oversight bodies 'must enter into arrangements'.
- 21 Further discussion during agency consultation on this paper has highlighted that the requirement that oversight bodies 'must' enter into arrangements may be premature. The Ombudsman is particularly concerned that requiring oversight bodies to enter into arrangements may be challenging given the potential difficulties in identifying all of the relevant iwi and Māori organisations and that these groups may not want to enter into such arrangements.
- 22 MSD have therefore proposed that the Ombudsman and the Monitor must endeavour to develop arrangements with iwi and Māori organisations in order to give effect to the Treaty of Waitangi. This provides assurance that oversight bodies must make best endeavours to enter into arrangements, while recognising that oversight bodies' operational practises and relationships with Māori are still being developed.
- 23 We also note that there is presently explicit provision in the Bill for the scheduled review of the operation of the Act to consider how oversight bodies are working with iwi and Māori organisations. This will provide an important opportunity to revisit strengthening engagement requirements with a greater understanding of how this can be done in a practical and meaningful way.

9(2)(f)(iv)

Minor changes to the scope of monitoring

- 27 Earlier drafts of the paper had proposed to confirm that the scope of monitoring should only extend to services provided under, or in connection with, the Oranga

Tamariki Act 1989. Further consultation with Oranga Tamariki highlighted that this would not fully capture the range of services provided at the interface between the Oranga Tamariki system and the systems of support provided by other Government agencies (e.g. health and housing services provided to those who are subject to a report of concern). It is important to ensure the Monitor is able to make observations about these wider services being provided to develop a holistic understanding of the outcomes being achieved by children, young people and their whānau.

- 28 We have therefore included a minor extension to the scope initially proposed, by including relevant services provided by other government agencies and their contracted partners to children, young people and whānau known to Oranga Tamariki.

29 9(2)(g)(i)

In particular, the role of monitoring in relation to the Chief Executive's function, set out in section 7 (2) (bab) of the Oranga Tamariki Act 1989, to:

*ensure, where practicable, that any services funded by the department to reduce the impact of **early risk factors for future involvement in the care, protection, or youth justice systems** under this Act are co-ordinated with other government-funded activities for improving outcomes for children, young persons, and families, or reducing the impact of those early risk factors so that those services and activities—*

(i) are unified under a shared strategy and set of outcomes with respect to children and young persons with those early risk factors; and

(ii) adopt a common approach to evaluating the set of outcomes sought and, where possible, determining the return on investment by the Government in those services and activities; and

(iii) are available to meet the needs of children and young persons of different ages and at different developmental stages, and include processes to support children and young persons to move between services and activities as they get older and develop;

- 30 The intent of the agreed definition is to ensure monitoring does not extend to children, services, practice or outcomes experienced by children or young people with early risk factors for future involvement in the care, protection, or youth justice system. It is intended that the monitoring role assesses whether the Chief Executive is compliant with the above provisions and the paper now clarifies this point.

Further refinements

- 31 Several further refinements in response to agency feedback have been made including:

- providing more detail and clarity about the role of the Children and Young People's Commission, in response to feedback from the OCC
- clarifying that it is proposed that the Bill provide for the Children and Young People's Commission to have access to "personal information from which identifying information has been withheld" (rather than "non-identifiable personal information") informed by advice from the Office of the Privacy Commissioner. In addition, the need for information sharing provisions to be developed has been raised by Oranga Tamariki and this is now noted in the section on privacy implications
- revised wording on regulatory impacts. Oranga Tamariki requested that we clarify the advice provided by Treasury that the proposals are exempt from Regulatory Impact Assessments. The revised paper includes a statement that acknowledges that regulatory impacts on the not-for-profit sector will be passed on to government in the form of increased costs.

Request from OCC to include a statement on the Commission's investigation function

- 32 The OCC has requested this paper include the following statement in relation to the removal of the investigation function from the proposed Children and Young People's Commission:

The Children's Commissioner is of the view that removing the function to investigate any decision in respect to any child more broadly (S12(1) a) may weaken their ability to facilitate resolution in individual cases, and are of the view this function should be retained.

- 33 MSD has not included this in the paper as it is outside of the scope of issues being considered by Cabinet, however you may wish to consider including this in the final paper.

Changes to the Arrangements for the Independent Monitor Paper

Changes to independence provisions

- 34 The PSC provided feedback that our initial recommendation for the Bill to provide that the Statutory Officer be independent from the Minister did not achieve an appropriate balance in ensuring the Statutory Officer can provide trusted advice to both Ministers and the wider public. In particular, a broad independence provision would limit the ability of the Minister to provide direction to the Statutory Officer to support the policy objective of ensuring the Statutory Officer provides trusted advice to decision makers.
- 35 In response to this concern we are no longer recommending that the Statutory Officer be independent from the Minister with respect to their functions, powers and duties. We have made changes to the body of the paper and to the recommendations to indicate, instead, that Ministers could not stop or prevent the Statutory Officer from undertaking monitoring activities where the statutory officer considers the activity is necessary for them to discharge their functions or duties or exercise their powers. This guards against the risk that Ministers could inappropriately limit the functions of the Statutory Officer.
- 36 The Bill would instead provide for the Minister responsible for Monitoring to be able to positively direct the Statutory Officer to commence or undertake additional monitoring activities that are within the scope of their functions, duties or powers. In discussion with PSC and other agencies we consider this achieves a better balance in meeting the policy objective of ensuring the Statutory Officer can provide trusted advice to Ministers and the public.

Clarifying the power of Minister to request reviews

- 37 We are no longer proposing the paper recommends that further work be undertaken in relation to Minister initiated reviews to ensure these requests do not unduly delay the Monitor's wider work programme. We now consider that the broader changes to the independence provisions noted above mitigate this risk.
- 38 We are proposing the paper makes clear that the Bill will provide that the Prime Minister, the Minister responsible for Oranga Tamariki, and the Minister responsible for Monitoring could direct the Statutory Officer to undertake a review into a matter of interest or concern. However, Ministers could not stop or prevent the Statutory Officer from undertaking monitoring activities as a way to prioritise their request for a review.

Further refinements

- 39 Several further refinements in response to agency consultation have been made including:
- 39.1 providing more detail and clarity about the role of the Children and Young People's Commission. This is in response to feedback provided by the OCC and the Ministry of Justice that the earlier draft did not accurately characterise the scope of the Children's Commission and did not make clear the inherent tension between advocacy and monitoring

39.2 strengthening the rationale to align the departmental agency with the Education Review Office, noting that a number of agencies who we consulted with considered it to be insufficiently clear

39.3 strengthening the role of the proposed Māori Advisory group such that the Statutory Officer must collaborate with the Advisory Group and have regard to their views. This change responds to concerns raised by the OCC, Te Arawhiti, and Ministry of Health that the advisory group was not sufficiently empowered to inform the Statutory Officer's monitoring activities. We note that TPK are supportive of the proposal to establish a Māori Advisory Group.

39.4 clarifying the obligations of the Statutory Officer, as the Chief Executive under the Public Services Act 2020, to building cultural capability. This responds to concerns raised by Te Arawhiti and the OCC that this was not sufficiently clear.

9(2)(g)(i)

Further feedback from the Office of the Children's Commissioner and MSD's Kāhui group

41 The Office of the Children's Commissioner continue to advocate for the establishment of the monitoring function within a crown entity and with a governing board. The OCC considers a crown entity arrangement is vital to provide public assurance of the wellbeing of children and young people in the Oranga Tamariki system and ensure mandated Māori partnership through a governance board. They consider that a crown entity could share back office functions with a host department to support cost effectiveness and sector cohesion.

42 MSD have included a brief summary of OCC's view on this issue in the draft paper, however you may wish to consider whether this be included in the final paper to SWC.

43 MSD's Kāhui advisory group have expressed a strong concern with the proposal of ERO as the host agency. 9(2)(g)(i) OIA

there is a risk that should Oranga Tamariki systems monitoring be associated with ERO, communities may be less open to engaging and may not value the Monitor's work as highly.

44 Kāhui has also queried why a decision on the host agency for the departmental agency needs to be taken now. For the purposes of progressing the Bill, agreeing the host agency is not required; only the decision that monitoring will be led by a Statutory Officer is required.

45 It is our view that a decision on the host agency would be helpful to allow this to be considered as part of the Select Committee process.

46 The paper has been amended to provide a high-level statement about the Kāhui group's views in relation to the public perception risk. It is further noted in the paper that the risk that the Monitor is perceived to be too close to ERO may be manageable given the perception of similar departmental agency arrangements. For example, Te Arawhiti is not widely perceived to be associated with the Ministry of Justice, despite being a departmental agency of that department.

Further policy work needed to clarify the jurisdiction of the Ombudsman

- 47 Through our consultation with Oranga Tamariki on the scope of the Monitor, we have become aware of a related policy issue regarding the jurisdiction of the Ombudsman under the proposed new oversight arrangements.
- 48 Cabinet agreed in March 2019 [CAB-19-MIN-0113 refers] that the Ombudsman should provide independent complaints and investigation functions in relation to the application of the Oranga Tamariki Act 1989 and/or children in the care or custody of the State. However, there was no explicit agreement about whether the jurisdiction of the Ombudsman's complaints and investigation oversight role should extend beyond Section 396 custody and care providers to include Section 403 community providers under the Oranga Tamariki Act 1989.
- 49 Oranga Tamariki are concerned that extending the jurisdiction of the Ombudsman to include Section 403 providers would likely be a significant cause for concern for the up to 2000 providers delivering these services. Oranga Tamariki further note that the approximately 170 Iwi and Māori organisations who provide Section 403 services are likely to have very significant concerns about the possibility of the Ombudsman having the right to access sensitive whakapapa data that they hold relating to whānau they work with. Oranga Tamariki believe that, as contract holders for these partnerships, they would be in a position to provide any relevant information to the Ombudsman to inform their investigations.
- 50 We are working closely with Oranga Tamariki and the Ombudsman to clarify this issue and develop a way forward as quickly as possible. We are not yet in a position to seek Cabinet agreement to resolve this issue and we have not mentioned this matter in the current Cabinet papers. To avoid delaying progress on the Bill it may be possible for Cabinet to consider this issue at LEG committee when seeking agreement to introduce the Bill in the house.

Next steps

- 51 Subject to your agreement, we will lodge the paper on 29 April 2021 for consideration by SWC on 5 May 2021.

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