

Discussion paper

Date: 15 December 2017

Security Level: IN CONFIDENCE

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

Paper Two: Implementation of the Inquiry into Abuse in State Care

Purpose of the report

- 1 This discussion paper outlines key issues relating to the implementation of the proposed inquiry into abuse in state care (the Inquiry) and seeks your feedback on these matters.
- 2 This builds on a paper considered by you on 11 December 2017, which sought feedback on the potential purpose and scope of the Inquiry.

Executive summary

- 3 The Government's 100 day plan includes a commitment to set up an inquiry into the abuse of children in state care. The Ministerial Working Group (the Working Group) is guiding decision-making on the Inquiry's establishment. You have already considered a paper on the potential purpose and scope of the Inquiry.
- 4 This paper seeks your feedback on other matters, including:
 - the type of inquiry
 - reporting dates
 - skills and attributes of the Chair and any additional members
 - the number of additional members
 - principles for ways of working.
- 5 For the Inquiry's success, it is vital to have an inquiry type of appropriate status, a credible Chair who inspires the confidence of stakeholders, and engagement processes that deliver on the Inquiry's objectives.
- 6 A January 2018 Cabinet paper will set out the proposed scope, type of inquiry, reporting dates, named options for the Chair, and draft Terms of Reference. It will confirm the appropriate Minister for the Inquiry, taking into account any perceived conflicts of interest. It will also outline the high-level budget implications and proposed agency to carry out further consultation on the Terms of Reference.
- 7 A Ministerial public announcement on key interim decisions could be made on the basis of the January 2018 Cabinet decisions.
- 8 Following consultation on the draft Terms of Reference in early 2018, a further Cabinet paper is expected to confirm the final Terms of Reference, any additional Inquiry members and the ongoing budget for the Inquiry.

Recommended actions

It is recommended that you:

- 1 **note** that on 11 December 2017 you considered a paper setting out the potential purpose and scope of an inquiry into abuse in state care
- 2 **provide feedback** on:
 - a) your preferred type of inquiry (public inquiry, Royal Commission, government inquiry)
 - b) whether one inquiry or a separate inquiry specific to Māori is preferred
 - c) final and/or interim reporting dates
 - d) whether a judicial or non-judicial Chair is preferred
 - e) skills and attributes required of the Inquiry Chair and any additional members
 - f) the desirability of appointing three to five members in addition to the Chair
 - g) the concept of creating a survivor advisory panel
 - h) good practice principles that could be outlined in the Terms of Reference
- 3 **note** that the budget for the Inquiry will be developed once directions on the Terms of Reference are clearer
- 4 **note** that a Cabinet paper in late January 2018 will seek agreement to the Inquiry's type, scope and purpose, reporting dates, preferred Chair, plans for engagement on a draft Terms of Reference, and agency leadership during the consultation phase
- 5 **note** the Department of Internal Affairs will discuss with the Minister of Internal Affairs her role as appropriate Minister for the Inquiry
- 6 **note** that the January 2018 Cabinet paper could provide for key interim decisions to be communicated publicly
- 7 **note** that a later 2018 Cabinet paper will confirm the other Inquiry members, the final Terms of Reference and the budget for the Inquiry.

Joint paper:

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Background

- 9 The Government committed to setting up an inquiry into abuse in state care as part of its 100-day plan.
- 10 There have been a number of calls for an independent inquiry into abuse in state care in New Zealand, including the *Never Again/E Kore Anō* campaign¹, launched by the Human Rights Commission.
- 11 On 4 December 2017, Cabinet agreed to establish the Inquiry under the Inquiries Act 2013 (the Act). Cabinet also agreed to establish the Working Group to guide decision-making on the establishment of the Inquiry, and invited the Minister of Internal Affairs to report back to Cabinet in January 2018 on the terms of reference, budget and appointment of a head [CBC-17-MIN-0028].
- 12 To support this process, Oranga Tamariki has engaged with a range of stakeholders, including signatories to the *Never Again* campaign, advocacy groups, academics, previous and current human rights commissioners, iwi and Māori leaders and experts, and the Oranga Tamariki Māori Design Group and Pacific Panel.
- 13 Cabinet agreed that the Inquiry head (Chair designate) would publicly consult on a draft Terms of Reference in early 2018, and that the Minister of Internal Affairs would bring any proposed changes back to Cabinet for a final decision. [CBC-17-MIN-0028]

This paper seeks your views on key Inquiry establishment matters

- 14 This is the second of two discussion papers to support Working Group consideration of the Inquiry's establishment. At the first Working Group meeting on 11 December 2017, you gave feedback on the potential purpose and scope of the Inquiry.
- 15 This paper seeks your feedback on aspects of implementation, such as the type of Inquiry, reporting dates, appointment matters, options for further consultation on the Terms of Reference, and principles (to be included in the Terms of Reference) for ways of working. Information is also provided on Secretariat and budget considerations.
- 16 Where appropriate, we have indicated what stakeholders have told us, what the *Never Again* campaign has requested, and the approaches taken for similar inquiries in other jurisdictions.
- 17 **Appendix A** sets out the options included in this paper and summarises the feedback we require from Ministers.

We seek your feedback on your preferred type of inquiry

- 18 The type of inquiry chosen will have implications as to its perceived strength and legitimacy. The Act specifies the following types of statutory inquiry:
 - **Option 1** – public inquiry
 - **Option 1a** – Royal Commission (a form of public inquiry)
 - **Option 2** – government inquiry.
- 19 These three types of inquiry have identical statutory powers to require the production of evidence, compel witnesses and take evidence on oath. They differ in status, method of establishment and the way they report back. Statutory inquiries may also regulate their own procedures as they consider appropriate, unless otherwise specified by the Act or by an inquiry's Terms of Reference.

¹ <http://www.neveragain.co.nz/sign>

- 20 **Other jurisdictions** have used a range of inquiry styles, including Royal Commissions (Australia), public inquiries (England), and inquiries led by the Law Commission (Canada).
- 21 The **Never Again campaign** has not made specific recommendations as to the type of inquiry that should be undertaken.
- 22 Public inquiries (**Option 1**) are typically used for significant or wide-reaching issues that are of high public interest or concern. They are established by the Governor-General by Order in Council. The final report of a public inquiry must be presented to the Governor-General and then by the appropriate Minister to the House of Representatives. Selecting a public inquiry would send a strong signal that abuse in state care is viewed as a matter of public importance.
- 23 Royal Commissions (**Option 1a**) are a type of public inquiry typically reserved for the most serious matters of public importance. Selecting this option would send the strongest signal that abuse in state care is viewed by the Government as a serious matter, and is likely to provide the Inquiry with more perceived weight.
- 24 Government inquiries (**Option 2**) typically deal with smaller and more immediate issues where a quicker and authoritative answer is required from an independent inquirer. There is no requirement that the report of a government inquiry be tabled in Parliament. Selecting this option may mean the Inquiry is seen as having less weight than with Options 1 or 1a. There is a risk that the report of such an inquiry is given less visibility if it is not tabled in Parliament.
- 25 **Stakeholders** have been clear that the Inquiry should either be a public inquiry or a Royal Commission, though they have generally indicated that features such as full independence, sufficient resourcing and public reporting are more important to them than the type of inquiry. The strongest preference is a Royal Commission, to better signal that the Government is treating the matter with the highest importance.

We seek your feedback on your preferred type of inquiry to be established.

Ensuring the inquiry is credible for Māori

- 26 Given the historically disproportionate numbers of Māori in state care, it is essential that the Inquiry gives Māori communities and participants confidence in the integrity of the inquiry process and their ability to engage with it. Successful engagement with Māori participants will need to be ensured.
- 27 [REDACTED] Maori stakeholders are keen to ensure Māori ownership of the process, and recognition of the history of State failures to uphold the Treaty of Waitangi in engagement with whānau, hapū and iwi. s9(2)(ab)
- [REDACTED] s9(2)(ab)
- 28 As the majority of children who have been in state care are Māori, it would be unusual to run a separate inquiry for the largest group of inquiry participants. Disadvantages of a separate inquiry include the duplication and dilution of resourcing and the potential for a lack of alignment between the outcomes and recommendations from each.
- 29 [REDACTED]

² Full hui notes were included in Paper One, Appendix 2.

Ensuring that the Inquiry is s9(2)(h) credible for Māori could be achieved by:

- explicitly asking the Inquiry to focus on issues for Māori (see Paper One)
- asking the Inquiry to consider a dedicated Māori phase or workstream
- choosing a Māori Chair or Māori members strongly connected to Māori communities
- appropriate engagement with Māori and iwi on the draft Terms of Reference
- including principles around delivering the Inquiry in ways that meet the needs of Māori (see Appendix B for further information).

We seek your feedback on whether one inquiry is preferred or a separate inquiry specific to Māori.

We seek your feedback on reporting dates for the Inquiry

- 30 Setting reporting dates for the Inquiry will set expectations around the duration of the Inquiry and will provide a means for showing progress. The Act provides for the Terms of Reference of an inquiry to set out any relevant matters, including a reporting date, a provisional reporting date, or a process for determining a reporting date.
- 31 Decisions on reporting dates for the Inquiry will have implications in relation to:
- time and resourcing
 - ease of implementation
 - the effectiveness of the Inquiry
 - public perceptions of the Inquiry, including of its seriousness and transparency
 - likely impact on government operations and processes.
- 32 Options for reporting dates for the Inquiry are set out below:
- **Option 1** – outline a process for determining reporting dates
 - **Option 2** – set a provisional reporting date, to be confirmed at a later point by the Inquiry
 - **Option 3** – set an earlier reporting date, such as two years from commencement
 - **Option 4** – set a later reporting date, such as five years from commencement
 - **Option 5** – set one or more dates for an interim report (potentially in addition to Option 4).
- 33 Setting out a process for determining reporting dates (**Option 1**) would provide more flexibility to implement the Inquiry. This option could set out a process in which some time after the commencement of the Inquiry, the lead Minister determines a reporting date jointly with the Chair.
- 34 Setting a provisional reporting date (**Option 2**) could also provide flexibility for the Inquiry. Following the Inquiry's commencement, the Chair could confirm the date with the lead Minister or could propose a new date. If the Inquiry is unable to meet a provisional date, there may be a risk of it being perceived as ineffective.
- 35 Setting an earlier reporting date (**Option 3**) could reduce the time and resourcing required for the Inquiry. However, the Inquiry may have less flexibility to respond to emerging themes in its investigation. There is also a risk that the Inquiry may need to ask for an extension if it cannot deliver to this timeframe.
- 36 Setting a later reporting date (**Option 4**) may result in the Inquiry being seen as more robust, but would increase the time and resourcing required.
- 37 Setting one or more dates for an interim report (**Option 5**) is recommended if a later reporting date is chosen (Option 4). Providing an interim report could increase

the visibility and perceived transparency and robustness of the Inquiry. This may place an additional cost burden on the Inquiry. The Inquiry could be directed to focus an interim report on specific matters, such as providing findings and recommendations about existing redress processes for participants. This may support government agencies to prepare for such recommendations and could limit the potential operational risk to those agencies.

s9(2)(h)

- 38 The ***Never Again*** campaign has not made specific recommendations as to how the Inquiry should report.
- 39 The majority of **stakeholders** have told us that they want a reporting date to be set for the Inquiry to ensure that it reaches conclusions in a timely way and that it does not increase the risk of re-victimising participants over time. Stakeholders have taken different views on the length of the report-back period. Most have recognised a three or four-year period as being likely based on international experience and the Inquiry's probable scope, though many would like to see the Inquiry report back within three years (before the next General Election).
- 40 Stakeholders recognise the challenge of balancing the need for a timely conclusion with the need to hear as many stories as possible. Based on the experience of the Confidential Listening and Assistance Service (CLAS), and assuming the Inquiry is well publicised and adequately supports people to come forward, it could take a number of years to hear all participants' stories. One option, which has received a favourable reaction from some stakeholders, is that people could be supported to come forward to tell their stories beyond the reporting date of the Inquiry through an ongoing service similar to CLAS.
- 41 They have indicated that interim reporting could allow the Inquiry to show progress ahead of a final report and to potentially report early on more urgent matters.

We seek your feedback on whether the Terms of Reference should set reporting dates for the Inquiry, and what any reporting dates should be.

We seek your feedback on the skills and attributes of the Chair

- 42 For the Inquiry's success, it is vital to have a credible Chair who inspires trust and confidence amongst a wide range of stakeholders, and delivers on the Inquiry's objectives.

Judicial or non-judicial Chair

- 43 We seek your views on whether the Chair is a member of the judiciary (a sitting or retired judge) or has a non-judicial background:
 - **Option 1 - judicial** – Appointing a current or retired member of the judiciary may signal the importance of the inquiry due to the regard in which most judges are held. Impartiality, evidential assessment, fact-finding and strong analysis are skills and attributes of judges which would be transferable to an inquiry. Given the New Zealand Court System is generally adversarial, there would need to be confidence that the person appointed could operate in an inquisitorial setting
 - **Option 2 - non-judicial** – A non-judicial head with an academic, legal, public service, iwi or community background could be considered. Depending on their background, they may be considered to be more 'in touch' with people who participate. While this is particularly true of iwi or community leaders, it may be difficult to ensure their neutrality. Some former public servants have the required skills, but could be perceived as tainted by the system under inspection. Whilst neutrality and status could be achieved through an academic

in a relevant discipline, it may be difficult to find the required skills for running an inquiry. A Queen's Counsel or prominent lawyer could have similar skills to a judicial appointee, but may be more comfortable with non-judicial ways of working.

- 44 Most previous New Zealand inquiries have been headed by members of the judiciary. This is particularly the case with Royal Commissions due to their perceived status and level of formality. The Ministry of Justice notes the number of High Court judges has almost reached the judicial cap under the Senior Courts Act 2016 (55 out of 56), which could make it difficult to replace a sitting judge that was appointed as Chair. The appointment of a retired judge that does not hold an acting warrant would not raise the same issues.
- 45 Similar inquiries in **other jurisdictions** are most commonly led by members of the judiciary. For example, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse is headed by a Judge of Appeal.
- 46 The **Never Again** campaign has not made specific requests as to the Inquiry leadership. Most **stakeholders** are anticipating the likelihood that the Chair will be a member of the judiciary, with mixed views. Some stakeholders may view a judicial chair as being part of the system responsible for their abuse. Some stakeholders view the Chair's personal qualities, such as empathy, as more important than judicial status.
- 47 Crown Law Office is identifying possible judicial candidates in consultation with the Attorney-General and in contact with the Chief Justice³. We are holding discussions with external stakeholders and government agencies to identify non-judicial candidates that could be considered if preferred.

Skills, experience and attributes of the Chair

- 48 Informed by our feedback from stakeholders and experience from past inquiries, we consider that the Chair should have the following desirable skills and experience:
 - ability to lead complex, system-level reviews drawing on a wide range of perspectives
 - knowledge of, or experience in, examining systems or processes affecting individuals
 - knowledge of the machinery of government and government processes
 - knowledge of legal systems and practices
 - experience of working within Māori kawa and tikanga
 - experience working in the public eye without being unduly influenced by public comment.
- 49 We additionally consider that the Chair must have the following personal attributes:
 - empathetic listening skills
 - the ability to assess evidence dispassionately and impartially
 - high personal integrity and no irreconcilable conflicts of interest
 - resilience and the ability to commit to the task
 - a focus on delivery and the ability to work to a tight reporting timeframe.
- 50 There is an opportunity to appoint a Māori Chair. This may help to build particular confidence with Māori stakeholders and participants, particularly if a decision is made not to deliver a separate Māori inquiry (as this has specifically been requested by stakeholders).
- 51 We note that the Chair's skills can be balanced or supplemented by those of the Head of Secretariat (see later section on the Secretariat), other members, and staff engaged to support the Inquiry. For instance, it will be important to ensure the team includes domestic and international human rights law expertise.

³ In line with Cabinet Manual guidance 4.106.

- 52 With your steer on the experience and judicial/non-judicial background desired of the Chair, name options will be discussed with the joint chairs of the Ministerial Working Group. After confirming candidate availability, the leading options will be included in the January 2018 Cabinet paper.

We seek your views on whether the Chair has a judicial or non-judicial background, and the skills and attributes of the Chair.

We seek your feedback on the number of other members and their desired skills

- 53 Given the anticipated workload of the Inquiry, and the range of required expertise, it would be valuable to have other Inquiry members in addition to the Chair. Overseas inquiries on similar themes, and other New Zealand inquiries on various topics, typically had multiple members.
- 54 In considering the number of members, a balance is required between the benefits of additional skills and increased capacity for meeting in diverse locations, and the risk of slowing decision-making if the membership is large. Given the wide scope of the Inquiry, we recommend three to five members in addition to the Chair.
- 55 We propose that other members should have similar attributes to the Chair (paragraph 36) and a mix of complementary skills and experience in relation to:
- understanding issues for, and building trust and confidence, with Māori, Pacific and disabled communities
 - technical expertise relevant to the matters in the Terms of Reference
 - transforming services
 - governance
 - machinery of government and government processes.
- 56 Including at least one Māori member in the Inquiry may help to ensure it commands support from Māori stakeholders and participants. Again, this may be particularly desirable if a separate Māori inquiry is not delivered.
- 57 To the extent possible within a small group, consideration will be given to gender, age, ethnic and geographical balance (for instance, North Island/South Island and rural/urban). Expertise can also be drawn in through the Secretariat staffing.
- 58 We propose that, once the Chair is confirmed, the other members be identified in consultation with the Chair, government agencies and key external stakeholders. Name options will be included in the later 2018 Cabinet paper.

We seek your feedback on the skills mix of members and the total number of members to be appointed.

Potential to create a survivor advisory panel

- 59 A survivor advisory group could also be established to provide input to the Inquiry. Most **stakeholders** have indicated they would favour the Inquiry having an 'advisory panel' of people who have experienced abuse in care. This panel could work closely with the Chair to ensure the Inquiry remains focused on and responsive to the needs of others who have experienced such abuse.

We seek your feedback on the concept of creating a survivor advisory panel.

We seek your feedback on working principles to be outlined in the Terms of Reference

- 60 Many **stakeholders** have told us that the ways in which the Inquiry conducts its work will determine whether it is successful and whether it commands stakeholders' confidence. A number have indicated they want the Terms of Reference to set clear expectations about how the Inquiry should work.
- 61 The Act provides discretion for an inquiry to conduct its investigation as it considers appropriate, within the parameters set by the Act and by the Inquiry's Terms of Reference.
- 62 There is an opportunity to include principles in the Terms of Reference that outline expected principles of 'good practice' for the Inquiry. This would need to be balanced against maintaining the independence of the Inquiry members to determine their approach.
- 63 **Appendix B** sets out high-level principles that could be included in the draft Terms of Reference, covering:
- be survivor-focused
 - take a whānau-centred view
 - work in partnership with iwi and Māori
 - be responsive to Pacific communities
 - avoid a heavily legalistic approach.

We seek your feedback on whether the attached proposed working principles should be included in the Terms of Reference.

Staffing and budget

- 64 The Department of Internal Affairs (DIA) is the default agency for administration of inquiries, and is responsible for supporting the establishment and operation of this Inquiry [CBC-17-MIN-0028].
- 65 The Secretariat is activated once the final Terms of Reference have been published in the *Gazette*. The Head of Secretariat (a senior public servant) is responsible for effective leadership, management and administrative support to the Inquiry. Staff may include analysts, advisors, administrative support and other specialist roles. Staff may be seconded from government agencies.

Determining the budget

- 66 Funding for previous inquiries has been agreed by Cabinet on a case-by-case basis. DIA does not have direct control over expenditure, and costs can be difficult to forecast as they are driven by the needs and work programme of the independent Chair.
- 67 DIA has some cost data from recent inquiries that will be considered in developing a proposed budget for the Inquiry. Recent inquiries including Royal Commissions have ranged in cost between \$1.8 million and \$10.1 million. The scale of this Inquiry is significantly larger than recent examples.
- 68 International examples of inquiries into similar matters, include the United Kingdom's Independent Inquiry into Child Sexual Abuse, with an expected duration of six years, at an approximate cost of £20.8 million per annum. In Australia, the Royal Commission into Institutional Responses to Child Sexual Abuse is expected to cost \$400 million over four years.
- 69 DIA has no standing baseline funding to support public inquiries and cannot absorb inquiry-related costs. Risks to the delivery of other Vote Internal Affairs services

arise if the cost of an inquiry is not fully funded. An approximate budget will be developed once the direction of the Terms of Reference is clearer. Key cost drivers will include:

- the number of members and the size of the Secretariat
- the breadth of age groups and institutions, and time period covered
- length of the Inquiry reporting timeframes
- any separate but related Inquiries set up to run in parallel
- the Inquiry engagement processes
- the level and nature of the assisting counsel.

70 Beyond direct Inquiry costs, there will be cost for other government agencies and non-government organisations, such as the need to search archives, and provide support for people who come forward.

We note that the budget will be developed once the direction of the Terms of Reference is clearer.

We will provide you with further advice on leading and resourcing a consultation period prior to Secretariat establishment

71 As noted earlier, Cabinet has agreed that the Chair designate for the Inquiry will publicly consult on a draft Terms of Reference in early 2018. The aim is to ensure an independent figure seeks input and builds stakeholder confidence in the integrity of the Inquiry.

72 While Oranga Tamariki has been leading consultation to date, it is important that it stand aside from this role because of its close relationship to the matters to be investigated. As the Inquiry Secretariat is normally established by DIA once the Terms of Reference have been confirmed in the *Gazette*, there is a question as to which agency leads and resources this consultation period.

73 Officials are working on options for the January 2018 Cabinet paper that could include:

- determining an 'establishment team' within government to undertake further consultation, with the Chair playing a preliminary supporting role
- formally establishing the Inquiry in two phases: the first involving appointment of the Chair (who then undertakes consultation on the Terms of Reference), and the second phase where the Inquiry proper commences.

We note that the January 2018 Cabinet paper will outline detailed options around agency support for consultation on the Terms of Reference early in 2018.

The lead Minister

74 The Act provides for an 'appropriate Minister' who is responsible for the Secretariat in DIA. The Minister of Internal Affairs has indicated that further consideration is needed regarding who should be the appropriate Minister, given potential perceived conflict of interest with her role as Minister for Children.

We note the Department of Internal Affairs will discuss with the Minister of Internal Affairs her role as appropriate Minister for the Inquiry.

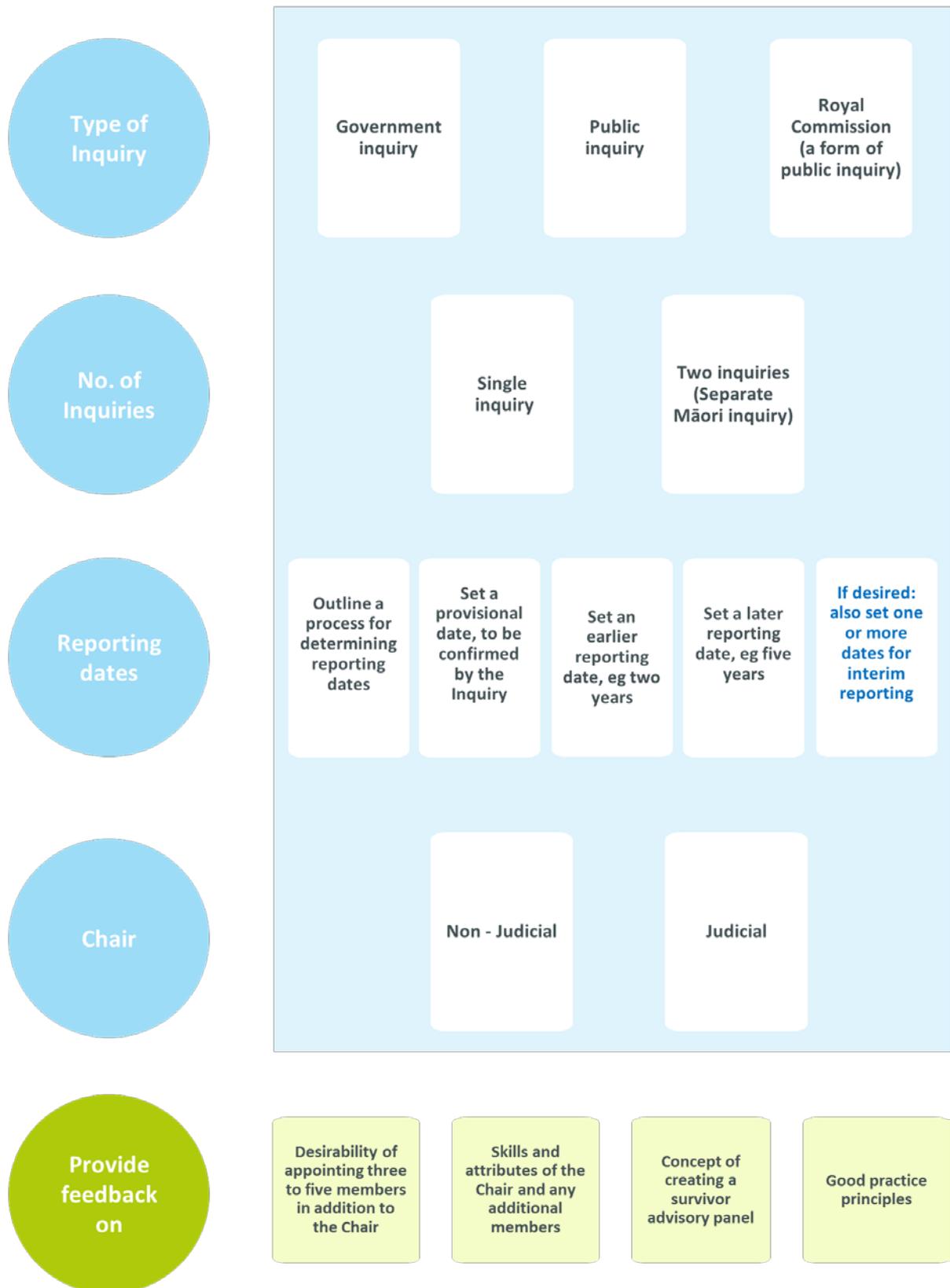
Next steps

- 75 Your feedback on Papers One and Two will be incorporated into a Cabinet paper which will include a draft Terms of Reference and seek agreement to a Chair for the Inquiry. We will circulate the Cabinet paper for Ministerial consultation on 10 January 2018, prior to Cabinet consideration in late January 2018.
- 76 If agreed by Cabinet, a press release can then be issued by the appropriate Minister, announcing the Chair, the type of inquiry and plans for further engagement on the other members and draft Terms of Reference.
- 77 Following further stakeholder engagement by the Chair on the draft Terms of Reference, a third Cabinet paper will be prepared for Cabinet later in 2018 outlining:
 - the other proposed members
 - the final Terms of Reference
 - the budget.

s9(2)(a)

Responsible manager: Hoani Lambert, Tamariki Advocate, Deputy Chief Executive, Voices of Children, Oranga Tamariki

Appendix A: Inquiry into abuse in state care: Implementation matters



Appendix B: Potential principles to be outlined in the Terms of Reference

The following high-level principles could be further refined through consultation with the public and by the Inquiry members.

Be survivor-focused

Stakeholders have told us that the Inquiry needs to be focused on the needs of people who have experienced abuse in care, make it as easy as possible for them to tell their stories, and take an approach that avoids re-victimisation as much as possible.

Take a whānau-centred view

A number of stakeholders, particularly Māori and Pacific stakeholders, have told us that the Inquiry needs to acknowledge the role of whānau around the individual. This would support a restorative approach and would help to ensure the Inquiry is responsive to the needs of Māori and Pacific communities.

Work in partnership with iwi and Māori

Māori have stressed the importance of ensuring the Inquiry takes an approach that sufficiently involves iwi and Māori as partners and participants in the Inquiry's process.

Be responsive to Pacific communities

Pacific stakeholders have called for the Inquiry to acknowledge and respond to Pacific perspectives throughout the investigation.

Avoid a heavily legalistic approach

Most stakeholders, including lawyers, have argued that the Inquiry should aim to avoid a heavily legalistic or adversarial approach. Many stakeholders have talked about the importance of the Inquiry having a 'restorative' feel or taking a 'truth and reconciliation'-type approach.

Some stakeholders have also asked that the Terms of Reference be clear (reflecting the legislation) on what powers the Inquiry will have to refer individual cases to the police, or to refer people to support services.