



Report

Date: 15 December 2017

Security Level: IN CONFIDENCE

To: Ministerial Working Group on the Inquiry into Abuse in State
Care

Supplementary advice to Paper One: The potential purpose and scope of an inquiry into abuse in state care

Purpose of the report

- 1 This briefing outlines the purpose and outputs for the proposed inquiry, agreed at the Ministerial Working Group meeting on 11 December 2017, and provides further advice requested at the meeting.

Executive summary

- 2 The Government has committed to setting up an inquiry into the abuse of children in state care as part of its 100-day plan (the Inquiry).
- 3 On 11 December 2017, the Working Group met for the first time to discuss the potential purposes and scope for the Inquiry. This paper summarises the purposes and related outputs agreed at the meeting.
- 4 The Working Group requested further advice on the following scope aspects of the Inquiry:
 - definition of care
 - entry into care
 - age range
 - time period.
- 5 On 18 December 2017, the Working Group will meet to discuss a second paper covering other establishment questions, including the type of inquiry, reporting, appointments, structure and funding.
- 6 We invite you to provide feedback on the further advice provided in this paper.

Recommended actions

It is recommended that you:

- 1 **provide any further feedback** on the purposes and outputs to be set for the Inquiry
- 2 **provide feedback** on the care settings to be set for the Inquiry and whether they should include:
 - health-based placements
 - residential special schools
 - health camps
 - health camp schools
 - school hostels.
- 3 **note** the definition of ‘vulnerable persons’
- 4 **provide feedback** on the inclusion of decisions around entry into care
- 5 **provide feedback** on whether the Inquiry should include disabled adults
- 6 **provide feedback** on your preferred time period to be considered by the Inquiry
- 7 **note** the information about complaints and grievance mechanisms

Joint paper:

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Purposes of the Inquiry

- 7 The purposes provided in the Inquiry's Terms of Reference will create expectations as to what the Inquiry should investigate and the outputs it should deliver.
- 8 At the first Working Group meeting held on 11 December, you indicated the main purposes and outputs expected of the Inquiry as the following:

Historical focus

Purpose 1: investigate the nature and extent of the abuse that occurred – It is expected the Inquiry will make a public statement on these matters and will create a more detailed public record.

Purpose 2: investigate the impacts of the abuse on survivors and their families, whānau and communities – It is expected the Inquiry will take a particular focus on investigating the differential impacts of the abuse for Māori, Pacific peoples and disabled people.

Purpose 3: investigate why the abuse occurred – It is expected the Inquiry will recommend that the Government make an apology and will present general findings on the causes of or contributing factors to the abuse, including systemic issues.

Current and future focus

Purpose 4: consider current settings to prevent and respond to abuse – It is expected the Inquiry will report on general lessons to be learned from the past and will identify gaps or recommended areas of focus, such as standards or protections to help to prevent abuse or promote good care. In addition, it is expected the Inquiry will examine current policy, legislative and practice settings, including around rehabilitation of survivors, and make specific recommendations, building on previous work already completed.

Purpose 5: consider existing redress processes for people who have been abused – It is expected the Inquiry will comment on the impact of existing redress processes on survivors and may recommend changes to these processes.

- 9 At the Working Group meeting you indicated that the Inquiry should not have separate workstreams that investigate the nature and extent of abuse of Māori, Pacific peoples and disabled people, rather the Inquiry should focus on the differential impacts of the abuse for Māori, Pacific peoples and disabled people (**Purpose 2**).
- 10 The Working Group indicated that the Inquiry should not present individual findings of fault; rather the Inquiry should present findings on the systemic issues (**Purpose 3**).
- 11 Lastly, the Working Group indicated that the Inquiry will not address individual claims for redress nor will it resolve individual claims directly. Instead, you have indicated the Inquiry should comment on the impacts of the existing processes and recommend changes to existing redress processes (**Purpose 5**).
- 12 These purposes will be incorporated into the draft Terms of Reference.

We invite you to provide any further feedback on the purposes and outputs to be set for the Inquiry.

Specific types of residential schools and health-based placements

- 13 The definition of care used for the Inquiry will determine which groups of people are eligible to participate, as well as which institutions or agencies may be involved.
- 14 You indicated at the first Working Group meeting that the definition of care includes all child welfare and youth justice placements. You also indicated that the definition of care should **not** include private institutions (e.g. church, sports or scouts groups), except in situations where the individual has been placed in that setting by the state (including through contracted providers). You also indicated that the Inquiry should **not** include prisons.
- 15 The Working Group requested further detailed information on the following ‘care’ settings:
 - health-based placement
 - health camps
 - residential school settings, including special schools and boarding schools.
- 16 The role of the State in relation to these institutions has changed over time. It has changed from a direct role in the administration of schools pre-1989, to various obligations under legislation ranging from the exercise of a statutory decision in individual circumstances (for example, directing or allowing placements at a school) to broader obligations as the licensing, funding and monitoring body for schools.

Health-based placement

- 17 In health facilities, such as psychiatric hospitals and residential care facilities (such as the Kimberley Centre), placements were made on the basis of operation of law (such as under the Mental Health Act 1969 or by court order). This included with the agreement of those persons with responsibility for care and control of the person (such as parents or guardians) where persons lacked capacity (including by age and/or intellectual disability).
- 18 If the time period covered by the Inquiry extends to contemporary claims, “operation of law” will also include placements where authorisation was given in accordance with the Protection of Personal and Property Rights Act 1988 (such as by a welfare guardian or under an enduring power of attorney).

Residential special schools

- 19 Residential special schools are a particular type of special school. Currently these schools care for students who have:
 - low vision or hearing
 - severe behaviour needs
 - high educational, social and emotional needs.
- 20 There have been nine residential special schools in total; six of these schools are still open. The sensory schools (BLENNZ (Homai) and Kelston and van Asch Deaf Education Centres) are also part of the residential special school network.
- 21 The administration of residential special schools falls under three distinct periods:
 - The Child Welfare Act 1925 created a special child welfare division in the Department of Education. The Act aimed to make better provision for the maintenance, care and control of children under the protection of the state. The responsibilities included running the various residential special schools. The Child Welfare Amendment Act 1948 made the Child Welfare Division autonomous with its own Minister. A separate Department of Social Welfare was created in 1972, but the control of residential special schools remained with the Department of Education.
 - Between 1972 and 1989 residential special schools were administered by the Department of Education.
 - In October 1989, the governance of these schools passed to Boards of Trustees, which are Crown entities, as part of Tomorrow’s Schools reforms.

- 22 Historically, many state wards were referred to residential special schools by the Department of Social Welfare. Currently students that receive the Ministry's Intensive Wraparound Service can attend their local school or a residential special school. Access to these schools is by agreement under section 9 of the Education Act 1989. Parents or guardians have to agree to their child's enrolment in a residential special school.
- 23 It is separately worth noting that the age that students can attend a special school or receive special education in another school, class or clinic is up to 21 years.

Health camps

- 24 Admission into health camps was on recommendations from a public health nurse or Medical Officer of Health, but required consent from a parent or guardian. For example, under section 35 of the Children's Health Camps Act 1972, it required:
- written consent of a parent or guardian; and
 - recommendation of a Medical Officer of Health or public health nurse.
- 25 Currently health camps are administered by Stand Children's Service, a non-governmental organisation

Health camp schools

- 26 Health camp schools were attached to health camps. Prior to October 1989, the schools attached to the Health Camp were administered by the regional Education Board, until governance was transferred to Boards of Trustees. Prior to January 2012, there were seven separate health camp schools, all of which are now closed.

School hostels

- 27 Since 2006, all school hostels are required to be licensed. The Ministry of Education is the licensing body under the Education (Hostels) Regulations 2005. Hostels are also reviewed by the Education Review Office. Hostels attached to state schools are run by private providers but sometimes the provider will be a school Board. Hostels are privately funded.
- 28 The regulations set out minimum standards and a code of practice for hostel owners. There is also a requirement to have a complaints process.

We invite you to provide feedback about the inclusion of the following care settings to be set for the Inquiry:

- health-based placements
- residential special schools
- health camps
- health camp schools
- school hostels.

Decisions around entry into care

- 29 You have requested further advice on whether decisions to intervene (or not intervene) in certain situations to bring individuals into state care should be considered by the Inquiry, and the implications of this.

- 30 It is likely that an inquiry hearing about abuse in state care will also hear grievances about decisions regarding whether a child is to be taken into care or not. Practically, the Inquiry may choose to comment on these decisions whether or not they are mentioned in the Terms of Reference.

Entry into care

- 31 An inappropriate decision to remove a child from their family and place them in care could be scoped in for the Inquiry.¹ The experience of entry into care could also contribute to the overall harm experienced by an individual in care.
- 32 We consider there are two appropriate options:
- **Option 1:** The Terms of Reference could explicitly include for the Inquiry to receive evidence about, and comment, on the circumstances that led to a person coming into state care and the factors that may have contributed to the decision-making process involved.
 - **Option 2:** The Terms of Reference are silent on the matter. In this instance, it can be expected that decisions to enter care may still be considered relevant by the Inquiry.
- 33 Option 1 allows for the Inquiry to acknowledge views expressed by stakeholders that decision-making surrounding a child coming into care is relevant, whilst retaining a focus on abuse in care.
- 34 Option 2 may be seen as an oversight by stakeholders, given that Government's removal of children and young people from their families and whānau has been a focus of public input on the Inquiry to date.²

Failure to bring a child into care

- 35 Instances where a child was at clear risk of harm, but wasn't brought into state care, and then went on to experience harm are also a question for the scope of the Inquiry.
- 36 In the welfare area, Oranga Tamariki (and its predecessors) has a duty to inquire where it is aware that a child or young person is at risk of serious harm.³ Police constables hold a similar duty. There are undoubtedly instances where questions could be raised about whether appropriate inquiries were undertaken and the appropriateness of a decision taken to not put someone into state care. These issues have been raised in historical claims.
- 37 Including failures to bring children into care within the scope of the Inquiry would broaden the scope and this has not been the focus of calls for the Inquiry. In the welfare area this would bring into scope significant portions of the operation of the welfare system, including decisions of the judiciary, social workers and supervisors, and police constables. In the disability and mental health areas concerns around failure to act could scope in the work of medical doctors, medical officers, public health nurses and education officials.

We invite you to provide feedback about your preferred approach to decisions around entry into care to be set for the Inquiry.

Definition of 'vulnerable adults'

- 38 The age range for the Inquiry will define the ages at which people experienced abuse while in care in order to be eligible to participate.
- 39 You have indicated that children and vulnerable adults are in scope of the Inquiry. But have separately asked for detailed advice on the definition of 'vulnerable adults' to distinguish from disabled adults.

¹ Decisions that were unlawful or otherwise arbitrary, or decisions based on prohibited discriminatory grounds, may amount to a breach of an individual's rights under both domestic and international human rights law.

² It may also invite further examination by UN bodies such as CERD, the Working Group on Arbitrary Detention, or others.

³ *White v Attorney-General* (HC WN CIV-1999-485-85, 28 November 2007), Section 17 Oranga Tamariki Act 1989 and Section 5(2) Children Young Persons Act 1974

- 40 In the health sector, reference to ‘vulnerable persons’ usually relates to a person who lacks competence (either in whole or in part) to make informed decisions or informed choices about their care⁴. ‘Vulnerable persons’ are distinguished from persons who may be in care as a result of physical disabilities, but who have competence to make informed decisions about their care.
- 41 It is worthwhile noting that defining ‘vulnerable persons’ was not an explicit issue with the Confidential Listening and Assistance, which covered persons who:
- “allege abuse or neglect or have concerns about their time in State care in health residential facilities (for example psychiatric hospitals and wards, and health camps, but excluding general hospital admissions), child welfare or residential special education sector prior to 1992.”
- 42 The fact that the person was in state care was sufficient, and there was no discrimination on the basis of how they were admitted to a facility (including whether lawfully or unlawfully). The concern was whether abuse had occurred in a state run facility, and whether or not entry was consensual, authorised by a parent or guardian or compelled by operation of law.

We invite you to provide feedback on whether the Inquiry should include disabled adults.

Time period for the inquiry

- 43 You requested further information on the potential time period to be considered for the Inquiry.
- 44 The Confidential Listening and Assistance Service (CLAS) took a focus on abuse that occurred between the 1950s and 1992. Judge Carolyn Henwood, the Chair of CLAS, has since recommended that an inquiry cover a more contemporary period.
- 45 The *Never Again/E Kore Anō* campaign led by the Human Rights Commission focused on abuse in care that took place between the 1950s and the 1990s. However, stakeholders (including those associated with that campaign) have indicated a preference for the Inquiry to extend to the present day.

Notable dates that could inform decisions on the time period

- 46 You have asked for information about significant system changes that could inform decisions on the time period to be considered by the Inquiry.
- 47 Appendix One sets out a timeline of dates that relate to significant system changes. Appendix Two provides information about complaints and grievance mechanisms that have been available in different sectors.

⁴ Right 7 of the Code of Consumers Rights, as issued by the Health and Disability Commissioner.

48 We consider that the most feasible dates for the cut-off period for the Inquiry are:

Date	Rationale
1 January 1992	Aligns with the scope used by CLAS, though does not include system changes that took place in 1992 and would risk cutting across the Ministry of Social Development (MSD) historic claims process. The Chair of CLAS has since recommended that an inquiry cover a more contemporary period
31 December 1992	Captures significant system changes that took place in the care, protection, youth justice, education and health sectors in 1992, as well as an earlier definition used by the MSD historic claims process
1 January 2008	Aligns with the current scope of the MSD historic claims process and the commencement of a new Child, Youth and Family complaints process
1 April 2017	Aligns with the date of the establishment of Oranga Tamariki
Mid-2018	Planned commencement date of the Inquiry
1 July 2019	Aligns with the date by which legislative changes relating to the new complaints and feedback mechanism for Oranga Tamariki come into effect

49 Setting an earlier cut-off would exclude more people from participating in the Inquiry, may be seen by stakeholders as arbitrary, [REDACTED] However, a case could be made s9(2)(h) that people excluded by that cut-off are able to access contemporary complaints mechanisms.

50 A later cut-off may be more reflective of stakeholder views. This could increase the workload of the Inquiry and may have more significant implications for current processes and practice. If the Inquiry is to consider cases of abuse up to 1 April 2017 or later, systems will need to be in place for agencies to be able to respond if investigations identify a current potential risk to a child or young person. Depending on the date chosen, this may include systems for addressing concerns relating to children, young people or vulnerable adults who are currently in the care of the state.

51 It is likely that setting a cut-off at the commencement of the Inquiry would command the broadest support from stakeholders.

1 January 2000 cut-off

52 At the 11 December 2017 Ministerial Working Group meeting, the option was raised that instead of setting a cut-off date for cases to be considered by the Inquiry, the Inquiry could allow anyone born prior to 1 January 2000 to participate. This option was suggested on the basis that anyone born after that date would still be a child as at 1 January 2018 and may still be able to access complaints and grievance procedures through Oranga Tamariki.

53 This option could potentially result in the inequitable treatment of different groups and would mean that the Inquiry would capture only some of the abuse that has occurred since 2000. For example, this could allow someone who was born in 1998 to talk to the Inquiry about abuse that took place in 2016, but would not allow someone born in 2001 to talk to the Inquiry about abuse that took place in 2003. This may be inconsistent with your preferred purposes for the Inquiry, which include examining the nature and extent of abuse that has occurred and any systemic issues which have contributed to that abuse.

We invite you to provide feedback on your preferred time period to be considered by the Inquiry.

Next steps

54 Working Group feedback will inform advice to Cabinet by 29 January 2018. To meet this timeframe, a draft Cabinet paper will be circulated for Ministerial consultation by 10 January 2018.

Appendix One – high-level timeline of dates

This table sets out information about significant dates from the late 1980s to the present that relate to the state care, health and education sectors.

Date	Event	Further information
1988	<i>Puao-te-ata-tū</i> report released	Identified failings and institutional racism in the social welfare system towards Māori
	State Sector Act 1988	Devolved employment in the State sector from the State Services Commission to government agencies
1989	Children, Young Persons and Their Families Act 1989 (now Oranga Tamariki Act 1989)	Delivered significant reforms to the care, protection and youth justice systems Established the role of the Children’s Commissioner
	Significant education sector reforms	Education Act 1989 Created the Education Review Office and the Education Council and established schools as autonomous entities managed by Boards of Trustees
1992	Children and Young Persons Service created within the Department of Social Welfare	
	Health sector care institutions disestablished	
	Mental Health (Compulsory Assessment and Treatment) Act 1992	Introduced a range of safeguards in relation to mental health settings
	CLAS cut-off	CLAS listened to stories from people who had suffered abuse and neglect in state care prior to 1 January 1992
	Earlier MSD historic claims cut-off	31 December 1992 has previously been used as a definition for MSD historic claims
1993	Health sector Area Health Boards disestablished	
	Health sector historic claims cut-off	1 July 1993 sets the cut-off period used for managing health sector historic claims
1994	Health and Disability Commissioner Act 1994	Established the role of Health and Disability Commissioner
	<i>Te Punga: Our Bicultural Strategy for the Nineties</i> report released	Set a bicultural direction for the Department of Social Welfare, building on the impetus from <i>Puao-te-ata-tū</i> and the Children, Young Persons, and Their Families Act 1989
1999	Department of Child, Youth and Family Services established	
2000	New Zealand Public Health and Disability Act 2000	Introduced a major change to the public funding and provision of personal health services, public health services and disability support services Established DHBs and Pharmac
2001	Lake Alice apology and compensation	The Government issued an apology and compensation to a group of former patients of the former Lake Alice psychiatric hospital
2003	Children’s Commissioner Act 2003	Amended the functions and duties of the Children’s Commissioner

2005	Child, Youth and Family merged into the Ministry of Social Development	
2006	Education (Hostel) Regulations 2005	Required all boarding establishments (used mainly for the accommodation of students enrolled at a registered school) to be licensed
2007	Crimes of Torture Amendment Act 2006	Created monitoring and oversight roles for the Children's Commissioner, the Ombudsmen, the Independent Police Conduct Authority, and the Human Rights Commission in relation to prisons, detention facilities and children and young person's residences
2008	Child, Youth and Family implements a new complaint process	
	MSD historic claims cut-off	1 January 2008 sets the cut-off period used for managing MSD historic claims
2014	Vulnerable Children Act 2014	Introduced measures to protect and improve the wellbeing of vulnerable children. Built on the 2011 <i>Green Paper for Vulnerable Children</i> and the 2012 <i>White Paper for Vulnerable Children</i>
2017	Establishment of Oranga Tamariki and VOYCE – Whakarongo Mai	Both were established on 1 April 2017. Responded to recommendations by the Modernising Child, Youth and Family Expert Advisory Panel in 2015
2018	Commencement of the inquiry into abuse in state care	Likely to take place in mid-2018
1 July 2019	Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017	Remaining legislative changes will come into effect, including changes around the establishment of the new complaints and feedback mechanism for Oranga Tamariki, and enabling young people to access support up to age 21 (and in some cases 25)

Appendix Two – Complaints and grievance mechanisms

This appendix provides information about complaints and grievance mechanisms that have been available in different sectors.

Child welfare and youth justice sector

In 2008, a new complaints process was implemented for Child, Youth and Family (a predecessor agency of Oranga Tamariki). This complaints process allowed children and young people (and others) to make a complaint about a service they have received directly from the agency.

In 2010, the Chief Executives' Panel was established, enabling people to seek review if they were unhappy with the outcome on the Ministry's response to their complaint.

Since 1996, children and young people in Child Youth and Family/Oranga Tamariki residences have also been able to make a grievance through the residential grievance procedure, now called Whaia Te Maramatanga. Each Residence has an independent grievance panel and the functioning of the grievance process is monitored by the Children's Commissioner, Principal Family Court Judge and Principal Youth Court Judge (Reg 31).

Work is underway to implement a new feedback and complaints response within Oranga Tamariki.

There are also a range of independent mechanisms to which children and young people can raise complaints. These include:

- lawyer for the child
- the Children's Commissioner (established in 1989 and provided independent Crown entity status in 2003), who may, but is not required to, investigate complaints relating to actions under the Oranga Tamariki Act 1989
- VOYCE – Whakarongo Mai (established on 1 April 2017).

The Ombudsman, the courts, and the Privacy Commissioner may also have jurisdiction to review decisions.

Education sector

Since 1989 (following significant reforms to the education sector), people have typically take complaints to Boards of Trustees, as the governing body of schools. Boards also employ teachers and other staff working at the school. Complaints about teachers may also be raised with the Education Council, which oversees teacher competency and exercises disciplinary functions.

From 2009, the Ministry of Education (MOE) has been authorised to settle historic claims under the Crown Litigation Strategy. For MOE, these have largely been confined to abuse or neglect at a residential special school that occurred prior to 1989. If the complaint relates to an incident that occurred after 1989, these are referred to the Board unless the school in question has been closed, in which case MOE resolves these.

Health sector

A range of complaints mechanisms have been available in the health sector. Mental health and disability complaints mechanisms are outlined in the following sections.

Mental health:

- from 1992, district health inspectors have been able to investigate complaints about abuse in mental health facilities and the Mental Health Review Tribunal has been able to investigate complaints where the rights of mental health patients have not been upheld
- from 1996, a Code of Rights was established for health services, against which people could complain to the Health and Disability Commissioner about breaches of their rights by any health provider
- from 2003, mental health services delivered in certified health facilities could be investigated by an auditing agency

District Health Boards (DHBs) and other health providers also hold internal complaints processes in relation to mental health facilities.

Disability:

- from 1996, all health services (including health camps) have been under the jurisdiction of the Health and Disability Commissioner
- from 2003, services delivered in certified residential facilities could be investigated by an auditing agency and district inspectors have been able to investigate complaints by individuals held under the Intellectual Disability Compulsory Care and Rehabilitation Act 2003
- from 2003 (estimated), the Ministry of Health quality and safety team has been able to investigate complaints of abuse of individuals in Ministry of Health-funded care

DHBs and other health providers also hold internal complaints processes in relation to disability facilities.

Additional monitoring mechanisms

Five organisations have been designated under the Crimes of Torture Amendment Act 2006 as independent National Preventive Mechanisms (NPMs) with monitoring responsibilities for specific areas:

- the Ombudsmen – prisons, health & disability, immigration, children and young persons' residences
- the Independent Police Conduct Authority – police custody
- the Children's Commissioner – children and young persons' residences
- the Inspector of Service Penal Establishments – Defence Force.

The Human Rights Commission has a coordination role as the Central NPM with responsibilities for coordination, reports, systemic issues and liaison with the United Nations.

The NPMs are each independent of government, and of the agencies that they monitor.