



## Strengthening independent oversight of Oranga Tamariki and children's issues – post consultation report by the independent lead reviewer

Date: 10 August 2018

Report no.: REP/18/8/1145

Security level: IN CONFIDENCE

Priority: Medium

### Action Sought

**Hon Carmel Sepuloni** For discussion with officials August 2018  
Minister for Social Development

### Contact for telephone discussion

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

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

### Minister's office comments

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- Withdrawn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

#### Comments

*To set up meeting with joint ministers and officials*

Date received from MSD

13 AUG 2018

Date returned to MSD

31 AUG 2018



# Report

**Date:** 10 August 2018

**Security Level:** IN CONFIDENCE

**To:** Hon Carmel Sepuloni, Minister for Social Development

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## **Strengthening independent oversight of Oranga Tamariki and children's issues – post consultation report by the independent lead reviewer**

### **Purpose of the report**

- 1 This paper:
  - provides the post consultation report prepared by the independent lead reviewer for strengthening oversight of the Oranga Tamariki system and children's issues, and our advice on that report
  - gives you an update on timelines and key steps for this work, including how it fits with other activities such as the (re)appointment of the Children's Commissioner by 1 April 2019, and appointing an independent monitor for National Care Standards
  - proposes we meet with you to discuss next steps and future direction of the work to strengthen independent oversight.

### **Recommended actions**

It is recommended that you:

- 1 **note** that from May 2018 to July 2018, the independent lead reviewer (with support from the Ministry of Social Development and the State Services Commission) led a targeted consultation process to test the preliminary work on options to strengthen independent oversight of the Oranga Tamariki system and wider children's issues
- 2 **note** that the attached independent lead reviewer's post consultation report (the Report):
  - provides a summary of what was learnt from the targeted consultation
  - provides the independent lead reviewer's preliminary view on the case for strengthening oversight and what is required to do so
  - identifies where more detailed analysis is required
- 3 **note** that the report provides preliminary advice on the independent lead reviewer's overall direction on:
  - functions of the future independent oversight system for children
  - the form of the independent oversight body/bodies, but note that more detailed analysis is required in the next phase of work

4 **agree** that officials from the Ministry of Social Development and the State Services Commission meet with you in August 2018 to discuss the Report and next steps with the Review process

**Agree / Disagree**

5 **agree** that, following your consideration of the Report, officials from the Ministry of Social Development meet with the Children's Commissioner and the Ombudsman to give them a copy of the Report (and this cover report) and provide them with an update on the further work required for the next stage of the Review

**Agree / Disagree**

6 **agree** that, in consultation with you on the timing, we proactively release the Report on the Ministry of Social Development website

**Agree / Disagree**

7 **note** that, by the end of August 2018, the Ministry of Social Development, the State Services Commission and Oranga Tamariki will provide the Minister for Children as the Minister responsible for the National Care Standards (and the Minister of State Services and you) with joint advice on how decisions on the appointment of a monitor (including an interim monitor if required) for the National Care Standards fit with the timeframes of the Review

8 **note** that subject to your direction, we aim to seek final policy decisions from the Social Wellbeing Committee on 7 November 2018:

Action	Date
Further analysis	Aug – Sept 2018
Draft Cabinet Paper to Ministers for review	Late Sept 2018
Draft Cabinet Paper out for consultation	Early Oct 2018
Final Cabinet Paper to Minister	26 Oct 2018
Consideration of Cabinet Paper at Social Wellbeing Committee	7 Nov 2018
s 9(2)(f)(iv)	

9 **agree** to forward this report to the Minister for Child Poverty Reduction, Minister for Children and the Minister of State Services to support ministerial discussions on the direction of the Review.

**Agree / Disagree**

13.8.18

Date

Simon MacPherson  
Deputy Chief Executive  
Policy

21/8/18

Date

Hon Carmel Sepuloni  
Minister for Social Development

## Background

- 2 The recent reforms of the Oranga Tamariki system and new government priorities provide an opportunity to review the current independent oversight arrangements for the Oranga Tamariki system and children's issues (the Review).
- 3 On 9 August 2017, the Cabinet Social Policy Committee agreed that the Review 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]. The use of an independent lead reviewer is considered important to ensure that the review process is seen to be sufficiently independent. MSD appointed Sandi Beatie QSO as the independent lead reviewer. Ms Beatie has a high level of policy experience, independence and credibility with the Children's Commissioner and the sector.
- 4 The first phase of the Review, during 2017, identified overlaps and gaps in current arrangements, and potential options to strengthen the independent oversight model to improve outcomes for children and young people. As part of this phase, we engaged with relevant government departments, Crown Entities (the Children's Commissioner, Human Rights Commissioners, the Health and Disability Commissioner, the Privacy Commissioner, and the Independent Police Conduct Authority) and the Ombudsman.
- 5 On 28 March 2018, the Cabinet Social Wellbeing Committee agreed that we undertake a second phase of work and carry out targeted consultation with a wider group of stakeholders to test the preliminary work done before final policy decisions are made [SWC-18-MIN-0025 refers].

### **From May 2018 to July 2018, the independent reviewer led a targeted consultation process**

- 6 The consultation sought views on the core functions 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.
- 7 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.
- 8 In May 2018, the independent oversight Cabinet paper was proactively released on MSD's website along with other consultation materials to initiate engagement with stakeholders.
- 9 The consultation materials were emailed to around 140 groups and individuals, both internal and external to government, inviting them to participate in the consultation

process by submitting written feedback or meeting with the independent lead reviewer.

- 10 The independent lead reviewer (or in some cases MSD on behalf of 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. We can provide you a full list of submitters and those we met with at your request.
- 11 Incorporating the voice of children and young people is a priority for the Review. Based on advice from Oranga Tamariki and the Office of the Children's Commissioner (OCC), the independent lead reviewer drew on existing insights (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 has engaged specialist expertise to undertake focus groups with children and young people who are vulnerable but not care experienced. We will receive findings from these focus groups by the end of August 2018 (along with a composite report on relevant insights from children). The findings will feed into the detailed analysis stage of the Review before final policy decisions on independent oversight are sought from Cabinet.

### **The independent lead reviewer's report summarises the outcome of the consultation process and her views on the direction required for the future independent oversight**

- 12 In August 2018, the independent lead reviewer provided a post consultation report (the Report) to inform the Review. A copy is **attached**.
- 13 The independent lead reviewer sets out the proposed purpose and role of each function and recommends that more focused functions of monitoring, complaints review and investigation are established. The Report also highlights the continuing need for strong systemic advocacy, including on poverty reduction, children's wellbeing and rights.
- 14 There was general consensus from submitters on the need to strengthen independent oversight, but a range of views on how the functions should be organised and who is best to deliver them. There was more support for keeping all the functions together than for separating functions into different bodies.
- 15 The key messages from those with experience of the care and protection system is that independent complaint avenues separate from Oranga Tamariki are needed for children and adults. They need to be accessible, trusted, timely, fair and safe. The complaints and investigation functions are currently inadequate in the oversight system. Under current arrangements, OCC does not provide oversight for *individual* complaints and does not have routine access to system information from Oranga Tamariki. The reviewer suggests new functionality that focuses on complaints made by or on behalf of individual children and their whānau is needed (whether directly or escalated from Oranga Tamariki). The reviewer identifies that the complaints review and investigation functions relating to the Oranga Tamariki system could potentially be incorporated in the OCC but notes that a very different skill set is required in the OCC to undertake these functions effectively.
- 16 Alternatively, the Report suggests that the complaints review and investigation functions could be located in a separate body such as the Office of the Ombudsman. This option has advantages given Ombudsmen's status as Officers of Parliament and the Office's established experience in complaints review and investigations processes and specialist capability. However, further investment is required to ensure a child and whānau friendly gateway and expertise in children's systems and services.
- 17 The Report supports broader systematic monitoring of the care and protection system as a whole, and of all arrangements for children and young people in care. It sets out that systematic monitoring must provide credible evidence based

assessments, be a respected source of independent advice and add value and underpin a learning system. It must also be a trusted source of independent reporting that provides assurance to Ministers, Parliament and to the public.

- 18 The Report recognises that the monitoring of National Care Standards (alone) would represent a significant increase in scale (less than 3% of care population is systemically monitored by OCC as part of its Optional Protocol to the Convention Against Torture [OPCAT] designations), is more regulatory in nature than current OCC activity, and would require investment in expertise. The Report suggests that OCC should be the monitor of Oranga Tamariki recognising the sector support for the retention of the Commissioner and its current functions. There are also other benefits such as avoiding time lags from the economies of scale of utilising an existing body. The Report, however, notes that changes would be required to OCC legislation, and that a significant build in organisational capability and capacity would be required.
- 19 To ensure the required focus and expertise, the Report recommends consideration of the creation of two statutory Commissioners – a Children’s Commissioner and an equal and distinct Commissioner for Care and Protection. The Commissioners could be supported by a Board, appointed by Government, incorporating an appropriate range of knowledge and skills, with the OCC being led and managed by a Chief Executive.

### **The Report identifies areas of further work for the next phase of the Review**

- 20 The independent lead reviewer reinforces that her conclusions in the Report are subject to detailed analysis to be done in the next phase of the Review. Areas for further consideration include:
  - the feasibility and desirability of assigning the Office of the Ombudsman the complaints review and investigations functions, for example the:
    - capabilities required to ensure a child and whānau friendly gateway to access complaints
    - legislative changes needed to establish the independent complaints review and investigation functions
  - a system wide perspective on the extent of the OPCAT designations required and where these are best located for monitoring purposes
  - the skills, capabilities, leadership and structure to support the changes
  - wider changes to the legislation and adequate new funding to support the transition and future operations.

### **Preliminary advice on the overall direction proposed by the independent lead reviewer**

- 21 Based on the feedback received during the consultation process and our preliminary analysis, our initial advice on the main proposals in the Report is set out in the following table.

Independent lead reviewer's recommendation	Our preliminary advice
<b>Functions</b>	
<p>The OCC to have responsibility for <i>systemic advocacy</i> and <i>monitoring</i> (with changes to its legislation and structure), including:</p> <ul style="list-style-type: none"> <li>• NZ application of UNCROC</li> <li>• OPCAT monitoring</li> <li>• National Care Standards monitoring</li> <li>• Oranga Tamariki system monitoring</li> </ul>	<p>This recommendation relies on a significant build of OCC's processes, policies, systems, culture, capacity and capability (especially if OCC was appointed to monitor the new National Care Standards)</p> <p><b>Benefits:</b></p> <ul style="list-style-type: none"> <li>• Delivers the desired focus on children and young people that are part of the Oranga Tamariki system</li> <li>• Preserves and builds on OCC's current strength and reputation in advocacy, UNCROC and current OPCAT activity</li> <li>• Leverages potential synergies of having the systemic advocacy function and monitoring function in the same agency</li> </ul> <p><b>Risks and issues:</b></p> <ul style="list-style-type: none"> <li>• The need for a significant capacity and capability build may undercut the advantages of utilising an existing body</li> <li>• Formal, internal separation of the advocacy and monitoring functions is required to address any perceived risk of having both functions in one body</li> <li>• s 9(2)(g)(i)</li> <li>• New capabilities and a revised approach are needed to in the OCC to monitor at the scale required or to manage systemic monitoring that is more regulatory in nature – a revised approach is needed, and cultural change and capability build in the OCC will require time and investment</li> <li>• The focus on systemic monitoring of National Care Standards is required but there are other parts of Oranga Tamariki's operating model and target populations that should be considered, eg children at risk</li> <li>• Care will be required to balance oversight of all children vs children in Oranga Tamariki system appropriately</li> </ul>
<p><b>And either</b> incorporate <i>complaints</i> and <i>investigations</i> functions into OCC</p>	<p>The main issues with this option are the nature of the capabilities required and the perceived conflict between advocacy on behalf of children and even-handed complaints review and investigation functions</p> <p><b>Benefits:</b></p> <ul style="list-style-type: none"> <li>• One body recognised as dedicated to children</li> <li>• Consultation indicated more support for keeping all functions together than for separating these</li> </ul> <p><b>Risks and issues:</b></p> <ul style="list-style-type: none"> <li>• Perceived conflict between advocacy on behalf of children and other functions that require an objective and even-handed approach – formal, internal separation could mitigate this risk to some extent</li> <li>• OCC does not currently undertake complaints functions at any scale and does very few investigations. They would need to significantly build capability and capacity to do this work at the level required.</li> </ul>

	<ul style="list-style-type: none"> <li>If OCC needed to develop a new complaints and investigations functions (as well as an enhanced monitoring function) the high level of change and build in the OCC will increase implementation risks</li> </ul>
<p><i>Or incorporate complaints and investigations functions into a separate body (eg the Ombudsmen)</i></p>	<p>This option requires specific capabilities and resources to be built to ensure a child and whānau friendly gateway (eg by establishing a Children’s Ombudsman), and resourcing the new functions to ensure timely responses</p>
	<p><b>Benefits:</b></p> <ul style="list-style-type: none"> <li>The Office of the Ombudsman has established experience in complaints and investigation processes, systems, policies, culture and specialist capability</li> <li>Could be a faster build than in the OCC</li> <li>Spreads the overall change and build required across two entities</li> <li>The Ombudsmen’s existing power and wide mandate make them well placed to deal in a ‘child centric’ way with complex matters that span agencies’ boundaries</li> <li>Based regionally (wider than in Wellington)</li> <li>Removes an extra step for complaints (which can already be escalated to the Ombudsmen)</li> <li>The Ombudsman’s Office has extensive powers as an Office of Parliament</li> <li>We understand that the Chief Ombudsman would be supportive (as indicated in his submission)</li> </ul> <p><b>Risks and issues:</b></p> <ul style="list-style-type: none"> <li>The Chief Ombudsman recognises the need for a more child and whānau friendly gateway and additional specialist skills</li> <li>Key principles (eg for being timely, mindful of the broader system, restorative, child and whānau centric) could be incorporated in the Ombudsman Act</li> <li>Some reduction in synergies resulting from the focus on children being spread across two bodies and potential confusion around who does what – an effective communication plan would be required</li> <li>Arrangements/protocols would be needed for the Office of the Ombudsman and the OCC to work together and with Oranga Tamariki</li> </ul>
<b>Form</b>	
<p>Strengthen aspects of the OCC structure:</p> <ul style="list-style-type: none"> <li>Two equal Commissioners with their own statutory functions – a Children’s Commissioner and a Commissioner, Care and Protection</li> <li>A Board – two Commissioners being ex officio executive members and five to six independent non-executive members,</li> </ul>	<p>We see separation of roles and more than one Commissioner as essential to provide good coverage of the range of functions and continuity of direction</p> <p><b>Benefits:</b></p> <ul style="list-style-type: none"> <li>Keeps the concept of a Children’s Commissioner, which has strong recognition nationally and internationally</li> <li>Establishing a Commissioner for Care and Protection would deliver the focus on Oranga Tamariki that is needed</li> <li>Introducing a Commissioner Care and Protection and a CE could fill deficits in capability, and support the required transformation in culture change and organisation</li> <li>Two Commissioners would enable focus on both all children and children in the Oranga Tamariki system in one body – outcomes for care experienced</li> </ul>



<p>including young people</p> <ul style="list-style-type: none"> <li>• A Chief Executive (CE) to manage the staff – appointed by Board, employer of staff and supporting the work of the Commissioners</li> </ul>	<p>children can be aligned to and considered alongside outcomes for all children</p> <ul style="list-style-type: none"> <li>• A Board could provide participation opportunities for a diverse range of voices, including children, care experienced people and Māori</li> <li>• A Board would also provide stability of focus for the body over time, particularly if OCC is appointed to monitor the National Care Standards which require consistent, stable ongoing regulatory assessments</li> <li>• Shifting to more than one Commissioner and a Board avoids priorities remaining at the discretion of a single Commissioner</li> </ul> <p><b>Risks and issues:</b></p> <ul style="list-style-type: none"> <li>• Recent events at the Human Rights Commission highlight the risk of having multiple commissioners combining governance and management roles – the risk could be mitigated with appropriate separation of roles between the Commissioners, Board and the CE</li> <li>• A Board would need to be adequately resourced to maximise effectiveness</li> </ul>
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## The next phase of the Review

*We will undertake detailed analysis on the options and consult key stakeholders*

- 22 On balance, we suggest that the next phase of the Review actively explores preserving and building on the existing systemic advocacy and monitoring functions in the OCC and the option of incorporating the complaints and investigation functions in the Ombudsman (note that individual complaints and investigation functions are not undertaken by the OCC at present and a very different skill set is required).
- 23 Subject to your direction, we will proceed with the next phase of the Review including detailed analysis of each function, capability and capacity requirements, and organisational design to enable policy development and legislative amendments.
- 24 As well as the further work identified by the independent lead reviewer, other issues identified that will need to be addressed in developing final proposals include:
- a decision on who might chair the Board eg an independent person or one of the Commissioners
  - whether independent monitoring of child wellbeing is required and where it should be located
  - whether OCC also requires further investment in its advocacy work
  - how to ensure that the independent individual advocacy which is an important element of the care and protection system is delivered effectively (the role for which VOYCE Whakarongo Mai has been established)
  - rewriting the Children’s Commissioner Act 2003, in consultation legal advisors and Crown Law if required to:
    - rebalance functions (and associated powers) depending on the direction decided
    - embed the commitment to the principles of the Treaty of Waitangi (consistent with the new provisions in the Oranga Tamariki Act) and potentially to ensure Maori representation in oversight arrangements
    - give joint and balanced attention to the internationally established rights of the child, child wellbeing and te aro Māori and Treaty of Waitangi obligations

- potentially to better recognise the role of family and whānau in caring for and protecting children
  - the need and mechanisms of (more) transparent reporting on performance of the Oranga Tamariki system and children’s wellbeing
  - leveraging synergies between functions (and individual advocacy) to improve system performance and learning and outcomes for children
- 25 We anticipate amendments to the Children’s Commissioner Act 2003, and possibly to other legislation eg the Oranga Tamariki Act 1989 and the Ombudsman Act 1975.
- 26 We seek your agreement that, following your consideration of the independent lead reviewer’s report, officials from MSD meet with the Children’s Commissioner (and the OCC) and the Ombudsman to give them a copy of the Report (and this cover report) and an update on the Review. We have already provided a confidential copy of the Report to the CE of Oranga Tamariki to check for factual accuracies.
- 27 We also seek your agreement that, in consultation with you on the timing, we proactively release the independent reviewers Report on the MSD website.

*We will maintain connections with relevant activities*

- 28 During the next phase of the Review we will continue to maintain connections with Oranga Tamariki on the work on the National Care Standards. The Oranga Tamariki Act requires the Minister for Children to appoint an independent agency or body to monitor and report on the Standards when the Oranga Tamariki (National Care Standards) Regulations come into force on 1 July 2019. The scope of the Review includes consideration of who this agency or body should be.
- 29 By the end of August 2018, MSD, SSC and Oranga Tamariki aim to provide the Minister for Children (and Minister State Services and you) with joint advice on how decisions on the appointment of an independent monitor fits with the rest of the process on the Review.
- 30 Depending on the timing of Cabinet decisions and subsequent implementation of the chosen option, an interim independent monitoring body for the National Care Standards may be needed. s 9(2)(h) - Legally privileged
- We note that specialist expertise (including in regulatory oversight) will be required to develop the framework for independent monitoring of National Care Standards, and we may need to consider who has the right level of expertise to do this development work.
- 31 Judge Becroft’s term of appointment was due to end on 30 June 2018. He has agreed, however, to continue to serve until 31 March 2019. It is estimated that a process to appoint a new commissioner will take between four and six months.
- 32 The independent lead reviewer noted (during a follow up discussion) that a Commissioner on their own is unlikely to successfully manage the required transformation in the OCC and transitional appointments would need to be made to support the change process. Following final policy decisions by Cabinet on the Review, we will provide separate advice on the range of skills and experience needed for the Office to make the capability and culture shifts required to ensure:
- a significantly enhanced monitoring function
  - successful change leadership through a period of growth and development
  - the ability to work effectively with Government officials and as new/ enhanced functions are developed (and there are concurrent changes in Oranga Tamariki)
- 33 Consideration also needs to be given to the financial implications of the proposed changes to the OCC funding. We note that the OCC’s current baseline is \$2.157

million per year. This was supplemented by an additional \$500,000 in 2017/2018, and agreement that the OCC would spend some of its cash reserves. For 2018/2019 a further \$1 million was set aside. This was primarily to allow the OCC to maintain current levels of monitoring.

34 Both of these payments were “one-off” decisions, pending the outcome of the Review and decisions on the OCC’s long term funding requirements. Given the timeframes, this process is not likely to be completed until the policy and legislative process is substantively complete.

35 s 9(2)(f)(iv)

### Next steps

36 The table below sets out the indicative timeframes to seek final policy decisions from Cabinet by 7 November 2018:

Action	Date
Further analysis	Aug – Sept 2018
Draft Cabinet Paper to Ministers for review	Late Sept 2018
Draft Cabinet Paper out for consultation	Early Oct 2018
Final Cabinet Paper to Minister	26 Oct 2018
Consideration of Cabinet Paper at Social Wellbeing Committee	7 Nov 2018
s 9(2)(f)(iv)	

37 Following final policy decisions by Cabinet, a bill could be introduced in the House around March 2019. Once Cabinet has taken decisions on the nature of the functions and where they should sit, it should be possible to start implementation of the new functions and capabilities before the legislation is passed, subject to the agreement and cooperation of the Children’s Commissioner (and, if applicable, other agencies).

38 Officials from MSD and SSC would like to meet with you in August 2018 to discuss the independent lead reviewer’s report and the next steps with the Review process, including engagement with the Children’s Commissioner and the Ombudsman, and the public release of the independent reviewer’s Report. If you agree we also recommend that the Commissioner and Ombudsman receive a copy of this report. Subject to your direction, we may need to revise the timeframes.

39 We recommend that you forward this report to the Minister for Child Poverty Reduction, Minister for Children and the Minister of State Services to support ministerial discussions on the direction of the Review.

File ref: A10711784

Author: s 9(2)(a) Policy Analyst, Seniors and International Policy

Responsible manager: Justine Cornwall, General Manager, Seniors and International Policy