



Joint Te Kawa Mataaho/ Health Transition Unit Report: Māori Health Authority – proposed application of Crown Entities Act 2004 and Public Service Act 2020

Date: 10 September 2021 **Security Level:** IN CONFIDENCE

Report No: PSC 2021/0257, TU DPMC 2021/22-308

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| | Actions Sought | Due Date |
|--|-----------------------------|-------------------------------|
| Hon Chris Hipkins, Minister for the Public Service | Agree recommendations below | 15 September 2021 |
| Hon Andrew Little, Minister of Health | Agree recommendations below | 15 September 2021 |
| Hon Peeni Henare, Associate Minister of Health | Agree recommendations below | 15 September 2021 |
| Hon Grant Robertson, Minister of Finance | For information | Click or tap to enter a date. |

Enclosure: No

Minister's Office Comments

| | |
|--|--|
| Comments: | |
| Date returned to Te Kawa Mataaho: | |

Executive Summary

- 1 This briefing outlines a proposed approach to applying the Crown Entities Act 2004 (CEA) and Public Service Act 2020 (PSA) to the new Māori Health Authority (Authority) as a statutory entity that is not a Crown entity.
- 2 In comparable statutory bodies (notably Te Mātāwai and Regenerate Christchurch) much of the CEA has been applied by copying sections into the establishing legislation. While that has the advantage of putting most provisions together in one Act, the result can quickly get out of step with the CEA and the context for some provisions will not be clear. We therefore propose that CEA provisions are applied as much as practicable through cross-reference to the CEA.
- 3 The Public Service Act 2020 contains provisions regarding principles, values, and integrity and conduct that apply to Crown entities as well as to the Public Service. We propose that these also be applied to the Authority as an integral part of the health system.

Recommended Action

We recommend that you:

- a **agree** that relevant provisions of the Crown Entities Act 2004 (CEA) should apply to the Māori Health Authority (Authority) as indicated in the Appendix
Agree/disagree *Agree/disagree* *Agree/disagree*
- b **agree** that the Authority should be within scope for whole of government direction powers, for example those establishing the Government Rules of Sourcing (see para 10)
Agree/disagree *Agree/disagree* *Agree/disagree*
- c **note** that issues may be raised at Select Committee regarding the application of section 30 CEA (grounds for disqualification of members) (see para 11)
- d **agree** that the collective duties of the Authority's board should be owed jointly to the Minister and to Māori (see para 12)
Agree/disagree *Agree/disagree* *Agree/disagree*
- e **note** that submitters may seek greater discretion than the CEA appears to provide on how the interests of board members are managed (see para 13)
- f **agree** that all financial management, accountability and reporting provisions in Part 4 of the CEA apply as relevant to the Authority (see para 14)
Agree/disagree *Agree/disagree* *Agree/disagree*
- g **agree** that the Authority be covered by the provisions of the Public Service Act regarding principles, values, integrity and conduct and workforce that will apply to Health NZ (see para 15)
Agree/disagree *Agree/disagree* *Agree/disagree*

- h **agree** that the Public Service Commissioner’s powers to inquire and investigate agencies beyond the Public Service also be extended to cover the MHA (see para 16)

Agree/disagree

Agree/disagree

Agree/disagree

- i **agree** that Te Kawa Mataaho release this briefing in full once the Health Reform Bill is introduced in the House of Representatives

Agree/disagree

Agree/disagree

Agree/disagree

Hon Chris Hipkins

Minister for the Public Service

Hon Andrew Little

Minister of Health

Hon Peeni Henare

Associate Minister of Health

Joint Te Kawa Mataaho/ Health Transition Unit Report: Māori Health Authority – proposed application of Crown Entities Act 2004 and Public Service Act 2020

Purpose of Report

- 4 This briefing seeks further decisions for drafting purposes on how the Crown Entities Act 2004 and Public Service Act 2020 should apply to the Māori Health Authority, building on key choices Ministers are making about the legal form, governance, and accountability mechanisms for the Authority through the *Health and Disability System Review: Further Policy Decisions* paper expected to be considered further by Cabinet on 20 September 2021.

Decisions sought through the *Further Policy Decisions* paper

- 5 The key decisions being sought through the *Further Policy Decisions* paper include:
- that the Māori Health Authority would be a statutory entity (not a Crown entity) established under the Bill, and subject to specified provisions of the Crown Entities Act 2004, with functions including:
 - co-developing the New Zealand Health Plan and relevant health strategies
 - developing expectations for Health New Zealand to strengthen its performance for Māori
 - that the Minister of Health will, among other things:
 - appoint the board members of the Authority
 - be the responsible Minister for the purposes of the Authority's statement of intent and statement of performance expectations
 - have powers to:
 - direct the Authority to give effect to government policy, provided that policy be given effect only insofar as it relates to improving equity of access and health outcomes for Māori, consistent with the Authority's functions and objectives
 - issue letters of expectations, require amendments to statements of intent and statements of performance expectations
 - require information from the Authority
 - review the operations of the Authority
 - replace a board with a commissioner
 - appoint Crown observers to the Authority board or any significant internal meeting
 - require an improvement plan
 - enter into Crown funding agreements
 - that the Bill will establish a Māori Health Advisory Committee to provide advice on the exercise of the Ministerial powers above relevant to hauora Māori in the health system including appointments, directions, approval of accountability documents and intervention powers.

Application of the Crown Entities Act 2004 (CEA)

- 6 The *Further Policy Decisions* paper recommends that the Authority be a statutory entity that is neither a Crown entity nor a company. It will have legal accountabilities primarily to the Crown and Parliament (as its funders) as well as moral accountability to Māori. As noted above, the Minister is expected to have considerable powers over it, although most will be exercised in consultation with a statutory Māori advisory committee.
- 7 In comparable situations, Parliament has avoided doubt about how statutory entities such as Te Mātāwai and Regenerate Christchurch should operate by applying many of the board member appointment, behaviour and accountability/financial provisions in the CEA, usually with little or no modification. Applying a well-understood existing framework as much as possible helps to mitigate

the legal, financial and accountability risks involved in establishing a bespoke entity with some aspects of co-governance or shared accountability. Officials consider that this approach would be sensible and justifiable for the Authority. The table in the Appendix summarises the relevant parts of the CEA, which sections would apply, and whether any modifications would be required.

- 8 In the cases of Te Mātāwai and Regenerate Christchurch, the relevant CEA sections were largely brought across in a separate schedule to their respective establishing Acts. This approach has the advantage of enabling users to see the provisions in one Act, but runs the risk that when either Act is amended the provisions get out of step. Officials will signal to Parliamentary Counsel an initial preference to use cross-reference to the CEA rather than repeating provisions in the Health Reform Bill.
- 9 We have identified some areas Ministers may wish to give particular consideration to, noting that they may be raised by submitters during the Select Committee process. These are:
 - Powers of direction
 - Grounds for disqualification of members
 - Authority board members' collective and individual duties
 - Management of conflicts of interest
 - Application of Part 4 CEA (financial, accountability and reporting regime)
- 10 **Powers of direction:** The *Further Policy Decisions* paper includes a tailored version of the s103 CEA power to direct a Crown agent on government policy. The other question is whether the Authority should also be within scope for whole of government (section 107) directions. For example, the Authority will be a significant commissioner and purchaser of services, so ensuring it is covered by the procurement direction to apply the Government Rules of Sourcing would support consistency and interoperability with Health NZ (all DHBs are currently mandated to apply the Rules). The Rules of Sourcing include a specialised section on procurement in the social sector that recognises the need for a collaborative approach with NGOs. Officials recommend that the Authority be considered as within scope for whole of government directions under the CEA.
- 11 **Grounds for disqualification of members:** CEA section 30 combines the disqualification grounds in the Companies Act 1993 (various forms of demonstrated mismanagement of an organisation) with elements that are more of a 'fit and proper person' assessment, particularly criminal record. Although this looks as if it could prevent some candidates with relevant and valuable experience from being appointed, those who have served the relevant sentence or penalty are eligible for appointment. Officials recommend retaining s30 in full in the Bill, noting that issues could be raised through the Select Committee process.
- 12 **Authority board members' collective and individual duties:** Under the CEA members are collectively accountable to the responsible Minister, and individually accountable to the Minister and the entity. A key reason for establishing the Authority as a statutory entity that is not a Crown entity is the desire for it to be accountable to Māori as well as to the Crown. A similar rationale was behind the statutory form for Regenerate Christchurch (dual accountability to Minister and city council) and Te Mātāwai (accountable to iwi and Māori). Making the collective duties of the board owed jointly to the Minister and to Māori acknowledges this dual accountability in the Authority. Officials note that it does not create additional risks as the response to a failure in collective duty would still lie with the Minister.
- 13 **Management of conflicts of interest:** To have the requisite experience and mana, board members of the Authority are even more likely than most Crown entity board members to have interests – for example governance roles in provider organisations – that will need to be declared and managed. Officials do not expect any debate regarding the importance of transparency around the existence of

interests (CEA ss62-65). Issues may be raised about how the CEA generally excludes members with an interest in a decision from the entire decision-making process (ss66-67). In officials' view, section 68 provides sufficient flexibility for the Chair or Minister to permit an interested member to take part in discussions and/or decisions. However there is precedent in Te Mātāwai to require disclosure and transparent management of interests without prescribing how this is to be achieved.

- 14 **Application of Part 4 CEA (financial, accountability and reporting regime):** Some entities, for example Te Mātāwai, are subject to a bespoke version of Part 4 that covers the key intentions, performance and reporting elements only. However the Authority is expected to be an entity operating with a significant appropriation and a large number of staff, so officials consider it should be explicitly subject to financial management safeguards such as Minister of Finance/Treasury instructions and the CEA limitations on borrowing, guarantees and derivatives. It will also be operating in the context of the Government Policy Statement and accountable for its part in the NZ Health Plan, which may be designed to meet many of the planning and reporting requirements in Part 4. Officials' view is therefore that all provisions of Part 4 of the CEA should be applied as relevant to the Authority.

Public Service Act 2020

- 15 To support effective collaboration across the health sector, officials recommend that the Authority should also be covered by the following provisions of the Public Service Act that will apply to Health NZ and other Health Crown entities:

Provisions normally covering the Public Service plus Crown agents:

- Board collective responsibility for ensuring that the entities they govern uphold the public service principles when carrying out their functions (politically neutral, free and frank advice, merit-based appointments, open government and stewardship) (s12(6))
- Board collective responsibility to preserve, protect and nurture the spirit of service to the community that staff bring to their work (s13)

Provisions also covering other types of Crown entity:

- Part 1 Subpart 4 – public service values including adherence to minimum standards, including for integrity and conduct, set by the Public Service Commissioner
- Part 4 – Government workforce policy (employment relations, workforce development, pay equity, diversity and inclusion etc)

- 16 The Public Service Act (schedule 3 clause 5) also provides for the Public Service Commissioner's powers of inquiry and investigation to be extended to other organisations in the State services (including Health NZ), by own motion in relation to integrity matters or by direction from the Prime Minister or request from either the head of an agency or its responsible Minister. These powers may be a useful complement to the information and review powers already agreed for the responsible Minister. Officials recommend that a link to these powers be created in relation to the Authority. Where inquiries and investigations are sought by the responsible Minister, the Minister would be expected to consult the statutory advisory group. Where the Commissioner is undertaking an own motion investigation, it may well be a confidential personnel matter.

Appendix: Summary of Crown Entities Act provisions proposed to be applied to the Māori Health Authority

| What | Section | Notes |
|--|----------------|--|
| <i>Entity characteristics:</i> body corporate, separate from members, existence continues until another Act, powers of a natural person, acts for purpose of functions | 15, 17-18 | |
| <i>Validity of actions:</i> must serve functions, protection for natural person acts, not limiting consequences for board members | 19-24 | |
| Authority of board and accountability to responsible Minister | 25-26 | |
| Responsible Minister's role, monitor role, technical appointment of members, term of office | 27-29, 32 | Will need to specify term and who makes the appointments in relation to the Authority |
| Grounds for disqualification and ensuring these are declared in appointment process | 30-31 | See para 11 above |
| Members' acts valid regardless of defect in appointment | 34-35 | |
| Removal of members | 41 | Bespoke provisions for the Authority |
| No compensation for loss of office, resignation and ceasing to hold office | 43-45 | |
| Fees and expenses (under Fees Framework) | 47-48 | |
| Collective duties of board | 49-52 | |
| Individual duties of members (due care and skill etc) | 53-57 | |
| Accountability for board member duties | 58-61 | See para 12 above re duties being owed to Māori as well as Minister. (Note: DHB board members are barred from taking legal action under CEA s60 against other members (NZPHDA s27(3))) |
| Identification, disclosure and management of conflicts of interest | 62-72 | See para 13 above |
| Board delegation powers, effect of vacancies and board procedure | 73-78 | |

| What | Section | Notes |
|--|------------------|---|
| Crown entity subsidiary provisions | 96-100, 102 | Helpful framework for any subsidiaries that the Authority might establish. We propose that 98(1)(c) requiring PS Commissioner consent to chief executive terms and conditions not apply (this will be a consequential to consider for all entities covered by the Health reform Bill) |
| Ministerial powers to direct entity | 103, 107-115A | The <i>Further Policy Decisions</i> paper recommends a limited form of the s103 power to direct the Authority on policy. As discussed in para 10, it may also be helpful to include the Authority in scope for whole of government directions (s107). |
| Requirement to get Public Service Commissioner consent to proposed terms and conditions of chief executive | 117 | Note that we do not propose this extend to any subsidiaries the Authority may create |
| Entity to be a good employer | 118 | |
| Superannuation for employees (ability to continue membership of Government Superannuation Fund) | 119 | Fund closed in 1992 but worth ensuring coverage continues for any staff in GSF who join the Authority |
| Board and staff protections from liability, indemnities, D&O insurance etc | 120-126 | |
| Contracting, address etc | 127-130 | |
| Application of Ombudsmen and Official Information Acts | 131 | Should also apply Public Audit Act 2001 and Public Records Act 2005 |
| Ministerial powers to require information and review performance | 132-134 | |
| Members and staff 'officials' | 135 | Ensures covered by Crimes Act provisions on bribery and corruption |
| Reporting and financial obligations including Statement of Intent, Statement of Performance Expectations, Annual Report, banking, borrowings and derivatives, financial instructions | Part 4 (136-176) | Propose to cross-reference to this Part in full (some provisions will not be applicable) – see para 14 |