



Updated advice on early changes to the National Care Standards Regulations relating to the independent monitor

Date: 11 March 2019

Report no.: REP/19/3/162

Security level: IN CONFIDENCE

Priority: High

Action Sought

Hon Tracey Martin
Minister for Children

Agree to recommendation

11 March 2019

Contact for telephone discussion

Name	Position	Telephone	1st Contact
Justine Cornwall	General Manager, Seniors and International	s 9(2)(k)	<input checked="" type="checkbox"/>

Report prepared by: s 9(2)(a) Seniors and International

Minister's office comments

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to (specify)

Comments

OK to Progress

Date received from MSD

11 MAR 2019

Date returned to MSD

12 MAR 2019



Report

Date: 11 March 2019

Security Level: IN CONFIDENCE

To: Hon Tracey Martin, Minister for Children

Updated advice on early changes to the National Care Standards Regulations relating to independent monitoring

Purpose of the report

- 1 This report updates advice provided on 28 January 2019 on the same subject. It seeks your agreement to make changes to the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (NCS Regulations) prior to its commencement on 1 July 2019 to:
 - set out commencement provisions for independent monitoring
 - clarify the scope of the independent monitoring function
- 2 Seeks your agreement that Cabinet agreement be sought for the proposed changes through the Cabinet paper, led by the Minister for Social Development and the Minister of State Services, on strengthening independent oversight of the Oranga Tamariki system and children's issues.

Recommended actions

It is recommended that you:

- 1 **note** that in September 2018, you agreed that the Ministry of Social Development (MSD) and State Services Commission (SSC) advise you directly on the appointment of the independent monitor for NCS Regulations
- 2 **note** that the NCS Regulations come into force on 1 July 2019 and require the independent monitor to be ready to perform its monitoring function, as set out in Part 6 of the NCS Regulations, promptly after 1 July 2019
- 3 **note** that the independent monitoring required by the NCS is a major new undertaking and requires a significant build in the appointed monitor's capacity and capabilities
- 4 **note** that MSD considers that legislative and regulatory changes are required to establish the broader monitoring function as envisaged by the review of Independent Oversight of Oranga Tamariki and Children's Issues, including some additional powers and provisions in support of independent monitoring of NCS Regulations

5 **note** that Minister Sepuloni will seek Cabinet decision in March 2019 to agree to a new Oversight Act and regulations; and, that if a new Act is not supported legislative and regulatory changes relevant to oversight would still needed

6 **agree** that to allow time for the monitoring function to develop and for broader legislative changes to be in place, the commencement provisions in the NCS Regulations allow independent monitoring to commence at a later date

Agree / Disagree

7 **agree** that the following provisions in Part 6 of the NCS Regulations continue to commence from 1 July 2019:

7.1 regulations 77 and 78 – the independent monitor must establish an assessment framework

7.2 regulation 84(1)(b) and 84(2) – independent monitor may request information and the circumstances when Oranga Tamariki must provide it

7.3 regulation 85 – provision of information to the independent monitor on reports of abuse or neglect that the Chief Executive of Oranga Tamariki has received under regulations 69 and how those reports were responded to

7.4 regulation 82 – the independent monitor may provide supplementary reports to the Minister

7.5 regulations 86 and 87 – Oranga Tamariki’s self-monitoring

Agree / Disagree

8 **agree** that all other Regulations in Part 6 commence on 31 December 2020, and that this is set out in the commencement provisions in regulation 2

Agree / Disagree

9 **agree** that regulation 77 is amended to specify that the independent monitor must *develop* and establish the Framework

Agree / Disagree

10 **agree** that regulation 83 of the NCS regulations is amended to reflect the intent that the scope of independent monitoring only extends to non-compliance with the regulations, that the independent monitor becomes aware of or informed in the ordinary course of monitoring, that places or is likely to place a child or young person in care or custody at immediate risk of suffering serious harm

Agree / Disagree

11 **note** that the recommended changes to the NCS Regulations are required before they come into force on 1 July 2019

12 **agree** that Cabinet agreement be sought for the proposed changes through the Cabinet paper, led by the Minister for Social Development and Minister of State Services, on Strengthening Independent Oversight of the Oranga Tamariki System and Children’s issues

Agree / Disagree

13 **agree** that if Cabinet approve the proposed changes to the NCS Regulations, the MSD progress these amendments, with support from Oranga Tamariki, and prepare a paper to the Cabinet Legislation Committee; we will provide you with further advice on the appropriate arrangements for this.

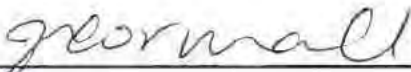
Agree / Disagree

14 **note** that you will receive an updated draft Cabinet paper for comment during the week beginning 11 March 2019 which will provisionally include the proposed NCS Regulation changes outlined in this paper


15 **note** that the Independent Oversight (Oranga Tamariki System and Children's Issues) Bill may include some changes to the information sharing provisions in the Oranga Tamariki Act 1989 to clearly provide for information sharing for the purposes of independent monitoring, including to monitor compliance with the NCS Regulations

16 **agree** to forward this report to the Minister for Child Poverty Reduction, Minister for Social Development and the Minister of State Services.


Agree / Disagree

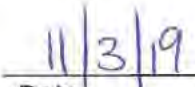


Justine Cornwall
General Manager
Seniors and International Policy



Date


Hon Tracey Martin
Minister for Children


Date

Background

- 3 This report provides updated advice, provided to you on 28 January 2019 on the same subject. That report proposed changes to the NCS Regulations that must be made before the commencement of those Regulations on 1 July 2019. It sought your agreement that these changes are progressed through the Cabinet paper (led by the Minister for Social Development and Minister of State Services) on Strengthening Independent Oversight of the Oranga Tamariki System and Children's issues.
- 4 This updated advice reflects the intention that independent monitoring of NCS Regulations should commence no later than December 2020, provided that required legislation and regulations are passed.
- 5 Minister Sepuloni intends to seek Cabinet approval that MSD is appointed as the independent monitor for NCS Regulations to design and stand up the new monitoring function, with the intention to appoint the OCC as the monitor once legislation is passed clarifying the powers of direction in relation to the function, and operations are established, robust and transition ready. Final policy decisions will be sought in March 2019.
- 6 There are no other significant changes to the context for decision making. As advised in the January report on this matter:
 - the NCS Regulations set out the standards of care children or young people in care or custody are entitled to, and the level of care that caregivers must provide
 - section 447A of the Oranga Tamariki Act 1989 requires that you appoint an agency or body independent of Oranga Tamariki to monitor and report on compliance with the new care standards; Part 6 of the NCS Regulations set out the provisions related to the monitoring and reporting of compliance with the new care standards
 - in September 2018, you agreed that MSD and SSC advise you directly on the appointment of the independent monitor for the NCS Regulations
 - other matters that are related to the wider functions and powers of the independent monitor that are considered less urgent will be progressed through the Independent Oversight (Oranga Tamariki System and Children's Issues) bill (the Bill) following Cabinet agreement to wider reforms to independent oversight
- 7 Oranga Tamariki was consulted on the 28 January 2019 paper and with this updated paper and have no major concerns with these proposals.¹

Changes to the NCS Regulations are required prior to 1 July 2019 to clarify timing and monitoring requirements

Existing commencement requirements in NCS Regulations are not feasible

- 8 The NCS Regulations as currently set out require the independent monitor to develop an assessment framework to use when monitoring compliance with the NCS Regulations and be ready to perform its monitoring function promptly after the commencement date of 1 July 2019 (or promptly after the date i.e. in July).
- 9 There are commencement provisions² to phase in the NCS Regulations that apply to Oranga Tamariki and its approved organisations³. However, there are no provisions to allow the independent monitor to develop and scale up its monitoring function.

¹ Oranga Tamariki has indicated that it does not take a view on the amendments around commencement of independent monitoring, since they relate to the monitor's compliance with the NCS

² Schedule 1, NCS Regulations

- 10 MSD is of the view that it is not feasible for an independent monitor to be in a position to meet all requirements by July 2019. We have previously advised that if appointed as the independent monitor, MSD would need up to 15 months to build its capabilities for that role [REP/18/12/1684 refers]. Independent monitoring required for NCS is a major new undertaking. An independent monitor would require time to:
- stand up its new function including to establish operations and infrastructure sufficient to meet the obligations and intent of the independent monitor
 - undertake consultation, develop, test and refine the framework for monitoring⁴
 - establish information sharing and other working arrangements⁵ with appropriate bodies including Oranga Tamariki and its contracted providers and other oversight bodies
 - better align with Oranga Tamariki's implementation timeframes.⁶
- 11 MSD also considers that independent oversight arrangements are best provided for in a dedicated independent oversight Act and regulations, and that an Oversight Bill should introduce new powers and functions for the independent monitor that are not already provided in the NCS Regulations (or that need clarification and more detail). The purpose of a monitoring function and additional powers and provisions were set out in the draft Cabinet paper provided to you in January 2019. An updated draft Cabinet paper will be provided to you in the week beginning 11 March 2019. If endorsed by Cabinet, MSD is planning for a new Oversight Act to be enacted by late July 2020 and regulations by late December 2020. (MSD considers that even if a new Act is not supported, primary and secondary legislation must be amended to enable effective oversight).
- 12 To note, we expect the development of the monitoring framework could identify further detail on methods of assessment and information requirements for monitoring.
- 13 We envisage NCS monitoring will commence on 31 December 2020, expecting that the required new (or amended) legislative framework has passed.

MSD recommends that NCS Regulations are amended to specify commencement provisions

- 14 We propose amending the commencement provisions in the NCS Regulations to enable the independent monitoring function to be phased in. We have considered the time needed to establish the monitoring function, the necessary powers and provisions in primary legislation and regulations, and the importance of taking steps

³ Oranga Tamariki's cabinet paper: Oranga Tamariki "Oranga Tamariki (National Care Standards) Regulations 2018" (Cabinet Paper from Office of the Minister for Children to the Chair, Cabinet Social Wellbeing Committee, Feb 2018) proposes allowing "a degree of flexibility to the independent monitor to develop an appropriate monitoring and reporting regime" [at para 63.1]. That paper makes it clear that the Regulations were not intended to be "overly prescriptive" and would allow a "significant scope for operational decision-making as to how the Ministry can best meet the proposed requirements in each area" [at para 84]. This is partly due to costs which will be phased in over time [at para 85].

⁴ The NCS Regulations specify that the Framework must be developed in consultation with the Chief Executive of Oranga Tamariki and any approved organisation with children or young persons in their care or custody. Sufficient time is required to work through avoiding potential duplication of the monitoring of NCS with the accreditation processes. The Framework must also be developed having regard to the consistency of the framework with the Oranga Tamariki systems for continuous improvement and self-monitoring. The monitor would require sufficient time to use early prototypes to refine the framework before it is applied across the board.

⁵ This would include the monitor fully informing Oranga Tamariki and its approved organisation of the processes and the Framework used by the monitor to assess their compliance.

⁶ Oranga Tamariki Care Cabinet paper states Oranga Tamariki intends to build its system so that, over four years all children and young people in care, and their caregivers, receive a standard of care that fully delivers on the policy intent of the NCS to provide high quality care.

toward independent monitoring of abuse and neglect in care as soon as possible, in developing our recommendations.

Monitoring-related provisions that should continue to commence from 1 July 2019

- 15 We believe that the following provisions in Part 6 of the NCS Regulations should (continue to) commence from 1 July 2019.

Intent	NCS Regulations on independent monitoring to commence on 1 July 2019
To enable the monitor to commence the development of the Framework	The content and establishment of the assessment framework (regulations 77 and 78)
To enable the monitor to have some oversight of abuse and neglect of children and young people in care and custody from the commencement of the NCS Regulations	The requirement for the chief executive to provide information to the independent monitor on reports of abuse or neglect received under regulation 69 and how those reports were responded to (regulation 85)
To enable the monitor to report on any relevant topic to the Minister for example on matters related to the abuse and neglect of children and young people	Provisions for supplementary reports by the independent monitor (regulation 82)
To provide for the independent monitor's access to required information	Provisions that the Chief Executive and any approved organisations with children in care or custody must provide information requested by the independent monitor so long as is reasonably required to assess compliance with regulations (regulation 84(1)(b) and 84(2)) ⁷
To require Oranga Tamariki to self-monitor and improve.	Regulations 86 and 87 required Oranga Tamariki to self-monitor, and to report the Minister and independent monitor on results of self-monitoring. Oranga Tamariki intends to have a framework and processes in place to enable it to monitor its practice against the standards from 1 July 2019. These processes will continue to evolve beyond 1 July 2019, alongside the independent monitor as it develops its framework.

- 16 Regulation 77 sets out that the independent monitor must establish a framework for monitoring. **§ 9(2)(h)**
§ 9(2)(h) As detailed in paragraph 11, the independent monitor requires sufficient time to undertake consultation, develop, test and refine the Framework. We therefore recommend that regulation 77 is amended to specify that the independent monitor must *develop* and establish the Framework.

Monitoring related provisions to commence no later than December 2020 (rather than from 1 July 2019)

- 17 MSD recommends that all other provisions under Part 6 of the NCS Regulations commence on 31 December 2020 (as set out in the box on the following page).
- 18 Risks and mitigations for delaying commencement of monitoring and not delaying are noted in **Attachment A**. The primary risk of delay is that public and stakeholders may be disappointed with amending the Regulations to push out the date on which substantive independent monitoring will start. However, we believe there is a greater reputational risk if independent monitor is seen to breach privacy, or rushes the development of the framework for monitoring, as this will require consultation with a

⁷ Oranga Tamariki officials have advised MSD that the provision of personal information is allowed under the Oranga Tamariki Act and NCS Regulations read together.

wide range of stakeholders (and Māori in particular) and will require specialist expertise to develop.

Provisions in the NCS Regulations to commence on 31 December 2020
Source of information to assess compliance (regulation 79)
Method of assessing compliance with these regulations (regulation 80)
Reporting requirements for independent monitoring body (regulation 81)
Independent monitor may request information (remainder of regulation 84 i.e. regulation 84(2))
The obligation to do urgent reports on non-compliance where a child or young person is at risk (regulation 83)

Amendments are also required to the NCS Regulations as it will require the monitor to discover all non-compliance, which is not operationally feasible

- 19 Regulation 83 of the NCS Regulations will require the independent monitor to ensure it discovers *all* non-compliance with the Regulations that could give rise to immediate risk to a child or young person in care or custody.
- 20 s 9(2)(h)
s 9(2)(h) we propose amending regulation 83 to clarify that the scope of the monitoring should only extend to non-compliance with the NCS that the independent monitor becomes aware of in the ordinary course of monitoring that places or is likely to place a child or young person in care or custody at immediate risk of suffering serious harm.
- 21 We propose that regulation 83 commence by December 2020. However, the amendment to regulation 83 is required prior to 1 July 2019 to make the scope of monitoring done by the independent monitor clear, as it impacts on how the function would be resourced and developed.

Next steps

- 22 Following your agreement, the proposed changes to the NCS Regulations will be progressed through the Cabinet paper (led by the Minister for Social Development and Minister of State Services) seeking wider changes to strengthen independent oversight of the Oranga Tamariki systems and children's issues.
- 23 You have received an early draft Cabinet paper for comment. The Cabinet paper will be updated to include the proposed NCS changes, as set out in this paper.
- 24 The Cabinet paper will be considered at the Social Wellbeing Committee on 20 March 2019 and drafting instructions will be issued to the Parliamentary Counsel Office. We recommend that, following Cabinet approval to the proposed changes to the NCS Regulations, MSD progress these amendments, with support from Oranga Tamariki. We will provide you with further advice on the appropriate arrangements for this.
- 25 We would work to ensure that the drafted Regulations will be considered by the Cabinet Legislation Committee in time for the amended Regulations to be in place before 1 July 2019.
- 26 The Cabinet paper will also include proposals related to other functions, powers, and administrative provisions of the independent monitor that may have further

implications on the NCS Regulations⁸. The paper may also include changes to the information sharing provisions in the Oranga Tamariki Act 1989 to clearly provide for information sharing for the purposes of independent monitoring. MSD will continue to work with Oranga Tamariki on this matter. These changes are considered less urgent and will be progressed through the Bill process.

- 27 We recommend that you forward this report to the Minister for Child Poverty Reduction, Minister for Social Development and the Minister of State Services for their information. **Attachment B** provides background information on the NCS requirements for their information.

⁸ The proposed functions of an independent monitor are wider than monitoring compliance with the NCS Regulations. The Bill will enable the independent monitor with functions and powers to monitor the entire Oranga Tamariki operating model, which NCS is a part of.

Attachment A

Risk and issues of delaying substantive independent monitoring of the NCS

Risk/issue	Consequences/mitigation
<p>The public and stakeholders would be disappointed with amending the Regulations to push out the date on which substantive monitoring will start.</p>	<p>There is a greater reputational risk if Government is seen to rush the development of the Framework and commencement of monitoring, or the monitor has inadequate powers and provisions for the role.</p> <p>A communication plan will be developed to clearly communicate to stakeholders that certain functions would still be undertaken by the independent monitor to ensure the safety of children and young people in care.</p>
<p>Lack of independent assurance over the safety of children and young people in care during 2019/20.</p>	<p>Oranga Tamariki will have systems in place to commence self-monitoring from 1 July 2019. Also, Oranga Tamariki has created a Safety of Children in Care Unit in 2018 which is implementing a new method of reporting on harm of children in care. Since October 2018, the unit has been undertaking an assessment of all findings of abuse of children in care. This data was provided to the Minister for Children in February 2019, and will be provided on a quarterly basis thereafter.</p> <p>The Office of the Children’s Commissioner will continue to undertake its current monitoring activities through 2019/20.</p> <p>Also, from 1 July 2019, the independent monitor would:</p> <ul style="list-style-type: none"> • provide oversight over how Oranga Tamariki respond to reports of abuse or neglect in the care and protection system • have the ability to seek information and report on any topic to the Minister to ensure the safety of children and young people.
<p>For some children and young people in care, and caregivers, support plans will be renewed to be in line with the requirements under the new care standards during 2019. This would not be externally monitored.</p>	<p>The learnings of the application of the NCS will build-up over time, and lessons derived from the initial months of implementation could be picked up by the independent monitor when monitoring commences</p> <p>The absence of independent monitoring of children covered by the NCS over 2020 would only be temporary, and we do not consider that it presents an inordinate systems risk.</p>
<p>Potential to delay a first NCS-State of Care report.</p>	<p>Implementing monitoring by 31 December 2020 would still enable the compilation of a comprehensive monitoring report to be provided to Ministers by 2022 (i.e. three years from commencement of the regulations as required).</p>

Attachment A (continued)

Issues of not delaying substantive independent monitoring of the NCS

Issues	Consequences/mitigation
<p>The independent monitor would be required to develop the Framework before 1 July 2019 to enable monitoring to commence promptly after 1 July 2019.</p>	<p>It does not allow the independent monitor sufficient time to fully consult with Oranga Tamariki and its approved providers, including with iwi providers. There have been strong calls from the approved providers and the sector for the need to avoid potential duplication with the current accreditation processes.</p> <p>It will also not allow sufficient time for the independent monitor to give full consideration to how the Framework aligns with the Oranga Tamariki systems in place for internal self-monitoring and continuous improvement.</p>
<p>Oranga Tamariki's record keeping system in its current form has too few relevant data fields to generate data driven reports.</p>	<p>The independent monitor cannot rely on Oranga Tamariki to provide information that will support the independent monitor to fulfil its monitoring role from year one. As a result, there is a need for the independent monitor to undertake direct collection of information from children and young people in care which requires a significant build in the capacity and capability of the independent monitor. This will require time. There is insufficient time to establish this ahead of 1 July 2019.</p>
<p>The scale of independent monitoring required under the NCS is a substantial undertaking for the independent monitor and requires a significant build.</p>	<p>The independent monitor would not have sufficient resources and infrastructure, including regional presence to undertake its monitoring function at full scale from 1 July 2019. The independent monitor would ideally scale up its function over time and changes to the regulations will be progressed through a separate process to enable this.</p>

Attachment B

Overview of National Care Standards and what is required of an independent monitor

- 1 New legislative National Care Standards (NCS) for children or young people in care or custody will come into force on 1 July 2019. NCS are intended to address the variability in the quality of care experienced by children and young people in the care or custody of the chief executive and organisations approved under section 396 of the Oranga Tamariki Act and places explicit obligations on them.
- 2 NCS sets out the actions and steps that must be taken by the chief executive and approved organisations to ensure children and young people receive an appropriate standard of care that is consistent with the principles of the Act. These steps and actions cover the spectrum of the care experience for children and young people in care and also set out the support that caregivers can expect when they have a child or young person in their care. They cover:
 - the needs assessment and planning that must occur when a child or young person comes into care
 - the support they and their caregiver must receive to meet the child or young person's needs
 - matters to be explained to children and young people
 - planning and support that must occur when the child or young person leaves care.
- 3 Under section 447A of the Oranga Tamariki Act, the Minister for Children must appoint an agency or body (independent of Oranga Tamariki) to monitor compliance by the chief executive, the chief executive's delegates, and approved organisations with the NCS regulations.
- 4 The minimum requirements for the independent monitoring agency or body are to:
 - establish an assessment framework for monitoring and reporting on compliance with the NCS Regulations which must:
 - be developed in consultation with the chief executive and other affected organisations
 - specify how compliance and the quality of care will be assessed
 - include detail of key sources of information and key indicators of performance.
 - use multiple sources of information to assess compliance, and that this must include a range of information from Oranga Tamariki sources and stakeholder feedback (including advocacy sources), and information obtained directly from children and young people
 - report to you every three years on an overall assessment of the state of care provided under the Oranga Tamariki Act and the NCS Regulations⁹
 - make supplementary reports on its own initiative or at your require on any relevant topic
 - report urgently to Oranga Tamariki any non-compliance with the NCS Regulations if, in the course of carrying out its functions, it finds that place a child or young person is at immediate risk

⁹ Under Regulations 81(1), the independent monitor must report, at the minimum, on the state of care provided to children and young people in the care and protection system. The scope of reporting does not extend to the assessment of the entire operations of Oranga Tamariki including the operations that take place before a decision is made by the Family Court for the uplift of the child into the custody of Oranga Tamariki.

- monitor reports of abuse and neglect that Oranga Tamariki has received and how those reports were responded to
 - monitor self-monitoring reports by the chief executive and approved organisations of Oranga Tamariki.
- 5 In undertaking these tasks, the monitor must have regard to the purposes of the Oranga Tamariki Act (to promote the wellbeing of children, young persons and their whānau) and encourage Oranga Tamariki to work towards continuous service improvement by identifying areas of high performance and areas for improvement.