IMPROVING A SYSTEM WHEN YOUNG LIVES ARE AT STAKE

A Public Policy Analysis of the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill

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ABOUT THE AUTHORS

David King is an independent public policy analyst, specialising in child and youth wellbeing, mental health, public administration and constitutional policy. He was a senior public servant for 20 years working across a wide range of public policy domains, including care and protection and constitutional policy. He is a survivor of child abuse and of its adverse impacts on wellbeing. His abuse was not identified by the care and protection system at the time. He, therefore, has a personal, as well as a professional, commitment to ensuring the best possible arrangements are in place for the optimal performance of the Oranga Tamariki System.

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DISCLOSURE OF INTERESTS

The authors of this paper submitted to the relevant Select Committee in opposition to the Bill which is the subject of this paper. In preparing this paper they have, metaphorically, wiped the slate clean and approached the issues covered by the Bill afresh in order to examine where the application of a conventional public policy framework leads.

David King is a friend of former Children's Commissioner, Judge Andrew Becroft. In making his submission on the Bill, in order to ensure his analysis was seen to be independent, he did not discuss its merits with Judge Becroft.

Jonathan Boston previously provided advice to a former Children's Commissioner in relation to child poverty issues.

Neither David King nor Jonathan Boston received any financial support in preparing this paper.

'The difference between this job and any others I have held is that I am privileged now to be at the ultimate of decision-making tables. Whilst at this table my commitment is to advocate for the vulnerable'.

Hon Carmel Sepuloni, Minister Responsible for the Oversight of Oranga Tamariki System and Children and Young People's Commission Bill

Maiden Speech, House of Representatives, 16 December 2008

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EXECUTIVE SUMMARY

The Oranga Tamariki System (the System) is responsible for identifying children and young people experiencing abuse or at risk of abuse and addressing their needs, including by, at times, taking children and young people into the care of the State.

There is robust evidence that abuse can have a significant adverse effect on lifetime outcomes across a range of life domains. The actions or inactions of the System, therefore, have significant consequences: young lives are at stake

The Oversight Bill

The Government currently has a Bill before Parliament reforming the oversight of the System; oversight refers to the arrangements that need to be established, independent of the System, to ensure the System performs well and can be seen to perform well.

The Bill is controversial. A large number of submitters on the Bill think the proposed arrangements put children and young people at greater risk (ie will reduce rather than improve System performance).

This paper examines the issues involved in the Bill afresh, using conventional public policy analysis, to identify whether submitters are correct or not and, if they are correct, what the best arrangements are for oversight of the System.

The policy problem

The policy process and the policy analysis undertaken leading to the Bill have some very unusual features. Most significantly, there is no one place where the core problem to be addressed and the options for addressing it are properly identified and the analysis clearly laid out, so that the rationale for the proposed arrangements on such an important issue can be understood (and, if necessary, critiqued).

This paper establishes that there are two key problems. The first is a long-standing failure by successive governments to undertake sufficient oversight; the Government is addressing this problem. The second core problem, the focus of this paper, can be framed as follows:

> Given the complex and challenging environment in which the System operates, what oversight arrangements are needed to maximise System performance (that is, to ensure the safety and wellbeing of children and young people now and in the future as far as can reasonably be expected), such that the System rightly enjoys the confidence of the public and their political representatives?

Close examination of the relevant government papers establishes that the Government has broadly identified the same problem and broadly attempted to address it.

The Government's solution

Four critical functions are relevant to establishing the optimal solution: investigation of complaints, monitoring of the System, advice on improvement of the System (arising, at least in part, from monitoring), and advocacy on behalf of children and young people.

The Government's proposed arrangements for those functions are that:

- investigation of complaints should be undertaken by the Ombudsman;
- monitoring should be undertaken by the Independent Monitor (the Monitor) taking a departmental agency form and hosted by the Education Review Office;
- advice should be provided by the Monitor, with the Children and Young People's Commission able to develop advice based on the Monitor's monitoring information;
- advocacy should be provided, where required, by the Children and Young People's Commission (the Commission) which replaces the Children's Commissioner with a Board; and
- the Ombudsman, Monitor and Commission should work together as appropriate.

Our analysis

Should there be a Board rather than a Commissioner?

Our analysis supports the proposal for there to be a Commission, so long as its Chair is called the Chief Children's Commissioner, as proposed by the Select Committee, and so long as the Commission is properly resourced to perform its functions. A Board brings greater diversity and strategic focus to the table, while still enabling there to be a high-profile figure who is recognised as children and young people's advocate with the agility to act on their behalf.

The monitoring and advice functions are critical to improving the System.

In determining the optimal solution to the identified policy problem, the crucial question is: what type of monitoring and what type of advice should be provided and by whom? This is because monitoring enables advice to be developed and advice enables the System to learn and move towards optimal performance.

Our paper argues that two types of monitoring and two types of advice are required. One type of monitoring and advice is fully independent. Such monitoring and advice is necessary to provide public confidence that there is a credible 'watchdog' for children and young people. The other is monitoring 'responsive' to government policy and advice that is 'trusted' and 'responsive'; neither of these is fully independent (in the sense that they are unconstrained) but they are necessary for Ministers and officials to operate effectively.

Hosting the Monitor in ERO increases risk to children and young people's safety and wellbeing.

The Government's proposed arrangements try to have its cake and eat it too. It has created the impression that the Monitor is fully independent. In practice, government papers are clear that the Monitor is not fully independent. We concur; the Monitor will not provide fully independent monitoring and advice because as a departmental agency the Monitor is too close to Ministers for it not to be influenced by political considerations.

Low levels of public trust in oversight (because the Government is effectively monitoring itself) will lead to System instability and inhibit System improvement. Particularly low trust can be expected from Māori and those in care and, and this will inhibit the effectiveness of

the Monitor and lead to poorer quality advice that will, in turn, further reduce System stability and System improvement. With the Monitor located so close to government, there is a non-trivial risk that harm to children and young people will at times be swept under the carpet.

Locating monitoring and advice with the Commission will improve outcomes for children and young people.

Our analysis concludes that System performance is maximised if:

- fully independent monitoring is undertaken by the Commission, with the Government commissioning any additional monitoring specifically attuned to government policy from the Child Wellbeing and Poverty Reduction Group in the Department of Prime Minister and Cabinet; and
- fully independent advice is provided by the Commission, with trusted and responsive advice, based on all monitoring information, provided by the Child Wellbeing and Poverty Reduction Group.

The advantage of this proposal is that it will provide the Government with a range of monitoring and advice with different characteristics to enable it to make the best judgements about how to improve System performance. The arrangements will also enjoy greater public confidence and, thereby, create improved System stability which will support System improvement.

A Board will bring discipline to the monitoring and advice functions such that there will be little chance of advocacy influencing monitoring as the Government has assumed it will. With a Board structure any public disagreement between the Government and the Commission will, therefore, clearly be a legitimate matter of public interest, the result of robust monitoring and different views about the implications for the System.

Our paper suggests that locating the monitoring and advice functions with the Commission creates the possibility of a virtuous cycle of improvement in outcomes for children and young people. It also suggests that hosting the Monitor within ERO creates the possibility of a vicious cycle of ongoing reduction in outcomes for children and young people.

Outcomes will be further improved if the complaints function sits with the Commission too.

If the independent monitoring and advice functions are located in the Commission, it makes sense to also locate the investigation of complaints in the Commission, on the basis that the opportunities for System learning are far greater when all the relevant functions are internalised. This also creates a highly desirable single point of call for children and young people.

But our proposal should wait for the Royal Commission.

Having identified the preferred option for oversight arrangements, the paper concludes that, nonetheless, that option should not be implemented at this point. Instead, implementation should be postponed until the recommendations of the Royal Commission

of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions has reported mid-next year. This is to ensure there is public confidence in the implemented solution.

And questions about the Government's motivation need to be answered to reduce risk.

The paper then asks why the Government is so committed to its proposed set of reforms when there is such opposition to them and, by its own analysis, public confidence is critical for System improvement. Our conclusion is that it is possible that a critical view of the performance of previous Children's Commissioners (whether fair or not) is influencing the Government's decision making unduly, such that the Commission has been designed in such a way that it does not focus significantly on the System. If this is the conclusion the public draws (and it seems that many submitters have drawn), then this will further reduce public confidence, System stability and System improvement.

It is time to reconsider the Bill

Whatever the past, this paper for the first time provides the Government and the public with one place where they can consider a full analysis of what oversight arrangements should be in place in the future.

This paper, therefore, presents an opportunity for the Government to take a fresh look at the issues and either change direction if it is persuaded by the analysis here or, if not, to explain clearly where it disagrees with the analysis in this paper and why.

1.0 Introduction

The Oversight of Oranga Tamariki System and Children and Young People's Commission Bill (the Bill) is currently before Parliament following its report back from the Social Services and Community Select Committee on 13 June 2022.

The Bill is highly controversial. Some 403 submissions were made on the Bill, only eight in favour and 311 in opposition (the remainder were neutral). Submitters included the independent advocate for children and young people in care (VOYCE Whakarongo Mai, established by care-experienced individuals), a wide range of children and young people's advocacy and services organisations, prominent academics and former public servants with care and protection experience.

The Bill is also opposed by all parties in Parliament, except a single party, Labour. This is a highly unusual situation under MMP. The Bill has only progressed so far because Labour holds the majority in the House (and so forms the Government), as opposed to the usual two-party (at a minimum) coalition arrangement under MMP. As in the former FPP system, the Labour Government has the majority on the Select Committee and that majority has supported the Bill's progress.

This paper's aim is to conduct a conventional policy analysis of the issues involved in the Bill to see whether the Government's decisions represent good policy or not. It does this by:

- first, providing background on the purpose of the Bill, the key features of the proposed reform, and the key features of the policy development process;
- second, determining the core policy problem to be addressed by assessing the nature of the Oranga Tamariki System (the System); a simple framework for understanding the nature of the System is contained in Appendix 1;
- third, after concluding that the Government has also identified the same core problem as we have (alongside increasing resourcing of oversight), outlining the reasoning behind its policy decisions; and
- fourth, assessing the options available to address the core policy problem and reaching conclusions about the optimal policy solution (taking into account and, at times, critiquing the Government's reasoning).

The paper concludes that the optimal solution to the policy problem is that the core oversight functions (monitoring of the System, advice on System improvement, investigation of complaints, and advocacy) should be located in the Children and Young People's Commission (the Commission) and should not be allocated to different agencies as the Government proposes.

The solution we identify, including proposed supplementary measures relating to the role of the Child Wellbeing and Poverty Reduction Group (CWPR Group) in the Department of Prime Minister and Cabinet (DPMC), is superior to the Government's proposed solution by a significant margin.

The paper then considers whether, even if the optimal solution has been identified, it makes sense to wait for the report of the Royal Commission into Historical Abuse in State Care and the Care of Faith-based Institutions (the Royal Commission), due in June 2023), because of its potential impact on public confidence and, thereby, its impact on the effectiveness of that solution.

The paper also considers what the Government's motivation could be in advancing the solution it does, given its clear inferiority to the solution identified in this paper; it does this because that motivation could also, through its impact on public confidence, affect the effectiveness of the solution being proposed by the Government.

Conventional footnoting is not used in this paper. In part, this is due to the need to produce this paper swiftly, given the currency of the public debate. In part, this is also due to the large number of government papers and related public communications involved (the policy process began in 2018). The authors are confident, nonetheless, that we have fairly and in good faith represented the Government's position in regard to the large number of papers we have reviewed. These papers have been released either proactively or under the Official Information Act 1982 (the OIA). Links to key papers are provided in Appendix 2.[1]

2.0 Background to the Bill

This section of the paper provides background on the nature of the System, the purposes of the Bill, the key features of the proposed reform, and the key features of the policy development process.

2.1 The Nature of the Oranga Tamariki System

The System is defined in the Act as the system covered by the Oranga Tamariki Act 1989. It includes all associated regulations, policies and practices.

In simplified terms the System has responsibility for:

- identification of children with risk factors for future involvement in the care and protection and youth justice systems and the provision of appropriate services to those with risk factors and their families (to minimise the risk);
- the provision of early intervention and high intensity services services, as appropriate, to those who come into contact with Oranga Tamariki, but are not assessed as requiring entry into the statutory care and protection or youth justice systems; and
- the provision of services to those who enter the care and protection and youth justice systems to provide them with the necessary care to ensure their well-being now and into adulthood.

[1] It would be helpful if the Government were to make all papers proactively released or released under the OIA publicly available in one place, given the significant public interest in this Bill. It is very difficult to locate the various papers available on various government websites and not all information released under the OIA appears to be available to the general public.

The key player in this System is, of course, Oranga Tamariki, New Zealand's care and protection and youth justice agency. However, it also includes a range of government departments and service providers (including NGOs); these all play a role in bringing children and young people to Oranga Tamariki's attention and/or providing services to them.

2.2 Purposes of the Bill

The Bill effectively combines two Bills which are being considered together and will effectively be separated into two separate Bills during the remaining Parliamentary process.

The Oversight of Oranga Tamariki System component of the Bill does not specifically define oversight. We define oversight to be the arrangements that need to be established, independent of the System, to ensure the System performs well and can be seen to perform well.

The purpose of the Bill is (clause 4):

> 'To uphold the rights and interests and improve the well-being of children and young people who are receiving, or have previously received, services or support through the Oranga Tamariki system and promote the effectiveness of that system by' (to paraphrase) establishing an Independent Monitor of the System (the Monitor), giving the Ombudsman a more specific role in investigating complaints in relation to children and young people in the System, and requiring the Monitor and the Ombudsman to 'work together…as appropriate'

The purpose of the Children and Young People's Commission component of the Bill is (clause 83):

> 'To establish the Children and Young People's Commission to promote and advance the rights, interests and participation of children and young people and to improve their wellbeing within (without limitation) the context of their families, whānau, hapū, iwi and communities.'

2.3 Key features of the reform

The key features of the reform are as follows.

2.3.1 Monitoring and advice

The core objective of the Monitor is (clause 13 (1)):

'to carry out objective, impartial, and evidence-based monitoring, and provide advice in order to—

a) assess the extent to which the Oranga Tamariki system and its interface with other systems support the rights, interests, and well-being of children, young people, and their families and whānau who are receiving, or have previously received, services or support through the Oranga Tamariki system:
b) assess whether the coercive powers exercised under the Oranga Tamariki Act 1989 are being exercised appropriately and consistently:
c) support public trust and confidence in the Oranga Tamariki system:

d) identify areas of high performance and areas for improvement in relation to the chief executive of Oranga Tamariki and approved providers to encourage them to work towards continuous improvement:
e) support an understanding of specific aspects of the Oranga Tamariki system and its interface with other systems:
f) support informed decision making'.

The Select Committee, as a result of submitters' concerns about the independence of the Monitor, inserted a clause into the Bill to clarify that the Monitor is required to act independently (clause 16A). Officials advised that this was not necessary but supported its inclusion to increase public confidence in the independence of the Monitor. This requirement to act independently does not apply to the Monitor's objectives, but its functions and tools and monitoring approaches (clauses 14 and 16)

The Government intends to establish the Monitor as a department agency to monitor and advise on the operation of the System. A departmental agency is effectively a government department hosted by another government department, largely for reasons of administrative efficiency (for example, the sharing of back-office services). The Government has decided that the Education Review Office (ERO) will host the Monitor once the Bill is enacted.

Government papers reveal that, initially, it was not proposed that the Monitor have an advisory function; rather, the findings from monitoring would be taken (by other officials presumably) and advice developed from those findings. As thinking developed it became clear that the Monitor was to give advice (although the reasons for this change in thinking were not made explicit). Consequently, the legislation makes clear that the Monitor has an advice function. The nature of this advice function becomes of critical importance later in the paper when the core policy problem is identified and policy analysis is undertaken in relation to that problem.

The Monitor has, in practice, been established and operating since June 2019 as a business unit within the Ministry of Social Development (MSD). Its work has focused on monitoring of the Oranga Tamariki (National Care Standards and Related Matters) Regulations 1918. The Government decided that it was best to establish the monitoring function first within MSD in order to ensure its robustness, with the 'in principle' intent of transferring the Monitor to the Office of the Children's Commissioner. It subsequently made the decision to locate the function as a departmental agency within ERO.

The Monitor, in effect, takes over and expands most of the statutory powers of the Children's Commissioner to monitor Oranga Tamariki (except for the Commissioner's monitoring functions under international agreements, which cover three per cent of children within the formal child care and protection and youth justice systems). The Minister for Social Development and Employment (the Minister responsible for the Bill, Hon Carmel Sepuloni, henceforth referred to as the Minister) has stated since the Select Committee report back that the Commissioner has not in practice used these wider monitoring functions.

The Government has provided significant resources to the Monitor to undertake its functions. Compared to previously, the new oversight system represents a significant increase in the scale of monitoring that will take place.

2.3.2 Investigation of complaints

The investigation of complaints by one or more individuals, including children and young people (the complaints function), becomes the sole preserve of the Ombudsman. Currently, the Children's Commissioner has this power also. In practice, the Minister has stated publicly that the Commissioner has not formally investigated complaints, but referred complaints to the Ombudsman. Government papers, however, acknowledge that the Commissioner has resolved a number of complaints informally (and, we understand, the power to launch an investigation has been important in bringing parties to the table).

The Government has provided significant resources to the Ombudsman to support the complaints function. The Ombudsman is already implementing changes to the complaints function in anticipation of the Bill being enacted. Changes aim to increase the visibility and accessibility (or child and young people 'friendliness') of the function. In practice, the Bill is likely to result in a significant increase in the number of complaints made and investigated.

In addition to the complaints function, the Ombudsman has a general investigation function which it may exercise in relation to any matter it deems appropriate related to the actions of the Executive branch of government. This function includes matters relating to the System.

2.3.3 Advocacy

The Bill replaces the Children's Commissioner with a Board as well as giving the entity a new name (the Children and Young People's Commission, the Commission) to reflect its effective scope. The Select Committee, in response to submissions, recommended naming the chair of the Board the Chief Children's Commissioner to ensure there was a visible individual whom children and young people and the community knew was their advocate (as opposed to a more 'faceless' Board). The Select Committee also recommended restoring the power of the Commissioner/Commission to report to the Prime Minister on any matter, again in response to submissions.

The Bill establishes a range of functions for the Commission, including the principal functions of (clauses 99-111):

- promoting the interests and wellbeing of children and young people;
- promoting and advancing their rights; and
- encouraging their participation and voices.

Like the Ombudsman, the Commission has a general inquiry power (limited in its case to matters related to children and young people), specifically 'inquiring generally into, and reporting on, any systemic matter, including (without limitation) any legislation or policy, or any practice or procedure that relates to the rights, interests, or wellbeing of children and young people' (clause 100 (i)). The Minister has made clear in subsequent communications that this power can be used in regard to the System.

It is interesting to note at this point that the Bill does not describe the Commission as an advocate (advocacy is a specific element of some of its functions) and that Government papers do not precisely define what an advocate is; this point also becomes relevant in later analysis.

It is also interesting to note that the advocacy function is not formally part of the oversight system (it has no functions in the Oversight of Oranga Tamariki System Bill). However, it is clear from government papers that the Commission was conceptualised to be part of the oversight system. A judgement seems to have been reached that it was important to retain a separate piece of legislation for the Commission, as is the case currently for the Children's Commission role.

The Office of the Children's Commissioner is, of course, up and running. Additional resources have been provided by the Government to allow for the Board structure. However, the Commission's budget, at this point at least, is minimal (compared to the resources provided for the Ombudsman and the Independent Monitor), given the breadth of its advocacy function.

2.3.4 Coordination

The Bill again places common duties on the Monitor, the Ombudsman and the Commission, including to 'work together…as appropriate' (clause 102 (3) (d)).

2.4 Key policy development process features of the Bill

The policy development process behind the Bill has some interesting features.

First, the genesis of the Bill goes back a number of years, primarily to a report by Sandie Beatie QSO dated August 2018. A key finding by Beatie was that the level of oversight of the Oranga Tamariki system needed significant bolstering.

Second, Beatie concluded that this bolstering could not wait (she made this latter comment with the Royal Commission in mind). However, it has taken considerable time for the Government to complete the policy process and introduce the Bill (so much so that the report of the Royal Commission is now less than a year away). There was a significant period where issues were under active consideration, particularly relating to the location of the Monitor, but decisions were not made (December 2019 – May 2021).

Third, the conclusions reached by the Government on the Bill largely rely on consultation undertaken prior to and during the development of the Beatie report. In particular, Beatie relied on the views of children and young people that had been gathered prior to her report by Oranga Tamariki, the Children's Commissioner and VOYCE Whakarongo Mai (MSD did commission some research on the views of children at risk; this research was not concluded before Beatie completed her report).

Following Beatie, there was no substantive consultation with children and young people and with the children and young people's sector on the proposed solution. Beatie's work was not intended to be definitive, but was designed to tease out what the issues were and what

options might be; further analysis, she stated, was needed. For a decision of this scale a discussion document identifying the preferred option would be the usual process.

Government papers state that a Māori consultative group, the Kāhui Group, has subsequently been involved with the policy development process on an ongoing basis. Nonetheless, submitters, including Māori, stated consistently in submissions that consultation in the lead-up to the Bill was not sufficient and particularly did not hear the voices of those most effected, those of Māori and those in care and the care-experienced.

Fourth, there was a significant change of policy direction during the course of the policy development; the in-principle decision made in December 2019 to transfer the monitoring function to the Children's Commissioner was changed to a decision in May 2021 to establish the Monitor as a departmental agency hosted by ERO.

Fifth, at least one significant policy decision was made without any rationale provided in written form to Cabinet - it was agreed that the Office of the Children's Commissioner would take on a Board structure (ie become a Commission), whether or not the monitoring function was transferred to the Commissioner. This decision was not announced at the time that the decision about the location of the Monitor was made public –the decision only emerged with the introduction of the Bill (in fact, the press release relating to the location of the Monitor continued to refer to the Children's Commissioner despite the decision having been made to create a Board).

The justification given when the decision was announced seemed unusual – that the job was beyond the capacity of one person. Papers reveal that this was not a consideration presented at any point – the diversity that could be achieved through a Board structure and the risks perceived to be associated with the performance of Commissioners-sole were the reasons presented in writing to relevant Ministers.[2]

Sixth, no Regulatory Impact Assessment was required by the Treasury. This seems unusual considering the significance of the issue for children and young people and the scale of change provided (Treasury saw the issues to be related to Machinery of Government and not to have impacts on individuals, ie children and young people). The Treasury itself did not participate in the policy process to any meaningful degree.

Seventh, there is no one place where the Government's overall thinking about what it is doing and why is laid out: what the core problems are, what the options are for addressing them, the strengths and weaknesses of each option, and the rationale for choosing one option over another. This is perhaps because of the long path to the Bill and the absence of a Regulatory Impact Assessment. One needs to read through a large number of papers covering a long period of time to identify the problems as the Government saw them and the considerations it brought to bear in addressing them. At times the rationale behind a decision has to be inferred as it is not made explicit.

[2] Commissioners-sole are a form of Crown Entity which instead of having a Board structure with a chief executive officer, have a single individual who is in effect the Board and chief executive. The Privacy Commissioner is another example.

3.0 Identification of the Core Problem

This section seeks to identify the core problem that needs to be addressed in reforming the oversight system and to compare it with the Government's problem definition.

3.1 Care and Protection

In order to identify the core problem, it is necessary to be clear about the nature of the care and protection system.[3] There are a number of points to be made, all relatively straightforward, but all profoundly significant.

First, care and protection is one of the most significant interventions the Government can make – decisions made by the System impact on the safety and wellbeing of children and young people, with impacts potentially making a significant difference to children and young people's life trajectories. In particular, the System has the power to remove children and young people from their families when the System concludes they are not safe where they are and that remaining with their current care givers is not an option (removal, or uplift, is one of the State's most coercive powers).

Second, care and protection is a hugely difficult job. There are multiple actors involved, including children and young people, their families, children's sector organisations, social workers and the Court. Decision making requires complex judgements where discretion can be exercised and where the situation can involve considerable uncertainty.

Third, even a System performing optimally will not be perfect and errors will be made. In particular:

- children and young people will be taken into state care who should not have been and will be adversely impacted by that experience or by subsequent in-care abuse;
- children and young people will be left in families when they should not have been and will subsequently be (potentially further) abused; and
- children and young people appropriately in-care will be abused in-care.

Fourth, there will always be considerable media focus on the System, given the significance of what it does and the public interest in cases where things go wrong. That media attention will, all other things being equal, likely focus on cases where 'acceptable' (but terribly unfortunate) errors are made as much as on cases where 'unacceptable' errors are made.

Fifth, such media scrutiny will place significant pressure on an organisation like Oranga Tamariki, the key agency in the System. There is a risk that it lives from crisis situation to crisis situation and the resulting instability may place constraints on its ability to improve its performance.

[3] The analysis in this paper focuses on the care and protection system, rather than the youth justice system, because it has been the major focus of public debate (and many times more children and young people are involved in the care and protection system). The analysis in this paper, however, can be broadly applied to the youth justice system and the same conclusions reached.

This is not to say that the media focus is unwarranted. It reflects legitimate public interest in the performance of the System. It simply establishes that the challenge of achieving optimal performance is not straight-forward. It also establishes that there may be an important role to play in assisting the media to understand the difference between acceptable, but unfortunate, and unacceptable errors and for its reporting to be informed by this awareness.

Sixth, because of media and public interest there will be a complex political environment for the System to operate in; it can expect to be subject to the intense scrutiny of both the Government and parties in Parliament not forming part of the Government. This again adds to the risk of living from crisis to crisis and the challenging environment in which System improvement must take place.

Seventh, independent oversight of the System is a necessary part of the System's operating environment (alongside media monitoring and investigation): independent monitoring of the policies and practices of the System, independent investigation of individual complaints and independent advocacy on behalf of those affected by the System This infrastructure ensures to the fullest extent possible that the power adults have over children and young people is not abused (both by those in the community, particularly care-givers, and those who are part of the System) and that those in the System are supported to develop and fulfil their potential.

Eighth, the act of being monitored (to say nothing of complaints being investigated and public advocacy) will have impacts on the performance of the System. On the positive side, information will be revealed that will enable advice to be developed about what needs to be changed so that the System can be improved. On the negative side, monitoring and investigation may reveal information that contributes to the sense of crisis and the associated risks outlined in previous points. In addition, those who are monitored may feel less free to operate effectively and become more risk averse than necessary, with negative effects on System performance.

None of this leads to a conclusion that independent oversight via monitoring (or the complaints or advocacy function) is not needed. Rather, it suggests that the reality of being monitored and investigated is an operating condition that must be managed by the System and that the approach (or culture) of the monitor may well be important in managing its impact on the System's performance.

Ninth, and very far from the least in the Aotearoa New Zealand context, is the constitutional reality of Te Tiriti o Waitangi and the significantly disproportionate number of Māori children and young people in the System (some 60-70 percent of children and young people in care are Māori). Te Tiriti brings into question the legitimacy of the System itself (the Waitangi Tribunal has in effect said that the removal of tamariki and rangatahi from their iwi, hapū and whānau is a breach of Te Tiriti). Disproportionality legitimately raises the question of whether there is individual and systemic bias at work within the System.

Tenth, lack of confidence in the System, by Māori and those in care in particular, will make the work of the System particularly hard (even where efforts are close to best practice

within that set of institutional arrangements). This applies also to the oversight system; confidence by Māori and those in care will be important if the oversight system is to engage effectively with Māori and those in care in performing its various functions.

Eleventh, there is a factor that is not explicitly stated in the government papers but is important to say here if transparent policy analysis is to be undertaken. Oranga Tamariki (to say nothing of the wider System) is not in great shape as an organisation; in fact, it is far from optimal performance. It has, in its various guises, been subject to ongoing reviews for most of its life; most reviews have come to broadly similar conclusions but those conclusions have not been properly given effect to.

It is reasonable, therefore, to presume that Ministers lack confidence in Oranga Tamariki's ability to monitor itself, to identify what needs to change in order to improve and to implement required change. None of this is to say that there are not highly talented and well-motivated people within Oranga Tamariki who are conscientiously doing the best they can. The problem is largely at the System level, not with specific individuals in the organisation – the quality of the advice that is generated about what needs to be done to improve the System and the quality of collective leadership to implement what needs to be done.

Not much of the above background about the care and protection system is laid out so clearly or starkly in the government papers. In fact, much of it is absent. Rightly, however, there is emphasis placed on the importance of confidence by the public, particularly the confidence of Māori, in the work of the Monitor.

3.2 Defining the problem

In laying out these features of the care and protection system, the core problem begins to emerge.

Overall, these factors add up to the following: given the importance of what it does, there is a need for the System, particularly Oranga Tamariki, to be very high performing, to become so in a very difficult operating environment of scrutiny, and for the public and their representatives (Ministers and Members of Parliament) to have confidence in it. The less confidence the public and their representatives have the more challenging the operating environment and the greater the organisational challenge.

Critically, the System depends on high-quality advice being developed and that advice being received and acted upon effectively so that the System can learn, improve and over time optimise performance (in public sector language, this means acting as a 'learning system'.)

In this context the core policy problem is:

> Given the complex and challenging environment in which the System operates, what oversight arrangements are needed to maximise System performance (that is, to ensure the safety and wellbeing of children and young people now and in the future as much as can reasonably be expected), such that the System rightly enjoys the confidence of the public and their political representatives?

Overall, the key problems identified by the Government, particularly as articulated in recent communications, if not always in the core policy papers, are that:

- there is not enough oversight (consistent with the Beatie report);
- there is unnecessary overlap between functions (in particular, duplication of the complaints function);
- there is not enough clarity about who has what function;
- there is not enough visibility of the functions, particularly the complaints function;
- the functions are not accessible enough, particularly the complaints function; and
- advocacy (to the extent it has been focused on children and young people within the System) has not been sufficiently focused on the needs of all children and young people.

All of these are legitimate problems to be concerned about. In particular, it is clear that a key problem with the oversight system is that there simply has not been enough oversight for many years (the dynamics behind funding of the oversight system in the past is discussed further later in the paper – see section 11.0). The Government is right to be addressing this and has said that boosting the level of oversight is the major purpose of the reforms.

Most of the other problems identified by the Government are really second-order problems, to be addressed in designing the optimal solution to the core problem identified above. Advocacy having a focus on all children is clearly an important issue, but the problem in the context of the System is probably better expressed as clarifying precisely what role the advocacy function should play in regard to the System.

Nonetheless, close examination of the government papers reveal that the Government did broadly identify the core problem identified in this paper to be a significant problem. In particular, the papers emphasise a number of times the need for 'system learning' and for 'system improvement' and 'continuous improvement' to take place.

This paper proceeds on the basis that the core problem to be addressed is that identified by us above. It is taken for granted that the level of oversight needs to be increased and that the Government is increasing the level of oversight. What matters is who within the oversight system should do what with those increased resources to optimise System performance.

4.0 Addressing the problem: Ministers' and officials' approach

The government papers in addressing the core problem identified by us focus on two key functions: investigation of complaints and monitoring of the System. However, before discussing the Government's analysis in regard to these two functions, it is important to understand its thinking about advocacy. This is because advocacy is conceptualised by the Government to be part of the oversight system (as identified earlier) and its thinking about the nature of the advocacy role influences thinking about the monitoring function in particular.

4.1 Advocacy

As noted earlier, the Government does not precisely define the advocacy role. Its conceptualisation of the role in its papers is, broadly, that an advocate is there to challenge governments publicly about whether its policies are right. At this point, we simply note that definition of the role and return to whether it is the right definition, when we undertake our own analysis later in the paper.

The core problem identified with the advocacy function is, as stated above, that it is not focused enough on the needs of all children and young people. The papers do not state a solution particularly clearly, but do reveal the thinking was that a Board will enable greater diversity of experience, expertise and ethnicities and, consequently, will advocate more effectively across a wider range of issues.

Government papers and the drafting of the Bill, in restricting advocacy to 'the system level', suggests another problem was identified (but not always made very explicit): that advocacy could be too narrowly focused, and that there was a need to bring a more strategic focus. Though again not stated, it appears to have been assumed that a Board structure would represent a solution.

Supporting this interpretation, early on in the departmental papers there is a reference to the decision to have a Board being made in the light of Public Service Commission (PSC) work on Commissioners-sole. The nature of this work is not expressly stated in any of the Cabinet papers. However, PSC papers reveal that that work raised concerns about the Commissioner-sole model in the light of experience with a Retirement Commissioner, and suggested that Commissioner-sole models were not generally desirable because too much responsibility lay in the hands of one person, resulting in a potential focus on areas of personal interest, rather than those of the most importance (ironically, the PSC is, for all intents and purposes, a Commissioner-sole model and when the Public Service Bill was under consideration in 2019-2020 the Government explicitly rejected a Commission model).

4.2 Complaints

In returning to the solutions the Government actually proposes to address the core problem, it makes sense to begin with the complaints function. This was the area where analysis seems to have been most straightforward (and consequently the decision about it was made in December 2019 and never revisited).

The papers, overall, do not generally emphasise the investigation of complaints as an important part of the solution to the 'learning system' problem. However, it is recognised that the function will need to coordinate with other functions (such as monitoring) to (implicitly) ensure issues (implicitly, learning opportunities) are identified and addressed.

In assessing where the complaints function should be located, the papers raise no question about whether it should be outside of a Government department or not. It is assumed that it should be outside of a Government department.

It would have been helpful to lay out the rationale for this judgement because it would seem, prima facie, to be relevant to consideration of the location of the monitoring function.

In the absence of any statement to that effect in relevant papers, it is inferred that the rationale for having the complaints function outside of a government department is as follows: the public (and complainants in particular) can only have the confidence needed in the impartiality and fairness of the complaints process, if the investigator of complaints is as independent of the Government as possible and is seen to be as independent as possible.

The choice for Ministers about the complaints function, therefore, was focused on whether it is best located within the Commission as an Independent Crown Entity (an ICE, the most independent form of government agency within the Executive branch) or with the Ombudsman (an Officer of Parliament). The Government in opting for the Ombudsman put greater weight on the Ombudsman's experience in dealing with complaints, than the Commission's experience in being child-friendly. It recognised, however, a need for the Ombudsman to improve the visibility and accessibility (ie 'child-friendliness') of the complaints function.

4.3 Monitoring and advice

Close examination of the government papers indicates that the core solution to the core problem (identifying the oversight arrangements that will maximise System performance for children and young people through System learning) was identified as the Government having 'trusted' and 'responsive' advice based on monitoring that is objective, impartial, and evidence-based and 'responsive' to government policy.

As noted earlier, the government papers do not generally identify 'advice' as a separate function needing independent consideration, but they are clearly linked functions in the Government's final thinking about the matter, and so the advice function is fundamental to the Bill. Advice is not, however, defined in the Bill.

It is also interesting to note that the concepts of responsive monitoring and trusted and responsive advice are not elaborated on significantly in government papers, particularly Cabinet papers; it seems that what these meant for the nature of monitoring and advice was clear to officials and Ministers.

The nature of these concepts is elaborated on further in this paper, as they are critical to the core judgement lying at the heart of the Government's thinking and, therefore, to its analysis of the optimal solution to the core problem. For now, it is sufficient to say that to the extent these concepts were defined by the Government, the idea was that the Monitor would be able to be focused on monitoring current government policy settings and would be able to work effectively with Ministers in providing 'insights' into System improvement.

The papers conclude that responsive monitoring and trusted and responsive advice will best be developed if the monitoring function is established as an Independent Monitor within a departmental agency rather than one located in the Commission or another ICE. Within a departmental agency there is less risk of the monitoring and advice functions not being

focused on government policies, of being affected (or 'coloured') by the Commission's advocacy role, and of not being able to work effectively with Ministers.

There was in effect a perceived or potential tension between the monitoring role and the advocacy role. This perceived tension was first identified by Beatie. Over time, the language hardened. The perceived tension became an actual conflict. Officials tried to develop a governance structure for the Commission that would manage the tension, but were not able to come up with a design that was more effective than letting the Board find a way to manage it.

Over time, the judgement was made that the (by then) actual conflict could not be managed and it was not appropriate to locate the monitoring function with the Commission. This decision was made taking into account the 'specific context' of Oranga Tamariki, recognising that sometimes advocacy and monitoring may go together; what that specific context is was never stated, which in our view is a serious omission from the Government's analysis (and the best judgement we can make is that the risk of monitoring being coloured by advocacy was considered to be particularly high in this case).

In the December 2019 Cabinet Paper, the Minister effectively acknowledges that a trade-off has to be struck in the monitoring function. She says 'To build trust and confidence in the oversight system, it will be important for the monitor, Ombudsman and Children's Commissioner to maintain independence from Ministers. For monitoring, a balance is needed so that the monitor can be responsive to Ministers while ensuring a degree of independence to support the provision of free and frank reporting.'

A later MSD paper also acknowledges this trade-off. It says 'in deciding on the form of this entity, Ministers will need to weigh the need to balance the perception of the entity being sufficiently "independent" against the need for Ministers to maintain a degree of control over the nature of the monitoring arrangements. Ministers will also need to consider how the monitor will function within a wider system where the Children's Commissioner and the Ombudsman already have roles with a high degree of independence.'

Another paper confirms this trade-off is being struck, and that the trade-off is not just about perception but actual independence, by advising that having a clause requiring independence in the legislation would not allow for the 'degree' of independence required to allow the Monitor to work effectively with others as intended.

In effect, the thinking is that the best System learning will take place if some reduction in at least the perception of the independence of monitoring and advice. That way Ministers can exercise some degree of control over the Monitor's activities and receive trusted and responsive advice.

Interestingly, contrary advice about the proposed independence clause is provided in the Departmental Report to the Select Committee, with officials there saying an independence clause was not necessary but could be helpful in improving public confidence (this resulted in the insertion of the clause requiring the Monitor to act independently). There are no

papers available at the time of writing explaining why this advice has changed – either the facts have changed or different legal arguments have been brought to bear.

It should be noted, however, that whatever happens in practice, there may well be a question over the degree to which the Monitor is legally required to be independent and what independence actually is in this legal context. This matter may need to be clarified in the Bill if it proceeds. For now, it is reasonable to conclude that the policy intent – being able to work effectively with Ministers and Oranga Tamariki - is what the Government expects to happen as a result of the legislative requirements.

As Cabinet made final decisions in May 2021, the trade-off was again recognised, at least in part, by the Minister. She identified that the public, particularly Māori, may not have sufficient confidence in the independence of the Monitor, and that this may impact on the ability of the Monitor to work effectively with Māori. The Kāhui Group preferred a Crown Entity, but were 'accepting' of a departmental agency (while opposing hosting by ERO because of the impact that might have on the ability of the Monitor to work with communities effectively).

The Minister advised Cabinet that 'I consider the measures outlined above to ensure appropriate statutory and operational independence [the power to direct, but not stop the Monitor], if effectively communicated, can address these concerns.' Officials had also advised the Minister that public confidence could be achieved if the monitoring function was effectively implemented.

It is notable that in public communications the Minister has not communicated the trade-off that is being struck in order to enable better understanding of why the government's proposed solution is the best one. While she has talked about the right balance being struck, she has not clearly described what is being balanced. Rather, her communication has emphasised the independence of the Monitor, which, in our view, conveys the common meaning of independence, 'full' independence in the terminology we introduce later in the paper.

4.4 Coordination

Having identified the appropriate locations for the complaints and monitoring functions the papers identify the need for coordination between the Ombudsman, the Independent Monitor and the Commission, as identified earlier.

With this cooperation in place the optimal solution to the core problem, in the Government's eyes, is complete and the legislative requirements to give effect to that solution are contained in the Bill.

5.0 Establishing a framework for addressing the policy problem

The paper now moves to take the core policy problem identified earlier and asks afresh: what is the appropriate policy framework to use in approaching this problem and what are the appropriate criteria to apply in considering options for addressing it? This establishes

the basis for assessing whether the Government's analysis and conclusions (as described in the previous section) are correct or not.

5.1 The policy framework

A policy framework is simply a structure that is established for addressing a policy problem in order to ensure that a logical, systematic and transparent approach is brought to bear upon the relevant problem.

In approaching this task, and taking into account the Government's thinking (outlined in the previous section), we consider the following framework is the most appropriate to use in addressing the core problem.

First, it can be taken as a given that the complaints function should be located as far from Government as possible. The Government does not disagree with that and the reasons inferred for concluding that is the right approach are robust.

Second, it can be taken as a given that the advocacy function should sit with an ICE, the Children's Commission. The only question is whether there should be a Board structure or not.

Third, in our view it is reasonable to conclude at this point that a Board is an appropriate structure, even if the role is limited to advocacy only. A Board does place potential limits on advocacy through the constraints of Board processes – the need for a majority on the Board to approve decisions, potentially limiting agility. However, it is accepted here that the case for a Board has been established with the Select Committee's amendment that the chair of the Board be called the Chief Children's Commissioner.

The discipline and diversity a Board brings to the Commission's activities outweigh any potential reduction in the agility of advocacy activity. This discipline and diversity should over time increase public and Ministerial confidence in the organisation. And it is hard to imagine that any credible Board with an advocacy function will not use its delegation powers to respond with agility to issues as they arise; this will be the public's legitimate expectation of the Commission.

This conclusion, of course, only holds if the Commission is appropriately funded to perform its advocacy role. It is assumed here that the Commission will be so funded; it is simply not credible to not fund it properly if it has a Board structure.

Fourth, the most significant question to answer, therefore, is where the monitoring and advice functions should be located. Tellingly, this is the most significant point of concern in public debate, alongside Te Tiriti related issues.

Fifth, the answer to this question depends on absolute clarity about the type of monitoring and advice required. This is because so much of the policy and public discussion has focused on the need for an <u>independent</u> monitor, the Government has called its monitor the Independent Monitor and a clause in the Bill now requires the Monitor to act independently. This need for clarity is also important because, as identified earlier in our

discussion of the nature of care and protection, it was taken as a given that monitoring should be independent, given the vulnerability of children who interact with the System.

On the other hand, the Government has identified 'responsive' monitoring attuned to government policy and 'trusted and responsive' advice as the key solution to the System improvement problem. Clearly, we need to understand what is meant by these terms and whether there is a difference between them and independent monitoring and advice.

Sixth, having determined the type of monitoring and advice required, it then needs to be assessed whether such monitoring and advice would actually be provided under each of the two options – hosting of the Monitor by ERO or locating the function in the Commission. Only then can the evaluation of the two options be undertaken. If the required type of monitoring and advice would not be provided, each option needs to be assessed in terms of the impacts of the deficit.

Seventh, only two options for locating the Monitor need to be assessed. There were essentially five options on the table for the location of the monitoring function during the Government's policy process: a department; a departmental agency; the Commission; or another (new) Crown Entity (CE), either an ICE or an Autonomous Crown Entity (ACE, a CE that has to have regard to government policy and so, unlike an ACE is not fully independent).

We will not assess the departmental form or the new ICE or ACE form on the grounds that it is legitimate to establish the monitor as a departmental agency (if it is to take a departmental form) for administrative efficiency reasons and that creating another Crown Entity would be administratively inefficient and add additional confusion to an already complex landscape.[4]

Sixth, the question of where the complaints function should sit should only be considered after the location of the monitoring function is determined. This is because, if the conclusion is that the Monitor should be located with the Commission, this may affect the pros and cons of the location of the complaints function. This approach to the complaints function stands in contrast to the Government's analytical approach, where the decision about the location of that function was made in March 2019 and not revisited in the light of subsequent decisions.

5.2 Criteria for assessment

A policy framework generally contains criteria by which options will be assessed. In this case the criteria are established by our earlier discussion of the nature of the care and protection system and by our conceptualisation of it as a learning system (see Appendix 1). They are:

- the quality of monitoring undertaken;
- the quality of the advice developed based on that monitoring;

[4] The Minister at one point accepted the option of an ACE, but later changed her mind. The factors at play in that decision are not material to this paper. We are satisfied that when it comes to 'degrees' of independence the choice is between a departmental agency and the Commission.

- the likelihood of that advice being accepted by the System (including Ministers as key decision makers);
- the quality of the implementation of that advice (recognising implementation can be monitored) and its impact on System performance;
- the impact of that System performance on public confidence and resulting media coverage;
- the impacts of public confidence and resulting media coverage on System stability and the System's consequent capacity for improvement; and
- the particular impacts of the confidence of Māori and those in care in the Monitor on the quality of monitoring and on System stability .

These are the 'lenses' through which the options identified in this paper are considered. In analysing the options, we identify many of the same issues raised directly by or inferred from the Government's analysis, as well as raising a number of other considerations.

6.0 What type of monitoring and advice is required?

The policy framework adopted above established that location of the monitoring and associated advice functions is the critical matter to assess in addressing the policy problem.

It also established that before addressing that issue, it is important to be clear about what type of monitoring and advice is required and whether the required type of monitoring and advice would be undertaken and delivered under each option. This part of the paper addresses the first of these two questions.

In addressing what type of monitoring and advice is required, it is helpful to separate the issue into its two sub-components – monitoring and advice.

6.1 What type of monitoring is required?

There seems, at one level, to be no disagreement that the type of monitoring required is independent monitoring. The earlier discussion of the care and protection system suggested independent monitoring was necessary. And the Government says that the Monitor is legally required by law to be independent.

But what is meant by the word 'independent'? The word is not specifically defined in the Bill. This paper considers the following to be a reasonable, common-sense definition of independence:

- the Monitor is able to choose freely what to monitor;
- the Monitor is able to choose freely how to monitor; and
- no-one can prevent the monitor from undertaking monitoring activity or from monitoring in a certain way.

However, it needs to be recognised that independence is not an absolute, but more of a continuum. Even the most independent monitor will bring frameworks and approaches to bear on issues that may not be explicit and reflect a way of looking at the world which unconsciously shapes what the monitor chooses to monitor and how monitoring takes

place. Even at the most independent end of the spectrum no monitor can be said to be 100 per cent independent.

For the purposes of this paper, however, we use the term 'full independence' to describe the level of independence an ICE has (and are satisfied it substantively meets the definition of independence given above). We use the term 'low-level independence' to describe the level of independence a departmental agency has because, like government departments, it is generally subject to Ministerial direction.

The government papers, as stated earlier, recognise that there are degrees of independence and state that the Government is establishing the 'degree' of independence which is 'appropriate' to the monitoring function.

Generally, the view is taken that the degree of independence that is needed in monitoring is not full independence, but a degree of independence that is more than the standard low independence of a departmental agency (we will call this 'medium independence'). Monitoring should be 'responsive' to government policy. That is, it should generally undertake monitoring designed to assess what results are being achieved by current policy settings (as embodied in the Oranga Tamariki Act, associated regulations, policies and practices). And, in particular, it should be required to undertake monitoring of government policies that the Government sees to be particularly important to monitor (and, therefore, the Minister should have the power to direct the Monitor).

Crucially, however, the Government decided that the Monitor should not be prevented from undertaking work that it considers to be important. The Government might argue that in this regard the Monitor has full independence (this is discussed further later in the paper), but the overriding policy objective of having monitoring focused on current policy settings suggests that this level of choice is still mid-level independence.

Other than the capacity for Ministerial direction, the only constraint the monitor faces in making choices about what to monitor and how, are the legislative requirements to make those choices in the best interests of children and young people, and in accord with best-practice monitoring methodologies. The Minister does, however, identify stakeholder concern at one point that proximity to Ministers may influence the Monitor's findings (including, we infer, potentially how it monitors); this concern is better addressed, and is addressed, when we consider the type of advice required. For now we categorise monitoring as having medium-level independence.

The crucial question, therefore, is whether the medium independence monitoring the Government seeks is the appropriate level of independence required for the monitoring function.

It is clearly important that current policy settings and specific government policies are monitored, so it is reasonable for the government to seek monitoring arrangements that do not create significant risk of those settings and policies not being monitored.

Nonetheless, it seems to us that there is a clear need for fully independent monitoring. Given that the safety and well-being of children is at stake, fully independent monitoring

allows for deviation in what is monitored from matters that are simply the focus of government policy.

It would be surprising, however, to conceive of a fully independent monitor not monitoring government policies. It has the same objective as the government of identifying whether government policies are being implemented as intended and, if so, whether they are achieving the desired outcomes (putting to one side for the moment the question of whether the monitoring function should be combined with the advocacy function and might be influenced by that function).

This leads us to the conclusion that two types of monitoring are required –medium independence monitoring (particularly focused on current settings and government policies) and fully independent monitoring (focused on what is considered most important to monitor whether highly related to core government policies or not). Both types of monitoring must be methodologically robust

6.2 What type of advice is required?

In exploring this issue, it is important to remember that the legislative requirement on the monitor is to provide advice. It was open to the Government not to give the monitoring function an advice function (as some of the early thinking intended). However, it has done so and this is clearly appropriate. It would be very strange to have the Monitor look at practices and outcomes within the System, and not to obtain its advice as to whether, for example, failures are an implementation problem or a policy problem.

The government papers do not address the question of what degree of independence is required of the advice function specifically (as opposed to that of the monitoring function). However, they frequently refer to the need for 'trusted' advice and less frequently 'responsive' advice. They state that advice of this type enables the Monitor to work effectively with Ministers. It is, therefore, crucial to understand what is meant by these terms and to categorise them (using our terminology) as having full, medium or low independence.

6.2.1 What is trusted and responsive advice?

In the language of the public sector, advice is <u>trusted</u> if it is and can be seen to be:

- impartial (no interest is being served but the outcomes desired), deploys rigorous analytical frameworks, and deploys any robust evidence available – in public sector parlance it is advice that is 'free and frank'; and
- not oppositional: the advisor can be trusted not to go public if the Government does not accept the advisor's advice (except to the extent the OIA makes such advice available, with the most free and frank advice not being released under the OIA or not being put in writing unless it is a matter of law).

Advice is <u>responsive</u> if it is and can be seen to be:

- attuned to the Government's policy priorities and policy preferences: this means that analytical frameworks will not be deployed or weighted so heavily nor any

advice developed that is not sensitive to the flavour of the Government of the day; such 'responsiveness' supports advice being 'trusted'; and
- accommodating to any concerns Ministers raise about the nature of advice received; if they do not believe a particular factor has been given sufficient weight, the advisor will be sensitive to that and advice may be subtly adjusted to reflect that concern (this is one reason officials have 'strategic' discussions about an issue with Ministers as part of the development of their advice; at least one such 'Whiteboard' session occurred on the monitoring issue during the policy process leading to the Bill).

It is important to note the tensions in the concept of trusted and responsive advice. The advisor is in effect required to calibrate to what extent advice should be 'free and frank' (to ensure fully independent advice) and to what extent it should be influenced by the flavour of the Government of the day (to retain that Government's trust). The equilibrium usually struck is to give fully free and frank advice one to three times (depending on the strength of the reaction to it) and then to attune (or adjust) it in response to the flavour of the Government of the day.

The result of this equilibrium position is that trusted and responsive advice can be quite 'coloured' in nature (this term is deliberately used, because of the example that follows). For example, one piece of advice, given early on in the policy process by the PSC, which has received some media attention was that if the (then) Children's Commissioner took on the monitoring role:

- it would simply pick up and apply its current format of monitoring (in the context of international treaty monitoring obligations it retains under the Bill) which was deemed inappropriate in the context of the National Care Standards Regulations; and
- its feedback may extend beyond what is required by the current policy settings, would not be helpful to Oranga Tamariki, and may be perceived by Oranga Tamariki and others as 'coloured' by its advocacy role.

There are a number of presuppositions behind these claims, including:

- that it is inappropriate to provide feedback beyond what is required by current policy settings (notwithstanding the requirement for free and frank advice);
- that advocacy can colour monitoring (or at least the perception of monitoring);
- that the risk could not be mitigated through discussions with the Children's Commissioner (the perceived risk was, in fact, addressed by placing the Monitor in MSD initially, to ensure robust monitoring processes were in place in preparation for the 'in-principle' transfer to the Commission).

It is not unfair, we think, to describe this advice as itself 'coloured' by a view about the nature of the Children's Commissioner and their office. That view may be right or wrong, but (apart from the PSC's general concerns about Commissioners-sole), there is no evidence offered for it during the policy process; it is likely to be, at least in part, the result of earlier

discussions and advice that may have been influenced by and attuned to the Minister's views.

It is important to note that, as a result of the propensity to accommodate Ministers (to say nothing of bureaucratic self-interest), there are risks associated with trusted and responsive advice. In particular, there is the risk that:

- the most significant analytical issues affecting major public policy decisions are not clearly brought to the public's attention, so that the full reasoning behind decisions can be understood, that reasoning tested, and a judgement made about whether the decision is sound (this has been referred to, at times, as 'the quiet thing that is not said aloud');
- issues that may cause embarrassment for the Government or departments are managed internally as much as possible; and
- ultimately, advice is not perceived to be high quality, even if 'trusted' by Ministers, and is, therefore, not trusted by others and public confidence in the legitimacy of decisions is lacking.

Managing these risks is particularly important where constitutional issues are at stake, including the rights of minorities and of vulnerable populations who lack a voice (in this case, children and young people). It forms the basis for establishing alternative, independent streams of advice into the system through what are called by some the integrity agencies (such as the Human Rights Commission).

By definition, therefore, trusted and responsive advice is not fully independent.[5] It may give fully independent advice early on. But that advice may not be in writing or, if in writing, may be protected under the OIA. And where that advice is not accepted, advice is calibrated from there on according to the flavour of the Government of the day and fully independent advice is not repeated.

While recognising that trusted and responsive advice can be fully independent, we consider it fair to characterise it as medium-level independent. This is because the day to day business of policy advisors is not to get out of alignment with Ministers. We recognise, however, that others might reasonably characterise this as low independence.

Now that we have established the level of independence in advice that is expected, it is necessary to ask if this is the type of advice that is required.

It is important to acknowledge that it is valid for the Government to want monitoring that is responsive and advice it can trust and that is responsive. Our system of government relies on a public service operating in this way. With such trusted relationships, effective conversations can take place between public servants and Ministers that enable better

[5] It is important to note here that the term 'an independent public service' in general refers to its independence in employment practice and its political neutrality, or readiness to serve a government of any political make-up, not to the full independence of its advice (to the extent the term can rightly be used of advice, it refers to the free and frank elements of its advice and the absence of any political considerations factoring into the advice).

decisions to be made. Without such trust, the most sensitive discussions cannot take place, and worse decisions will be made than otherwise.

But once again, in the context of the vulnerability of children and the need for System improvement and optimisation, it is reasonable to conclude that fully independent advice is also required. A body that is not close to Ministers should be providing advice on how the System needs to be improved, so that the chances of the risks associated with trusted and responsive advice (as described above) materialising are minimised

Again, two types of advice are required: medium-level and fully independent advice

6.3 Conclusion: two types of monitoring and advice are required

In conclusion, there are actually two types of monitoring and two types of advice that are required if the System is to perform optimally.

The first type of monitoring and advice is straightforward: it is fully independent monitoring and advice which is seen to be fully independent. Unless this type of monitoring and advice is delivered into the System, there cannot be the necessary level of public confidence that there is a fully independent stream of monitoring and advice on behalf of the children and young people impacted by the System.

The second type of monitoring and advice required is that which is attuned to government policy and trusted and responsive, but is only medium-level independent.

This paper proceeds on the basis that both types of monitoring and advice are needed if System performance is to be optimised.

7.0 What type of monitoring and advice will be delivered?

Having established that there are two types of monitoring and advice required, we now ask what sort of advice will actually be provided under the two options being considered: location of the monitoring and advice function with the Independent Monitor or with the Commission.

It may seem strange to ask such a question since it, prima facie, appears to be obvious what type of monitoring and advice will be provided depending on whether the Monitor is hosted by ERO or located with the Commission.

Nonetheless, it is important not to take anything for granted when the stakes are so high and we think it important to explore the dynamics of how the monitoring and advice roles will play out in practice, particularly given the judgement call involved in categorising trusted and responsive advice as medium rather than low independence. It is also possible that further steps can be identified that might be taken under each option to create greater certainty about the likely nature of the monitoring and advice that will be delivered.

7.1 Monitoring and advice with the Monitor hosted by ERO

The previous section concluded that mid-level independent monitoring and advice will be provided by the Monitor with the functions located as a departmental agency hosted by

ERO. This seems to be a clear and obvious conclusion from our reading of the government papers.

However, before reaching a definitive conclusion that this is the way the monitoring and advice function will play out in practice, it is important to consider carefully the arguments the Minister has put forward publicly to provide assurance that the Monitor is actually independent. In our view these arguments seem designed to provide assurance to the public that the role is fully independent (notwithstanding the Minister's statements that the right 'balance' has been struck and the government papers showing that the Monitor is not fully independent). There is no doubt also that choosing to call the Monitor 'the Independent Monitor' reinforces that impression of full independence.

There are three main arguments that the Minister has put forward that seem aimed to persuade that the Monitor is fully independent. These are:

- the Monitor will be operationally separate from Oranga Tamariki (and MSD); it is hosted by ERO for purely administrative reasons;
- the Minister's power to direct the Independent Monitor has been proscribed: while the Minister can direct the Monitor to undertake particular work, the Monitor cannot be required to cease work currently underway or scheduled; and
- the Monitor's duty is prescribed in legislation (it is a Statutory Officer) and therefore, there can be a high level of trust in its independence in performing its role (with the Select Committee clarifying this by inserting a specific clause requiring independence).

We now assess each of these arguments for their strength.

7.1.1 Location of the Monitor within ERO, not Oranga Tamariki (or MSD)

Location of the Monitor within ERO, as opposed to within Oranga Tamariki, is no guarantee of full independence at all. As former Government Statistician Len Cook indicated in his oral submission to the Select Committee, the Monitor could be located in Oranga Tamariki – the effect is the same from a public administration viewpoint. As one submitter put it, in this sense it is an 'internal' rather than an 'independent' monitor. As other submitters put it, it is in essence government monitoring itself.

Location within ERO may, in fact, have informal influences upon the operation of the Independent Monitor. It is no coincidence that ERO and its CEO are experienced in running monitoring systems related to children and young people – there is the opportunity to learn (and the government papers are explicit about this). Such opportunities may be beneficial, but they do not meet the standard of full independence or the perception of full independence.

7.1.2 The Minister's inability to stop the Independent Monitor working on an issue

The Minister not being able to direct the Monitor to stop work (whether underway or scheduled), while being able to direct the Monitor to do work, is an arrangement that could only work in one of two ways.

First, the Monitor could hold resources in reserve for Ministerial work or the Minister could provide specific funding for each Ministerial direction; this would be an unusual arrangement. Second, the Minister and the Monitor could come to a practical agreement as to what the Monitor's work programme will be so that in the normal run of things the Minister will have limited need to direct the Monitor. Sufficient ambiguity would be left around the work programme such that no work would ever formally need to be stopped or rescheduled, or rescheduling decisions could be said to have been made independent of the Minister without that being the reality.

This second scenario seems much more likely (the first is simply too inefficient and cumbersome) and the government papers effectively say that the Monitor and the Minister will discuss the work programme implications; in this scenario the Monitor cannot be said to enjoy full independence from the Minister.

7.1.3 The Monitor's position as a Statutory Officer

First, it is true that there are Statutory Officers within government departments who are required to act fully independently and generally do. These include, for example, the roles of the Government Statistician, the Public Service Commissioner and the Commissioner for Inland Revenue.

However, the circumstances surrounding these positions are quite different. They are areas where constitutional norms and consensus have built up over time, to all but guarantee full independence.

On the other hand, oversight of the System is politically contentious. There is no guarantee at all that in such an area such norms and consensus will be established immediately or in the long term. It usually takes Ministers and officials to have a fully aligned view of the full independence of the role, and the role is clearly not conceptualised by the Government to have such a degree of independence. Consequently, it is not reasonable to expect full independence to develop.

Second, it is not completely true that the roles referenced above are all fulfilled completely independently. For example, in practice the Public Service Commissioner takes the views of the Minister concerned strongly into account in appointing chief executives. It is difficult to think of a chief executive being appointed where the Minister has said 'I cannot work with that person effectively'. In this circumstance it is difficult to see that the Commissioner has substantive independence; the Minister's opinion is all but determinative. In the same way, it is possible that the Minister's views on what should be monitored could be determinative, and for the Minister's views on policy matters to have significant influence on the findings of monitoring and the advice given (the papers highlight political influence on the findings of the Monitor to be a significant concern of stakeholders). Again this is not full independence.

Third, there is a particularly unique feature of the Monitor's situation. That is that, in effect, the Monitor is one chief executive monitoring the performance of another chief executive. The pressure on chief executives to act in a collegial manner for the benefit of the entire public service (and its reputation) is very high, so there is likely be pressure on the Monitor not to vary from the core responsive monitor and trusted and responsive advisor roles.

This situation is quite different from the ERO situation, where ERO monitors the performance of individual schools and, to some extent, the performance of the schooling system as a whole; its assessments cannot be so directly linked to the performance of the chief executive of the Ministry of Education.

Fourth, as long as the Government has identified that the key solution to addressing System performance is monitoring responsive to government policy, and trusted and responsive advice, the Monitor is in a morally ambiguous position and, again, the pressure to be influenced by the Minister's thinking will be high. There is little guarantee that any Monitor will not accede to the Minister's (and officials') requirements, or that they will otherwise last long in the job.

Fifth, it is striking that the Government did not appear to consider applying the same thinking to the monitoring function as it did to the Ombudsman's complaints function. In that case, no thought was given to locating the complaints investigation function within a government department. It seems to have been clear that to be fully independent (as well as to be seen to be fully independent) the function needed to be located outside government.

There is no question that the same logic could as readily be applied to the monitoring and advice functions with the same conclusions. That it was not, suggests that another form of monitoring and advice (not fully independent) is clearly in mind and that the role is intended to 'play out' differently (ie to be attuned to government policy and trusted and responsive).

Sixth, the requirements for one of the key features of the Bill, a three-yearly report on the State of the Oranga Tamariki System by the Monitor, are to be established in regulations. The Minister, in effect, determines what the report can cover. In this crucial area, the Monitor has no independence at all.

7.1.4 Conclusion on monitoring and advice under the Independent Monitor

Overall, the conclusion reached is that, no matter the impression the Minister creates publicly that the Monitor is fully independent, the arguments deployed simply do not have any strength. The Monitor is clearly designed to deliver medium independence monitoring and advice (and the government papers, as we have shown, reflect that).

However, we consider there are significant reasons to be concerned that at times there will low level independence in the way the roles play out. This is because of the risks we outlined earlier about monitoring and advice within the core public service setting, in effect the risk of overly political influence. This is a particular possibility in this case because of the high levels of public, media and political concern about the System and of the consequences for governments if extremely bad practice is revealed. In short, there is a non-trivial risk of significant issues being, at best, watered down and managed as best as possible internally and, at worst, covered up, such that the safety and wellbeing of children and young people is prejudiced.

The medium independence of the Monitor with the non-trivial possibility of low independence, will be the perspective we take when we analyse the pros and cons of locating the monitoring and advice function with the Monitor.

Our assumption will be that under this option, as the Government has indicated, the Commission will take the information generated by the Monitor and use it to develop fully independent advice. However, it must be recognised that any such advice the Commission develops will be limited by the medium-low independence nature of monitoring by the Monitor (including in regard to what is monitored and, potentially, how it is monitored) and so may not qualify as fully independent.

It remains open under this option for the Commission to launch an investigation and to undertake fully independent monitoring of certain aspects of the System. But such an investigation is resource intensive and may not be deemed a high priority by a particular Board given there are no specific requirements for the Commission to focus particularly on the System under the Bill.

Our assumption under this option will be that the Commission will undertake some fully independent monitoring, but not enough to provide the level of fully independent monitoring that is required given the vulnerability of children and young people in the System.

7.2 Monitoring and advice at the Commission

It is now time to examine what type of monitoring and advice will be provided if the functions are located at the Commission.

It seems intuitively clear that the type of monitoring and advice that will be provided by the Commission will be fully independent. As an ICE it has a higher statutory requirement to act independently than any other institutional form within the Executive branch of government.

The government papers, however, argue that the monitoring (and, by inference, the advice) of the Commission will not be fully independent. In particular, their concern is that monitoring (and advice) will be 'coloured' by the Commission's advocacy role, that there is in effect a tension between the monitoring and advocacy roles. Again, it is important to test the strength of this argument.

It seems clear that the arguments about this tension are not strong. In reaching this conclusion, it is important to note that the Government at no point in the policy process clearly articulates why we have an advocate for children and young people. The answer, of course, is that children and young people are vulnerable and do not have a voice in the political system – there is a public interest in them having an advocate, to ensure their wellbeing is maximised and power over them not abused. It may, of course, be that the Government took this to be so obvious that it did not need to articulate it.

Neither did the Government define precisely what effective advocacy is, let alone what can rightly be expected of an advocate which is an ICE, but one with a Board and no longer a Commissioner-sole. The closest it came was to conceptualise that advocacy was challenging

existing government policies publicly. These are very narrow conceptions of the advocacy role, particularly in the ICE context.

Put simply, advocacy is the right to put a view into the public arena and argue for that view. Clearly, some advocates put forward views without a substantive basis for their views. However, an ICE, particularly one with a Board, does not have a licence to act in this manner. The Commission's responsibility (and that of all integrity ICEs) is to undertake high-quality advocacy. That requires a process: to first analyse an issue fully independently and develop high-quality advice on which advocacy can be founded. And high-quality advice depends on high-quality evidence, which in turn depends on high-quality monitoring. And high-quality monitoring involves high-quality decision making, about what to monitor and how.

Advocacy of this nature involves not just challenging government policy, but at times affirming government policy where its analysis supports that. It is not the wholly adversarial game that government papers seem to envisage it to be. The Government can instead expect the Commission to be a fair-minded, but fully independent entity. There is little reason to think that a high-quality Board cannot differentiate between and develop appropriate systems for establishing fully independent monitoring, advice and advocacy functions.

It is understandable that the Government concluded that there might be a tension between monitoring and advocacy under a Commissioner-sole model. Too much relies on the sound judgement of one person. While Children's Commissioners have had a significant impact on public policy by identifying issues not otherwise on the policy agenda that needed to be addressed, there is legitimate concern that the wrong appointment might be made, with counterproductive impacts on System performance. Some commentary by one of the 'chief architects' of the reforms certainly indicates a factor in analysis was actual performance by Commissioners that was counterproductive to System performance.[6]

It is notable that the Government has established a Mental Health and Wellbeing Commission with explicit monitoring and advocacy roles. Given the vulnerability of the mentally unhealthy, this Commission is a highly relevant organisation for comparative institutional analysis. While its ultimate performance is yet to be established, officials raised no concerns about any tension between monitoring and advocacy in its establishment. As indicated earlier, the best judgement we can make is that in the case of Oranga Tamariki, perceptions of past performance are influencing perceptions of how the roles will play out in the future).

Given the above considerations, the conclusion reached here is that if the monitoring and advice functions are located with the Commission, they will be performed fully independently.

[6] Objective independent oversight of Oranga Tamariki, children's agencies overdue, Stuff, 7 July 2022 https://www.stuff.co.nz/opinion/129191670/objective-independent-oversight-of-oranga-tamariki-childrens-agencies-overdue

The outstanding question in this context is: does the Government receive responsive monitoring and trusted and responsive advice under this scenario?

The answer is yes, if it makes provision for it. It has a Group within the DPMC specifically set up to monitor and advise on highly relevant policy areas, the Child Wellbeing and Poverty Reduction Group (the CWPR Group). From this Group it could commission monitoring focused on government policies in areas where it thinks the Commission is not focusing but should. That Group could develop advice based upon its own monitoring and the monitoring the Commission undertakes (and any advice the Commission develops).

It is notable that this option was not considered by the Government at any point (ie it didn't consider asking itself to use the monitoring information developed by the Commission, in the way it is asking the Commission to use that developed by the Monitor).

The assumption in this paper is that, under the option of locating monitoring and advice with the Commission, the Government would (and should) commission such monitoring and advice, for example from the CWPR Group (or at least from this Group while current government organisational arrangements exist). There may be some additional expenditure required, but that expenditure is justifiable given what is at stake (and dual monitoring arrangements are not unique in government). Given it seems unlikely the Commission would not focus its monitoring on key government policies, it seems likely the additional resource involved would not be significant, again given what is at stake.

This arrangement also has the advantage of providing a source of advice separate from Oranga Tamariki and addresses Ministers' potential lack of confidence in Oranga Tamariki's internal monitoring and advice (it is noted in one paper that Oranga Tamariki's own monitoring capacity is still maturing).

In addition, under this option the Commission, while still retaining its independence, can possibly fulfil some requirements of a trusted and responsive advisor. In particular, it can give impartial advice on what improvements the Government could make to its operations if it wishes to stay within current policy parameters (even if the Commission, like a free and frank advisor, has advised initially the policy parameters are inappropriate and has given that advice on a limited number of occasions).

Under this option, the Commission can also establish protocols with Ministers and the System around when it will move from advisory to advocacy mode; for example, the Commission could undertake (and probably should undertake) not to go public with its policy concerns until the Government has had reasonable opportunity to prepare for the release of its advice (assuming the Government has had an opportunity to comment on the proposed policy position as it was developed, as required by the Bill).

It is assumed under this option that these operating protocols will be developed. In this respect, the establishment of the Board represents an opportunity for a 'reset' in the relationship between the Government and the 'advocate' (to the extent there is a need for a reset).

It is on the basis of the conclusions reached in this part of the paper about how the monitoring and advice functions in the Commission would play out in practice (including the establishment of complementary functions in the CWPR Group and a reset in relationships between the Board and Ministers), that analysis in this paper proceeds.

8.0 Where should monitoring and advice be located?

We have now arrived at the most crucial point in the analysis – assessing the two key options for location of the monitoring and advice functions.

A considerable amount of prior analytical work has been necessary, to arrive at this point. The pay-off for that work is that it should enable the assessment to be undertaken with considerable clarity.

The heart of the matter is this: will children and young people be safer and experience greater wellbeing today, and in the future, through improvement to System performance, if the monitoring and advice functions are located within a departmental agency, or within the Commission?

In analysing each option, we apply the criteria established earlier in the paper (and portrayed in diagram form in Appendix One), namely:

- the quality of monitoring undertaken;
- the quality of the advice developed based on that monitoring;
- the likelihood of that advice being accepted by the System (including Ministers as key decision makers);
- the quality of the implementation of that advice (recognising implementation can be monitored) and its impact on System performance;
- the impact of that System performance on public confidence and resulting media coverage;
- the impacts of public confidence and resulting media coverage on System stability and the System's consequent capacity for improvement; and
- the particular impacts of the confidence of Māori and those in care in the Monitor on the quality of monitoring and on System stability.

In applying these criteria, we recognise that judgement is involved and much of that judgement is based around the potential for, or probability of, a certain dynamic happening within the System under each option. We have some degree of confidence in the judgements we make, however, based on the analysis we have undertaken to establish the appropriate foundations and criteria for examining the options.

8.1 The Monitor as a departmental agency hosted by ERO?

The first option we examine is the Government's proposal: hosting the Monitor as a departmental agency within ERO. In this option, the Commission does not feature significantly as a monitor or advisor as described above.

8.1.1 The quality of monitoring

On the basis of our analysis, the quality of monitoring under this option will be at best medium level. There is a non-trivial risk of the focus of monitoring not being on the priorities (as fully independently assessed) and the findings of monitoring being coloured by its location so close to government.

There is also a non-trivial risk of monitoring being of low quality because of the low levels of confidence Māori and children and young people in care will have in it and consequently the poor quality of the information the Monitor will be able to collect.

There is also a non-trivial risk that monitoring findings regarding the safety and wellbeing of children may be hidden from public view.

8.1.2 The quality of advice

As a result of the medium level (and potentially lower) quality of monitoring, there is a non-trivial risk of advice being at best medium level quality and at worst low quality.

8.1.3 The likelihood of advice being accepted

The likelihood of advice being accepted by Ministers and the System is assessed to be high initially (because of their confidence in the oversight arrangements) deteriorating to low over time as the reality of the quality of monitoring hits home (e.g. due to the lower-quality information received from Māori and children and young people in care).

8.1.4 The quality of the implementation of advice

The quality of the leadership of the System is a factor that is not directly influenced by whether the Monitor is hosted by ERO or located in the Commission. The Public Service Commissioner, the Minister for Children's Oranga Tamariki Advisory Board, and the Chief Executive of Oranga Tamariki have primary responsibility.

It can be expected that some advice will be implemented initially, but because of its poor quality, this will lead to System instability and limited System improvement.

Over time, it can be expected that with the reducing level of acceptance of advice, that advice will not be implemented. This will further contribute to System instability (the System will in effect be rudderless) and a lack of System improvement.

Such levels of System instability could set up a vicious cycle where instability produces further System instability and so reduces System performance over time.

8.1.5 The impact of System performance on wider public confidence

Increased System instability and potential deterioration in System performance create a significant risk of declining public confidence.

8.1.6 The impact of wider public confidence on System performance

Reduced public confidence, in turn, will result in increased scrutiny of Oranga Tamariki by the public, the media and politicians. This will lead to further System instability and the potential for further System deterioration and an exacerbated vicious cycle of decline.

8.1.7 The impact of System performance on Māori and those in care

System instability and deterioration will impact particularly on the confidence Māori and those in care have in the System. This will exacerbate the effects of reduced public confidence described in the previous section. It will also reduce the level of confidence that these communities have in working with the Monitor. A feedback loop is thereby created by which the whole process recommences but from a lower base. The result is an ongoing increase in System instability and an ongoing reduction in System performance.

8.1.8 Conclusion

Our analysis suggests that hosting the Monitor within ERO creates an increased risk of a significant reduction in System performance over time. When we say a significant reduction in System performance, we need to remind ourselves that this means a significant reduction in the safety and wellbeing of children and young people within the System.

Nothing in this analysis relies on anything but the factors the Government was aware of in assessing this option; we have just applied the factors within a robust policy framework. And nothing in this assessment factors in fully the possibility of cover-ups and their exposure. Should those occur, the instability of the System and its performance will be so much the greater. Either way, the System does not look like it will rightly enjoy the confidence of the public and major reform of the System and its oversight will eventually be needed.

While it may be tempting to say these possibilities are remote, that 'we' are all trying to do the right thing, history suggests one should not downplay them (and that at a minimum, they are medium-risk, catastrophic consequence possibilities that need to be safeguarded against). Abuse of unchecked power is a reality, particularly where vulnerability exists, as is the case with children and young people.

That reality of the potential for abuse is currently playing out in New Zealand in front of the Royal Commission. Though hard to accept, it is clear that institutions (such as governments, government departments, faith-based organisations and businesses) in modern, rather than fully historical, times can and do act to protect their own reputations rather than being faithful to their espoused values. And there is no doubt that abuse in care continues to this day, and is not likely to be detected and rectified if oversight is poor, and the System's performance declines as a consequence.

Risk over time is also a relevant consideration. While one government may be confident that the risks can be managed, has it asked itself whether it has confidence that another government of another complexion will identify, let alone, manage the risks of internalising monitoring and advice as well as it thinks it can? This is a question that should focus Ministers' minds.

8.2 As part of the Commission?

We have concluded that establishing the Monitor as a departmental agency is high risk in terms of children and young people's safety and wellbeing. Nonetheless, the question remains: is locating the monitoring and advice functions with the Commission a better solution or not? We now undertake assessment of that option.

In undertaking this analysis, it is important to remember that under our configuration of this option, some monitoring and advice is provided by the CWPR Group in DPMC as well as the Commission and a reset in the relationship between Ministers, the Commission, and Oranga Tamariki takes place.

8.2.1 The quality of monitoring

The quality of monitoring under this option will be high. As an ICE with a Board structure fully independent monitoring will be undertaken by the Commission which is objective and evidence-based.

The fully independent nature of monitoring is much more likely to enjoy the confidence of Māori and children and young people in care and so be much richer because of their increased input.

The Commission's monitoring will also be complemented by monitoring undertaken by the CWPR Group in those relatively rare cases where the Commission chooses not to monitor an area of government policy that the Government considers important to monitor.

The likelihood of monitoring in which the findings are watered down are significantly reduced, as are the possibilities of issues being managed out of the public light or of cover ups.

8.2.2 The quality of advice

The quality of advice under this option will also be high. As an ICE with a Board structure fully independent advice will be developed from monitoring information without any colouring from the advocacy function.

This advice will be supplemented by advice developed by the CWPR Group from the Commission's and its own monitoring information (advice that is not fully independent but trusted and responsive).

Ministers will, therefore, have a range of advice to consider which should result in better decisions being made than when there is only one source of advice.

8.2.3 The likelihood of advice being accepted

The likelihood of the Commission's advice being accepted is assessed to be medium initially but increasing to high over time as Ministers and Oranga Tamariki develop confidence in the Commission's operations, in the Commission's fair dealing, and the benefits of the Commission's effective relationships with Māori and children and young people in care.

8.2.4 The quality of the implementation of advice

Once again, the quality of implementation of advice is not fully within the ambit of the oversight system; other mechanisms for increasing implementation capability within Oranga Tamariki will be crucial.

However, it can be expected that because the advice is higher quality and more likely to be accepted, that implementation will be substantially better than it would otherwise be. The System will experience increased stability, will be better positioned to improve and will in all likelihood make improvements in performance.

8.2.5 The impact of System performance on wider public confidence

So long as the Government's wider efforts to improve the leadership and implementation capabilities of Oranga Tamariki pay dividends, there should be increased public confidence in the System. This will arise from the fact that there is fully independent monitoring and that through the quality of advice and implementation the System is stabilising and beginning to improve.

8.2.6 The impact of wider public confidence on System performance

Increased public confidence (in both the independence of oversight and System improvement) will reduce the level of (unwarranted) scrutiny on the System by the public, the media and politicians. This will further contribute to System stability and create an environment in which further System improvement can take place.

Once again, we can see a cycle emerging, this time a virtuous cycle. Quality advice and quality implementation lead to System improvement which leads to public confidence, increased Stability and increased opportunity for improvement.

8.2.7 The impact of System performance on Māori and those in care

System stability and improvement will impact particularly on the confidence Māori and those in care have in the System. This will accelerate the effects of increased public confidence described in the previous section. It will also increase the level of confidence that Māori and those in care will have in working with the Monitor. A feedback loop is thereby created by which the whole process recommences but from a higher base. The result is an ongoing increase in System stability and an ongoing increase in System performance.

8.2.8 Conclusion

This option seems to be considerably better than hosting the Monitor within ERO. In fact, the dynamic that is established is the polar opposite. Within ERO there is the possibility of a plummet toward very poor System performance. With the Commission there is the possibility of optimal performance being achieved.

Of course, it is unlikely the contrast will in practice be as stark as that represented here. It is most likely that hosting the function within ERO will not be as negative as the possibility presented here. But it is a real possibility and ongoing poor performance by the System is probably the best that can be hoped for. Equally, it is most likely that locating the monitoring function at the Commission will result in strong improvement by the System, but not necessarily optimal performance.

In particular, the quality of the relationship between Ministers, Oranga Tamariki and the Commission is probably the decisive factor in how much the benefits of locating the function with the Commission are realised. There is a leadership challenge for all involved to recognise the fundamental importance of robust, fully independent monitoring and advice. There is also a leadership challenge to accept that there must be a degree of tension between monitoring and the System for monitoring to be fully independent. If there were no tension between the Independent Monitor and the System, that would be a significant cause for concern.

But, however much we take into account the importance of these relationship issues, it seems clear that locating the monitoring function with the Commission is the superior solution. Given the serious risk of increased harm to children and young people in the departmental agency option, there seems to be no credible reason for choosing that option.

None of this is to say that the preferred solution is perfect, if perfection is incorrectly defined to be no conflict between the Commission and the Government. There is still the possibility of significant differences between the Government and the Commission that eventually play out in the public arena through the Commission's advocacy role.[7]

This, however, will not be a bad thing. Where it happens, it will be appropriate because an appropriate process has got parties to that point, and it will be transparent to the public that it is a legitimate (not ad hoc, or ill-informed) issue for it to consider, with clear information available for it to make its judgement about who is right.

This potential conflict is a necessary part of the oversight system. The leadership challenge for the System, including Ministers and officials, is to accept that the process to that point has been fair (as it is set up to be), and that the ultimate point of having an independent body is that it can (if it has to) speak publicly in favour of its view of what is in the best interests of children and young people.

It may seem unfair to Ministers and officials that there is a body with this role of criticising the Government at times (or, more kindly perhaps, of speaking publicly about areas of, and reasons for, disagreement with the Government). However, any sense of unfairness should be moderated (again a leadership challenge) by the legitimate rationale for the Commission's existence (the need for a fully independent 'watchdog' for children and young people) and the structures established (primarily by moving from a Commissioner-sole to a Board) to maximise the possibility of the advocate performing its functions well (poor performance, or the perception of poor performance, is a risk with any public sector agency; there is no reason to think the risks are any greater with the Commission). The discipline a Board structure requires and Ministers' ability to select the Board should mitigate any sense of unfairness.

The purpose of the optimal solution is to ensure that those occasions when public disagreement occurs, the public knows a lot is at stake and assesses the positions of each party on their merits.

And it is right that the Commission should lose the public discussion sometimes. By definition it cannot be perfect and reasonable people can reasonably have different views on the same issue.

[7] While the Monitor has the opportunity to 'speak out' through its reporting to Parliament under the Bill, it is difficult, given the analysis in this paper, to imagine any such advocacy by the Monitor will be in anything but the muted tones of the public sector

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9.0 Location of the complaints function

Having determined that the independent monitoring and advice functions should sit with the Commission, so that it is now performing two, rather than one, functions, the question of where the complaints function should be located can now be considered.

The advantages of locating the complaints function with the Commission are as follows:

- there would only be one primary point of call for children and young people, creating clarity and reducing confusion;
- the opportunities for learning between the functions are maximised when the functions are internalised within one organisation (so that issues do not arise and children and young people do not fall between the gaps); and
- the Commission already has institutionalised knowledge of child-friendly practice which it can apply to the development of the complaints function.

The disadvantages of locating the complaints function with the Commission are:

- it has not had experience of leading formal investigation of individual complaints since 2010 (it has resolved most complaints informally and referred complaints it cannot resolve to the Ombudsman due to a lack of resources); and
- there is still an element of fragmentation, and potential confusion, as children and young people are still able to complain to the Ombudsman.

The advantages and disadvantages of locating the function with the Ombudsman are the opposite of the advantages and disadvantages of locating the function with the Commission. Consequently, they are not specifically laid out here, being obvious in nature.

The balance of arguments seems to us to favour locating the complaints function within the Commission. In the context of the other clear advantages to locating the function with the Commission, the question of which agency should have the learning to do (the Commission to learn the formal investigation role or the Ombudsman to learn to be child-friendly), it seems clear the Commission should be given the learning task.

The Ombudsman being available for complaints is not undue fragmentation; children and young people who approach the Ombudsman can simply be referred to the Commission, if the Ombudsman so chooses (intuitively, this will be more comprehensible to children and young people than being referred by the Commission, their advocate, to the Ombudsman).

Locating the complaints function with the Commission might be the right choice anyway, even if there were no other factors in its favour. Formal investigation processes are probably more readily learnt than child-friendly (visible and accessible) skills. It is a bigger step for the Ombudsman to become child-friendly than for the Commission to become investigation-savvy (given it has knowledge of how to undertake wider investigations).

There seem to be no particular specialisation advantages to locating the function within the Ombudsman; if anything the specialisation advantage lies with sitting within an organisation that is geared to be child-friendly, the Commission.

In addition, the Ombudsman has had a number of years to make the complaints process child-friendly and has not done so; this does not provide confidence that the role will be undertaken with the necessary sensitivity.

The argument might be made that the Commission will have a bias in favour of children and young people in exercising its complaints function. This is a risk in any fully independent complaints system. Consequently, the same risk pertains to the Ombudsman. As an Officer of Parliament, the Ombudsman's function is to investigate complaints about the actions or inactions of the Executive. By definition, there is the same potential bias by the Ombudsman in favour of children and young people, so this argument for locating the function with the Ombudsman is not persuasive. A Board (such as the Commission) potentially mitigates the risk of bias more effectively than placing the function in the hands of a single person such as the Ombudsman.

10.0 The Royal Commission into Historical Abuse

Application of a conventional policy framework to the policy problem, and using appropriate criteria for assessment, has established the optimal solution to the policy problem to be:

- a single point of call, the Children and Young People's Commission with the combined functions of fully independent complaints, monitoring, advice and advocacy.
- a Board structure for the Commission to ensure discipline and diversity is brought to bear on its various functions, without unduly constraining its agility in performing its advocacy role.
- the Government establishing a responsive monitoring, and trusted and responsive (mid-level independent) advisory, function within, for example, the CWPR Group.

This solution ensures there is the minimum required level of functional independence (full independence), minimises System instability and maximises System learning and improvement, through both the range and type of monitoring and advice provided and the impact of improved public confidence upon the System's ability to improve.

Having identified the optimal solution to the policy problem regarding the oversight system, it is relevant to ask whether the Government should proceed at this point in time given the Royal Commission into Historical Abuse is due to report in June next year.

The advantage of moving ahead, if the optimal solution was adopted, is that the system would be embedded earlier than otherwise with resulting likely benefits for children and young people

The disadvantage of moving ahead is that even with the optimal solution, survivors of abuse in care are likely to say that it is the right thing to do to pause, both from a substantive and from a procedural point of view. Substantively, the Royal Commission may identify factors not identified to date that require reshaping of the optimal design – moving ahead with that as a real possibility would be inefficient and wrong. Procedurally, it seems to be insulting to

survivors to move ahead of such a significant Inquiry. In addition, both these factors would lead to a reduction in public confidence, impacting on System stability and improvement.

On balance, it would be prudent to await the Royal Commission's findings. That conclusion is even stronger in respect of the current proposals: the reduction in public confidence and its impact on System learning (particularly in the crucial set-up phase, where protocols and relationships are critical to get right) could be very significant given the level of political and public concern about the Bill.

Little is lost by the Government in pausing the Bill. The Monitor can continue to establish its monitoring practice. The Ombudsman can continue to develop their child-friendly investigation processes. These resources and associated staff can be transferred to the Commission at a later point at no great loss.

The only downside is the lack of diversity and increase in rigour that the Board brings – that would be lost during the interim. Given the circumstances of the Royal Commission, this is a reasonable cost to bear. With appropriate resourcing the current Commissioner could begin to increase the diversity of the staffing mix in anticipation of a more diverse Board.

11.0 Motivation for the reforms

Finally, it is legitimate to ask: what is the Government's motivation in proposing and persevering with these reforms? If the public (particularly Māori and those in care) reach the conclusion that the Government's motivation is not valid, this could impact on the level of public confidence in the oversight system, leading to adverse impacts on the quality of monitoring, System stability and System improvement.

There are a number of reasons have concerns about the reasonableness of the Government's motivation, in particular:

- the generally poor quality of the analysis undertaken in the lead-up to the Bill (as illustrated in this paper, in particular the absence of a comprehensive policy framework and its application); the general unresponsiveness of the Select Committee to submissions on the key issue of location of the Monitor; and the poor quality of the Committee's report (which did not provide any explanation for its rejection of submitters' key concerns about location of a Monitor so close to government);
- the general superiority of the preferred solution, when a comprehensive policy framework is applied (as it has been in this paper), over the Government's solution;
- Ministers' continued defence of the Bill in the face of a strong opposition with strong arguments (as identified in this paper);
- some commentary from the Government's viewpoint seeming to be quite visceral in assessing Commissioners' past performance;[8] and
- a strong concern in submissions suggesting that the motivation behind the proposals is to weaken Commissioner/Commission.

[8] As per footnote 6.

There seem to be only two possible motivations for the Government's proposals. One, is that senior Ministers and officials have been personally impacted by the criticisms of the Children's Commissioner such that they want to constrain the role as much as possible.

In considering this possibility it is appropriate to examine the funding of the Commission, since funding often speaks to Ministerial satisfaction with the performance of a role. It seems indisputable that Commissioner's office has been consistently under-resourced for many years. Its annual operating revenue for many years was under $3 million to cover the complaints, monitoring, advice and advocacy functions. This is an extremely modest amount by public sector standards, and has only increased recently to $5 million, largely as a result of taking on the anticipated costs of a Board structure, not to provide more resources to do its job better.

By contrast, the Ombudsman has been provided $8 million to undertake just the complaints function and the Independent Monitor $10.5 million for just the monitoring function. Without these resources, the Commission could not have undertaken the monitoring and complaints functions it is now criticised for not exercising. As one of the 'chief architects' of the reforms has implied, further funding was not provided for fear of it resulting in further criticism of the Government.[9]

This examination of the funding of the Children's Commissioner does suggest there may be a personal motivation to the decision to not place the monitoring and complaints functions with the Commission: the fear of further criticism, criticism which the Government feels has been unwarranted and that, therefore, has hurt.

At this point, therefore, the first motivation cannot be dismissed; under this scenario the generally poor analysis in the Government papers is the result of a preconceived end point: to reduce the Commission's capacity to criticise the Government; or, at least, to avoid providing it with sufficient resourcing to criticise the Government, particularly in regard to the System.

The second possible motivation for the Government's perseverance with the Bill is that officials and Ministers have not engaged with the issues sufficiently, such that they genuinely think the solutions they have proposed are for the best.

The length of the policy process and the lack of a coherent one-stop statement of the problem, the options and analysis of the options point to this as a possible reason for the Government having reached poor-quality policy conclusions.

Under this second possible motivation (which is not inconsistent with the first), it may be that officials and Ministers have made the judgement that the Children's Commissioner creates too much 'noise' and, therefore, gets in the way of officials and Ministers getting on with System improvement (so the issue is not so much resenting the Commissioner's criticisms personally, but seeing them as contributing to System instability).

[9] As per footnote 6

If the Government's motivation is either of those outlined above, then they are not reasonable motivations. Whatever has happened in the past should inform, but not determine the policy conclusions; the best arrangements for the future should be the primary concern, and the analysis should clearly be focused on that.

It is hoped that this paper demonstrates that the issues involved are considerably more complex than an analysis of the impact of the Children's Commissioner on the System in the past.

In particular, not assigning to the Commission roles shown by sound analysis to properly belong with it will reduce public confidence in the System significantly, thus impacting adversely on System stability and improvement.

And it is perhaps wishful thinking to expect the Commission not to inquire into the System (even if starved of resources and even if there is a poor quality Board appointed), given the huge public interest there will be in it doing so, its clear statutory obligation to act independently as an ICE, and the particular vulnerability of children and young people in the System.

To the extent past Commissioners have created 'noise' that is destabilising, the analysis in this paper suggests that in the future, with the optimal institutional arrangement in place, any 'noise' generated by the Commission will be necessary to ensure that System improvement takes place.

If there is no 'noise' from the Commission or any 'noise' it generates is poorly-founded (as is possible under the Government's proposed arrangements), then the System will underperform and the safety and well-being of more children and young people than is necessary will be compromised.

12.0 Conclusion

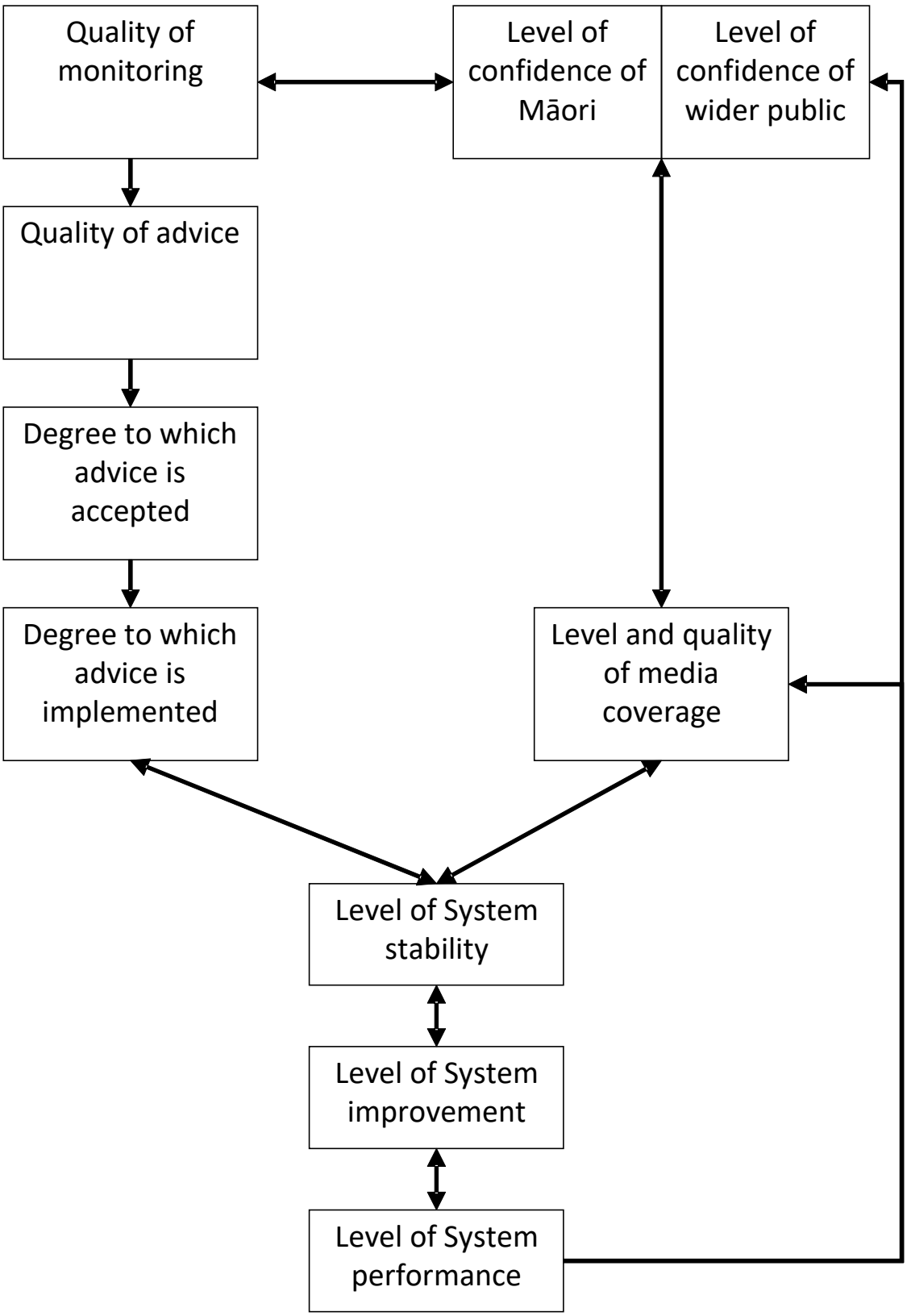
The stakes are high with this Bill. Getting it wrong risks significant reduction in the safety and wellbeing of children and young people. Getting it right creates significant possibilities of achieving real improvements in their safety and wellbeing.

This paper sets out strong grounds to think the wrong path is being taken, and that Ministers and officials need to revisit their decisions.

The Royal Commission provides a legitimate reason for there to be a breathing space and for a fresh look at the issues (further engaging with key parties, including children, young people and Māori whose confidence in the oversight system is so important to achieve).

In the meantime, development of the Government's proposed functional arrangements can continue. And, perhaps most importantly, Oranga Tamariki can proceed with the significant changes it needs to make to policy and practice in an environment of relative stability.

APPENDIX 1: ORANGA TAMARIKI SYSTEM AS A LEARNING SYSTEM



APPENDIX 2: KEY PAPERS

August 2018: The Beatie Report

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/strengthening-independent-oversight/post-consultation-report-independent-oversight.pdf

August 2018: MSD Report on the Beatie Report

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/strengthening-independent-oversight/post-consultation-report-strengthening-independent-oversight-of-oranga-tamariki-and-childrens-issues.pdf

March 2019 Cabinet Paper: Strengthening Independent Oversight

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/strengthening-independent-oversight/cabinet-paper-strengthening-independent-oversight-of-oranga-tamariki-and-childrens-issues.pdf

December 2019 Cabinet Paper: Clarification of Matters to Support Oversight

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/clarification-of-policy-matters-to-support-the-oversight-of-the-oranga-tamariki-system-and-children-s-commission-legislation/cabinet-paper-clarification-of-policy-matters-to-support-the-oversight-of-the-oranga-tamariki-system-and-children-s-commission-legislation-bill.pdf

May 2021 Cabinet Paper One: The Monitor

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/paper-one-arrangements-for-the-monitor-of-the-oranga-tamariki-system.pdf

May 2021 Cabinet Paper Two: Other Policy Issues

https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/paper-two-oversight-of-the-oranga-tamariki-system-and-children-and-young-people-s-commission-bill-further-policy-decisions.pdf

October 2021 Cabinet Paper: Introduction of the Bill

https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/information-releases/cabinet-papers/2021/oversight-of-oranga-tamariki/cabinet-paper-december.html