

IN CONFIDENCE

Office of the Minister for Children
Office of the Minister for Social Development

Chair
Cabinet Business Committee

INQUIRY INTO THE ABUSE OF CHILDREN IN STATE CARE

Proposal

- 1 This paper seeks agreement to establish an inquiry into the abuse of children in state care. A Ministerial Working Group is proposed to guide decision-making on the establishment of the inquiry.

Executive summary

- 2 This Government undertook in our 100 day plan to “set up an inquiry into the abuse of children in state care” in response to growing public calls for an independent inquiry. This paper outlines our first steps to achieve this.
- 3 A number of key decisions need to be made in order for an inquiry to be established. These include the legal status, purpose, and scope of the inquiry. These parameters will impact on substantive issues covered and the inquiry’s effectiveness at meeting the needs of survivors.
- 4 To help progress this work efficiently, we propose that a Ministerial Working Group is formed to provide oversight of the work. The proposed Working Group would be supported by officials to consider the substance and significance of these decisions, and would report back to Cabinet for decision on substantive matters.
- 5 We propose that this group comprise the Ministers for Children, Education, Health, Internal Affairs, Justice, Social Development, State Services, and Whānau Ora. The Minister for Children and Internal Affairs will chair this group supported by the Minister for Social Development.
- 6 We propose that activity in the first 100 days is focused on the core foundations: terms of reference, inquiry head, and budget. The Minister of Internal Affairs will report back from the Ministerial Working Group to Cabinet on these matters in January 2018.

An inquiry into abuse of children in state care is required

- 7 In recent decades, many jurisdictions have grappled with allegations of historic abuse in state care, which have required thorough and effective examination. Significant inquiries have been initiated in the United Kingdom, Canada and Australia. The size and scale of these inquiries required a significant investment of time, resources and expertise.
- 8 New Zealand responses to date to concerns around abuse in state care have included answering individual legal claims, restorative and assistance processes for affected groups, and larger scale reviews of state care delivery and oversight mechanisms.
 - Claims processes – In 2008, in response to significant numbers of individuals bringing legal cases in relation to their experiences in state care, the Government determined that agencies should work to settle claims with individuals where possible. 9(2)(h)

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9(2)(h)

- Restorative processes:

The Confidential Listening and Assistance Service, which provided a forum to hear from and assist people who alleged abuse or neglect in state care before 1992. Between 2008 and 2015, over 1,100 New Zealanders engaged with this service.²

The Confidential Forum for Former In-Patients of Psychiatric Hospitals, which provided a forum to hear from and offer assistance to former patients with concerns about their experiences in State institutions before 1992.³

- Reviews and reorganisations of the delivery of state care, and the institutional and oversight arrangements, have often in part, been a response to concerns about abuse and neglect in state care.

In the child welfare area these have included Puao-te-ata-tu (1988) and most recently, the Expert Panel on Modernising Child, Youth and Family (2015). The Panel counted 14 restructures to Child, Youth and Family between 1998 and 2008.⁴

In the disability and mental health areas most large institutions for children and adults were closed between the 1980s and the early 21st century, in response to growing concerns about the environments they provided.

The Children's Commissioner was established in 1989 with a mandate to monitor state care of children; the Health and Disability Commissioner was established in 1992.

- 9 The Confidential Listening and Assistance Service presented its final report *Some Memories Never Fade* in 2015.² The report included several recommendations relevant to this inquiry; in particular for the Government to offer a public statement about what happened to those who suffered abuse and neglect in State care and acknowledge the wrongs of the past.⁵
- 10 Since that time, there have been growing public calls for an independent inquiry. Evidence of this includes petitions presented to the New Zealand Parliament,⁶ and survivors of abuse gathering outside Parliament to tell their stories and join the call for an inquiry. The New Zealand Human Rights Commission launched the 'Never Again' campaign,⁷ which included an open letter endorsed by over 12,000 New Zealanders. The subject has also been considered at the international level by United Nations human rights treaty bodies.⁸
- 11 We believe a full, independent inquiry is now appropriate. The overriding purposes of an inquiry include: understanding the full extent of abuse that happened in state care,

¹ Figures as at July 2017. New cases are continuing to be lodged.

² Final Report of the Confidential Listening and Assistance Service [https://www.dia.govt.nz/diawebsite.nsf/Files/Confidential-Listening-and-Assistance/\\$file/Confidential-Listening-and-Assistance-Service-Final-Report-Some-Memories-Never-Fade.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Confidential-Listening-and-Assistance/$file/Confidential-Listening-and-Assistance-Service-Final-Report-Some-Memories-Never-Fade.pdf)

³ Established in 2005 and reported in 2007; 493 people attended meetings with the Forum. Te Āiotanga: Report of the Confidential Forum for Former In-Patients of Psychiatric Hospitals.

https://d3n8a8pro7vhmx.cloudfront.net/nzhrc/pages/174/attachments/original/1487714414/Report_of_the_Confidential_Forum_for_Former_In-Patients_of_Psychiatric_Hospitals.pdf?1487714414.

⁴ Modernising Child, Youth and Family, Expert Panel: Interim report <https://www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/cyf-modernisation/interim-report-expert-panel.pdf>

⁵ Other key recommendations include 3: to establish an independent body to resolve historic and current complaints, and 6: to ensure lessons are learned from the past.

⁶ For example, Petition 2014/136 of Anneleise Hall: *That the House note that 5 296 people have signed an online petition requesting that the Minister for Social Development set up an independent commission of inquiry into the historic sexual physical and emotional abuse of children in state care.*

⁷ New Zealand Human Rights Commission, *Never Again: E Kore Ano* <http://www.neveragain.co.nz/>

⁸ The subject has been considered, for example, by the UN Committee on the Elimination of Racial Discrimination, as well as the UN Committee against Torture.

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acknowledging the impact of this on those involved, and examining the underlying questions about why the abuse occurred. It would also involve considering how the lessons learned from the past translate into future practice.

Comment

Key decisions are required on both formal and substantive matters, to ensure the inquiry's success

- 12 Setting up an independent inquiry is a multi-stage process, and some elements will require careful deliberation. Decisions on the following matters are required for an inquiry to be established.
 - 12.1 **Legal status** – There are different inquiry types that could be used for this inquiry under the Inquiries Act 2013: Royal Commission, public inquiry, or government inquiry. They are treated equally under the Act in terms of their functions and powers. The main difference is their status, method of appointment, and the way they report back on their work. The need for the inquiry to be, and be seen to be independent, and for its status to reflect the seriousness of the issue, will help determine the appropriate inquiry type. It will also depend to some extent on the desired scope of the inquiry.
 - 12.2 **Terms of reference** – Terms of reference are the key enabling instrument and commissioning lever for the Government when setting up an independent inquiry. It is important to get the details right in order to achieve the goals and mitigate potential risks in an appropriate manner, including actual or perceived conflict of interests. Inquiries, due to their unique function, are afforded wide statutory authority to regulate their own processes, subject to the parameters in the terms of reference. While terms of reference can be amended through a formal process, it is highly preferable to ensure this instrument is acceptable and fit-for-purpose from the outset.
 - 12.3 **Purpose** – The purpose of the inquiry is a key feature of the terms of reference. In general, the purpose of an inquiry may include establishing facts or developing policy, learning from events, providing an opportunity for reconciliation and resolution, or holding people or organisations to account. In this case, the defined purpose is likely to include the presentation of a clear, public account of what happened to affected individuals in state care during the relevant period, an assessment of why it happened (systemic analysis), and an assessment of the impact on survivors. Consideration will also need to be given to tone of inquiry – for example, the balance between forensic detail and accountability, or truth, reconciliation and restorative processes (this can be reflected in both the terms of reference and the skills of the appointed head of the inquiry and their preferred ways of working). The purpose of the inquiry, as provided in the terms of reference, may also refer to compliance with international human rights treaties and obligations (set out in paragraph 21).
 - 12.4 **Scope and deliverables** – A number of detailed scope and deliverable questions will need to be considered that will have an impact on the complexity of the inquiry's work and on individuals whose experiences might fall within or outside the scope of this particular inquiry. The scope will also have cost implications. Key scoping considerations include:
 - **definition of state care:** this could be broadly defined to include a wide range of state care settings, or narrowly defined to include specific sorts of facilities. Some stakeholders have made public calls for an inquiry that goes beyond state care, for

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example, into other publically funded institutions (eg boarding schools), or societal institutions (eg churches, clubs)

- **dates covered:** this will determine whether more recent experiences are included and how far back to look
- **ages covered:** different definitions of children exist and the public calls for an inquiry have included reference to vulnerable adults in state care
- **definition of abuse:** some international inquiries have focused on physical and sexual abuse, while emotional (psychological) abuse and neglect could also be included. These different types of abuse are fairly well defined in New Zealand law, as well as relevant international law applicable to New Zealand
- **whether recommendations should be sought:** recommendations are a common feature of international inquiries. Given the impact of recommendations, these require careful consideration. Defining the powers of the inquiry, particularly around resolution and redress, will be a key consideration for Cabinet. These could have significant financial implications
- **parameters around the inquiry's focus:** the manner in which the inquiry considers matters such as the previous restorative work to address historic cases, will need to be clarified in the terms of reference, as will the extent to which the inquiry considers the current policies applicable to children and vulnerable adults
- **principles guiding engagement with survivors:** careful consideration will be given to how the terms of reference can include guidance on the principles to assist the inquiry in its engagement with individuals, whilst ensuring the necessary independence of the inquiry and its processes.

12.5 **Structure, make-up and cost** – Practical decisions will need to be made including the appointment of a head of the inquiry, facilities and secretariat support. The administrative and other resources, including resources to support agencies to respond to the inquiry, will need to be assessed to ensure the inquiry is able to undertake its work in a timely manner. Depending on scope, the inquiry would be examining alleged failures of state agencies. Active identification and management of actual or perceived conflicts of interest will be needed, both in the establishment phase and thereafter.

We propose that a Ministerial Working Group be established to help set up the inquiry

- 13 To help progress this work efficiently, we propose that a Ministerial Working Group is formed to oversee the establishment of the inquiry. The proposed Working Group would be supported by officials to consider the substance and significance of these matters, including how they interrelate, and would report back to Cabinet in January 2018 for decisions.
- 14 We propose that this group include the Ministers for Children, Education, Health, Internal Affairs, Justice, Social Development, State Services, and Whānau Ora. The Minister for Children and Internal Affairs will chair this group supported by the Minister for Social Development.
- 15 Under the Inquiries Act 2013 the Department of Internal Affairs is usually the agency responsible for administering inquiries. We propose that the Department of Internal Affairs administer this inquiry. This ensures consistency with previous practice and Cabinet Manual guidance. It also appropriately responds to any conflict, or perceived conflict, of interest. Oranga Tamariki and the Ministry for Social Development will work closely with the

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Department of Internal Affairs on establishment activity in support of the Minister of Internal Affairs, who will report back to Cabinet.

We propose that our activity in the first 100 days focuses on the core foundations: terms of reference, inquiry head, and budget allocation

- 16 We are seeking confirmation of Cabinet's expectations for what will be progressed within the 100 day period. We propose that activity in the first 100 days is focused on the core foundations: terms of reference, inquiry head, and budget. This approach is challenging but realistic. The terms of reference, which usually includes the appointed member(s), once formalised, establishes the inquiry. From this point, it would be up to the inquiry itself to determine its work programme.

Consultation

- 17 The Ministries of Education, Health and Justice, Te Puni Kōkiri, State Services Commission, Crown Law, Treasury and Department of Internal Affairs were consulted on this paper. The Minister for Children has also consulted the Prime Minister and Attorney General on whether an inquiry should be established.
- 18 Given the strong stakeholder interest in this inquiry and the importance of the terms of reference to the inquiry's work, we will undertake careful and focused consultation with relevant agencies and key individuals in preparing advice for Cabinet.

Financial implications

- 19 Costs can be difficult to forecast accurately at the outset and, historically, inquiries have sought further funding later on to complete their work. The Department of Internal Affairs does not have baseline funding to support inquiries and cannot absorb inquiry-related costs. Financial implications will be considered in parallel to the questions around the scope of the inquiry and further advice will be provided to Cabinet.

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s9(2)(g)(i)

Human rights implications

- 21 A strong rationale for the inquiry itself is to uphold human rights. The scope and work of inquiry should be mindful of compliance with international treaties and obligations, including the:
- UN Convention on the Rights of the Child (UNCRC)
 - UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)
 - UN Convention on the Rights of Persons with Disabilities (CRPD)
 - UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- 22 Human rights implications include procedural fairness for all parties, whether they are complainants or persons whose conduct is under consideration by the inquiry.

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23 The Crown needs to act consistently with the principles of the Treaty, in the establishment of the inquiry. Officials are working with Te Puni Kōkiri and Crown Law, as part of this process, to guide engagement with Māori.

Legislative implications

24 None.

Regulatory impact and compliance cost statement

25 Not required.

Gender implications

26 The inquiry would be expected to include all genders in its scope and to consider gender implications in the development of its processes.

Disability perspective

27 The inquiry will need to engage effectively with all relevant individuals, including those with disabilities. Decisions on the scope of the inquiry will have an impact on whether those in state care with disabilities are included as a particular focus group.

Publicity

28 Publicity will be co-ordinated by the responsible Minister.

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Recommendations

29 It is recommended that the Committee:

- 1 **note** that the Government has committed to set up an inquiry into the abuse of children in state care in its first hundred days
- 2 **agree** to establish an inquiry under the Inquiries Act 2013, subject to further advice on the nature and scope of the inquiry
- 3 **agree** to establish a Ministerial Working Group to guide decision-making on the establishment of the inquiry
- 4 **agree** that the membership of the Ministerial Working Group will include the Ministers for Children, Education, Health, Internal Affairs, Justice, Social Development, State Services, and Whānau Ora
- 5 **agree** that the Department of Internal Affairs is the administering agency for the inquiry
- 6 **agree** that the Minister for Children and Internal Affairs will chair the Ministerial Working Group, supported by the Minister for Social Development
- 7 **invite** the Minister of Internal Affairs, to report back to Cabinet in January 2018 from the Ministerial Working Group on the inquiry establishment: terms of reference, budget and appointment of a head.

Authorised for lodgement

Hon Tracey Martin
Minister for Children

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Hon Carmel Sepuloni
Minister for Social Development

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