



[IN-CONFIDENCE]

Future governance for the Children's Commissioner

Date: 26 August 2019
Report No: SSC2019/0261
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	Action Sought	Deadline
Minister of State Services	Agree recommendations	3 September 2019 (to enable inclusion in draft paper to Minister Sepuloni by 4 September)

Enclosure: Yes (A3 attached)

Executive Summary

- 1 MSD is preparing a paper for SWC 16 October on additional decisions for the Bill regarding independent oversight of the children's system. SSC is responsible for the section of that paper relating to the governance of the Children's Commissioner (CC). This report sets out the rationale for our proposed advice and some of the alternatives we have considered during the process.
- 2 In our view:
 - Government should take the opportunity to update the governance of the CC from the current corporation sole, independently of Cabinet's intention to transfer the independent monitoring function to the CC
 - A multi-member board provides the best vehicle for a partnership approach with Māori, needed both to give effective representation to the population affected by the care system and in recognition of Te Tiriti
 - Most key stakeholders are focused on managing the tension between the CC's advocacy role and the independent monitoring function. The board should be able to work out how to manage this tension itself to give effect to the functions for which it is legally responsible. If Ministers believe it necessary, the attached A3 shows two other options for hardwiring functional separation at the governance level.
- 3 Our recommended option is a board, collectively possessing a range of relevant skills and attributes that enable members to speak credibly for the organisation, appointed through a partnership process with Māori and empowered to

determine how best to manage the tensions arising when the independent monitoring function is transferred to the CC.

Minister's Office Comments

Comments:	
Date returned to SSC:	

Recommended Action

We recommend that you:

- a **note** that SSC is advising on the future governance of the Children's Commissioner (CC) as part of the additional decisions for the Bill for the independent oversight of the children's system and Oranga Tamariki
- b **note** that we have engaged with key stakeholders, most of whom are seeking a hard-wired functional separation between advocacy and monitoring to manage the tensions between these roles
- c **note** that while we have engaged with several possible models to support functional separation, we see little value in hard-wiring the separation at the functional level. MSD's work to determine the statutory requirements for each function will establish the duties the governing body needs to meet

Proposed approach to the governance section of the SWC paper

- d **agree** that governance of the CC, currently a corporation sole with no deputy arrangements, should be updated irrespective of Cabinet's in principle decision that the new independent monitoring function should transfer to it in due course

Agree/disagree.

- e **agree** that the proposed governance arrangement should be a board of 2-6 members, collectively possessing a range of relevant skills and attributes including experience of the care system, wider understanding of children's issues, understanding of Te Ao Māori, and management skills that will enable them to publicly and credibly hold government to account for the outcomes it achieves for all children and specifically children in care

Agree/disagree.

- f **agree** that, both to give effective representation to the population affected by the care system and in recognition of Te Tiriti, the legislation should provide for the board to embody a partnership with Māori, to be given effect in part through at least half the board being appointed through a Māori led nominations and appointments process

Agree/disagree.

- g **note** that other Ministers will have a strong interest in the wider implications of a partnership approach and the extent to which it drives expectations for similar approaches to be applied elsewhere
- h **agree** that, when the monitoring function is transferred to the CC, the board will be responsible for making arrangements within the organisation to manage the tensions between the advocacy and monitoring roles

Agree/disagree.

- i **agree** that the SSC release this briefing in full once the related MSD paper has been considered by Cabinet

Agree/disagree.

Hon Chris Hipkins
Minister of State Services

SSC Report: Future governance for the Children's Commissioner

Purpose of Report

- 4 MSD is preparing a paper for SWC on 16 October on additional decisions for the Bill regarding independent oversight of the children's system. SSC is responsible for the section of that paper relating to the governance of the Children's Commissioner (CC). This report sets out the rationale for our proposed advice and some of the alternatives we have considered during the process.
- 5 The additional decisions will support drafting of the oversight Bill. The recommendations above are intended to provide enough guidance to enable drafting, while leaving some of the detail to be worked through during the drafting process.

Situation

- 6 In March 2019, Cabinet agreed a package of measures to strengthen the independent oversight system for children's issues and Oranga Tamariki [CAB-19-MIN-0113 refers]. The decisions included:
 - agreement to establish a new independent monitoring function for the care system, initially in MSD
 - in principle agreement to transfer that function to the CC once it was fully operational, the relevant legislation had passed and the governance of the CC had been updated to enable the additional role.
- 7 MSD has been setting up the new function and fleshing out the March decisions to enable legislative drafting, with SSC developing advice on the governance aspects.
- 8 Following these decisions, MSD has been engaging with the CC, Ombudsman, Māori (overseen by a Kāhui advisory group of Māori leaders convened by MSD), and Oranga Tamariki (OT).
- 9 The attached A3 illustrates three approaches to governance of the new monitoring function that have emerged from our engagement with stakeholders (Models A, B and C). The key questions in that engagement have been:
 - To what extent does the **functional separation** between the advocacy and independent monitoring need to be hardwired in the governance structure?
 - How can real **partnership with Māori** be achieved in governance of the future Children's Commission?
 - How can we change to a more collective form of governance while keeping one of the most valued features of the current Commissioner sole – the **mana and flexibility** to hold government to account?
- 10 All of the three models could be configured to address the partnership with Māori and the mana and flexibility to hold government to account. They take different approaches to the functional split:
 - Model A – the Board has flexibility to determine how to manage the tension between advocacy and monitoring functions
 - Model B – the Board still oversees all functions, but there is clear separation of the monitoring function, with a separate governance layer

- Model C – effectively creates a completely separate organisation for the monitoring function, which is then linked to the CC through cross-appointments, collaborative arrangements and shared services.

Functional separation between advocacy and monitoring

- 11 The oversight arrangements agreed by Cabinet in March included a new independent monitoring function, focused on whether the care system was performing in line with government policy and with a reporting line to Ministers.
- 12 We originally proposed that the monitoring function sit somewhere other than the CC partly because of the tension between advocacy and monitoring functions. The CC already sees instances where advocacy is weakened by the need to retain good relationships for monitoring, or conversely that information is withheld from the monitor for fear that it will be used for public advocacy.
- 13 The CC has expressed concern that the transfer of the new monitoring function (expected to be 70+ people) could impact the Commissioner's key role in advocacy on behalf of all children and have a major effect on the CC's culture. The CC has therefore proposed a twin organisation model (Model C on the attached A3) where the independent monitoring function would have a close relationship with, but remain separate from, the CC.
- 14 In the longer term, the transformation effort at OT should enable a reduction in external monitoring effort as OT improves its own compliance and systems to enable it to self-assess and provide consistent and robust information. OT recognises that it is building from a low base and is keen for the independent monitor to walk alongside it as it seeks to improve.
- 15 We acknowledge the tension inherent in bringing the advocacy and monitoring functions into one organisation, but see little value in hardwiring the functional separation at the governance level. Our preferred governance approach is Model A (refer attached A3), which allows the board to determine how best to manage the statutory requirements for each function and would be the most flexible approach over time. The functional separation would result from the statutory requirements for each of the oversight functions, including access to and protection of information and reporting, and the board would have a duty to determine how the organisation could meet its statutory requirements. Ministers could raise any concerns about how this was being done through engagement in the Statement of Intent process.
- 16 If Ministers want to be more directive in their approach, they could 'nudge' or specify a formal separation between the functions. Model B illustrates how a business unit with its own governing subcommittee could be used to achieve separation.
- 17 The 'twin entity' Model C, while complicated, could be a starting point for the sort of shared platform arrangements you expressed interest in earlier this year. Once established, other bodies such as the Mental Wellbeing Commission or the Health and Disability Commissioner could also join.

Achieving real partnership with Māori

- 18 The recent coverage of OT removing Māori children from their parents has highlighted the overrepresentation of Māori in the care system (nearly 70% of children in care). Māori engagement in reviewing and critiquing that system from a position of real influence is a critical element in changing that overrepresentation.

- 19 The Kāhui group has been considering how the governance arrangements could provide real partnership with Māori. For example, the agreement to recognise the Whanganui River as a legal person is given effect through two 'pou' who act as the 'face and voice' of the river and legally act on its behalf. Māori and the Crown each identify preferred candidates for one of the 'pou' and they are then appointed jointly.
- 20 In our view, both the care statistics and Te Tiriti justify a partnership approach. Elements of the partnership in governance of the CC, as recommended by the Kāhui group, could include changes in terminology to reflect a different view of the governance role ('Pou' rather than Commissioners), a requirement for at least 50% of the governance roles to be Māori, and the selection of these through a Māori led appointment process. This approach could be applied to any of the governance models shown.
- 21 In response to questions from stakeholders, we have identified many precedents where Crown entity Board membership is determined by people other than Ministers, although the Crown manages the appointment process. School Boards of Trustees and District Health Boards are largely elected. Three of the five Te Taura Whiri (Māori Language Commission) board members are nominated through an electoral college system (Te Mātāwai). The initial discussion process used for nominations to the Whanganui River pou would encourage consensus between the parties before appointments are made and mitigate the risk of future conflict between Ministers and appointees.
- 22 A key question for Ministers is whether they are interested in bringing a partnership approach into governance of Crown entities more broadly, as similar issues are being raised in other work currently underway such as the Mental Wellbeing Commission. If Ministers do not wish the decisions on CC governance to be regarded as a precedent, they will need to be clear on the particular issues faced in the care system.

Board ability to speak with mana and flexibility

- 23 The nature of the CC's work is to hold government to account, including publicly raising issues about government's policies and performance. With a Commissioner sole, the Commissioner is the lead spokesperson, combining individual credibility and status with the mana of the organisation.
- 24 Stakeholders have expressed concern that a conventional non-executive board model would limit the CC's effectiveness. The challenge inherent in the CC's work needs to be delivered by board members with individual credibility.
- 25 Our view is that the role and person specifications for this board need to reflect the nature, functions and risk profile of the organisation. The legislation would specify a range of relevant skills and attributes including experience of the care system, wider understanding of children's issues, and understanding and experience of Te Ao Māori. The 'pou' model would require at least a couple of members to be credible as the 'face and voice' for all children (the advocacy aspect) and for children in care (linked to the monitoring role). While not full-time, the 'pou' roles are likely to require more time and budget than more conventional non-executive roles.
- 26 The range of skills and attributes sought for the board, how the 'pou' role is described and the key elements of the nomination process will need to be further worked through with stakeholders during drafting.

Stakeholder views

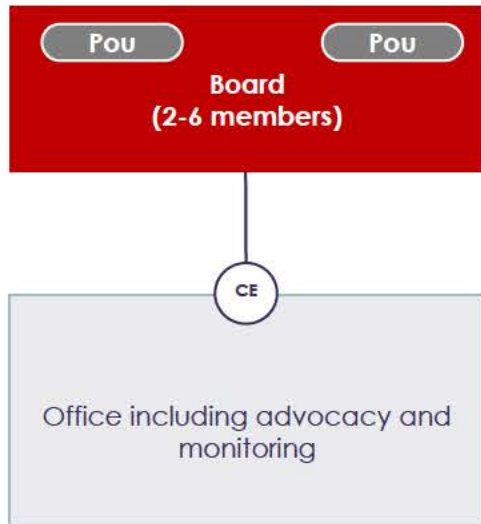
- 27 The stakeholder views on governance have been complicated by the question of whether the 2021 report-back process would result in the monitoring function transferring to the CC (and if not, where it could go).
- 28 As noted above, SSC's preference is for Model A – a board structure, appointed through a partnership process, with the mandate and flexibility to develop its own approach to the issue of functional separation. In light of both our previous work on corporations sole and the increasing expectation for a partnership approach, we would recommend a board of at least two members regardless of whether the monitoring function transfers into the CC.
- 29 The Children's Commissioner has become increasingly concerned about the potential effect of the monitoring function on the rest of the organisation, and so developed Model C to enable the monitoring function to remain separate from the CC while connecting with its advocacy work.
- 30 The Kāhui group has expressed:
- different perspectives on the functional separation issue, with some confident that it could be managed by the board (Model A), and others considering it would be helpful to specify the separation of monitoring and advocacy (Model B)
 - unanimous support for a partnership approach, with a relatively informal process for bringing together nominations from Māori
 - some differences of view on whether the 'pou' speaking for the organisation should be board members or senior staff.
- 31 MSD and OT are both concerned about the risks of having monitoring and advocacy in the same organisation (see paragraph 12) and have therefore supported models which provide the greatest formal separation between the functions.

Next Steps

- 32 If you agree to the recommendations, we will draft a section based on them for inclusion in Hon Sepuloni's SWC paper.
- 33 We expect that MSD will be able to develop any further detail required for drafting in consultation with stakeholders once SWC has agreed the parameters.

POTENTIAL GOVERNANCE MODELS FOR THE CHILDREN'S COMMISSION – DRAFT FOR DISCUSSION

MODEL A – ONE ENTITY, FLEXIBLE



FUNCTIONAL SEPARATION

- Board determines how best to deliver entity's functions, including how to achieve any separation of functions arising from how these are framed in statute
- Minister(s) receive assurance on how this is done through Statement of Intent process

PARTNERSHIP WITH MĀORI

- If Ministers wish to take a partnership approach:
- Board appointed on partnership basis – equal number of members nominated by Crown and Māori (through organisations working in the sector) and appointed through a joint process
 - Two 'pou' (effectively co-chairing)

HOLDING GOVERNMENT TO ACCOUNT

- Board determines which members represent the voice of what area - could have one pou for all children (system advocate) and another for children in care (monitoring)

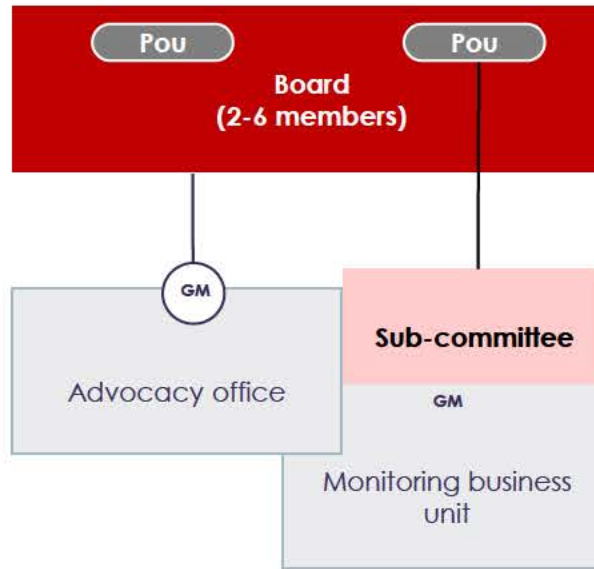
PROS

- Cohesive governance attractive to Māori candidates
- Simple and easy for public to understand
- Flexible to allow evolution of functions

CONS

- Not clear at the outset how the tensions between advocacy and monitoring roles will be managed

MODEL B – FORCED FUNCTIONAL SPLIT



FUNCTIONAL SEPARATION

- Enforced functional separation – statute could specify need for separate unit
- Governance of the business unit would be through by its own committee of the Board
- A stronger separation could be made through a subsidiary company, with a board including some main board membership. (RoVE and Kainga Ora both push entities towards creating subsidiaries with distinct governance linked to main entity)
- However a company form would appear inappropriate to the social good functions of this organisation.

PARTNERSHIP WITH MĀORI

- Board appointed in same way as model A
- Board could appoint additional members to the sub-committee or subsidiary board without further reference to the Crown

HOLDING GOVERNMENT TO ACCOUNT

- Pou chairing main board would speak on advocacy, pou chairing sub-committee on monitoring

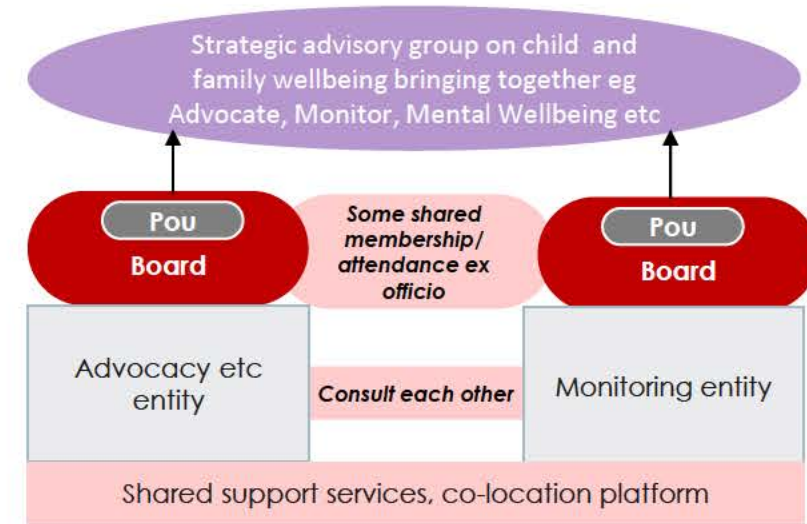
PROS

- Keeps functions together through main board, but gives visible separation

CONS

- Separation of functions could be offputting to Board candidates wanting to take a holistic view
- Positions monitoring as a subordinate function
- Rigid separation of roles may not be required long-term

MODEL C – 'TWIN' ENTITIES



FUNCTIONAL SEPARATION

- Monitoring and advocacy functions housed in separate entities, with aspects of a 'shared platform' likely provided through a related department
- Connection between the entities at governance level created through some shared membership

PARTNERSHIP WITH MĀORI

- Use partnership process as models A and B
- Could have one of two pou chairing each of the respective entities

HOLDING GOVERNMENT TO ACCOUNT

- Pou of each body speak for their respective areas
- These entities could convene wider strategic group of key bodies, eg bringing in Mental Wellbeing and Health and Disability to form holistic view on child and family wellbeing

PROS

- Minimises tension between advocacy and monitoring without placing monitoring in a subordinate position
- Other bodies could attach to the shared platform over time

CONS

- Information asymmetry
- Costly and difficult to push independent Crown entities to use shared services if they are unwilling
- Fragmentation