



Cabinet

Minute of Decision

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

Portfolio Social Development

On 16 December 2019, following reference from the Cabinet Social Wellbeing Committee (SWC), Cabinet:

Background

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

Providing a commitment to the Treaty of Waitangi

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

Oversight bodies must ensure:

- 3.1 that in setting strategic priorities and in the development of the work programme they have as a key priority the need to support improved outcomes for Māori children and young people;
- 3.2 Māori participation in the context of the oversight bodies discharging their functions;
- 3.3 their employment, engagement and other policies, procedures and practices must give effect to tikanga, mana tamaiti (tamariki), whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū and iwi;

- 3.4 oversight bodies and iwi and Māori organisations will enter into partnerships or arrangements to:
- 3.4.1 provide opportunities to, and invite proposals on how to improve oversight of the Oranga Tamariki system and in so doing, outcomes for Māori children, young persons, and their whānau who come into contact with the Oranga Tamariki system;
 - 3.4.2 enable the robust, regular, and genuine exchange of information between oversight bodies and those iwi and Māori organisations (supported by information sharing provisions);
 - 3.4.3 agree on any action both or all parties consider is appropriate;
 - 3.4.4 the complaints and investigations processes are accessible for Māori children and young people and their whānau, hapū, and iwi or any other Māori organisation supporting them;
 - 3.4.5 the complaints and investigations processes incorporate a tikanga approach, and the whānau, hapū, and iwi of the child or young person are engaged with, where possible, during the complaints and investigations processes, unless to do so would be impracticable or risk harm to a child or any other person;

Independent monitoring

- 4 **agreed** that the purpose of the independent monitor be clarified to include specific objectives, incorporating the concepts such as:
- 4.1 supporting the rights, interests and wellbeing of children, young people and their families;
 - 4.2 improving public trust and confidence;
 - 4.3 supporting systems learning and continuous systems improvement;
 - 4.4 recognising the Crown's Treaty partnerships with Māori and the significant proportion of Māori tamariki in care;
- 5 **agreed** that the functions of the independent monitor be clarified to incorporate the following components:
- 5.1 effective systems performance monitoring ;
 - 5.2 recognising the interface between systems;
 - 5.3 providing for the Crown's commitment to Māori;
- 6 **agreed** that the monitor's reporting will consist of a three-yearly 'state of the Oranga Tamariki system' report to the Minister responsible for the Oranga Tamariki Act 1989, annual reports on compliance with the National Care Standards and operations of the Oranga Tamariki system, and outcomes being achieved for Māori tamariki and whānau, and reports on any other areas it considers necessary to discharge its function;

- 7 **agreed** that the Bill contain a provision to enable the monitor to discharge its reporting function, including specifying that the monitor will produce and publish the types of reports mentioned in paragraph 6 above and that responses by those who have been subject to or a party to the report may be required;
- 8 **agreed** that the detail as to what these reports must contain, and requirements for responding to, and publishing and tabling reports, timeframes for these processes, and requirements around dissemination in a manner accessible to individuals, whānau and iwi will be specified in regulations to the Bill;

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

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

Information access and sharing

- 13 **noted** that in March 2019, Cabinet authorised the Minister for Social Development, in consultation with other Ministers as appropriate, to make decisions on access to information and powers of entry to enable the progress of legislative drafting in order to finalise the Bill [CAB-19-MIN-0113];
- 14 **noted** that due to the significant implications of information sharing with respect to the proposed oversight bodies, the Minister for Social Development has set these out in more detail for Cabinet consideration;
- 15 **agreed** that to effectively discharge their functions and achieve the purpose of the Bill, the independent monitor and the Ombudsman will have the powers to require the provision of information from organisations:
- 15.1 the independent monitor and the Ombudsman will be able to require information from any organisation that engages children and young people in the Oranga Tamariki system;
- 15.2 only the independent monitor and Ombudsman will be able to require the provision of identifiable or de-identifiable personal information;

- 16 **agreed** that the Children’s Commissioner’s system advocacy function be supported by the power to require information to discharge its functions through general information access provisions in the Bill, with some restrictions on what information can be obtained, including personal information, court information or certain sensitive information (any draft material including draft ministerial and Cabinet material, monitoring reports and responses, pre-budget material and commercially sensitive material);
- 17 **noted** that information access provisions for the Children’s Commissioner in the Bill will, where possible, align with provisions in similar legislation about sharing information with system advocates;
- 18 **agreed** that to enable the oversight bodies to effectively discharge their functions and achieve the purpose of the Bill, the oversight bodies will have the powers to:
- 18.1 engage directly with individual children, young people and whānau, after obtaining informed consent;
- 18.2 share information with each other, other agencies, iwi/Māori organisations (other than personal information) or parties that have a role with children, young people and their families within the Oranga Tamariki system to support their functions;
- 19 **agreed** that the Bill require each oversight agency to develop, in consultation with affected organisations and the Privacy Commissioner, a set of information management rules to govern how the oversight agency accesses information held by other agencies and manages information it holds;
- 20 **agreed** that the rules are signed off by the Chief Executive or equivalent of each oversight body;
- 21 **agreed** that to ensure personal information and rights of individuals are protected, each oversight body should develop a code, to support safe and ethical gathering and use of personal information, including when engaging with individuals;
- 22 **agreed** that in developing their respective codes, oversight bodies must, where possible, take a common approach to support certainty and minimise any potential burden on individuals or those who are responsible for them, seek input from ethics specialists and from Māori and consult with the Privacy Commissioner, to ensure the content of the code is appropriate;
- 23 **agreed** that prior to engaging directly with individuals oversight bodies must obtain their informed consent;
- 24 **agreed** that where the individual does not have the capacity to provide informed consent the person responsible for their day-to-day care may object to engagement on the grounds that engagement may place the individual at a risk of physical or emotional harm;
- 25 **agreed** that where engagement is for the purposes of a complaint and the person responsible for the day-to-day care is the subject of the complaint, consent may be obtained from the party who holds custody of the child;
- 26 **agreed** that the independent monitor will have the power to enter premises (other than private homes) with notice for the purposes of observing practice or conducting inspections to attest to compliance with the Oranga Tamariki Act 1989 and/or regulations;

- 27 **agreed** that the power of entry may be refused in the following exceptional circumstances:
- 27.1 where there has been a serious incident such as a police matter, an assault at the premises or a death has occurred between the time the visit is notified, and the time the visit is to take place;
 - 27.2 because the site is experiencing serious health concerns;
 - 27.3 where any other serious event has occurred, and a site visit is likely to exacerbate tension or emotional harm;
- 28 **agreed** that a duty is imposed on individuals and agencies engaging with oversight bodies to facilitate access to information they hold, premises and/or individuals where consent has been obtained;
- 29 **agreed** that the Bill provide for secrecy and privacy provisions to enable individuals to engage with oversight bodies in a free and frank manner;
- 30 **agreed** that reasons for oversight bodies to disclose information will be limited to:
- 30.1 where the oversight body has information that suggests a person is at risk of harm or where the oversight body believes a serious criminal offence has been committed that justifies notifying the police;
 - 30.2 to support a child or young person who is involved in a complaint;
 - 30.3 support notifications, referrals and the efficient and effective discharge of functions;

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

- 31 **noted** that Cabinet previously agreed that the governance of the Office of the Children's Commissioner (OCC) would require updating before it would be able to take on the independent monitoring function;
- 32 **noted** that MSD's work to determine the statutory requirements for each function will establish the duties the governing body needs to meet;
- 33 **agreed** that 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;
- 34 **agreed** that the governance arrangement should be a board of two to six members, appointed by the Governor-General, and collectively possessing a range of relevant skills and attributes including experience of the care system, wider understanding of children's issues, understanding of te ao Māori, and management skills;
- 35 **agreed** that, both to give effective representation to the population most affected by the care system and in recognition of the Treaty, the legislation should provide for the board to embody partnerships with Māori, to be given effect through the board being appointed through an appropriate process that incorporates te ao Māori and ensures Māori participation;
- 36 **noted** that adopting a partnerships approach for this purpose may heighten expectations for similar approaches to be applied elsewhere;

- 37 **agreed** that the Bill impose a duty on the board to provide for functional separation between the monitoring and advocacy functions, subject to the board being assigned the monitoring function;
- 38 **agreed** that the Bill include provisions for the OCC to have separate Commissioners responsible for each oversight function it is responsible for under the Act;
- 39 **agreed** that the OCC retain the role as advisory for appointments to the grievance panels and a recipient of quarterly reports on the outcome of grievance panel decision but that the complaints oversight role for the grievance panels be transferred to the Ombudsman as agreed by Cabinet;

Review of Oversight Arrangements

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

Historic claims

- 42 **noted** that the MSD and Oranga Tamariki are developing improved arrangements for the resolution of claims relating to abuse in state care, in which MSD would be responsible for resolving claims about events prior to 1 April 2017, and Oranga Tamariki would be responsible for resolving claims about events from that date onwards;
- 43 **noted** that to deliver the new claims arrangements and mitigate litigation risk to the Crown, a minor amendment to Schedule 1AA of the Oranga Tamariki Act 1989 is required to specify that the scope of the Oranga Tamariki complaints mechanism applies to any act or omission that took place from 1 April 2017 onwards;
- 44 **agreed** that the amendment specified in paragraph 43 above be included in the Bill;

General

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

- 46 **authorised** the Minister for Social Development, in consultation with other Ministers as appropriate, to make decisions on related policy matters or determine additional policy matters to enable the progress of legislative drafting in order to finalise the Bill;
- 47 **authorised** the Minister for Social Development, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill.

Michael Webster
Secretary of the Cabinet

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