

Departmental Disclosure Statement

State Sector and Crown Entities Reform Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the State Services Commission.

The State Services Commission certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

7 February 2018

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Part One: General Policy Statement

This Bill is an omnibus Bill introduced under Standing Order 263(a). That Standing Order states that an omnibus Bill to amend more than 1 Act may be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. The single broad policy of the Bill is to provide for greater integrity and accountability in the management of the State services by providing for strengthened and more consistent regulation of the conduct and remuneration of employees at the most senior level and a more consistent approach to the State Services Commissioner's investigatory and inquiry powers when dealing with agencies in the State services outside the public service. The Bill provides for a single integrated approach in the State services across these dimensions.

To achieve that purpose, the Bill amends the Crown Entities Act 2004 and the State Sector Act 1988.

Crown Entities Act 2004

There are 5 categories of Crown entities under the Crown Entities Act 2004: statutory entities (subdivided into 3 types: Crown agents, autonomous Crown entities, independent Crown entities), Crown entity companies, Crown entity subsidiaries, school boards of trustees, and tertiary education institutions.

The Bill amends section 117 of the Crown Entities Act 2004 to require the board of a statutory entity to obtain the written consent of the State Services Commissioner before finalising the terms and conditions of employment of a chief executive, or subsequent amendments to them. At present, most statutory entity boards are required to consult the Commissioner and have regard to the Commissioner's recommendations. The amendment will align all statutory entities with the requirement that already applies to Crown agents in the health sector to obtain the Commissioner's consent (District Health Boards, the Health Promotion Agency, the Health Quality and Safety Commission, the New Zealand Blood Service, and the Pharmaceutical Management Agency). Tertiary education institutions are also already required to obtain the Commissioner's written concurrence.

The Bill also amends section 117 of the Crown Entities Act 2004 to introduce a fixed term of appointment of not more than 5 years, renewable, for the chief executive of a statutory entity. The provision will apply only to appointments and re-appointments made after it comes into force. The amendment will align statutory entities with the regime that applies for the chief executive of a tertiary education institution and for chief executives of Public Service departments.

State Sector Act 1988

Under section 57 of the State Sector Act 1988, the State Services Commissioner has the mandate to set minimum standards of integrity and conduct by issuing a code of conduct and applying it to affected agencies: the Public Service, all Crown entities (except for tertiary education institutions and Crown Research Institutes and any of their subsidiaries), and a small range of other agencies. The Commissioner has discretion to vary the standards in a code in light of the relevant legal, commercial, or operational context. Once a code is applied to an agency, the agency (including its employees, contractors, and secondees) must comply.

However, under section 15 of the Crown Entities Act 2004 a statutory entity is a legal entity that is separate from its board and board members. The Bill makes explicit

provision to enable the Commissioner to apply a code of conduct to an agency's board and board members. The provision applies to the same range of agencies that are currently subject to the Commissioner's mandate under section 57 of the State Sector Act 1988. The Commissioner's related powers to carry out investigations will apply accordingly.

The State Services Commissioner currently has powers under the State Sector Act 1988 to conduct inspections and investigations, to obtain information, and to enter premises, and the same powers and authority to summon witnesses and receive evidence as are conferred on commissions of inquiry under the Commissions of Inquiry Act 1908. The Bill amends the State Sector Act 1988 to put in place a single investigation package aligned with the regime in the Inquiries Act 2013. This amendment will promote greater consistency in the manner in which inquiries and investigations are conducted across government.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	YES
<p>A Regulatory Impact Statement was not prepared in advance of the policy decisions made by the Cabinet Business Committee under authorisation by Cabinet to have Power to Act [CBC-17-MIN-0091].</p> <p>The State Services Commission prepared a Supplementary Analysis Report (SAR) for the State Sector and Crown Entities Reform Bill. The SAR was prepared in accordance with Cabinet Office Circular CO (17) 3 which requires a SAR for government regulatory proposals which have not already had regulatory impact analysis as part of the substantive decision by Cabinet to proceed.</p> <p>The SAR is presented in two parts covering the proposals most likely to have impacts on third parties, which are:</p> <ul style="list-style-type: none">• the proposal to amend the Crown Entities Act 2004 to require boards of statutory Crown entities (Crown agents; autonomous Crown entities; independent Crown entities) to obtain the State Services Commissioner's written consent to the terms and conditions of employment of a chief executive• the proposal to amend the State Sector Act 1988 to explicitly enable the Commissioner to set standards of integrity and conduct by applying a code of conduct to the board members of Crown entities that are subject to a code of conduct. <p>The SAR is planned for publication on 12 February 2018 on the SSC website.</p>	

The RIA Team in the Treasury provided the following independent opinion on the quality of the SAR.

The Regulatory Quality Team at Treasury has reviewed the Supplementary Analysis Report and in terms of the RIA quality assurance criteria.

Current arrangements are clearly set out. The value judgements underpinning the identified problems, and the risks and potential unintended consequences, are also reasonably well identified. However, the SAR is missing supporting evidence about the nature and extent of the harms now occurring. It is limited on analysis to underpin the assumptions or conclusions reached about the likely impact of either measure on board member behaviour and entity performance. This is particularly the case where the measures apply to quasi-commercial entities where the tensions between competing values are seen as most acute. This problem is exacerbated by the limited and tight timing of consultation undertaken.

It will therefore be important to take careful account of any advice or comment from stakeholders as the policy proposal is taken forward.

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

Widespread non-compliance with the policy change relating to the State Services Commissioner's mandate to give written consent to the terms and conditions of employment of the chief executive of a statutory Crown entity could impact adversely on the benefits sought. However, the Commissioner's regulator effort, based on the new statutory requirement to provide advice and guidance, should serve as a strong mitigating factor. Another mitigating factor is the fact that affected entities are already required to consult and have regard to the Commissioner's recommendations.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The State Services Commission is unaware of any international obligations relevant to the policy to be given effect by the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The State Services Commission has analysed the Bill and did not identify any implications for the rights and interests of Māori protected by the Treaty of Waitangi. Te Puni Kōkiri, as a department that monitors Crown entities, was consulted generally on the draft Bill and made no comment.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry's website upon introduction of a Bill at:

<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

Clause 8 inserts new section 9A (Application of Inquiries Act 2013).

New section 9A replaces existing sections that apply provisions of the Commissions of Inquiry Act 1908 when the State Services Commissioner investigates or inquires into a matter. Existing section 9 of the 1908 Act relates to offences, and penalties for offences.

New section 9A will apply relevant provisions of the Inquiries Act 2013 to investigations or inquiries by the Commissioner. These include section 29 of the Inquiries Act 2013 (which relates to offences), section 30 (which relates to penalties for offences), and section 31 (which relates to contempt proceedings).

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice raised the following matters in the context of its assessment of consistency with the New Zealand Bill of Rights Act 1990:</p> <ul style="list-style-type: none"> • whether the powers of the State Services Commissioner are being significantly expanded, or more clarified and formalised; and what the intended effects are • the policy reasoning regarding the necessity of the power to obtain information in Clause 8, from section 20 of the Inquiries Act 2013 • whether the inclusion of section 15 (power to impose restrictions on access to inquiry) of the Inquiries Act 2013 in the package of the Commissioner's powers (power to impose restrictions on access to inquiry) already exists and is being brought into a single investigation package) <p>The Ministry of Justice has indicated that it is satisfied with the State Services Commission's explanations.</p> <p><i>Powers of the Commissioner</i></p> <p>On the first matter, the State Services Commission considers that the Bill does not expand the Commissioner's powers, but expands the authority under which they may be exercised. At present there are differing thresholds and powers applicable to investigations undertaken by the Commissioner, depending upon whether the investigation is in relation to the core Public Service or in relation to the wider State services. In relation to the State services, there is also a difference to the powers of the Commissioner depending upon whether there is a direction to act from the Prime Minister or a request to act from a Minister responsible for, or the head of, a particular part of the State services. What is proposed can already be directed by the Prime Minister under section 11 (1) of the State Sector Act 1988.</p> <p>The intended effect is to put in place a single investigation package that provides a consistent approach to the Commissioner's investigatory and inquiry powers whether those powers are used in relation to the Public Service or the State services.</p> <p><i>Power to obtain information</i></p> <p>An inquiry needs the power to obtain information to fulfil its purpose. The Commissioner currently has that power due to section 25(1) of the State Sector Act 1988. Under that section, the Commissioner has the same powers and authority to summon witnesses and receive evidence as are conferred on Commissions of Inquiry under the Commissions of Inquiry Act 1908. Under section 4B (Evidence) and 4C (Powers of investigation) of the Commissions of Inquiry Act 1908, the Commissioner already has very similar powers to that contained in section 20 of the Inquiries Act 2013.</p> <p>The overall intention, in moving from drawing on the powers of the Commissions of Inquiry Act 1908 to the Inquiries Act 2013, is to bring the Commissioner's inquiries in line with other government inquiries.</p> <p><i>Power to impose restrictions on access to inquiry</i></p> <p>The SSC considers that, arguably, a broader ability to impose restrictions on access to information already applies. Currently in relation to the formal inquiries the Commissioner is called upon to perform, section 2(1)(b)(xii) of the Privacy Act 1993 excludes a commission of inquiry from the definition of "agency" for the purposes of that Act. Further, the Bill includes sections 32 and 33 of the Inquiries Act 2013 (which relate to the application of the Official Information Act 1982 and the Public Records Act 2005) in the provisions to apply to the State Services Commissioner's inquiries.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES

Clause 8 inserts new section 9A (Application of Inquiries Act 2013).

New section 9A replaces existing sections that apply provisions of the Commissions of Inquiry Act 1908 when the State Services Commissioner investigates or inquires into a matter. Under these existing provisions, the Commissioner has essentially the same powers and authority to summon witnesses and receive evidence as are conferred on commissions of inquiry.

3.5.1. Was the Privacy Commissioner consulted about these provisions?

YES

Refer to the Appendix: Further Information Relating to Part Three

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?

YES

The draft Bill was provided to departments that monitor Crown entities: Department of Internal Affairs; Ministry for Culture and Heritage; Ministry for the Environment; Ministry for Primary Industries; Ministry of Business, Innovation, and Employment; Ministry of Education; Ministry of Foreign Affairs and Trade; Ministry of Health; Ministry of Justice; Ministry of Social Development; Ministry of Transport; Te Puni Kōkiri; The Treasury. The Bill was also provided to the Ministry for Women and to the Tertiary Education Commission (which monitors the tertiary education institutions).

Departments that monitor Crown entities are generally supportive of the draft Bill. The Treasury, which monitors the semi-commercial entities, and another department indicated that the Commissioner approving remuneration of chief executives could potentially impede the ability of boards to recruit the best possible candidate and manage the ongoing relationship with the chief executive.

Other departments indicated the interface between the statutory duties of board members and a code of conduct will need to be carefully considered. The Ministry of Justice raised a similar issue in terms of the impact of a code of conduct on the independence of the functions and powers of independent Crown entities. The State Services Commission is aware of these matters and believes they are manageable.

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?

NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Clause 4 of the Bill replaces section 117(1) and (2) of the Crown Entities Act 2004.</p> <p>The terms and conditions of employment for the chief executive of a statutory Crown entity will continue to be agreed between the board and the chief executive. In future – instead of only consulting the State Services Commissioner and having regard to the Commissioner's recommendations – the board will be required to obtain the Commissioner's prior written consent.</p> <p>In practice, a process of consultation will continue as at present. This is reinforced by inserting new section 117(2B) that explicitly requires the Commissioner to provide the boards with advice and guidance on the terms and conditions of employment of chief executives. Existing section 117(1)(b) refers to guidance issued by the Commissioner, but does not make its provision a requirement.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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Appendix: Further Information Relating to Part Three

Was the Privacy Commissioner consulted about these provisions? – question 3.5.1

The Privacy Commissioner raised three matters:

- the privacy implications for personal information of those in the state sector and citizens who interact with the state sector if they are involved in an SSC investigation
- the extension of the full investigatory powers to any investigation the Commissioner undertakes across the state sector
- the conferring of two extra powers under the Inquiries Act 2013: section 20(c) power to examine documents for which privilege is claimed; section 15 power to impose restrictions on access to an inquiry.

Privacy implications

The State Services Commission considers the Bill does not give rise to a new issue in this regard. It is pertinent also in relation to the Commissioner's existing authority to summon witnesses and receive evidence.

Extension of full investigatory powers to any investigation

The comments above under 3.4.1. apply: effectively, there is not an expansion of the powers, but an expansion of the authority or trigger under which they may be exercised.

In addition, the Commissioner may already apply the full range of existing investigation powers in relation to integrity and conduct concerning employees in the State services who are subject to the code of conduct. Under the Bill, these own motion powers will apply to board members who become subject to a code of conduct.

New powers

Inquiries Act 2013, section 20(c) – The SSC does not consider that this is additional to the current powers in section 4C of the Commissions of Inquiry Act 1908 but rather a modernised version of the previous section. Privilege is protected, but that necessitates the ability to determine whether a document is in fact privileged. There is currently no ability for witnesses to simply claim confidentiality and refuse to provide information.

Inquiries Act, section 15 – The Ministry of Justice also queried the inclusion of section 15 of the Inquiries Act 2013 among the Commissioner's powers. As explained in 3.4.1, the SSC considers that, arguably, a broader ability to impose restrictions on access to information already applies.

The SSC considers the range of provisions in the Inquiries Act 2013 that will apply achieve a balance between transparency and countervailing interests in the context of inquiries.