



The Paediatric Society of New Zealand
Te Kāhui Mātai Arotamariki o Aotearoa

Submission on behalf of the Paediatric Society of New Zealand (PSNZ)

**Oversight of Oranga Tamariki System and Children and Young People's Commission
Bill 2021**

Who are we

The Paediatric Society of New Zealand Te Kāhui Mātai Arotamariki o Aotearoa is a professional body of >500 doctors, nurses, allied health clinicians, officials and managers working to improve the health and wellbeing of tamariki and rangatahi in Aotearoa. We were founded in 1947 and are a not-for-profit membership organisation. We support many clinical networks focused on specific areas of practice.

The Child Protection Clinical Network is one of the Networks in the NZ Child and Youth Clinical Networks support by the MOH in conjunction with the Paediatric Society. Members include paediatricians, nurses, midwives and social workers with expertise in child protection. This submission was written by the Child Protection Clinical Network but represents the collective view of the PSNZ.

Children in need of care and protection are part of the everyday clinical practice of many members of the society both because they may present acutely for care but also because many of these children are at a much higher risk for developmental, mental health and physical health problems throughout childhood and adolescence and then into adulthood. Members of the society also regularly in their clinical practice see the effects of poverty and disadvantage experienced by children in Aotearoa and the disparities in health outcomes for Māori and Pacific tamariki and rangatahi.

We would like to represent the views outlined in this submission in person to the Select Committee. As we are both practising clinicians we would be grateful for advance notice if possible.

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Executive summary

The Paediatric Society of New Zealand notes and agrees:

- That the monitoring and advocacy functions of the Children's Commissioner are both essential for the wellbeing of New Zealand's children and young people.
- That effective monitoring of the Oranga Tamariki system must be independent, impartial, expert, multidisciplinary, thorough and well-evidenced.

We support:

- Strengthening the Treaty partnership and Māori oversight of the Oranga Tamariki system.
- Retaining the legislative independence of the monitoring and advocacy functions.
- Placing the complaints and investigations function with the Office of the Ombudsmen in partnership with the Children's Commissioner has merit, but needs further discussion, e.g., leaving complaints and investigation for other matters with the Children's Commissioner.

We do not agree with the contentions that

- the monitoring and advocacy roles of the Children's Commissioner are too large or complex for one Commissioner to manage.
- the monitoring and advocacy roles are fundamentally conflicted and irreconcilable.

We do not support:

- Separation of the monitoring and advocacy functions of the Children's Commissioner.
- Dis-establishing the Children's Commissioner role and replacing it with a Commission.

We believe instead that

- The role of a single, identifiable Children's Commissioner should be retained.
- The monitoring and advocacy functions of the Children's Commissioner should be strengthened.

Objectives of the omnibus Bill: why do we need advocacy for children and a Monitor of Oranga Tamariki?

The stated broad policy objectives of the omnibus bill are to "*strengthen (both) the independent monitoring and complaints oversight of the OT system and advocacy for children's issues generally*". The policy objectives are laudable and unlikely to change. This submission therefore addresses the actual wording against these policy objectives.

The key question is: Do we believe that separating the advocacy and monitoring functions of the Children's Commissioner and other changes will strengthen monitoring and complaints oversight for children in the Oranga Tamariki system and advocacy for children and young people in New Zealand overall, or undermine them?

The reasons given for having strong independent monitoring and complaints oversight functions are sound: assurance that outcomes for vulnerable children are improving, independent scrutiny of coercive powers especially for children being removed, to support improved processes and systems, and to promote transparency and trust in the system. All of these are important and all have been threatened in the past by, for example, a lack of transparency and reliable data from Child, Youth and Family (CYF) and subsequently Oranga Tamariki (OT), as identified in the Expert Panel's 2015 report¹.

Why does Government believe the current system for Monitoring Oranga Tamariki and advocating for children generally needs to change?

Currently, general advocacy for children and most functions to monitor Oranga Tamariki are the responsibility of the Children's Commissionerⁱⁱ. A 2018 Cabinet paperⁱⁱⁱ described the Commissioner's legislative mandate and officials' advice on the then current strengths and weaknesses of the current system. The paper discussed the reform of OT and poor current outcomes for tamariki in the care and protection and youth justice systems, especially for Māori. Officials noted the changes to the system, including increasing the age ranges, more support for children in care and transitioning from care, requirement for OT to partner with Māori, new legislative responsibilities for Courts, Police, Education and Health, and the new care standards. Most importantly, officials conclude that the new system is larger, has more players, is more complex and that expectations for the system are greater.

The Cabinet paper describes the core functions of oversight and what is critical for effective oversight. To be trusted by Māori and the public, and to engage with key groups, the Monitor must be independent. To be trusted by Ministers and improve policy decisions, the Monitor must be independent of the agency it is monitoring, impartial and well-evidenced.

We agree with these points.

The Cabinet paper then discussed gaps, overlaps and constraints in oversight at present (p10). Advocacy is seen as a strength of the Office of the Children's Commissioner (OCC), e.g., on child poverty. We agree.

The paper noted that the complaints mechanisms for young people in the OT system are not child friendly and children don't use them. We agree. Young people in care not using the complaints system is an international problem and complex to solve, because young people in the care and protection system and their families often have limited literacy, are disempowered and have little trust in government. We note that OCC has done a great deal of work with OT on making the complaints system accessible over the years and helped design a more child friendly system. Ultimately though, the complaints system and any problems with it are the responsibility of OT. While complaints have to be investigated and taken seriously when they arise, their place in improving care is, we believe, likely to remain small compared to other mechanisms.

The OCC visits all nine OT residences and several OT sites (offices) every year. The OCC Monitoring Team are experts in child protection and youth justice practice, and in talking to young people in state care. They privilege this feedback in every report and in the annual OCC State of Care report. This has been a very effective way of understanding and communicating their experience of the system. The PSNZ particularly note the multidisciplinary skill set of the Monitoring Team and expertise in gathering the voice of care-experienced young people, which gives a comprehensive view of care and outcomes. In our view, these strengths are essential, hard to replicate and must be retained. To claim that OCC is not getting the voice of care-experienced young people simply does not stand scrutiny.

The Cabinet paper claims, "The OCC may not be set up or fully resourced to deliver the full range of oversight functions at the level and scale needed in the future. For example, the Commissioner has indicated that he does not have all the powers needed to effectively carry out investigations, make findings and compel remedial action."

We agree, and believe that capacity, rather than skills has been the key constraint on the Children's Commissioner's ability to monitor Oranga Tamariki.

The perception that the task is too big for one Commissioner, and that the Monitoring and Advocacy functions are in conflict

The Cabinet paper discusses “broad challenges” that “emerged from our current consultation”, without saying who raised these challenges, or whether key stakeholders agreed with them or not. The challenges include “balancing a broad remit”, so OCC “may have challenges focusing sufficiently on both groups”. “There was also a perception” (? whose) that the advocacy role “does not fit” alongside monitoring, complaints and investigations, which could distract from objectivity. Specifically, a view appears to have formed that:

- a) The task of monitoring the Oranga Tamariki system is so large and complex that it must be the sole focus of one agency, and
- b) The roles of trusted advisor to a Minister and public advocate are irreconcilable.

Monitoring is too large and complex for one Commissioner, or too important to place in an organisation with other tasks

We agree that the Oranga Tamariki system has increased in size and complexity. There are now more providers with direct responsibility for children and young people in the OT system. As these are the most vulnerable young people in society it is essential that practice and outcomes be monitored well and publicly shared.

However, the OT system is no more complex than many other complex systems, e.g., a District Health Board or the education system. To be too complex for one Commissioner, it would have to be too complex for all leaders responsible for the OT system, e.g., the CEOs of OT and MSD and the Ministers. This is clearly not a supportable position.

The PSNZ believes that Children’s Commissioners have performed the monitoring function well, constrained only by resource. We have seen no evidence that the system is too complex for any previous or current Commissioner to grasp, nor that any Commissioner has not prioritised the function appropriately. To suggest so concerns us as it amounts to an anonymous attack on the independence and credibility of the current and previous Commissioners.

We note the multidisciplinary nature of the OCC’s monitoring team, their highly skilled ability to hear the voices of young people in care, that these voices are privileged in the State of Care reports, robustness of their observations and conclusions, and the accessibility of the State of Care reports.^{iv}

The roles of trusted advisor to a Minister and public advocate are irreconcilable.

For this to be true, it must be true of all entities legislated to be both monitor / advisor and advocate. It is our understanding that this is the role of all Independent Crown Entities, e.g., the Parliamentary Commissioner for the Environment, Health and Disability Commissioner, Ombudsmen and Independent Policy Conduct Authority. All monitor an aspect of the public service and advise Ministers and all release their findings publicly and promote change in policy and practice.

The PSNZ is very concerned at the claim that these roles cannot co-exist. The Independent Crown Entities are a fundamental check on the exercise of Government power and to erode these checks and balances on power will undermine trust in Government. The basis for this claim should be substantiated with examples or withdrawn.

What were the options for change, what did Ministers finally decide (the new Bill) and what are the pros and cons?

If you accept that the roles are conflicted or too big, (Cabinet Paper p10) you have the options of separating the functions or keeping them together (Appendix B, p17-21).

The 2018 Cabinet Paper gave four options:

1A: Keep all functions with OCC and increase the investment. The risks were considered to include: large demands on a single commissioner, priorities remain at the discretion of a single commissioner, hindering the effectiveness of the OCC due to a lack of objectivity and difficulty recruiting.

1B: Keep all functions in the OCC and strengthen aspects, e.g., separate Commissioners for various roles, enhancing the powers – see below

2A: Partial separation of functions – keep monitoring and advocacy, while complaints and investigations go elsewhere

2B Complete separation of functions – keep advocacy only, while monitoring, complaints and investigations functions go elsewhere – what was finally decided. The Bill recognises “...that it is no longer possible for a single individual to be across the broad scope of issues...”

In practice, this Act will mean the Office of the Children’s Commissioner will be broken up and the functions distributed between three agencies: the Ombudsmen, a new Children and Young People’s Commission and a new independent Monitor. What will this mean in practice?

1. *Complaints about the Oranga Tamariki system will now go to the Ombudsmen:* The drafters believe that the Ombudsman is best placed to investigate complaints and their Act is sufficient for the task. The new Bill adds to the Ombudsmen Act 1975, requiring cultural competence and developing relationships with iwi and Māori organisations, giving powers to require OT to provide information and that they may provide guidance on design of complaints processes and to support learning and continuous improvement. This separates the complaints and oversight functions.

Pros:

- the Ombudsman is good at investigating complaints about powerful Government bodies, independent and fearless in publicly laying out their findings.
- cultural competence and iwi relationships are a good idea and welcome.
- new requirements on OT to provide information.

Cons:

- The Ombudsmen do not yet have the specialist staff to connect with vulnerable tamariki and rangatahi that the OCC does and that function would need to be built.
- It is not clear how findings from complaints and monitoring will be brought together to find common themes, which is what the OCC has done well in the annual State of Care reports.

On balance, the PSNZ agrees that this provision has merit and could strengthen the complaints and investigations system for children and young people in the Oranga Tamariki system, provided that the Children’s Commissioner works with the Ombudsmen to develop these skills and pool lessons learnt each year, e.g., in a combined annual “State of the Oranga Tamariki System” report.

We note that the OCC also receives complaints about other issues affecting children, e.g., being excluded from school and poor treatment by other Ministries or agencies. PSNZ believes the Children’s Commissioner should retain the ability to receive complaints on other

matters, investigate these with the current powers retained or ask the Ombudsmen to investigate.

2. The Children's Commissioner is replaced with a *Children and Young People's Commission*. The new Commission will have its own Act, separate from the monitoring and complaints oversight of OT, will remain an Independent Crown Entity and the minister with oversight will be appointed by the Prime Minister and not be the minister responsible for OT. "The function of inquiring generally into, and reporting on, any matter that relates to the welfare of children will be strengthened by the Bill with the ability of the Commission to require the provision of information from agencies to enable the effective discharge of this function."

Pros

- Requirement to provide information
- Remains an Independent Crown Entity

Cons

- Loss of a recognisable public face and leader for children: the Children's Commissioner is New Zealand's recognised and trusted advocate for children. S/he is who you call when you're worried about an issue facing children, e.g., >1,000 calls a year to the OCC advice line; hundreds of invitations to speak each year; dozens of media requests for an expert perspective on children's issues.
- The need for multiple Commissioners has not been clearly outlined.
- No clear leader of the Commission and no clarity of roles: risks a replay of the difficulties seen in the Human Rights Commission.

The PSNZ does not support this. The advocacy role should be retained in a single, identifiable Children's Commissioner, adequately resourced and supported for the role.

Each Commissioner should however give serious consideration to employing a deputy with responsibility for the operational leadership of the Office, freeing the Commissioner up to focus on relationships with key leaders and strategy.

3. Creating a new *Independent Monitor of the Oranga Tamariki System* (Part 2). This will be a departmental agency within the Education Review Office. Clauses state it will be independent, objective and impartial, etc. A Minister cannot direct the Monitor to stop or prevent any activity, it must have a Māori Advisory group and cooperate with iwi to improve monitoring. It must publish a *State of the Oranga Tamariki System Report* at least once every 3 years, and an annual report on compliance with regulations on national care standards and outcomes for tamariki Māori in the system. A Minister can request the Monitor to carry out a review on any topic but not in a way that makes them stop what they're currently doing. They can review any aspect of practice in the OT system and report on this. The Independent Monitor presents the reports to the Minister responsible for the Oranga Tamariki system, who presents the final reports to the House. Agencies are required to prepare a response to the report describing what they will do in response, by when and how they will know it's made a difference (this is new and welcome). The Monitor's reports are required to be published on their website, with identifiable details of individuals redacted unless consent is given. The Monitor's staff have power to enter OT premises and that of contractors, with notice and to require information from an agency providing support. The Monitor may report on any interference in them carrying out their duties but can't review any decision of a Court. The Monitor and Monitor's relationship with the Ombudsman will be reviewed no more than five years after enactment. Abuse in state care currently is the joint responsibility of OT and MSD. Claims before 1/4/17 will go to MSD and after that to OT.

Pros

- Minister cannot direct
- Māori Advisory Group and iwi partnerships
- Can review any aspect of practice
- Power to enter and require information be provided
- Agencies must respond
- Public reporting on website

PSNZ supports these aspects and notes that most are in place already. Further strengthening relationships with iwi and Māori organisations will further strengthen the role.

Cons

- The assertion that there is a conflict between the monitoring and advocacy roles in the Office of the Children's Commissioner is a serious challenge to the independence and performance of the current and previous Commissioners, as discussed above. The risk has never been properly described. No specific examples of conflicts have been given, the people expressing these opinions have not been identified and Commissioners never given the opportunity to collectively defend themselves.
- We note the many advantages of having the Monitoring and Advocacy functions under one roof, and could find no evidence of them being described in official advice. These advantages would be lost by separation of functions and include:
 - The Monitoring function is strengthened by co-location with Advocacy, e.g.,
 - the advocacy team have most skills in consulting with young people. Their child voice experts have upskilled the Monitoring team and the two teams have on occasion worked together on joint projects.
 - the advocacy team's skills in writing for public understanding has improved the readability of State of Care reports and public support for investment in the most vulnerable tamariki and rangatahi.
 - The Advocacy function is strengthened by co-location with Monitoring, e.g., greater understanding of the lived realities of the most vulnerable improves the Commissioner's advocacy.
 - The gravitas, independence of and trust in the Children's Commissioner give credibility to the findings of the Monitoring team and their reports, particularly the annual State of Care report. There is intense public and media interest in the annual report, which supports change and trust in the OT system.
- Our experience is that a departmental agency cannot help but be influenced by the Minister and Ministry, e.g., risk averse/ careful with language. Being "inside the bureaucracy" it is likely to quickly become bogged down in detail and inaccessible for most people.
- Public Report only every 3 years, should be annual.
- Public trust in the OT system is likely to become further eroded over time.

The PSNZ therefore cannot support this. The impact of separation of the advocacy and monitoring functions will be the opposite of the stated goal, and is likely to undermine both functions and public trust in the Oranga Tamariki system.

We note the argument that larger organisations have fewer issues attracting, retaining, developing and progressing staff, which is why the Monitor would be placed with the Education Review Office. However, to our knowledge the Office of the Children's

Commissioner has never had a problem recruiting quality staff, including members of PSNZ. Recruitment would only be an issue if the monitoring function was removed from the OCC.

We therefore recommend that the monitoring function be retained within the Office of the Children's Commissioner, with additional powers and resource.

The United Nations Convention on the Rights of the Child

The joint functions of the Children's Commissioner can be understood by reference to the Children's Commissioner Act 2003 and the Convention on the Rights of the Child (UNCROC). These are the Children's Commissioner's "reason for being".

UNCROC Articles 2 and 3

The Children's Commissioner is the advocate for all children in Aotearoa (UNCROC article 2). S/he is required to give better effect to the Convention and to have regard to the Convention when carrying out their functions and powers (CC Act 2003, ss3 and 11). Children at risk of abuse and neglect (article 3) are particularly noted in the Convention. Yet the new Act has the effect of removing children in the Oranga Tamariki system from the Children's Commission(er)'s responsibilities. It is hard to understand how the Commission(er) would give effect to their responsibilities under article 3 if they were not also responsible for children and young people in the care and protection and youth justice systems. To defend separation of functions, officials should demonstrate how this dilemma can be resolved.

Children's Commissioner Act 2003

The functions of the Children's Commissioner are described in s12 and 13 of the Act. The functions are intended to be (and in our experience, are) complementary; the whole should add up to more than the sum of the parts, e.g.:

- the child poverty work was inspired (among other things) by discussions with young people in the C&P and YJ systems.
- understanding UNCROC meant the age of culpability and eligibility for support had to be addressed and s59 repealed.
- Getting good at consulting with children improved our monitoring and advocacy for children generally.
- Etc.

To defend separation of these functions officials therefore need to demonstrate

- a) That the functions are not currently complementary and how, with examples, and
- b) That any advantages of separating the functions are greater than keeping them together.

The PSNZ believes that removal of monitoring of the care and protection system from the responsibilities of the Children's Commissioner creates challenges to effective implementation of the Convention on the Rights of the Child and should not be supported.

References

i Expert Panel Final Report: investing in New Zealand's Children and their Families. Modernising Child, Youth and Family Expert Panel (2015). Wellington, Ministry for Social Development.

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ii Children's Commissioner Act 2003.

<https://www.legislation.govt.nz/act/public/2003/0121/latest/DLM230429.html>

iii Consultation on Options to Strengthen Independent Oversight (Children's Issues and Oranga Tamariki System). Office of the Minister for Social Development (2018). Wellington, Ministry for Social Development.

<https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/policy-development/oversight-for-children/cabinet-paper-consultation-on-options-to-strengthen-independent-oversight.pdf>

iv <https://www.occ.org.nz/our-work/state-of-care/>.