

Chair
Cabinet Social Wellbeing Committee

STRENGTHENING INDEPENDENT OVERSIGHT OF THE ORANGA TAMARIKI SYSTEM AND CHILDREN'S ISSUES

Proposal

- 1 This paper seeks agreement for:
 - new institutional arrangements to strengthen independent oversight of the Oranga Tamariki system¹ and children's issues
 - key legislative changes to underpin these arrangements.

Executive summary

- 2 In response to reforms of the Oranga Tamariki system and new government priorities for children, the Government commissioned a review of independent oversight arrangements for the Oranga Tamariki system and children's issues (the Review).
- 3 The Review found that the oversight arrangements require strengthening to address key issues and gaps relating to resourcing for system-level advocacy; under-investment in the resources and powers required for independent monitoring and for complaints resolution; and a lack of Māori views across all elements of the Oranga Tamariki system and across independent oversight functions.
- 4 Therefore I propose the following changes to enhance independent oversight:
 - Strengthening the resourcing of the Office of the Children's Commissioner (OCC) to carry out its system-level advocacy for all New Zealand children and young people.
 - Appointing the Ministry of Social Development (MSD) to establish a robust independent monitoring and assurance function for the Oranga Tamariki system, with the intention to transfer it to an appropriate entity once relevant legislation has passed and a robust monitoring function has been established. Both MSD and the entity that monitoring is transferred to will need Te ao Māori capability and the ability to effectively engage with Māori.

¹ The term 'Oranga Tamariki system' is used in this paper to describe not only the statutory care and protection and youth justice system, as outlined in the Oranga Tamariki Act 1989, but also other agency services provided to children and young people under that Act, including Oranga Tamariki's early and intensive intervention services provided to those children at risk of future involvement in the statutory care, and services provided to young people transitioning out of care.

- Recommending to the Officers of Parliament Committee (OPC) that the Ombudsman provide an enhanced complaints oversight and investigations function relating to the Oranga Tamariki system.
- 5 The proposals to strengthen system-level advocacy will cover all children in New Zealand. Our proposals for both the monitoring and complaints functions will cover obligations and services provided under the *Oranga Tamariki Act 1989* (the Oranga Tamariki Act). These 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 (eg health, education and disability services). The oversight roles will 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 system².
 - 6 If the proposed changes to independent oversight are not made, the new Oranga Tamariki operating model may not deliver on the intended improved outcomes for children and young people, and past failures in care and protection system may be repeated. The new regulatory obligations to independently monitor the Oranga Tamariki Act and the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (the NCS Regulations) also cannot be met without changes to the legislative settings and s 9(2)(f)(iv)

Independent monitoring and assurance

- 7 The independent monitoring function will need to be phased-in. Under the Oranga Tamariki Act, the independent monitor for the NCS Regulations needs to monitor information that is disclosed on abuse or neglect in state care and how Oranga Tamariki is responding (NCS Regulations 69 and 85), to establish the assessment framework for NCS Regulations and broader monitoring.
- 8 I want to be confident that the new function that is established is robust and delivers what is intended. I will leverage MSD's very recent experience in establishing new operations at scale and its regulatory expertise, by appointing them as the independent monitor for an establishment phase.
- 9 During establishment MSD will work with Māori to develop the frameworks for monitoring, in accordance with the Māori Crown relations Engagement Framework and Guidelines and partnership principles. MSD will work with Te Puni Kōkiri, and the Office for Māori Crown Relations – Te Arawhiti, to achieve this.
- 10 The OCC and Oranga Tamariki are also key stakeholders and will be involved in developing frameworks for monitoring.
- 11 I propose that MSD conducts monitoring for a period to refine the operation of the function. Once the function is established and a new legislative framework is in place, I intend that the monitoring function is transferred to an appropriate entity.
- 12 This paper gives two options for deciding on where monitoring is transferred to:
 - **option one:** agree now, that in principle the intention is that monitoring will be transferred to the OCC

² This includes consideration of the rights contained and the aspirations expressed by the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP).

- **option two:** seek advice on where monitoring could be transferred to in December 2020, anticipating that a new legislative framework will be in place and the monitoring function will be established.

Independent complaints oversight and investigations

- 13 Assigning this function to the Ombudsman will enable it to leverage its existing capabilities and statutory powers, including its established experience in complaints review and investigations processes and specialist capabilities. s 9(2)(f)(iv)

s 9(2)(f)(iv)

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Legislative implications

- 16 Substantive legislative changes will be necessary to underpin the new oversight arrangements. I propose the creation of a new Act, which would establish and set out the roles, functions and powers of the oversight bodies, would be the best option for robust oversight arrangements. The legislation, provisionally entitled the Independent Oversight (Oranga Tamariki Systems and Children’s Issues) Bill, would be progressed from 2019 to 2020. This would involve repealing the Children’s Commissioners Act 2003, and transferring the relevant provisions (with modifications) into the proposed dedicated oversight Act and associated regulations.
- 17 The Crown’s relationship with Māori will be explicitly recognised through the provision of specific duties on parties who are responsible for oversight in this legislation.
- 18 A new Act would establish the statutory process for appointing entities to each function, and the Ministers responsible for appointments. The legislative design would include provisions that will effectively allow for appointment of any suitable entity to an oversight function (for example it will include provisions on the level of independence and governance necessary for each function to be applied regardless of the entity type). In this way, a new Act will be future proofed and will enable responsible Ministers to consider where each function is best placed.

19 I also propose amendments to the NCS Regulations – some of which will need to come into effect from 1 July 2019 to enable the monitoring function to commence in stages, with full monitoring of NCS regulations to begin on 31 December 2020, once the new legislative framework is in place.

20 I propose the following timeframe for strengthening the three oversight roles.

Function	From 1 July 2019	On or before 31 December 2020	2021 onwards
System-level advocacy	The OCC continues advocacy role based on current resourcing, including assessing Government's compliance with UNCRoC.	The OCC continues advocacy role based on current resourcing.	OCC to do enhanced system-level advocacy with s 9(2)(f) (iv) and sharpened focus.
Monitoring and assurance	MSD appointed as independent monitor for the purposes of: <ul style="list-style-type: none"> establishing the function and building the NCS assessment framework monitoring information disclosed on abuse and neglect in state care, and how Oranga Tamariki is responding. The OCC to continue its current general monitoring functions, including: <ul style="list-style-type: none"> monitoring policies and practices of Oranga Tamariki OPCAT. 	<ul style="list-style-type: none"> All NCS Regulations are monitored. The OCC to continue OPCAT monitoring. 	<ul style="list-style-type: none"> MSD to report to key Ministers in March 2021 on planning and readiness to transfer the monitoring function.
Oversight of complaints and investigations	Ombudsman building an enhanced model (can receive complaints about Oranga Tamariki)	The Ombudsman to carry out the function ³ .	No further change.

21 I propose that the effectiveness of these strengthened oversight arrangements be reviewed in 2023. This timeframe would allow the review to take into account relevant findings of the Royal Commission of Inquiry into the historical abuse of individuals in State care, the maturation of Oranga Tamariki's operating systems, and any other relevant developments in social sector monitoring and assurance.

³ Assuming approval from the Offices of Parliament Committee the Ombudsman already has powers under the Ombudsman Act that will enable commencement immediately. However, it will take time for the Ombudsman to build capability and capacity, for example, to establish a child and whānau-friendly gateway.

PART 1 - BACKGROUND AND CONTEXT OF THE REVIEW

- 22 Current independent oversight of children's issues for all children at both the national level and for children and young people in the Oranga Tamariki system is undertaken by, among others, the OCC, Human Rights Commission, the Health and Disability Commissioner, the Privacy Commissioner, the Independent Police Conduct Authority, and the Ombudsman. However, only the OCC has specific oversight responsibilities for children and young people.
- 23 Under the *Children's Commissioner Act 2003* (the Children's Commissioner Act), the Children's Commissioner has a broad remit, including:
- advocating for the rights of all children under 18
 - advancing and monitoring the application of the United Nations Convention on the Rights of the Child (UNCRC)
 - some specific oversight of children and young people within the Oranga Tamariki system – these include monitoring Oranga Tamariki policies and practices, and investigating decisions, recommendations, and acts or omissions in respect of any child or young person
 - promoting the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints.
- 24 The Commissioner is also designated to monitor the treatment of children and young people detained in care and protection and youth justice residences for the purposes of the Optional Protocol to the Convention against Torture (OPCAT).⁴
- 25 In August 2017, the Cabinet Social Policy Committee (SOC) agreed that a review of independent monitoring, complaints review, investigation and advocacy functions for the new vulnerable children's system be led by MSD with support from the State Services Commission (SSC). [SOC-17-MIN-0115]
- 26 In March 2018, the Cabinet Social Wellbeing Committee (SWC):
- 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
 - invited the Minister for Social Development to seek final policy decisions from SWC following the consultation. [SWC-18-MIN-0025]
- 27 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

⁴ The OCC currently monitors approximately 3 percent of children and young people in the care of the chief executive of Oranga Tamariki, as part of its designated OPCAT role. It also conducts visits Oranga Tamariki sites to look at practice issues, and can undertake thematic reviews which are incorporated into monitoring reports.

post-consultation report, which highlighted that there was strong consensus on the need to strengthen independent oversight.

- 28 MSD and SSC then carried out more detailed analysis of each function's scope and scale, the capabilities, resourcing and powers needed and which existing bodies or entities could deliver each of the oversight functions.
- 29 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 builds public trust and confidence that the wellbeing and safety of children and young people is paramount.
- 30 Independent oversight of the care, protection and youth justice systems 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 residence) and the State has specific responsibilities for those in their care. The decision to establish the Royal Commission of Inquiry into the historical abuse of individuals in State care (from 1950 - 1999) (the Royal Commission) highlights that we must 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.
- 31 A detailed summary of the stakeholder engagement process and the Review's findings is outlined in **Appendix A**.

Overall there is a compelling case for stronger oversight of the Oranga Tamariki system and children's issues

- 32 The Review found existing oversight arrangements are significantly under resourced, and there are some significant gaps in how these arrangements currently function:
 - current levels of resourcing limit the capacity for system-level advocacy on all of the matters that are relevant to children and young people
 - there has been an under investment in monitoring and assurance of the statutory care and protection and youth justice system, particularly at operational and service levels, and additional powers and resourcing are required
 - complaints pathways within the Oranga Tamariki system for children, whānau and others are unclear, difficult to navigate (particularly for complex matters), and not child-friendly, resulting in a reluctance to complain, and a lack of confidence in the system
 - powers for independent systemic investigation that could be used to identify areas for improvement, have been constrained by limited resourcing
 - better representation of Māori views is needed across all elements of the care and protection system and independent oversight functions. There is insufficient knowledge of and focus on Te Ao Māori by agencies given the high proportion of Māori children and young people in the Oranga Tamariki system.

- 33 Recent changes to legislation strengthen both the mandate and accountabilities on Oranga Tamariki to deliver improved outcomes for children and young people, including under the new NCS Regulations⁵.
- 34 Oranga Tamariki is implementing its new operating model, which will include significant changes to internal monitoring, assurance and complaints mechanisms for children and young people. These changes are intended to be implemented over time. Independent oversight is needed to support these mechanisms and the continuous improvement of the operating model, and ensure that Oranga Tamariki is meeting the requirements of the new legislation.
- 35 The importance of strengthened oversight should also be seen in the context of significant new wider Government priorities for children and young people. This includes the Child Poverty Reduction Act 2018, which was passed into law in December 2018, which encourages a Government focus on child poverty reduction specifically, and child and youth wellbeing more generally.

PART 2 – HOW OVERSIGHT SHOULD BE STRENGTHENED

- 36 Given the Review's findings, I consider it necessary to strengthen all three primary areas of the oversight system:
- system-level advocacy for all children and young people
 - complaints oversight and investigations of matters related to application of the Oranga Tamariki Act and/or children and young people in the custody of the State
 - monitoring and assurance of obligations, services and operations under the Oranga Tamariki Act.
- 37 The proposals to strengthen system-level advocacy will cover all children in New Zealand. 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* (the Oranga Tamariki Act). 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 (eg health, education and disability services).
- 38 Under the Children's Commissioner Act, the Commissioner currently has a remit for children and young people up to the age of 18 years. However, I consider it would not be appropriate for the future oversight functions to be constrained by this limit. I therefore propose the applicable age be extended to young people under 25 years. I note that the Oranga Tamariki system will cover children and young people up to the age of 25 in some circumstances (subject to amendments to the Oranga Tamariki Act which provide for young adults to receive transition advice and assistance up to age 25), s 9(2)(f)(iv)
- 39 Figure 1 depicts the proposed new independent oversight arrangements.

⁵ This new legislation requires that the Minister for Children appoint an independent monitor to monitor Oranga Tamariki's compliance with the NCS by 1 July 2019.

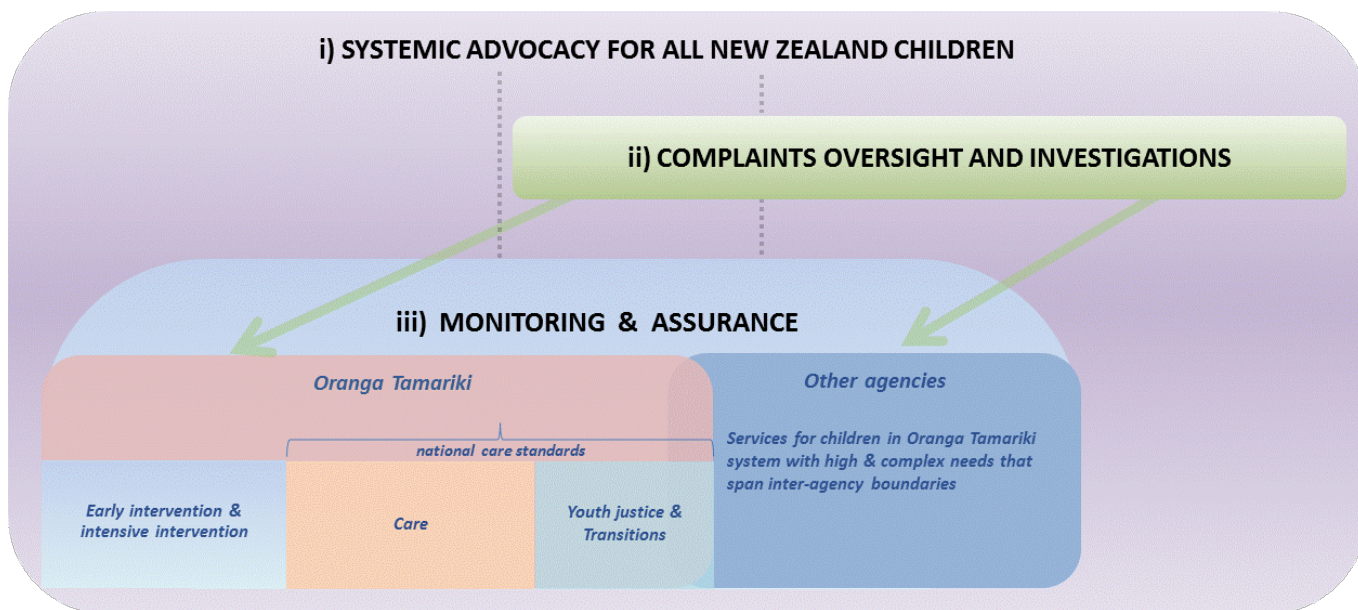


Figure 1: Proposed independent oversight functions

The foundations of independent oversight

- 40 I propose new primary legislation, to bring together in one place the respective roles, responsibilities and powers of oversight bodies, guided by common core principles in a single Act.
- 41 Those responsible for oversight will be required to give effect to the following principles when exercising any power conferred under the Act:
- ensure the voice, wellbeing and interests of children, young people are at the centre of oversight considerations and practices, and give better effect to the rights set out in the United Nations Convention on the Rights of the Child (UNCRC)
 - take a te ao Māori approach and incorporate Māori perspectives in the design and implementation of the functions
 - have particular regard to Māori and of other populations significantly represented within the Oranga Tamariki system, and consider Te Ao Māori and world view of others
 - recognise the important contexts of family, whānau and culture in children and young people's lives
 - require the consideration of how each function and the oversight system overall can help to reduce disparities and inequities that are evident for different populations, and for Māori in particular
 - employ or engage people who are culturally competent, and strive for a diverse workforce that reflects the diversity in the children and young people each oversight function serves
 - work in a constructive and collaborative manner with Oranga Tamariki and other agencies and bodies subject to oversight

- maintain appropriate independence from the agencies they oversee
 - support a cohesive system – oversight bodies should look for opportunities to share information and collaborate, with each other and with agencies
 - demonstrate appropriate levels of transparency, including through regular public and ministerial engagement and reporting.
- 42 Oversight bodies will also be required to consider the principles in section 5 of the Oranga Tamariki Act 1989 (so far as they are applicable and with all necessary modifications). For avoidance of doubt, if there is a conflict between the principles in the new Act and the principles in the Oranga Tamariki Act, the principles in the new Act will prevail.
- 43 I recognise both the Crown’s special relationship with Māori and the high rates of Māori children and young people in the Oranga Tamariki system. To take account of this, in addition to the principles above I propose the new legislation also require oversight bodies to make a practical commitment to the principles of the Treaty of Waitangi, including by setting out duties for chief executives or equivalent (examples are given in Table 1). I further recommend a high level of collaboration with iwi and Māori as the independent oversight functions are developed and delivered.

Three core oversight functions

- 44 The sections below outline the proposals for each of the three main oversight functions.

a) System-level advocacy for all children

Intent and purposes for the advocate function

- 45 The Review underscored the on-going importance of effective advocacy around the rights and interests of all children and the continuing need for strong system-level advocacy, including on poverty reduction, children and young people’s wellbeing and rights.
- 46 I propose that the OCC continue in the system-level advocacy role, as part of the broader future system of independent oversight. Stakeholder consultation carried out by the Review highlighted that the Commissioner is widely considered to be an effective advocate for children, and has a proven track record in carrying out this function.
- 47 I also propose that the relevant provisions in the Children’s Commissioner Act relating to its current advocacy role be transferred to the new independent oversight legislation. This broadly includes the current requirements for the Children’s Commissioner to:
- raise awareness and understanding of children’s interests, rights, and welfare
 - raise awareness and understanding of UNCRoC
 - undertake and promote research into any matter that relates to the welfare of children
 - act as an advocate for children’s interests, rights, and welfare generally

- receive and invite representations from members of the public on any matter that relates to the welfare of children
- promote the participation of children in decisions affecting their wellbeing
- inquire generally into, and report on, any matter, including any enactment or law, or any practice or procedure, that relates to the welfare of children.

48 I consider there is a strong case to increase the effectiveness of the advocacy function and build on the current strengths of the OCC. s 9(2)(f)(iv)

Based on stakeholder engagement carried out for the Review, this could include:

- a stronger focus on the interests and needs of Māori children and young people
- a specific system advocacy focus on issues for children and young people that span agency boundaries and Ministerial portfolios⁶ and bringing a whole-of-system perspective to safeguarding and promoting children's wellbeing, including children with disabilities
- representing children's interests to decision-makers, including by providing independent advice to government agencies, Ministers, and Parliament (including select committees) on the development of policies and legislation
- a strengthened voice for children and young people, supporting government agency capability building in this area – this could include contributing to the development of the Child and Youth Wellbeing Strategy, to be created under the Children's Act 2014.

49 s 9(2)(f)(iv)

b) Stronger independent monitoring and assurance

Intent and purposes for an independent monitoring and assurance function

50 The role of the independent monitor will be to objectively assess the quality and extent of compliance with and delivery of the Oranga Tamariki Act and related regulations and standards. This role is distinct from that of an advocate.

51 I propose that the legislation provide the monitor with the following functions (some further detail is in Tables 1 and 2):

- engage appropriately with Māori before making significant changes to the design and implementation of the monitoring function (this would be in line with the

⁶ For example, children who have disabilities that impact on their educational or care needs.

⁷ s 9(2)(f)(iv)

current Māori Crown relations Engagement Framework and Guidelines and partnership principles)

- monitoring and providing assurance of all parts of the Oranga Tamariki system, including monitoring compliance with:
- the NCS Regulations and related future regulations made by an oversight body or by Oranga Tamariki where independent monitoring is desirable
- any established or future standards and guidelines for practice and service
- the operation of complaints mechanisms
- other statutory obligations
- supporting Oranga Tamariki and its approved providers to work towards continuous service improvements by identifying areas of high performance and areas for improvement
- sharing insights with relevant chief executives, any approved organisations, and the Minister designated responsibility for overseeing the monitoring function
- from time to time, making deeper enquiries into particular issues or themes emerging from monitoring, complaints or critical incidents either on its own initiative or at the request of the Minister or the Ombudsman to better understand the issue and what could be improved or learnt
- compiling information about complaints, critical incidents within the Oranga Tamariki system, and abuse and neglect of children or young people in care so that issues and areas for improvement can be identified
- reporting publicly and to relevant Ministers.

52 I propose that the legislation require the monitor to have regard to the following matters when exercising functions and powers (some further detail is in Tables 1 and 2):

- the principles as specified above at paragraph 41
- taking a person-centric⁸ approach.

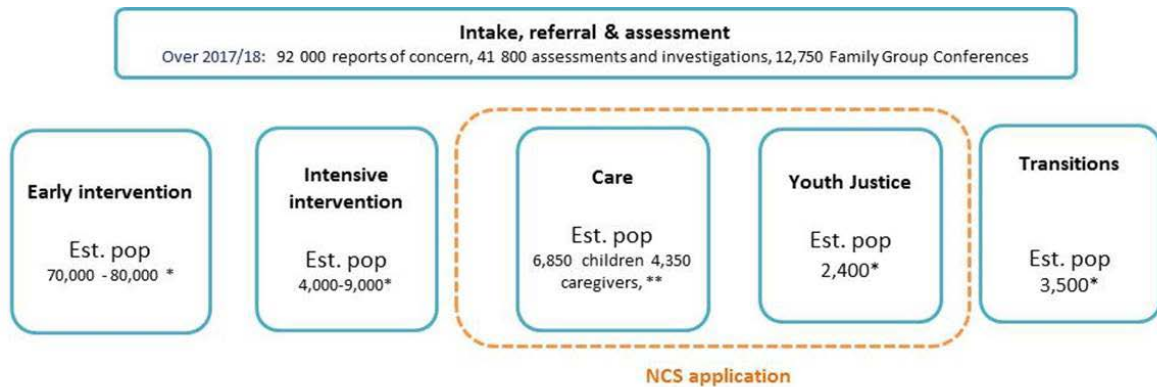
Further details on the scope and focus of monitoring

53 As outlined in **figure 2** below, I envisage that the independent monitoring function should initially focus on monitoring compliance with the NCS Regulations, but should not be limited to these areas. Over time, the 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.

54 Oversight of the Oranga Tamariki Act will mean that monitoring and assurance will also apply to other agencies providing services (eg health and education services) to

⁸ A 'person-centric' approach includes involving Māori (and clients) in the design and implementation of the monitoring function. It will be important that Māori are involved in the design of the function and that Te Puni Kōkiri is consulted to determine how assessment of effectiveness for Māori should be built into this function.

children and young people in the Oranga Tamariki system, in line with requirements of that Act.



* Source Oranga Tamariki, paper to Cabinet Social Wellbeing Committee considered on 27 June 2018: *The Future Direction of the Intensive Intervention Function for Oranga Tamariki-Ministry for Children*.

** Source: Oranga Tamariki, 16 November 2018

Figure 2: Initial scope of proposed monitoring function

I propose a phased approach for monitoring

55 The Oranga Tamariki Act 1989 requires the Minister for Children to appoint a monitor as soon as possible following 1 July 2019. § 9(2)(h)

56 The Minister for Children has, however, agreed that the NCS Regulations need to be amended in order to allow time for the monitoring function to develop, and for broader legislative changes as set out in this paper (if approved) to be in place. The amended timeframe will allow a phased-approach, with the assessment framework for the NCS to be developed from 1 July 2019, and NCS monitoring to commence on or before 31 December 2020. It will also provide time to ensure the monitor is established and scaled-up to adequately meet future monitoring needs. The proposed amendments to the NCS Regulations are discussed later in this paper.

I propose the monitoring function be established by MSD and once established is transferred to an appropriate entity

57 I considered which government agencies with experience in monitoring and assurance in related social sectors could potentially expand their functions to take up the independent monitoring function. The primary agencies considered were the OCC, MSD, the Education Review Office (ERO), the Health Quality and Safety Commission (HQSC), and relevant monitoring teams within the Ministry of Health (MoH).⁹ **Appendix B** summarises the assessments made of these organisations for the role.

58 I propose that MSD establish the broader, robust monitoring function to enable strengthened monitoring and assurance of the obligations and services provided under the Oranga Tamariki Act and associated regulations.

⁹ The main options were assessed against common criteria, including each entity's monitoring culture; experience in client-centric review and assessment; experience in conformance assessment; experience in quality improvement; knowledge and experience in the care and protection sector; cultural capabilities; regional presence; and the level of build required.

- 59 Once a robust monitoring function has been established, I intend that the function is transferred from MSD to an appropriate entity.
- 60 The work required is complex. MSD is well placed to lead the establishment of the monitoring role as it:
- has recent experience in the development of new functions, including the establishment of Oranga Tamariki and the Ministry of Housing and Urban Development
 - is currently the shared service provider for both Oranga Tamariki and the OCC
 - has quality assurance and regulatory expertise in related fields – eg MSD currently hosts the Social Services Accreditation (SSA) team, a shared service whose functions include accrediting non-government organisations providing care and protection services for Oranga Tamariki.
- 61 Some stakeholders may perceive MSD to be too close to Oranga Tamariki and to have a possible conflict of interest in carrying out the monitoring role, for example, due to MSD's role progressing historical abuse claims. However, I consider this risk is outweighed by the fact that MSD has the capability and capacity to establish such a significant and complex function. Any perceptions of a conflict of interest that relates to MSD as the monitor, should be mitigated by the proposal that MSD holds the function for the purposes of establishing the function.
- 62 MSD will work in consultation with the OCC and Oranga Tamariki to effectively progress establishment of the monitoring function, as they are key stakeholders.
- 63 Both MSD and the entity that monitoring is transferred to will need Te ao Māori capability and the ability to effectively engage with Māori. The function will also be developed with Māori in accordance with the Māori Crown relations Engagement Framework and Guidelines and partnership principles. I expect the independent monitor to seek advice from the Office for Māori Crown Relations – Te Arawhiti in relation to engagement with Māori during the establishment phase and beyond.
- 64 In consultation with Oranga Tamariki and other agencies, MSD will also review any commitments that have been entered into through Treaty settlements to ensure that the monitoring function considers how agencies are accounting for and meeting the obligations under relevant settlements. The Tuhoe and Te Hiku settlements, for example, include specific commitments in relation to the care and protection system.
- 65 Te Puni Kōkiri also has a role in monitoring the adequacy of services for Māori and may undertake a review of the Oranga Tamariki system.¹⁰

Some monitoring activity would take place from 1 July 2019 (during the establishment phase)

- 66 From 1 July 2019, when MSD is appointed the independent monitor:

¹⁰ In December 2018 Te Puni Kōkiri advised to Cabinet that it has refreshed its monitoring function for state sector agencies. The refresh aims to support the state sector to position government to better respond to the aspirations, needs and interests of Māori; to advise on the impacts of state sector agencies approaches to Māori development and effectiveness for Māori; and to advise on options to improve outcomes and Māori wellbeing.

- the initial function for MSD will be to establish the assessment framework for NCS Regulations and broader monitoring. MSD will also monitor information disclosed on abuse and neglect in state care, and how Oranga Tamariki is responding from 1 July 2019, and conduct monitoring for a period from December 2020 (or earlier if possible) to refine the operation of the function before it is transitioned
- the OCC would continue monitoring OPCAT, and continue its general monitoring functions under section 13 of its current Act, which enables it to monitor policies and practices of Oranga Tamariki – in line with current practice, this could include some thematic reviews in relation to the Oranga Tamariki system
- MSD would be undertaking extensive consultation with sector partners, Oranga Tamariki and Māori, with support from the Office for Māori Crown Relations – Te Arawhiti and Te Puni Kōkiri, and the OCC as a key stakeholder, on the development of an assessment framework to enable monitoring of the NCS
- alongside this there would need to be a range of work streams for example, the development of Memorandums of Understanding, Privacy Impact Assessments, development and implementation of stakeholder engagement and consultation strategies.

Options for deciding on where the monitoring function should be transferred to

- 67 If we take a decision at this time, in principle I consider the OCC would be the most appropriate entity for the independent monitoring function, subject to some important conditions being met. These are detailed in the next section.
- 68 Assigning this role to the OCC 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. It would also preserve and build on the OCC's current OPCAT monitoring activities and their work applying a Mana Mokokuna lens to monitoring.
- 69 However, I acknowledge that there are a number of social sector reviews and other developments underway that could generate new monitoring requirements. If the decision on where monitoring is transferred to is made later, new opportunities for a joined up approach to social sector monitoring, and or a specialised social sector monitor could be explored.
- 70 There are two options for deciding where monitoring transfers to:
- **option one:** agree now, that in principle the intention is that monitoring will be transferred to the OCC
 - **option two:** seek advice on where monitoring could be transferred to in December 2020, anticipating that a new legislative framework will be in place and the monitoring function will be established.

If monitoring is transferred to the OCC it will need to significantly expand its capacity and capabilities to carry out the role

- 71 Although the Commissioner is currently the predominant monitor of the Oranga Tamariki system and children's issues, its monitoring activity to date has been limited in scale and scope.

72 An effective, robust monitoring and assurance function requires a wide range of expertise and experience, a specialist, impartial and objective approach, operational policy development, corporate infrastructure and stakeholder management. The scale of the function, given the new regulatory context it will operate in, are a significant shift and requires new skills, different to the OCC's capabilities.

If monitoring is transferred to the OCC, it would also need strengthened governance and provisions requiring them to monitor against the Oranga Tamariki Act and regulations

73 The OCC's current Commissioner sole model would not be appropriate for leading two potentially conflicting functions – the system advocacy role, challenging government policy, and the independent monitoring role, testing how government policy is being delivered.

74 If OCC is the monitor and advocate, the OCC's governance would need to be strengthened in line with existing best practice for larger independent crown entities, providing for the establishment of a Board and a more traditional management structure, including the introduction of a Chief Executive. These steps would reinforce the leadership and management, provide greater continuity, and enable a greater range of expertise and representation within the governance of the OCC – including greater Māori representation.

75 To manage the tensions between the advocacy role and the impartial, objective independent monitoring role, I would expect formal internal separation of the advocacy and monitoring functions within the OCC, through separate lines of management. [REDACTED]
s 9(2)(f)(iv) [REDACTED]
[REDACTED]

76 As an independent Crown entity the Children's Commissioner does not have to have regard to current government policy. Appropriate provision would need to be made in legislation to require the OCC-as monitor to monitor against the Oranga Tamariki Act and associated regulations as written. Under the NCS Regulations a Minister can request supplementary reports and might require further information, and this ability –for a Minister to give direction, would also need to be reflected in an Act directing the Children's Commissioner.

77 A proposed new oversight Act will include provisions on the level of independence and governance necessary for each function to be applied, regardless of the entity type. This will enable the OCC, if appointed to the monitoring function, to carry out the function as required by legislation, without compromising the Commissioner's independence in undertaking advocacy – the Minister would not be authorised to direct the Commissioner on any element of the advocacy function.

Reporting on establishment and transfer of the monitoring function, and supporting transition

78 Officials will update key Ministers regularly on progress with establishment including a substantive update in mid-2020.

79 Transition planning will consider the new monitoring entity's capacity and capabilities so that it can successfully carry out the monitoring function when transferred. The tasks during transition include ensuring that the monitoring entity has appropriately skilled staff, analytical and data capability, ICT infrastructure and databases, and that operational policies and workforce planning are in place. The entity that is the monitor will also need both te ao Māori capability and the ability to engage and work with Māori.

- 80 Officials will also report to key Ministers in March 2021 on key steps, readiness and timeframes to transition the function to an appropriate entity, including new developments in the social sector that are relevant to the monitoring function.
- 81 If option two is supported, officials will provide further advice on where monitoring could be transferred to in December 2020.

c) An independent complaints oversight and investigation function

- 82 The Review found that under the current system children, young people and their whānau are often reluctant to raise concerns regarding their treatment, or openly share their care experiences with those providing services. Complaints can take a long time to resolve, and it can be challenging to find the right support or the right entity to resolve issues that span departmental boundaries - eg children in statutory care with behavioural difficulties, mental health issues, sensory, physical or intellectual disabilities, or serious and ongoing health conditions. A further key concern was a perceived lack of cultural responsiveness of the system for complainants.
- 83 I recognise that Oranga Tamariki is currently establishing a new internal complaints management system to provide more responsive internal processes for children, young people their whānau and other related individuals. The Review's findings show that it is important that an independent complaints oversight body be established to support trust and confidence in complaints management by providing for independent oversight, complaints resolution and issues investigation.

Intent and purposes for an independent complaints oversight and investigations function

- 84 An independent complaints oversight body would provide an escalation pathway where needed for complaints resolution and issues investigation.
- 85 I propose that the complaints oversight body should:
- undertake third-tier reviews of complaints not resolved to the satisfaction of complainants within Oranga Tamariki, including complaints about decisions made by the Grievance Panels (set up pursuant to *the Oranga Tamariki (Residential Care) Regulations 1996* (the Residential Care Regulations))
 - be notified of all complaints that the oversight bodies consider are serious and significant¹¹ and depending on the circumstances and context, investigate directly and make recommendations, or monitor actions by Oranga Tamariki and other relevant agencies
 - be culturally-responsive in dealing with children, whānau and others interested parties, including understanding and valuing te ao Māori
 - provide reports on the outcome of complaints resolutions and investigations to parties the oversight body considers appropriate for the purposes of supporting systems learning and improvement

¹¹ I envisage that complaint-types or circumstances that oversight bodies consider serious and significant may be agreed in MOUs and, or initially identified through the triage process. I expect that 'seriousness and significance' could be revisited as the complaint is investigated and resolved.

- provide a common doorway for receiving and resolving complaints (including receiving and resolving complaints that have already been the subject of an internal complaints review) that span agencies for any child or young person who in the custody of the State, and in line with this be able to liaise with other oversight bodies¹²
 - work collaboratively with Oranga Tamariki and provide advice and guidance to Oranga Tamariki on the design of its complaints processes
 - be able to consider matters related to the actions of staff¹³ (whether or not these are being considered through another process (eg a HR process) .
- 86 The performance of Oranga Tamariki's complaints operations would also be monitored and reported on by the independent monitor, including types and trends in complaints.
- 87 **Figure 3** below gives a view of the future independent complaints oversight function, alongside other internal tiers for complaints resolution that are currently being improved in Oranga Tamariki. Complaints are best resolved locally where possible (ie tier 1). These arrangements also allow for complaints to go directly to the independent complaints body eg because of the seriousness of the matter, or because the complainant chooses to do so.
- 88 As part of these arrangements, I consider it is important for all complaints to be classified and recorded, and for the complaints oversight body to be able to access all records related to a complaint. I also consider that all serious and significant complaints should be notified to:
- to the complaints oversight and investigation body so that they can review and investigate where necessary
 - to the independent monitor so that they can analyse and report on types and trends.

¹² For example for a family needing support to care for a child or young person with a disability, where there is risk of harm or abuse that support could help to mitigate. I envisage that a common doorway would include leading communications with the child and whānau as appropriate where a complaint or matter involves multiple agencies. Where a complaint or matter raises issues within the jurisdiction of another review body, the complaints body would refer it on or conduct parallel inquiries and/or investigations, with joint communications to the child and whānau.

¹³ In the past complaints systems have not been able to consider these matters.

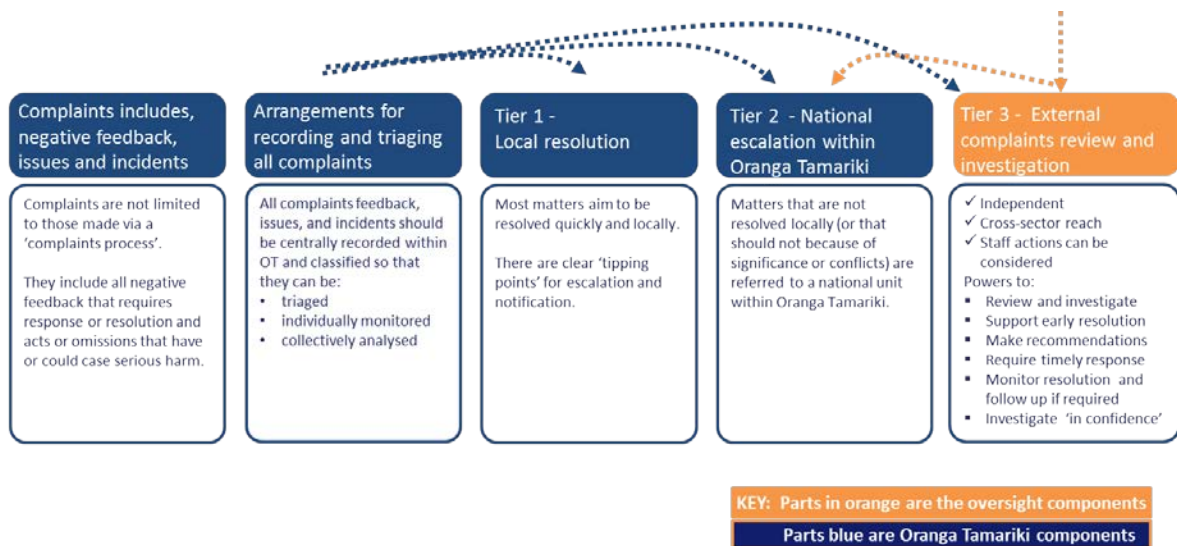


Figure 3: A future internal and independent complaints function together

I propose that the Ombudsman be assigned the complaints oversight function, with increased resourcing to expand its existing remit for investigations relating to the Oranga Tamariki system

89 I propose that Cabinet recommend to the OPC that the complaints and investigations function be undertaken by the Ombudsman. While the Ombudsman can receive complaints about acts or omissions by a state agency, I consider it important to ensure a specific focus on matters for children and young people in the Oranga Tamariki system and ensure the Ombudsman has all the necessary functions and powers to enable them to undertake this function effectively.

90 At present the OCC has a statutory role in receiving complaints and investigating issues that impact a wide range of children. I did consider the continuation of the OCC's current role in relation to complaints. However, the OCC has limited capacity in this field and is not currently resourced to deliver this function to any level. The OCC also does not have core policies, practices or systems to leverage. In contrast, this is the core focus for the Ombudsman's office. The Ombudsman has established capability and experience in complaints and investigations oversight, they are well placed to deliver this function quickly and more cost-effectively.

91 The Ombudsman can already make recommendations to agencies, refer a breach of duty or misconduct to the appropriate authority, and can report to Ministers and to Parliament.

92 They can support and investigate cross-agency complaints, including acts or omissions by other bodies, say in the health or education sector, where these relate to children and young people in the Oranga Tamariki system.¹⁴

93 They can also conduct 'own motion investigations' on significant or systemic issues in relation to state sector administration. This could be a vehicle for impartially overseeing

¹⁴ I acknowledge that there is work currently underway relating to the handling of complaints in other sectors. For example, the review of Tomorrow's Schools is considering mechanisms to address complaints relating to school board decisions. The Ombudsman already has the power to investigate decisions made by boards of trustees.

complex cross agency matters that reduce the effectiveness of the Oranga Tamariki system.

- 94 In the investigatory role, the Ombudsman makes non-binding recommendations only, and does not have power to enforce findings. I consider that the existing powers and the mana of the Ombudsman are sufficient to compel consideration of their recommendations and actions at this time, but that this could be reconsidered in the future.
- 95 Building cultural competency, communication and outreach into the design and initial implementation of the complaints function will be essential to overcoming barriers to accessibility. In consultation with the Office of the Ombudsman, it has been acknowledged that it will develop more child and whānau accessible processes and the necessary expertise in children's systems and services, and engaging with Māori. The Office of the Ombudsman has committed in its Strategic Intentions document to ensuring that the principles of the Treaty of Waitangi are at the heart of the work and culture of the Office. Accordingly, it will work closely with Māori to develop the function, as well as embedding a tikanga Māori approach into the complaints and investigation function. Further investment would be required, including for an enhanced workforce with required skills and cultural competencies.

Overlaps with other sectors and oversight bodies

- 96 I acknowledge that the potential for overlaps with other complaints and other investigation bodies exist, but note the Ombudsman's practice is to consider what role they may have and what should be referred to other bodies. For example the coordination of an investigation into the death of a child in the custody of the state, would take into account the relevant roles and responsibilities of bodies such as Police/ Coroner, and the Health Quality and Safety Commission. I do not consider it appropriate to restrict or direct the Ombudsman's decision to become involved or not in a particular matter.

Oversight arrangements to be reviewed in 2023

- 97 The proposed oversight arrangements and settings (if accepted) should be reviewed in 2023. As well as considering the effectiveness of the new oversight arrangements, any implications for legislation and resourcing, the review should consider relevant findings of the Royal Commission of Inquiry into the historical abuse of individuals in State care and the maturation of Oranga Tamariki's operating systems; and, broader social sector arrangements for monitoring and assurance.

PART 3: LEGISLATIVE AMENDMENTS s 9(2)(f)(iv) TO BRING THE PROPOSALS INTO EFFECT

Design of the new Act and related regulations

- 98 To ensure that each oversight agency has the necessary powers, duties and provisions it needs to effectively deliver on its function, I propose restructuring the current legislation that underpins independent oversight of the Oranga Tamariki system and children's issues, and to establish a dedicated oversight Act and associated regulations covering all oversight functions.
- 99 I propose to repeal the Children's Commissioner Act. Any relevant existing provisions relevant to the purpose and intent described for each function that are contained in the

Oranga Tamariki Act, the Children's Commissioner Act, the NCS Regulations, the Residential Care Regulations 1996, and the Vulnerable Children's Act 2014, will be transferred to the new Act and related regulations (with necessary modifications).

- 100 With regards to the complaints and investigation function, only new or expanded powers for that function will be in the new Act. Some consequential amendments may be required to be made to the Ombudsmen Act, but otherwise the Ombudsmen Act will remain unchanged. As a constitutionally significant piece of legislation I consider it would be undesirable to make the kind of narrow amendments to the Ombudsmen Act that would be required to enable the Ombudsman to undertake the complaints and investigation oversight function.
- 101 I considered maintaining and amending the current Children's Commissioner Act and Ombudsmen Act, rather than creating a new Act. However, on balance I consider the repeal of the Children's Commissioner Act and the re-establishment of the Commissioner and associated advocacy functions in the new Act would be more robust and future proof, and more transparent for parties interested in understanding how New Zealand views and provides for independent oversight.
- 102 The proposed Act and related regulations will support clarity and transparency with regard to the purpose, functions and powers of each oversight body, as well as allow for collaboration and common objectives within an independent oversight system. s 9(2)(f)(iv) it is important that the Commissioner be seen as a critical part of a cohesive system of oversight for Oranga Tamariki and children's issues. In addition, a new Act would send a strong signal that oversight of children's issues is important and broader than advocacy alone.
- 103 The OCC will be consulted on the development of the legislation and oversight model in line with the policy proposals in this paper. This will include consulting on the draft Bill and paper for Cabinet Legislation Committee.
- 104 MSD will work with Te Puni Kōkiri and the Office for Māori Crown Relations – Te Arawhiti on how to best give effect to the Māori Crown relations Engagement Framework and Guidelines in the drafting of provisions regarding the relationship between Māori and the Crown, and the needs of Māori children and whānau, in the Act.

Purpose and details of the new Act and related regulations

- 105 I propose that the purposes of the new Act should reflect an intent to provide an enhanced system of advocacy for all children and young people, more responsive and effective complaints resolution, and independent monitoring and assurance of the extent to which the obligations and requirements of the Oranga Tamariki Act and related regulations are being met. This will ensure that independent oversight works cohesively as part of a wider system that aims to protect children and young people from harm and ensuring oversight of harm in care. It is also intended that independent oversight should identify what can be improved, and in doing so support a learning and improvement in the Oranga Tamariki system. This would complement the overall objective to protect children and young people from harm.
- 106 Under the new Act (and regulations made under it), the agencies responsible for oversight should be guided by the principles set out earlier in this paper. These principles may be further refined during the legislative drafting process.

107 Each of the oversight bodies will have specific duties and provisions to enable them to effectively discharge their function. These are set out in Tables 2 and 3 below. General duties and provisions that are common to all are set out in Table 1. These are the types of powers and provisions that I consider are needed to deliver the intended oversight functions. Most are commonly provided for in like-functions that exist in current oversight legislation in New Zealand or in other jurisdictions.¹⁵

Common duties and requirements for oversight functions

108 Some overarching duties and requirements and general administrative provisions, as set out in Table 1 below, will be required in the new Act or related regulations, in order for the oversight functions to be carried out effectively.

Table 1: Common duties, requirements and administrative provisions for oversight functions

Objective:	Proposed duties/provisions
Recognising the special relationship between the Crown and Māori, duties in relation to Treaty of Waitangi (te Tiriti o Waitangi)	To establish duties for oversight bodies to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) for specified functions – eg a duty to establish objectives that are specific to Māori, to engage with Māori and to report on the performance of these duties ¹⁶ .
Supporting oversight bodies to work as one system	Each oversight body to be able to consult with other statutory bodies on any matter that relate to their functions.
To have an oversight Act that is future proof	<ul style="list-style-type: none"> • To allow that any type of entity can be appointed to an oversight function, provisions should set out regardless of entity type: <ul style="list-style-type: none"> ○ the level of independence and governance necessary for the statutory function and duties ○ requiring each function to be performed as set out in the oversight Act and related regulations • To allow that one entity can undertake more than one function, provisions should set out how any conflicts are addressed.
Protecting children and young people from harm	<ul style="list-style-type: none"> • Oversight bodies are required to notify Oranga Tamariki and relevant professional bodies (including the Police, where relevant) of suspected abuse or neglect to children and young people that they may not be aware of. • Oversight bodies should be required to notify Oranga Tamariki and relevant professional bodies of professional misconduct or negligence that they might not be aware of.
Protecting professional obligations and obligations for secrecy	Provisions for secrecy and confidentiality where that is not already provided for in existing legislation.
Establishing stable and effective working relationships	Any matters that are important and not detailed in primary legislation or regulations should be provided for in MOU's/protocols, for example: <ul style="list-style-type: none"> • information sharing • classifications for critical incidents and complaints. • timeframes for notifications • advising of a preliminary inquiry

¹⁵ For example, expecting that a monitor should know about critical incidents in care and prepare reports on these, a next step would be to define the meaning of 'critical incident'.

¹⁶ Section 7AA of the Oranga Tamariki Act may be used as a guide to establish these duties

	<ul style="list-style-type: none"> • roles and responsibilities for supporting children before, during and after contact with oversight bodies • expectations for coordination and collaboration clear in areas of overlap between oversight bodies and between oversight functions and Oranga Tamariki's internal arrangements • any other matters the oversight bodies and Oranga Tamariki agree should be included).
Allowing for normal administrative provisions	<ul style="list-style-type: none"> • To enable the Minister to continue the appointment (and make future appointments) of an independent monitor, with modifications that are consistent with the establishment of a statutory agency or body that has the powers and functions as outlined in this paper. • To enable the Minister to continue the appointment (and make future appointments) of a Children's Commissioner, with modifications that are consistent with a crown entity that has amended functions as outlined in this paper. • To enable the Minister to take other steps, in line with good management practice for the Children's Commissioner, consistent with a crown entity that has amended functions as outlined in this paper. This would include the flexibility to appoint a Chief Executive and a Board, and/or Deputy Commissioners, if the Minister considers this appropriate. • Provisions for commencement and transition for each function and common provisions. • Capacity to assign or delegate, where that is not already specified in existing legislation. • Provisions to enable an oversight body to report to the Prime Minister and the House, and relevant Ministers regarding any interference in the performance of their functions, such as a refusal to provide information or non-compliance with timeframes specified in the Act.

Additional provisions to enable independent monitoring and assurance

109 In addition to the duties and provisions set out in Table 1, Table 2 below sets out new provisions that are required in relation to monitoring and assurance that may not be allowed for in any current Acts or regulations, or are not sufficiently detailed in the NCS Regulations. Other provisions may become apparent in drafting.

Table 2: New duties and provisions in support of independent monitoring and assurance

Objective:	Proposed duties/provisions
General settings	<ul style="list-style-type: none"> • Substantive provisions for independent monitoring of NCS to be contained within the new Act and associated regulations, rather than in the Oranga Tamariki Act and NCS Regulations. • Providing for the Prime Minister to appoint the responsible Minister for this function. • The power to make regulations in the primary legislation for the independent monitor.
Protecting young people from harm by having access to information (Note that the section titled <i>Access to information and powers of entry</i> which discusses this further)	<ul style="list-style-type: none"> • Powers to access information collected by Oranga Tamariki and service providers, including client and caregiver contact information and reports generated on clients and caregivers relating to (with detailed arrangements established in MoUs between agencies). • Powers of entry with and without notice or permission to a

	<p>range of care settings eg residential facilities, NGO service providers, but excluding private residences¹⁷.</p> <ul style="list-style-type: none"> • The monitor to have access to information on request from other government agencies, NGOs, DHBs and schools¹⁸ (including private information) that is relevant to its function eg to understand the effectiveness of needs assessments and plans under the NCS Regulations. • Timeframes to provide information to the independent monitor are specified.
Making roles, responsibilities and requirements for improvement clear ¹⁹	<ul style="list-style-type: none"> • Provisions setting out the respective duties of the independent monitor and Oranga Tamariki in relation to: <ul style="list-style-type: none"> ○ informing areas for improvement ○ required actions by Oranga Tamariki that fosters continuous/ self-improvement ○ taking actions and reporting on such where improvement is required. • Power to require agencies and bodies to respond to the findings of a report and non-binding recommendations made by the independent monitor and to report on actions to improve services and compliance with the regulations.
Making reporting requirements clear, including timeframes, aiding transparency and supporting systems improvement ²⁰	<ul style="list-style-type: none"> • Provisions setting out how often the independent monitor reports to the Minister on all non-compliance (and also agencies and bodies who could have the right to reply or explain) and specifically: <ul style="list-style-type: none"> ○ requiring regular reporting on the state of the Oranga Tamariki system ○ providing that the Minister may require urgent supplementary and interim reports on any matter ○ making requirements to report on non-compliance clear. • Making expectations for NCS reports outside of every three years clear.
Supporting transparency, and also system learning and improvement	<ul style="list-style-type: none"> • A duty requiring that the monitor be notified by Oranga Tamariki about all critical incidents involving children or young people in custody or related to the Oranga Tamariki Act, and about acts and omissions under that Act leading to abuse or neglect in care with agreed definitions and thresholds reporting outlined in appropriate operational documents eg MOUs, in line with the NCS Regulations.
Ensuring consultation by the independent monitor	<ul style="list-style-type: none"> • Extending the range of agencies²¹, bodies and persons including iwi and Māori, to be consulted in the

¹⁷ In order to minimise disruption to families and caregivers, I expect that the monitor should rely solely on information provided by Oranga Tamariki about compliance with any physical aspect of private residences required in the Oranga Tamariki Act or related regulations or standards.

¹⁸ The monitor will work with the relevant agencies to work through the information sharing working arrangements to ensure the protection of private information and method of engagement.

¹⁹ These are modelled in NCS Regulations

²⁰ Regulation 87 requires the chief executive and approved organisations to report to the Minister and the independent monitor on their own self-monitoring. This includes on responses to any findings of non-compliance with the NCS Regulations. However, this reporting is only to be done every 3 years following a report by the independent monitor. This does not provide adequate response to urgent reports on significant incidents.

²¹ As noted earlier, I acknowledge the specific role Te Puni Kōkiri as the Ministry responsible for monitoring the effectiveness of State services delivery for Māori

	establishment of assessment frameworks for monitoring, and requiring consultation before significant change (from that currently outlined in the NCS Regulations).
Enabling the monitor to undertake deeper reviews	<ul style="list-style-type: none"> • Appropriate investigation-like provisions for the monitor. • Where there are other bodies with investigative powers, there should be consideration of arrangements for collaborating on investigations where appropriate, or alternatively for an independent investigation to be carried out by a single body. • Considering if there are any circumstances in which 'closed door' reviews of issues or incidents is support to better enable frank discussion and system learning (not unlike arrangements under the adverse event learning programme for the health system).
Ability to manage and prioritise work with the available budget	Allowing the monitor to have discretion to establish and change the priorities and intensity of monitoring and assurance of different parts of Oranga Tamariki's operations. ²²

Specific additional provisions to enable the Ombudsman to effectively manage complaints and investigations

110 In addition to the duties and provisions set out in Table 1, Table 3 below sets out new provisions that I consider will be required and which are not already allowed for in any current primary or secondary legislation. Others may become apparent in drafting.

Table 3: New duties and provisions for independent complaints oversight and investigations

Objective:	Proposed duties/provisions
Preserving the constitutional independence of the Ombudsman	Subject to agreement by OPC, to provide for the appointment of the Ombudsman by the designated Minister to carry out the complaints function
Ensuring oversight of harm in care as part of a wider system that aims to protect children and young people from harm	<ul style="list-style-type: none"> • Amend existing regulation 85 (provision of information to the independent monitor on reports of abuse or neglect and how those reports are responded to) to ensure the complaints body receives the same information received by the independent monitor. • Duties requiring that Oranga Tamariki be notified about the same matters that the Ombudsman becomes aware of²³.
Making systemic issues and critical issues more visible ²⁴ so that improvements can be identified	Duties requiring the Ombudsman to be notified by Oranga Tamariki about all critical incidents involving children or young people in custody or related to the Oranga Tamariki Act.

²² This will enable consideration of the available budget; emerging or acute issues; requests from relevant Ministers; the maturity of Oranga Tamariki operations, or its quality assurance and record keeping; for the monitor to establish a baseline of compliance and/or to apply a risk-based approach.

²³ While notifications are most likely to come from Oranga Tamariki, in cases where the Ombudsman may receive notifications from other sources, such as the public or providers, the Ombudsman would notify Oranga Tamariki.

Supporting earliest resolution of matters	<p>An exception from the Official Information Act 1982 (OIA) for information relating to communications between the Ombudsman and Oranga Tamariki and/or other relevant agencies prior to the commencement of a formal investigation, for the purposes of supporting systemic and early resolution of individual complaints.</p> <p>The exception will not apply to the ‘scanning’ for or ‘scoping’ of systemic investigations and will apply to communications, not to the raw information that informed those communications.</p> <p>Such information can already be withheld by the Ombudsman (who is subject to an oath of confidentiality and not covered by the OIA), but not by the entity providing it. This can make agencies reluctant to share information in full, or discuss matters frankly before a formal investigation is started. The exceptions to the OIA I propose already exist for formal investigations.</p>
Supporting early resolution and creating a common door for referral of complex matters	<p>To allow the Ombudsman to consult with agencies deemed appropriate on any matter relating to a complaint or investigation, to share information and to refer complaints to them if required.</p> <p>(These provisions must ensure that the Ombudsman is not precluded from consultations in the pre-investigation stage through the secrecy provisions in the Ombudsmen Act.)</p>
Supporting the management of complaints in a manner that is timely for children and young people.	<ul style="list-style-type: none"> • To establish timeframes for information to be provided (and exceptions to these including for urgent matters). • To allow the complaints oversight body to set a timeframe for response to recommendations that should be complied with.
Supporting investigations	<p>The Ombudsman’s existing investigatory powers to not be limited to government agencies in this context, but allow for entry to Oranga Tamariki’s approved organisations and entities with custody of children.²⁵</p>

Access to information and powers of entry

111 I consider that (depending on the need and purpose of obtaining information) the independent monitor and the complaints oversight and investigations body (ie the Ombudsman) should have access to information²⁶ that is as up to date (as close to real time) as possible (especially if it is relevant to the allegation of a child being abused or

²⁴ The Ombudsman has powers and provisions to conduct investigations in relation to state sector administration. Investigations can be receipt of a complaint, or initiated by the Ombudsman. The later is usually prompted by serious or systemic issues, where the Ombudsman thinks their intervention has the potential to result in wider administrative improvement. This provision would make the Ombudsman more informed.

²⁵ The Children’s Commissioner already has powers to carry out investigations under the current Children’s Commissioner Act, including special powers to call for information or documents.

²⁶ The legislative detail to support appropriate access to information will be worked through with Oranga Tamariki and the Privacy Commissioner, and presented for Cabinet Legislation Committee decision.

neglected), that information should be provided on request within specified time frames, and that these oversight bodies should be informed about the types of relevant information that Oranga Tamariki and its agents may hold (so that it can make an informed request for information).

- 112 I also consider that oversight bodies should be able to directly engage children, young people, caregivers and relevant other persons and bodies.²⁷ Whether this requires a power of entry needs to be considered more fully to ensure the powers (if required operationally) are set out appropriately in the legislative framework.
- 113 I note that the Ombudsman considers that to exercise a high level of independence for complaints and investigation, that they should have direct access to relevant information held by Oranga Tamariki, and to Oranga Tamariki's complaints management system in particular.
- 114 I note this view and consider that arrangements for access to information should not unduly limit the independence of an oversight body.
- 115 It may be the case that operationally it is necessary to have restricted direct access to relevant parts of Oranga Tamariki's systems (for example by providing restricted direct access to all or specific parts of Oranga Tamariki's case management systems for children and young people in care in order to monitor NCS Regulations or investigate complaints).
- 116 The operational implications of timely access to certain information and use of that information needs to be considered more fully alongside policy so that what is intended and required operationally is set out appropriately in the legislative framework. MSD will lead a Privacy Impact Assessment, in consultation with Oranga Tamariki. If it is the case that direct access to information is required, a question to be considered for legislative design is whether or not direct access to information (and any required qualifiers) for this vulnerable population should be established in primary legislation, regulation or working agreements. This will be considered in full in a legislative paper in support of a new Act (if agreed).
- 117 I consider information sharing with the independent oversight bodies should be underpinned by these key principles:
- Necessary and proportionate – access to information should be proportionate to what is required for the oversight function
 - Openness and transparency – that Oranga Tamariki and other bodies covered by oversight functions recognise the need to act openly, transparently and in a timely manner in interactions with the independent oversight bodies to enable them to perform their functions effectively, and vice versa. This includes how they share information with those bodies.
 - Compulsory provision of information – independent oversight bodies should be able to compel Oranga Tamariki to provide them with information that is reasonably required for them to effectively perform their functions.

²⁷ In directly engaging with children, young people and those who care for them oversight agencies would coordinate with services providers to minimise any intrusion and ensure support that may be needed is provided

- Appropriate safeguards – any information shared with the independent oversight bodies is subject to appropriate safeguards that protect individuals’ privacy.

118 Changes regarding information access and powers of entry will be worked through and outlined in the Cabinet Legislation Committee paper. I propose the Minister for Social Development is authorised to make decisions on these issues in order to finalise drafting the bill, consulting with other Ministers when required.

Early changes to the NCS Regulations are also required

119 The Minister for Children has agreed to necessary changes to the NCS Regulations prior to their commencement on 1 July 2019 in order to:

- set out commencement provisions for monitoring that allow sufficient time to progress wider legislative change, and to enable the independent monitor to develop, design and build the monitoring function alongside the phased roll-out of Oranga Tamariki’s new operating model
- clarify the scope of the independent monitoring function under the NCS Regulations
- clarify the assessment framework will be developed and established over 2019/20.

120 I propose that the current NCS Regulations be amended in two phases. The first phase will be limited to changes required prior to 1 July 2019, as set out in Table 4. Further changes to the NCS Regulations will be incorporated in the new Act and related regulations.

Table 4: Changes to the NCS Regulations prior to 1 July 2019

Objective:	Proposed duties/provisions
<p>Enabling the independent monitor to:</p> <ul style="list-style-type: none"> • commence development of the assessment framework and oversight of the safety of children and young people in care and custody from the commencement of the NCS Regulations from 1 July 2019 • develop the monitoring function, and commence monitoring with new legislative frameworks in place on or before 31 December 2020 or on a date appointed by the Governor-General by Order in Council. 	<ul style="list-style-type: none"> • That the following provisions in Part 6 of the NCS Regulations continue to commence from 1 July 2019: <ul style="list-style-type: none"> ○ Regulations 77 and 78 – the content and establishment of the assessment framework ○ Regulation 85 – the requirement for Oranga Tamariki to provide information to the independent monitor on abuse or neglect ○ Regulation 82 – provisions for supplementary reports by the independent monitor ○ Regulation 84(1)(b) and 84(2) - 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 ○ Regulations 86 and 87 – provisions that relate to the requirements for self-monitoring and self-improvement of Oranga Tamariki. • Commencement provisions to be amended to allow all other provisions under Part 6 of the NCS Regulations to commence on or before 31 December 2020 or on a date

	<p>appointed by the Governor-General by Order in Council.</p> <ul style="list-style-type: none"> Regulation 77 to be amended to specify that the independent monitor must <i>develop</i> and establish the assessment framework.
<p>Being clear that the independent monitor is not expected to ensure the discovery of <i>all</i> non-compliance with NCS Regulations s 9(2)(g)(i)</p>	<p>Regulation 83 be amended to clarify that the scope of monitoring should only extend to non-compliance with the NCS Regulations 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 abuse and neglect, or serious harm as defined in the Oranga Tamariki Act.</p>

121 I recommend that the proposed amendments to the NCS Regulations detailed in Table 4 above be managed through a separate legislative process, to ensure the changes are made before these regulations would otherwise come into force on 1 July 2019.

122 Other necessary amendments to the NCS Regulations have been identified for the purpose of the monitoring function, which can be enacted at a later date (ie not before 1 July 2019). These include amendments to:

- clarify access to information from Oranga Tamariki and its approved organisations
- make reporting requirements clear, including timeframes, aiding transparency and supporting systems improvement.

Consequential changes to the Oranga Tamariki Act and other relevant Acts and regulations

123 In providing for the above changes, a number of consequential amendments may be required to the Oranga Tamariki Act and associated regulations, the Ombudsmen Act, and the Children’s Commissioner Act – these will be worked through and outlined in the Cabinet Legislation Committee paper. Other Acts may also require consequential amendments.

Minister for Social Development be authorised to make minor decisions for drafting

124 Other provisions that are required may become apparent in preparing drafting instructions for PCO. I also propose that the Minister for Social Development be authorised to make any decisions on minor and technical matters required to finalise the Bill and associated regulations, consulting with other Ministers where required.

s 9(2)(f)(iv)

[Redacted]

[Redacted]

Legislative implications

- 133 The legislative proposals in this paper will be included in the Independent Oversight (Oranga Tamariki System and Children's Issues) Bill (the Bill).
- 134 The Bill has been accorded a category 2 priority (must be passed within the year) on the 2019 legislative programme. In view of the proposed timeline for the introduction of the oversight functions, with the functions to be commenced from late 2020, I recommend that this category should now be amended to a category 4 priority (to be referred to a select committee in the year) in the 2019 legislative programme.
- 135 New regulatory requirements for an independent monitor for new NCS commencing 1 July 2019 are a key driver (monitoring should start no later than a year from commencement of these regulations), as monitoring is to inform Oranga Tamariki's transformation.
- 136 As noted earlier in this paper, I also propose that amendments to the current NCS Regulations be implemented in two phases, with the first phase limited to changes required prior to 1 July 2019.

PART 4 – OTHER MATTERS

Implementation

- 137 Following Cabinet agreement to the proposals in this paper the Officers of Parliament Committee (OPC) will consider the appointment of the Ombudsman as the complaints oversight entity. The Ombudsman would then establish a work programme to build its enhanced functions.
- 138 MSD will also commence work to build functionality to consider information on abuse or neglect in care and to ensure NCS Regulations are appropriately amended by 1 July 2019.

139 The establishment of the monitoring function will be a significant and complex inter-agency piece of work, **Appendix C** depicts the likely work programme over the next two years. Success will depend on effective and efficient working arrangements between key agencies (Oranga Tamariki, the Office of the Children’s Commissioner and the Ombudsman’s Office). Agencies will need to coordinate to ensure effective engagement with stakeholders e.g. care providers and Māori, and to ensure the oversight system is set up to work together effectively going forward.

140 Subject to Cabinet and OPC agreement, s 9(2)(f)(iv) and the necessary legislative changes proceeding, I expect the following timeframe for commencing strengthened functions.

Function	From 1 July 2019	On or before 31 December 2020	2021 onwards
System-level advocacy	The OCC continues advocacy role based on current resourcing, including assessing Government’s compliance with UNCRoC.	The OCC continues advocacy role based on current resourcing.	OCC to do enhanced system-level advocacy with s 9(2)(f) (iv) and sharpened focus.
Monitoring and assurance	MSD appointed as independent monitor for the purposes of: <ul style="list-style-type: none"> establishing the function and building the NCS assessment framework monitoring information disclosed on abuse and neglect in state care, and how Oranga Tamariki is responding. The OCC to continue its current general monitoring functions, including: <ul style="list-style-type: none"> monitoring policies and practices of Oranga Tamariki OPCAT. 	<ul style="list-style-type: none"> All NCS Regulations are monitored. The OCC to continue OPCAT monitoring. 	MSD to report to key Ministers in March 2021 on planning and readiness to transfer the monitoring function.
Oversight of complaints and investigations	Ombudsman building an enhanced model (can receive complaints about Oranga Tamariki)	The Ombudsman to carry out the function ²⁸ .	No further change.

Review of the new independent oversight arrangements

141 Given the scale of changes, I propose that there be a statutory requirement to assess the effectiveness of the new independent oversight arrangements in 2023. A review could also potentially be aligned with the completion of the Royal Commission and/or

²⁸ Assuming approval from the Offices of Parliament Committee the Ombudsman already has powers under the Ombudsman Act that will enable commencement immediately. However, it will take time for the Ombudsman to build capability and capacity, for example, to establish a child and whānau-friendly gateway.

the requirements in the Oranga Tamariki Act for 'periodic review of legislation, government policy, and other arrangements'.

- 142 This review could consider, for example: the operation of oversight functions separately and as a system of oversight, the extent to which they are child and whānau friendly or culturally competent in other ways, functions, powers, and resourcing levels, changes that are required to reflect the maturing of Oranga Tamariki operating model, and/or concerns regarding public trust and confidence.

Regulatory impact and compliance cost statement

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

Human rights implications

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

Privacy implications

- 145 I consider that there is a strong case the entities undertaking the monitoring and assurance function, complaints oversight and investigations function should have access to personal information, and that this should be set out in primary legislation, and detailed in secondary legislation and or working agreements, in line with the findings of a Privacy Impact Assessment.

Child Impact Assessment

- 146 A Child Impact Assessment (CIA) has been conducted for the proposals in this paper. The CIA demonstrates that the proposals in this paper will help to safeguard and promote the wellbeing of New Zealand's children and young people, including in particular some of our most at-risk and vulnerable children and young people in contact with and/or in the care of the Oranga Tamariki system.
- 147 Māori children and young people account for a significant proportion of children in the Oranga Tamariki system, and can be expected to benefit from the proposals in the paper. The disparities in the numbers of Māori and non-Māori in the system continue to widen. For example, 69 percent of all children in care are Māori. As previously noted, the new Act would ensure that the set of core principles related to the functions align as appropriate with Treaty of Waitangi principles.

Gender implications

- 148 The oversight functions are being developed to be child-friendly and child-centred, which includes being responsive to the individual needs of each child, including needs related to gender identity, and the needs of their whānau and caregivers.

- 149 Boys and young men are slightly overrepresented in care, and significantly overrepresented in the youth justice system, and as such are likely to benefit from the proposals in this paper.
- 150 Women, many of whom head single-parent households, are more likely than men to be primary caregivers for children and young people receiving services from the Oranga Tamariki system, and will benefit from the proposals in this paper. Women are also dominant in the professional care system (eg as social workers and service providers) to which the proposed monitoring and complaints oversight arrangements in this paper will apply.

Workforce implications

- 151 Skilled and specialist staff will be required to carry out the main oversight functions. Significant recruitment will be required in particular for the establishment of the independent monitoring unit. MSD will support the OCC in planning for workforce development as part of the implementation plan for this function.
- 152 A key workforce requirement across all three oversight roles will be the need to demonstrate cultural competency in relation to Māori (in particular as tangata whenua, and under the Crown's Te Tiriti o Waitangi obligations) in relation to staff and management.
- 153 Oranga Tamariki is presently carrying out a significant social worker recruitment process to resource its new operational model. While there may be some overlap between the workforce needs of the proposals in this paper and Oranga Tamariki's recruitment process, I do not envisage it to have a major impact as we are focusing on compliance and monitoring skill sets and are proposing to scale up over time.

Disability perspective

- 154 There is an over-representation of disability needs in the care and youth justice systems. International research indicates that abuse and disability often coexist in the lives of children. Children who are abused are at a higher risk of developing a disability, and children with a disability are at a higher risk of being abused and neglected.
- 155 The initiatives to strengthen the oversight of the Oranga Tamariki system and children's issues proposed in this paper can be expected to support better outcomes for disabled children and young people.
- 156 I have highlighted that avenues to make complaints relating to care should be accessible to disabled people. In some cases, disabled parents may wish to complain, and in other cases, disabled children may wish to complain. These groups should have complaint mechanisms accessible to them, and/or support to make complaints should be available to them.

Consultation

Consultation on this Cabinet paper

- 157 This paper was prepared by MSD and SSC. The proposals related to the enhanced oversight function of the Ombudsman have been developed in consultation with the Ombudsman and the Ministry of Justice.

- 158 MSD will be working with Oranga Tamariki on the development of the operational details to bring the proposals into effect.
- 159 The OCC has not yet been consulted on proposals in this paper but were consulted during the Review's targeted public consultation phase in 2018. As the OCC are a key stakeholder, I propose that MSD work with them during the establishment of the monitoring function.
- 160 Other agencies consulted on this paper were Oranga Tamariki, the Ombudsman; the Ministry of Health; the Department of Justice; the Treasury; New Zealand Police; Te Puni Kōkiri; the Ministry for Pacific Peoples; the Departments of Corrections; the Ministry for Women; the Office for Disability Issues; the Child Poverty Unit, Child Wellbeing Unit, the Department of the Prime Minister and Cabinet; the Education Review Office, the Social Services Accreditation service; the Independent Police Conduct Authority; Te Arawhiti and the Legislation Design and Advisory Committee Subcommittee.

Proposed future engagement with Māori

- 161 A number of Māori stakeholders were approached for consultation as part of the Review. A targeted group of Māori organisations were invited to take part in a hui, of which eight Māori care and protection service providers attended. Te Puni Kōkiri supported the consultation phase and facilitated the hui. The consultation found that better representation of Māori views is needed across all elements of the care and protection system and independent oversight functions, and this has been reflected throughout this proposal.
- 162 Given the national significance of these proposals and the high proportion of Māori in the Oranga Tamariki system, and in line with recently released guidelines on engagement from the Office for Māori Crown Relations, Te Arawhiti, I propose that collaboration on these issues is necessary. I propose to run an engagement process with Māori organisations and iwi/hapū alongside the development of the legislation, assessment framework and operating model. MSD will engage Te Arawhiti for support and guidance on how to give best effect to the Māori Crown relations Engagement Framework and Guidelines.

Publicity and Proactive release

- 163 I plan to make a high-level announcement on the key decisions proposed in this paper subject to Cabinet agreement to the proposed approach. Prior to public announcement, I will brief the Children's Commissioner in confidence on these decisions. I propose to make this paper, and some of the relevant decision papers public with the announcement.

PART 5 – RECOMMENDATIONS

I recommend that the Cabinet Social Wellbeing Committee (SWC):

- 1 **note** that recent and ongoing reforms of the Oranga Tamariki system and new government priorities (including the reduction of poverty and the child wellbeing strategy), have prompted the need to consider strengthening independent oversight arrangements for the Oranga Tamariki system and children's issues
- 2 **note** that:

- 2.1 in August 2017, the Cabinet Social Policy Committee agreed that a review of independent monitoring, complaints review, investigation and advocacy functions for the new vulnerable children's system be led by the Ministry of Social Development (MSD), using an independent reviewer, with support from the State Services Commission (SSC) [SOC-17-MIN-0115]
 - 2.2 in March 2018, SWC agreed to a targeted consultation process to test the preliminary work done to identify the 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, and invited the Minister for Social Development to seek final policy decisions from the SWC following the consultation [SWC-18-MIN-0025]
- 3 **note** that:
- 3.1 MSD, with support from the SSC, has reviewed how these arrangements might be strengthened to ensure that we have the level of independent oversight of the operation of the Oranga Tamariki Act 1989 and children's issues that is now required (the Review)
 - 3.2 the Review drew on the findings of stakeholder consultation carried out in mid-2018, together with a range of additional sources
- 4 **agree** that the system of independent oversight for the Oranga Tamariki Act and children's issues should be strengthened in three core areas, specifically:
- 4.1 system-level advocacy for all New Zealand children and young people
 - 4.2 oversight and investigation of complaints of matters related to application of the Oranga Tamariki Act 1989 and/or children in the care or custody of the State
 - 4.3 independent monitoring and assurance of the operations and obligation delivered under the Oranga Tamariki Act 1989 and associated regulations
- 5 **agree** that new primary legislation – provisionally entitled the *Independent Oversight (Oranga Tamariki and Children's Issues) Bill* (the Bill) – bring together in one place the respective roles, responsibilities and powers of oversight bodies assigned the three primary oversight functions, with regulations to be made under the Bill as appropriate
- 6 **agree** that the three oversight functions apply to children and young people under 25 years, as appropriate

The system-level advocacy function

- 7 **agree** that the role of the system-level advocate for children and young people be continued as currently defined in the Children's Commissioner Act 2003
- 8 **agree** that the new Bill provide an enhanced focus on the areas of advocacy as set out in paragraphs 46-48 of this paper

The independent monitoring and assurance function

- 9 **note** that the depth and breadth of independent monitoring that will be required for Oranga Tamariki's new operating model will be a major new undertaking, particularly

with the independent monitoring requirements set out in the new Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (NCS Regulations)

- 10 **agree** in principle s 9(2)(f)(iv), to the role of the independent monitor as set out at paragraphs 50-52 of this paper
- 11 **agree** that MSD be appointed the independent monitor from 1 July 2019 to establish the monitoring function, with the intent that it is transferred to an appropriate entity once a robust monitoring function is established and a new legislative framework is in place
- 12 **note** that MSD's role will be to design and establish the framework for the independent monitoring of compliance with the NCS Regulations, information that is disclosed on abuse or neglect in state care and how Oranga Tamariki is responding (NCS Regulations 69 and 85), establish the broader monitoring frameworks and conduct full monitoring for a period from December 2020 (or earlier if possible) to refine the operation of the function before it is transferred
- 13 **agree** that MSD will work with Te Puni Kōkiri and Te Arawhiti, in line with the Māori Crown relations Engagement Framework and Guidelines, to:
 - 13.1 ensure appropriate Māori and iwi engagement during the establishment of the monitoring function, and to support improvement of MSD's te ao Māori capability
 - 13.2 support official's advice on the transfer of the function
- 14 **note** that MSD and relevant agencies, including Oranga Tamariki, the Ombudsman, the OCC and the SSC will work together to effectively progress the establishment and transfer of the monitoring function to an appropriate entity
- 15 **agree** that officials will report to the Minister for Social Development and other key ministers, including the Minister of Māori Development and the Minister for Whānau Ora, regularly on progress with establishment of the monitoring function including a substantive update in mid-2020
- 16 **agree** that officials will report to the Minister for Social Development and other key ministers, including the Minister of Māori Development, the Minister for Whānau Ora and the Minister for State Services, in December 2020 on further advice on where monitoring is transferred to if that is required, and in March 2021 on the plan, timeframes and readiness to transfer the monitoring function
- 17 **agree** that in principle the intention is that monitoring will be transferred to the OCC
or
agree to seek advice on where monitoring could be transferred to in December 2020, anticipating that a new legislative framework will be in place and the monitoring function will be established
- 18 **note** that transferring the monitoring function to the OCC along with existing advocacy and Optional Protocol on the Convention Against Torture (OPCAT) monitoring functions would fundamentally change the organisational structure and culture of the OCC
- 19 **agree** that the Bill provide for appropriate governance for a monitor, and for an entity undertaking oversight functions that may be in conflict

- 20 **note** that this will ensure strengthened governance for the OCC should the monitoring function transfer to it post establishment
- 21 **note** that from time-to-time it would be appropriate for the responsible Minister to provide direction in respect of matters that relate to monitoring and assurance functions
- 22 **agree** that, the Bill provide for the responsible Minister to provide direction in respect of monitoring matters but not in respect of systemic advocacy
- 23 **agree** that, to allow sufficient time to progress wider legislative change and to enable the MSD to develop, design and build the monitoring function alongside the phased roll-out of Oranga Tamariki's new operating model, the new independent monitoring function should be phased in, with:
- 23.1 MSD developing the NCS assessment framework in consultation with Oranga Tamariki, the Children's Commissioner, Te Puni Kōkiri, Te Arawhiti and others from 1 July 2019
- 23.2 MSD monitoring information that is disclosed on abuse or neglect in state care and how Oranga Tamariki is responding (NCS Regulations 69 and 85) from 1 July 2019
- 23.3 full monitoring of all NCS Regulations to commence on or before 31 December 2020

The independent complaints oversight and investigations function

- 24 **note** that within the care and protection and youth justice system children, young people and their whānau are often reluctant to raise concerns, complaints can also take a long time to resolve, and it can be challenging to find support to resolve issues that span several departments for children with complex needs
- 25 **note** that the Children's Commissioner is currently assigned the independent complaints function, but that the operation of this function has been severely constrained by a lack of resourcing, which has meant that there is currently no significant oversight of complaints made by children, young people or those who care for them
- 26 **agree** to the role of the independent complaints oversight and investigations function as set out in paragraph 85 of this paper
- 27 **agree** to recommend to the Officers of Parliament Committee (OPC) that the Ombudsman be appointed to carry out this function on or by 31 December 2020
- 28 **note** the Ombudsman's existing functions, powers under the Ombudsman Act and the operational infrastructure and capability of the Office of the Ombudsman makes the Ombudsman well placed to take up the strengthened complaints and investigation oversight function
- 29 **note** that should Cabinet agree to the proposals the Ombudsman will inform the Speaker and the OPC will consider Cabinet's recommendation
- 30 **note** the work underway on complaints relating to the education system, as part of the review of Tomorrow's Schools may enable future opportunities to further align and refine education complaints pathways for children and young people in the custody of the

Legislative amendments required to bring the proposals into effect

- 31 **note** that the legislative proposals in this paper will be included in the *Independent Oversight (Oranga Tamariki System and Children's Issues) Bill* (the Bill), which has been accorded a category 2 priority (must be passed within the year) on the 2019 legislative programme
- 32 **agree** that this category should now be amended to a category 4 priority (to be referred to a select committee in the year) in the 2019 legislative programme
- 33 **agree** that the Bill should reflect an intention to provide a strengthened system of independent oversight of the Oranga Tamariki Act 1989, and advocacy for all children
- 34 **agree** that the Bill reflect that bodies responsible for oversight should be guided by a set of core principles as set out in paragraph 41 of this paper
- 35 **agree** 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 are designated oversight roles in the Bill, as specified in paragraph 43 of this paper
- 36 **agree** that the Bill will:
- 36.1 repeal the Children's Commissioner Act 2003 and continue the provision of dedicated arrangements for the oversight of the Oranga Tamariki Act and children's issues including existing advocacy functions and powers – which include giving effect in New Zealand to the United Nations Convention on the Rights of the Child
 - 36.2 provide new governance arrangements to support the entity undertaking monitoring arrangements, as intended
 - 36.3 subject to OPC approval, provide for the Ombudsman to undertake complaints and investigations functions and provide additional powers required to exercise those functions, over and above those provided in the Ombudsmen Act 1975
 - 36.4 to continue the appointment, and make future appointments, of an independent monitor and necessary functions and powers to support monitoring and assurance
- 37 **agree** that any existing provisions relevant to the purpose, intent, administrative arrangements, functions and powers described for each function that are contained in the Oranga Tamariki Act 1989, the Children's Commissioner Act 2003, the Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 (the NCS Regulations), the Oranga Tamariki (Residential Care) Regulations 1996, and the Vulnerable Children's Act 2014 be transferred to the new Bill, with necessary modifications
- 38 **agree** that the Bill should refer to necessary functions and powers in the Ombudsmen Act 1975, to enable the Ombudsman to undertake independent complaints oversight and investigations
- 39 **note** that MSD will consult with Oranga Tamariki, the Ministry of Justice, Te Puni Kōkiri,


Te Arawhiti, the Office of the Ombudsman and the OCC on the development of the legislative proposals in line with the policy proposals in this paper, which will include releasing the draft paper for Cabinet Legislation Committee and the draft legislation to them

- 40 **note** that the OCC will also be consulted on the proposed oversight model, legislation and development of the monitoring function
- 41 **agree** that common duties and requirements, detailed in Table 1 (on pages 21-22) of this paper, for all oversight bodies be included in the Bill subject to changes considered when designing the bill in regards to whether or not they are combined for all functions or specified for separate functions
- 42 **agree** that the independent monitor have the duties and requirements detailed in Table 2 (on pages 22-24) of this paper and that these be included in the Bill or, where appropriate, in regulations made under the Bill
- 43 **agree** that the complaints oversight body also have the duties and requirements detailed in Table 3 (on pages 24-25) of this paper that are not allowed for in any of the above Acts or regulations, and that these be included in the Bill
- 44 **note** that amendments to the NCS Regulations are required in order to align the Regulations with the proposed implementation of the monitoring and assurance function outlined above
- 45 **agree** that the NCS Regulations be amended as set out in Table 4 (on pages 27-28) of this paper prior to 1 July 2019, in order to:
- 45.1 change the commencement provisions to enable the MSD sufficient time to develop the monitoring function – this will allow the assessment framework for the NCS to be developed over 2019/20 and the monitoring function to commence on or before 31 December 2020
 - 45.2 clarify the scope of the independent monitoring function under the NCS
- 46 **note** the policy on access to information held in the Oranga Tamariki system and use of that information needs to be considered more fully alongside policy and following a Privacy Impact Assessment to ensure what is intended and required operationally is set out appropriately in the legislative framework:
- 47 **note** the policy on powers of entry needs to be considered more fully alongside policy following a Privacy Impact Assessment to ensure what is intended and required operationally is set out appropriately in the legislative framework:
- 48 **agree** that officials may report to Minister for Children and Minister for Social Development on the issues of access to information and powers of entry.
- 49 **authorise** 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
- 50 **invite** the Minister for Social Development to issue drafting instructions to the Parliamentary Counsel Office (PCO) to draft:
- 50.1 the Bill and associated regulations to be made under the Bill,

50.2 changes to the NCS Regulations required prior to 1 July 2019

- 51 **agree** that consequential amendments will be required to the Oranga Tamariki Act 1989 and associated regulations, the Ombudsmen Act 1975, and other legislation such as the Privacy Act 1993 may also require consequential amendments
- 52 **authorise** the Minister for Social Development, in consultation with other Ministers as appropriate, to make any decisions on minor and technical matters required to finalise the Bill

s 9(2)(f)(iv)



Future review of the new independent oversight arrangements

- 66 **note** that given the scale of change proposed, the potential for Oranga Tamariki's internal monitoring and complaints systems to mature and develop, and the potential findings of the Royal Commission, it would be valuable to provide for a review of the new independent oversight arrangements
- 67 **agree** that there be a statutory requirement to review of the effectiveness of the new independent oversight arrangements in 2023

Publicity and Proactive release

- 68 agree that:
- 68.1 a high-level public announcement be made following decisions on the functions have been made by Cabinet and OPC
 - 68.2 prior to the public announcement, I will brief the Children's Commissioner in confidence on these decisions, and that I will release this paper and some key relevant decision papers with the announcement

Authorised for lodgement

Hon Carmel Sepuloni
Minister for Social Development

Appendix A

The Review: consultation and findings

On 9 August 2017, the Cabinet Social Policy Committee agreed that the Review of independent oversight arrangements for the Oranga Tamariki system and children's issues be led by the Ministry of Social Development (MSD) using an independent lead reviewer, with support from the State Services Commission (SSC) [SOC-17-MIN-0115 refers]. MSD appointed Sandi Beatie QSO as the independent lead reviewer.

The first phase of the Review

The first phase of the Review considered current settings for oversight, the gaps and overlaps, explored international models and the development of potential options for strengthening independent oversight arrangements, including consultation with government departments, Crown Entities and the Ombudsman.

The findings from the first phase of the Review were outlined in a paper to Cabinet Social Wellbeing Committee on 28 March 2018 [SWC-18-MIN-0025 refers].

The second phase of the Review – public consultation

On 28 March 2018, the Cabinet Social Wellbeing Committee agreed to a second phase of work, involving targeted consultation with a wide group of stakeholders [SWC-18-MIN-0025 refers].

The consultation sought stakeholders' views on what core functions are required for strong oversight, critical features for success (including skill and knowledge requirements), whether and how functions best sit together, and how the respective functions could be organised.

From May 2018 to July 2018, the independent reviewer (with support from MSD) led the engagement with a range of stakeholder groups, including with:

- iwi and Māori, including a hui with Māori providers
- Crown entities and Officers of Parliament
- Principal Judges in the Youth Court and Family Court
- other key individuals with particular expertise in the area
- Pacific peoples representatives, including the Oranga Tamariki Pacific Panel
- groups and associations representing children, caregivers and others involved with the Oranga Tamariki system, such as VOYCE – Whakarongo Mai, Fostering Kids, YouthLaw Aotearoa
- non-government organisations (NGOs) involved in delivering services to children and young people in the Oranga Tamariki system, such as Dingwall Trust and Barnados and NGOs that advocate for children's rights, such as Save the Children and UNICEF.

The independent lead reviewer consulted with 35 individuals or representative groups either face to face or by telephone, and we received a total of 33 written submissions.

The independent lead reviewer also drew on existing insights from children (particularly from care experienced children) gathered by the OCC, Oranga Tamariki and the Expert Advisory Panel for the Child, Youth and Family Review and VOYCE Whakorongo Mai. To supplement this, MSD engaged specialist expertise to undertake focus groups with children and young people who are vulnerable but not care experienced in August 2018 (along with a composite report on relevant insights from children).

In August 2018, Sandi Beatie provided her findings and recommendations in a post-consultation report entitled: *Strengthening independent oversight of the Oranga Tamariki system and of children's issues in New Zealand - Ko te whakakaha i te tirohanga motuhake ki te pūnaha a Oranga Tamariki me ngā take tamariki i Aotearoa: Post Consultation Report* (the Beatie Report). The Beatie report also provides a summary of the current settings of oversight in New Zealand, and an analysis of international models. The key findings from the Beatie report are summarised below.

Key findings

There was broad agreement across stakeholder groups on the need for:

- strong and independent system-level advocacy for all children and young people
- independent complaint avenues separate from Oranga Tamariki that are accessible, trusted, timely, fair and safe
- a broader systemic monitoring of the care, protection and youth justice system as a whole that provides credible evidence based assessments and a respected source of independent advice that provides assurance to the Government and public.

Overall, many stakeholders voiced concerns about the historical poor performance of the care, protection and youth justice system, and poor complaints arrangements in that system which has resulted in a loss of trust and confidence in state care. Stakeholders also highlighted the importance of independent roles for holding governments to account.

Many stakeholders stressed that better representation of Māori views is needed across all elements of the care and protection system and independent oversight functions. There is insufficient knowledge of and focus on Te Ao Māori by agencies given the high proportion of Māori children and young people in the care, protection and youth justice systems.

Current oversight arrangements

In the current settings independent oversight of children's issues has two main purposes. These are to:

- assess the Government's performance in line with our obligations under the United Nations Convention on the Rights of the Child, and advocating for change at the national level
- ensure the welfare and safety of children and young people in the Oranga Tamariki system.

Under the Children's Commissioner Act 2003, the Children's Commissioner has the key role in oversight of systems and outcomes for children.

Currently the Commissioner has a broad remit, particularly in two main areas:

- general statutory responsibilities for all children under 18, including advocating for the rights of all children.
- examining and monitoring the treatment of children and young people detained in care and protection and youth justice residences for the purposes of the Optional Protocol to the Convention against Torture (OPCAT)
- receiving complaints and investigating issues that impact a wide range of children
- providing oversight of the children and young people within the Oranga Tamariki system.

International models

A mix of different models for independent oversight for children and young people were examined as part of this review, including the models in England, Scotland, Wales, Canada and Australia.

While there are some notable features of the independent oversight models in these countries, there does not seem to be a definitive one ‘best practice model’. There also appears to be little compelling evidence to suggest which approaches to covering the various functions are most effective.

The main independent oversight functions – advocacy, monitoring, complaints and investigations are typically separated-out to some degree. An overall conclusion was that most of the countries looked at have continued over the years to review and refine how they respond to the representation of children’s issues and the need for particular independent oversight of those in state care.

System-level advocacy

Children’s voices should be included in decisions and policies that affect them

Stakeholder feedback from the Review highlighted the importance of ensuring children and young people have a voice in the design of policy and delivery of services, and strong advocacy for the rights and interests of all children.

Feedback to DPMC on the proposed Child and Youth Wellbeing Strategy called for children’s voices to be heard and for them to have input into decisions that affect them. Some respondents also noted the importance of having strong agents for children and children’s voices in different settings, including government.

The advocacy function should be independent from Government

Many stakeholders strongly supported the advocate’s role as an independent voice and influencer and felt that the advocacy function needs to be able to operate with independence from Ministerial influence. An independent advocate should be able to challenge government policy settings and highlight where improvements for children are required. The Children’s Commissioner’s fits this requirement, as its status as an Independent Crown Entity means that it is not subject to direction on government policy, except as specified in its own Act. This is important in order for the Children’s Commissioner to carry out the advocate function effectively.

The Children’s Commissioner’s remit for advocacy should be extended

Stakeholders strongly supported a continued role for the Children’s Commissioner in advocacy, including supporting and assessing our compliance with, and application of, the rights for children in line with the United Nations Convention on the Rights of the Child. Some felt that their remit should be broadened, to include a focus on mental health and children with disabilities.

The Office of the Children’s Commission (OCC) considers that its capacity for systemic advocacy is too limited, and that this has meant they have not been able to have input into all system and policy matters that are relevant to children.

Stakeholders thought the age of children and young people to be advocated for should be raised from under 18 to under 25, to better align with key legislation for children and young people.

With regard to systemic advocacy about the Oranga Tamariki system, some stakeholders viewed it important that the OCC consider how to best collaborate with individual and system-level advocates for children, young people in care and caregivers such as VOYCE Whakarongo Mai, FosterCare for Kids and others.

Independent monitoring and assurance

Effective independent monitoring can help assure the success of Oranga Tamariki's transformation

Timely and detailed information that comes from independent monitoring can help identify whether services delivered by Oranga Tamariki are working as intended, and where efforts to improve should be focused. It will provide important 'outside-in' data and intelligence to support successful transformation of the care, protection and youth justice system.

The Beatie report reflected that "keeping the system honest and ensuring that the wellness of all children can be tracked is an important part of accountability as is whether the actual experience of children and young people, whānau and carers who come into contact with Oranga Tamariki is improving".

Advice from the State Services Commission is that the independent monitor must be independent from Oranga Tamariki, and should be close enough to Government to report to Ministers on whether the system is performing as intended.

Māori should have a say on the development of an independent monitoring function

Māori perspectives in the development of assessment frameworks and other monitoring tools and operation of the monitoring function are also critically important. Māori children and young people account for a significant proportion of children in the Oranga Tamariki system; approximately 66 percent of tamariki in care, and 80 percent in youth justice facilities is Māori.

The remit of the independent monitoring function should be expanded to meet the requirements of new legislation

Stakeholders were clear that monitoring of the entire operating model is needed. This would enable the independent monitor to have oversight from the first point of contact of a child with Oranga Tamariki through to the child successfully transitioning out of care or youth justice custody. It was felt that a 'child and person-centric, on the ground' approach to monitoring is required to meet new expectations for independent monitoring set out in regulations for the NCS. The independent monitor should objectively consider the quality of delivery of services, and compliance with established standards and regulations, and the extent to which compliance and delivery supports what is intended.

Moving from a focus largely on the Optional Protocol to the Convention against Torture (OPCAT) and system settings, to a person-centric focus on Oranga Tamariki's operations would be a substantive shift. The depth and breadth of independent monitoring at the level required under the new legislative environment will be a major new undertaking. It will require extensive field work and engagement with stakeholders, children and their advocates and whānau, interrogation of data, and analysis of a wide range of material and regular reporting. A regional approach will be needed to be able to adequately assess what is happening for children on the ground and in the range of care settings that they may be located in, including residential facilities, group homes, and in foster care.

The current level of resourcing in the oversight system that is available for monitoring will not meet new regulatory requirements set out in the National Care Standards. The Government will need to be very confident in the capacity of an independent monitor to work in the new

regulatory environment and at considerably increased scale. The monitor will need to be able to have sufficient infrastructure and operational scale to be able to build the monitoring function relatively quickly.

Complaints oversight and investigations

A complaints oversight function needs to be focused on resolution and service improvement

Within the Oranga Tamariki system, children, young people and their whānau tend to be reluctant to raise concerns regarding their treatment or openly share their care experience with those providing services. This is particularly so for children and young people, parents, whānau and caregivers who are Māori and Pacifica. In these cultures, complaining is not encouraged as a way to resolve matters and historically they have had bad experiences when they do complain. Independent complaints oversight and investigations provides confidence to complainants that complaints will be approached fairly.

Complaints can also take a long time to resolve. Matters that are complex may be difficult to resolve and it can be challenging to find support or the right entity to help to resolve issues that span several entities, or should be considered together eg mental health or disabilities and education, or health and housing. This is both at individual and inter-agency levels.

To ensure a timely response and to encourage participation it is important that:

- parties are willing and enabled to support early resolution
- a 'no-wrong door' approach is taken to complaints. This would see a complaint able to be received by any agency within or associated with the Oranga Tamariki system and for the system to ensure the complaint is dealt with in a timely manner.

Stakeholders felt that the complaints system should be designed to support children, young people and their whānau, (and caregivers and adults in relation to Oranga Tamariki) to lay complaints and to deliver decisions quickly. Complaints should be investigated with an expectation that action will be taken, and necessary improvements to services will be made.

The complaints and advocacy functions may not be able to be delivered by the same body

The Review found the role and functions of the advocate and the complaints oversight function may not sit comfortably together. The Children's Commissioner predominantly advocates at a systems level, while complaints generally relate to individuals. Agencies may also struggle to have confidence in the independence of an organisation that also advocates for its complainants, and children may see the judgment aspect of an oversight body, and the potential for finding against them, as compromising its ability to advocate for them.

Oranga Tamariki alone is not responsible for, and is generally not in a position to resolve the complex cross agency matters that can hinder what is intended for children and young people in the care, protection and youth justice system. There needs to be a range of ways to consider and resolve these at multiple levels.

Investigations

The Children's Commissioner Act allows that the Commissioner may investigate any decision or recommendation made, or any act done or omitted, under the Oranga Tamariki Act in respect of any child or young person, but in practice very few investigations are undertaken.

The Ombudsman also has powers and provisions to conduct investigations in relation to state sector administration. These investigations can be conducted on receipt of a complaint, or 'own motion investigations' (self-initiated). A self-initiated investigation is usually prompted

by critical incidents or systemic issues, where the Ombudsman thinks their intervention has the potential to result in wider administrative improvement.

Some investigations undertaken by the Ombudsman are aimed at achieving wider administrative improvements in agency policies or processes. This is an important part of the oversight system and one that can provide an independent view on systemic issues and how they might be improved (including matters that span agency boundaries). This has not been substantively applied to the child protection system in the recent past, but going forward could provide an impartial, outside-in perspective on where improvements can be made.

Conclusions from the Beatie report

In her post-consultation report, Sandi Beatie laid out her proposals for strengthened independent oversight. She indicated that her preliminary views are intended to inform and act as a guide for the next stage of the Review.

Sandi Beatie stated that if government and the public are to be assured that the reforms being rolled out are leading to better experiences and outcomes for children in care then independent oversight needs to extend to where the majority of children and young people in care are living and being cared for.

Independent oversight should be based around the National Care Standards and include both the quality of care and service provision and the quality of support available to carers. There will need to be investment in an appropriate level of design expertise to develop a framework and its implementation for monitoring of the National Care Standards and for undertaking periodic targeted 'deep dives' from time to time of particular aspects of the care and protection system.

The importance of the quality of systematic monitoring can't be understated – it must provide credible evidence based assessments, be a respected source of independent advice and add value to Oranga Tamariki as well as contributing to a learning system of improvement in practice and service delivery. It must also be a trusted source of independent reporting that provides assurance to Ministers, Parliament and to the public.

Overall, it was proposed that:

- the Children's Commissioner have responsibility for systemic advocacy and monitoring (with changes to its legislation and structure)
- and either incorporating the complaints and investigations functions with the Children's Commissioner or into a separate body (such as the Ombudsman).

Appendix B

Assessment of other organisations potentially suited to carrying out the monitoring function

MSD and the SCC evaluated a range of existing government agencies (in addition to the Children's Commissioner and MSD) in related social sectors with experience in monitoring and assurance that could potentially expand their functions to take on the independent monitoring role.

The primary agencies considered were the Education Review Office (ERO), the Health Quality and Safety Commission (HQSC), and relevant monitoring teams within the Ministry of Health (MoH). While these entities had various strengths potentially applicable to the monitoring role, there are issues with each of them that effectively make them inappropriate to carry out the role.

- ERO would be well-placed to deliver the monitoring function based on its current operations – it has mature capability in carrying out monitoring and assurance in a regulatory environment, well-developed infrastructure including a regional presence, and cultural competencies and experience in engaging with children. However, the uncertainty around the future of ERO, following the release of the report of the Tomorrow's Schools Independent Taskforce and with the Government's decisions on its key recommendations still to be made, would make it inappropriate for ERO to be assigned the role at this time.
- While the HQSC has major strengths in quality improvement processes (and data analytics), it indicated that it would not have the required experience or expertise in monitoring and assurance activities to carry out the independent monitoring of the Oranga Tamariki system.
- Assigning the monitoring role within MoH would be completely new and would not rest on an established base of social sector monitoring as core 'business as usual' for the organisation. MoH also advised that they are in the process of rebuilding DHB performance monitoring and management at present, and it would be challenging for MoH to focus on a major new monitoring role along with this rebuild.

The appointment of a private provider was also considered for the monitoring role. Although the body appointed to carry out the role will be free to contract some of the work if it considers this appropriate, SSC's advice was that it would be inappropriate for Ministers to appoint a private provider directly to carry out such a sensitive statutory function.

Consideration was also given to launching a totally new government agency to carry out the role, but this was ruled out on the grounds that it would require a more extensive, costly and longer capacity and capability building process.

Appendix C

Draft work programme for establishing Independent Monitoring and transferring once established

