



AIDE-MEMOIRE

Establishing the independent monitoring function for the Oranga Tamariki system

Date: 4 March 2019

For: Hon Chris Hipkins, Minister of State Services
Hon Carmel Sepuloni, Minister of Social Development

Report No: SSC2019/0056

Establishing the independent monitoring function for the Oranga Tamariki system

Purpose Minister Sepuloni's office has requested urgent advice on options around appointing the Children's Commissioner (CC) as the independent monitor. You may also wish to share this aide-memoire with the Minister for Children.

Proposal We understand that Ministers are thinking of appointing the CC as the independent monitor from 1 July 2019, beginning to undertake monitoring from 1 July 2020. For reasons of resources, expertise and understanding of the nature of this intended monitoring function, the Ministry of Social Development (MSD) may be tasked with developing the monitoring function on behalf of the CC.

We recommend that you do not support the proposal in this form and propose for reasons set out below that the function be assigned to MSD in the interim, with a stated intention to move it to the Children's Commissioner after legislative change.

Can the CC legally undertake the independent monitoring role?

Key issues answered point by point

- Yes. The CC is an Independent Crown Entity (ICE) with functions established under the Children's Commissioner Act. Section 13 of the Act, setting out the CC's monitoring role in relation to Oranga Tamariki, provides scope to appoint the CC as the independent monitor.
- Note however that the role envisaged is very different from the CC's current monitoring and the Children's Commissioner Act lacks some of the powers needed to conduct the work effectively (eg regarding access to information)
- Access to information could be addressed through Ministerial direction for Oranga Tamariki to provide relevant information to the CC. However, given the CC's double role, information provided for monitoring purposes may need to be ring-fenced to avoid unintended use by the CC for its advocacy role.

How can the responsible Minister direct performance of that role by the CC?

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- All an ICE's functions are free from Ministerial direction except as stated in their governing legislation. How the relationship to Ministers and government policy could be managed prior to legislative change depends critically on the cooperation of the CC.
 - With that cooperation, it may be possible to set up arrangements for the Minister to clarify expectations (for example in a memorandum of understanding or a Statement of Performance Expectations) in exchange for the funding belonging to the function.

Can the establishment work be undertaken by MSD on behalf of the CC, and how would that work?

- MSD can support the CC to establish the role. As described above, the cooperation of the CC is critical. The CC's independence and the relationships between the CC, Ministers and MSD need to be very clear and legally robust. Considerations include:
 - if the CC is appointed as monitor but the funding is going to MSD because MSD is doing the work, the CC will have little incentive to cooperate with arrangements that reduce the CC's independence in relation to the monitoring
 - MSD cannot be tasked to do the work "on behalf" of the CC. A department does not carry out functions on behalf of a Crown entity, and certainly not one that it monitors. Departments sometimes work under the supervision of an ICE or the Ombudsman (e.g. investigating complaints and incidents), but such work is in areas not subject to Ministerial direction
 - although in theory the CC could delegate establishment of the function to MSD (with the CC retaining responsibility for and control over the work), this would strain MSD's Ministerial relationships, particularly if the CC (directing MSD) diverged from Ministers' expectations of the monitoring function.
- MSD could support the build of the function in the short term by agreement with the CC or second relevant staff into the CC. This approach would be legally appropriate but leave delivery risks with the CC.

As well as these questions, we also have concerns regarding:

- assigning two conflicting functions to an ICE commissioner sole - the system advocacy role (is government trying to do the right thing?) and the monitoring role (is government doing what it said it would do?)
- 9(2)(g)(i) free and frank



Our overall advice

Our recommended option to minimise the risks and issues outlined above would be to:

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- appoint MSD as the (interim) monitor for the build phase and then replace MSD with the CC once the legislation below is passed and the function developed, transferring funding and relevant staff accordingly
 - legislate as soon as practicable to clarify Ministers' ability to direct the independent monitoring function, specifically:
 - clarify in the CC's legislation that the monitoring function can be directed by Ministers
 - clarify the powers of the monitor, especially regarding access to information
 - create flexibility in the governance of the CC by allowing the Governor-General to appoint multiple Commissioners (or a Board) as required, for example when there is likely to be a conflict between different CC functions. This type of provision is already available in the legislation for some other corporations sole.

Ministers could announce the intended future appointment of the CC s(2)(f)(iv) confidentiality of advice when they announce the interim appointment of MSD. This approach would make MSD accountable for working with the CC for a defined period, building a function that was suitable for transfer, and managing the implementation of the transfer to the CC.

We recommend

- that you release this aide-memoire in full once Cabinet has taken the related decisions

Agree/disagree.

Hon Chris Hipkins

Minister of State Services

Agree/disagree.

Hon Carmel Sepuloni

Minister of Social Development

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