STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

State Sector Act 1988

Explanation of Amendments in 2013

New Zealand Government

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Contents

Preface

1 This paper provides a record of the main provisions in the State Sector Amendment Act 2013 that amended the State Sector Act 1988 (SSA) with effect from 18 July 2013[1].

2 The main purpose of this paper is to explain the legislative changes, not to provide implementation guidance. The paper records the rationale for the legislative amendments, including the more significant shifts in thinking at various stages during the policy development, legislation drafting and parliamentary processes. This paper primarily draws on:

- iterative drafts of discussion papers prepared within the State Services Commission (SSC) between January 2010 (SSC internal doc #1460871_1) and May 2012 (SSC internal doc #1712787 versions 1-6)
- four of the seven "Better Public Services" (BPS) papers submitted to Cabinet in May 2012: BPS Paper Two – Better system leadership; BPS Paper Three – Departmental Agencies; BPS Paper Four – Specific Purpose Boards; BPS Paper Six – Amendments to the State Sector Act
- the joint SSC-Treasury Briefing to the Finance and Expenditure Committee (FEC) on the State Sector and Public Finance Reform Bill, February 2013. This was an omnibus Bill that would be divided at the end of the committee of the whole House stage into a State Sector Amendment Bill, a Public Finance Amendment Bill and a Crown Entities Amendment Bill. The purpose of the omnibus Bill was to support the BPS work programme and the administrative changes needed to reshape the State services so that they are fit-for-purpose, not just for the present but for the next decade or more.
- the joint SSC-Treasury Departmental Report on the State Sector and Public Finance Reform Bill, March 2013; and three sets of Responses to Information Requests from FEC, April 2013.

3 Key dates leading to the changes to the SSA include:

- SSC commences its internal review of the SSA: September 2009
- Government establishes the Better Public Services Advisory Group (BPSAG): May 2011. It provided recommendations to Government in December 2011
- Cabinet: 14 May 2012
- Bill introduced: 30 August 2012
- First reading: 29 November 2012
- Select Committee (Finance and Expenditure) report: 23 May 2013
- Third reading: 10 July 2013
- Royal assent: 17 July 2013

[1] Two sets of provisions had a later commencement date: departmental agencies, and the new redundancy-related sections

Introduction to Review of the State Sector Act 1988

4 When the SSC launched its review of the SSA in 2009, its intention was to ensure that the Act is fit for purpose, meets the current and ongoing needs of the State services and accurately reflects current practice.

5 Subsequently, the report of the BPSAG provided the catalyst for major shifts in the public management model in order to improve the quality and direction of public services. The report provided the overarching and unifying themes and objectives for an omnibus Bill that would lead to substantive amendments to the SSA, the Public Finance Act 1989 (PFA) and Crown Entities Act 2004 (CEA).

6 Importantly, though, the BPSAG report did not provide a prescription for the amendments to the SSA: not all the report's recommendations were incorporated into the SSA. For example, the SSA as amended does not formally designate the State Services Commissioner (the Commissioner) as the Head of State Services; but it does formally establish the Commissioner's role of providing leadership and oversight of the State services.

7 Making substantive amendments to the SSA, PFA and CEA is significant for New Zealand's public management model. Collectively these Acts constitute foundation legislation for the organisation, operations and accountabilities of the State sector. In particular the SSA, together with the PFA and convention, establishes among other things the formal relationship between Ministers and the Public Service, and is thus a major source of New Zealand's constitutional arrangements[2].

8 Placing the review of the SSA in historical context, it was a century since the passage of the landmark Public Service Act 1912 which laid the foundations for a non-political, unified, career Public Service. The most substantive reforms since then were the passage of the State Services Act 1962 and the current SSA in 1988. The most significant change in 1988 was a move away from a centralised employment model, granting to chief executives of Public Service departments independence over all the employment decisions affecting individuals in their departments, a greater level of autonomy for the management of their departments and consequentially an increased level of accountability for their own performance and that of their departments.

9 Since its enactment in 1988, there were eleven amendments to the SSA designed to align its provisions with the new employment regime for the Public Service, or to address specific issues of the day. Annex 1 provides a short summary of the more significant elements of the amendment Acts.

10 This paper follows the sequence of the SSA. Each part of the Act is introduced with a statement of the important matters under review, and an indication where applicable of the ancillary or second order matters. Each issue is then discussed in order of its location within the Act.

11 The SSC wishes to record its appreciation to The Treasury as joint partner and project management leader for the preparation of the Bill, and to the Parliamentary Counsel Office for its significant contributions throughout the legislative drafting.

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[2] Cabinet Manual 2008 – page 2 and paragraph 3.6, page 37

Structure of the Act

12 The SSA as enacted in 1988:

- commenced with a long Title, setting out eight purposes of the Act
- provided for the statutory officer of State Services Commissioner, and set out the Commissioner's principal functions together with general and specific powers
- set out more detailed provisions in subsequent parts of the Act for the Public Service, chief executives, and various personnel-related regimes.

13 Accordingly, the SSA could be considered to 'cascade' naturally from the strategic and foundation provisions, to the more operational and detailed provisions.

14 Early during the review of the SSA, the SSC considered that the 'cascading' structure was useful and should be maintained, while being made more prominent with several significant amendments, as explained in the following parts of this paper:

- replacing the long Title to the SSA with a new section setting out the purpose of the Act as part of the legislative provisions. All other provisions would cascade from, and work to achieve, the purpose of the SSA
- inserting for the first time into the SSA a new section setting out the role of the Commissioner. All of the Commissioner's functions and powers would then serve to carry out the statutory role
- revising the Commissioner's principal functions by elevating them to a more strategic and overarching level
- tying the principal responsibilities of chief executives to the purpose of the SSA.

Purpose of the Act

The Act

15 The purpose of the SSA was expressed in the long Title quoted in the table below. This is set alongside the long Title of the foundation Act of 1912 and the pivotal Act of 1962.

Public Service Act 1912	State Services Act 1962	State Sector Act 1988
"An Act for the Regulation of the Public Service"	"An Act to provide for the appointment of a State Services Commission, to assist in promoting the efficiency of the State services in the performance of their duties, and in respect of the Public Service to ensure that their members are impartially selected, fairly remunerated, administratively competent, and imbued with the spirit of service to the community"	"An Act- (a) to ensure that employees in the State services are imbued with the spirit of service to the community; and (b) to promote efficiency in the State services and other agencies; and (c) to ensure the responsible management of the State services; and (d) to maintain appropriate standards of integrity and conduct among employees in the State services; and (e) to ensure that every employer in the State services is a good employer; and (f) to promote equal employment opportunities in the State services; and (g) to provide for the negotiation of conditions of employment in the State services and assistance to other agencies on conditions of employment; and (h) to repeal the State Services Act 1962, the State Services Conditions of Employment Act 1977, and the Health Service Personnel Act 1983"

Commentary

16 Modern law drafting practice tends to set out the purposes of an Act in one of the preliminary sections of the Act rather than in a long Title that precedes the legislative provisions. The SSC's preference from early in the review was that the long Title be replaced by a new section setting out the purposes of the SSA, probably as a new s1A located immediately after the short Title and commencement.

17 The question was: what purposes should the SSA serve to meet the current and ongoing needs of the State services, and accurately reflect current practice? First, it was useful to recall what was addressed by the Acts of 1912, 1962 and 1988.

- Public Service Act 1912
    - Problem: "Fifty years ago the vital problem of public service reform, in other countries as in New Zealand, was the replacement of political patronage by the principle of a career service"[3]
    - Reform objectives: "The Hunt Commission wanted a non-political, unified, career Public Service"[4]
- State Services Act 1962
    - Problem: "The State Services ... appear to us to have been living for years on their human capital ... The difficulty of maintaining (let alone improving) the quality of administrative leadership and of professional skill is the main problem facing the State Services today"[5]
    - Reform objectives: "To recommend such changes ... as will best promote efficiency, economy, and improved service in the discharge of public business, having regard to the desirability of ensuring that the Government service is adequately staffed, trained, and equipped to carry out its functions"[6]
- State Sector Act 1988
    - Problem: "The zest for reform in 1987 arose out of frustration at a set of management and employment arrangements in the public service that had remained largely unchanged since a royal commission in 1962 and a management philosophy that dated back to reforms from an earlier commission in 1912. Those existing arrangements were seen as a key part of a public service management system characterised by poor performance specification, few incentives to perform well and to promote the interests of the government of the day, and an inadequate level of efficiency"[7]
    - Reform objectives: "In particular the ministers wanted emphasis on clear managerial authority, clear organisational objectives and effective systems of accountability"[8]

18 This paper includes separate sections about the role and principal functions of the State Services Commissioner; the following paragraphs concern the purpose of the SSA itself.

19 In October 2011 the SSC held several workshops with officials from the Treasury, Department of the Prime Minister and Cabinet, and the Office of the Controller and Auditor-General, to discuss a range of initial proposals[9]. The clear view expressed by officials was that the purposes of the SSA should be pitched at the level of overarching principles that encapsulate enduring qualities intrinsic to a high performing, outward looking system of State services. The view was expressed that some of the objectives in the current long Title were mechanistic, relatively low level statements; and the operational provisions in the SSA should cascade from the overarching purposes.

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3 Report of the Royal Commission of Inquiry on the State Services in New Zealand 1962 (McCarthy Report), ch 2.6

4 McCarthy Report, ch 1.14

5 McCarthy Report, ch 1.21

6 McCarthy Report, pg ix

7 Public Management in New Zealand, Graham Scott, pg 6

8 Scott, ibid. Pg 1

9 SSC doc #1712787v3

Existing purposes to be retained

20 Certain qualities are fundamental to the very nature of New Zealand's system of State services.

21 Political neutrality – The replacement of political patronage through a non-political Public Service was at the heart of the reforms a century ago. The ability of the State services to serve successive governments relies on State servants performing their duties professionally, without bias towards one political party or another, in such a way that their agency maintains the confidence of its current Minister and of future Ministers. The SSA should provide for the ethical responsibilities of State servants, including maintaining political neutrality in the performance of duties and appropriate standards of integrity and conduct among employees in the State services and other agencies.

22 Spirit of service to the community – The agencies that comprise the State services do not exist for their own benefit. They operate as instruments of the Crown in respect of the Government of New Zealand and, in doing so, provide a myriad of services to the community. These services are paid for through taxes and other revenues raised from communities and individuals. State servants should respect the nature and purpose of the services they provide, and deliver them in the appropriate spirit of service.

23 Workforce arrangements – The good employer obligations applying in the Public Service and Crown entities are important features of the State services. The SSA should continue to reinforce these responsibilities and to set out responsibilities for employment agreement negotiations. These activities are subsets of the workforce matters and personnel arrangements that the SSA should continue to provide for in the Public Service.

24 Culture of excellence and efficiency –While the SSA should continue to promote efficiency in the State services and other agencies, this attribute is part of a wider vision for the State services. It is a vision of being driven by a culture of excellence and efficiency across all aspects of the State sector system. These qualities should drive system design, capability, operations and performance.

Other purposes

25 To meet contemporary and longer term needs, the SSA should also promote or foster other fundamental qualities of the State services.

26 Collective interests of government – A defining characteristic of New Zealand's public management system is how it concentrates decision-rights and accountabilities with departmental chief executives or boards of Crown entities. This arrangement supports a strong ability to deliver against the 'vertical' commitments within a single agency but has struggled to support 'horizontal' leadership and responsibility. In reality, agencies often need to operate cohesively as parts of one system in order to deliver services and achieve results. Coordinating activities, collaborating on joint initiatives, dealing with complex problems that cross agency boundaries, contributing to mutual priorities and objectives are normal requirements on many agencies. Agencies should also be conscious of the system-wide impacts of their activities, including the fiscal impacts of their decision making on a number of fronts, including procurement practices and remuneration processes. The SSA should foster a system-wide perspective where agencies operate with due regard for the collective interests of government.

27 Culture of stewardship across the system – The concept of "stewardship" embodies the responsible planning and active management of another's property or finances. Common features of good stewardship include positioning an agency to meet its medium and long term objectives and strategies; and ensuring there is appropriate infrastructure, management systems and succession planning in place to enable it to do so. Prior to the review of the SSA, the Act was silent on these aspects of chief executive or board responsibility. There was a risk, especially in times of restrictive budgets when resources are directed on current needs and priorities, to let medium and long term objectives and strategies, including organisational 'health' and capability, to slip from the horizon. Yet (while recognising that individual agencies will come and go), agency sustainability is critical to service delivery and the careful, proactive administration of the resources of the state. The SSA should foster a culture of stewardship across the system.

Recommendations to Cabinet

28 During the preparation of the draft Cabinet paper, there were several iterations of the proposed wording of the purposes of the SSA. The key point, as noted in BPS Cabinet paper 6 (paragraph 9) was that the proposed text was deliberately pitched at the level of the State sector system, rather than particular functions. The purposes of the SSA should set the scene and framework from which all other provisions in the Act cascade or are derived.

29 Accordingly, the Cabinet paper proposed that the purpose of the SSA should incorporate the following concepts (subject to legislative drafting refinements): An Act to promote and uphold a State sector system that –

- is imbued with a spirit of service to the community
- operates in the collective interests of government
- provides for the ethical responsibilities of State servants, including the maintenance of appropriate standards of integrity and conduct among employees in the State services and other agencies (this was simplified in the Introduction Bill to "maintains appropriate standards of integrity and conduct")
- provides for employment arrangements in the Public Service (the Introduction Bill changed this phrase to "provides for workforce and personnel matters"; and the Bill included an additional separate purpose: "meets good-employer obligations")
- ensures political neutrality in the performance of duties (changed in the Introduction Bill to "maintains political neutrality")
- is driven by a culture of excellence and efficiency across the system
- fosters a culture of stewardship across the system.

Select Committee process

30 Throughout this paper, phrases relating to 'changes to the Bill during the Select Committee process' technically refer to the Committee's recommended amendments as reflected in the Revision Tracked version of the Bill that accompanies the Committee's report to the House.

31 The Finance and Expenditure Committee (FEC) did not discuss use of the term "state sector system". The submission by the Public Service Association (PSA) supported the general policy intent behind a 'whole-of-system' view but believed the lack of definition

would create confusion and suggested amending the phrase to "promote and uphold State services that ...". Because this issue is pivotal to the whole scheme of the SSA and the thrust of the BPS reforms, the following explanation in the Departmental Report (paragraphs 13-15) is quoted in full.

"13. The term "State services" as recommended by the PSA would be problematic because it refers to a defined group of agencies (the diagram in Annex A refers[10]). This group of agencies is too narrow to form the 'boundaries' or framework of the SSA, because there are aspects of the SSA that extend beyond this group. For example:

a. when there are machinery of government reviews or proposals under existing s6(a) – i.e., advice on the desirability of or need for the establishment, disestablishment or amalgamation of any agency or agencies – the Commissioner's advice may relate to state-owned enterprises, tertiary education institutions and Offices of Parliament, all of which are outside the scope of the "State services"

b. the Commissioner's mandate under s57(1) to set minimum standards of integrity and conduct by issuing a code of conduct explicitly applies to the Parliamentary Service, which is outside the "State services", and

c. Parts 7 and 7B of the SSA confer various employment-related functions and responsibilities on the Commissioner in relation to tertiary education institutions, which are outside the "State services".

14. The phrase "State sector system" is deliberately not defined in terms of individual agencies or groups of agencies. The term and the list in (a) to (h)[11] above concern the operations and performance of the system as a whole. The "State sector system" refers to any aspect of the public management system. In its broadest sense, this refers to the interlocking set of relationships, processes, conventions and statutory arrangements that shape the way the State sector functions. It includes, for example, the strategy and priority setting system, policy and service delivery coordination arrangements between agencies, performance improvement and review systems, the design of the State sector, the systems to ensure the capacity and capability to perform, and the values and culture inherent to the State sector.

15. The deliberate intention underpinning the phrase 'State sector system" is to shift focus away from agency boundaries or groups, and to emphasise the system-wide foundations that matter."

32 The departmental advisers[12] agreed with the PSA that a state sector system that "provides for workforce and personnel matters" should be amended to "is supported by effective workforce and personnel arrangements". The PSA noted it is the SSA itself, not the "system", that "provides" for workforce and personnel matters.

33 Section 4.1 of the Departmental Report explains why advisers did not support the submission by the PSA that the purpose statement should include a clause relating to the Treaty of Waitangi.

10 Annex A in the Departmental Report, not this paper

11 The proposed purposes of the Act

12 Officials from the State Services Commission and The Treasury

Part 1: State Services Commissioner

34 Part 1 of the SSA deals with the duties, functions and powers of the Commissioner and includes provisions for the Deputy State Services Commissioner. Issues for review included:

- the desirability of inserting a section that sets out the role of the Commissioner
- the need to ensure an accurate and up to date description of the Commissioner's principal functions
- the desirability of expanding the application of the existing power to require agencies to supply certain information
- the desirability of broadening the grounds on which the Governor-General may appoint an acting Commissioner or acting Deputy Commissioner.

Role of State Services Commissioner

The Act

35 The SSA is constructed around the statutory officer position i.e. the duties, functions and powers of the Commissioner, rather than the agency i.e. the SSC as a department of State. This construct is appropriate generally for accountability purposes, in so far as people/officers are better able than agencies to be held accountable for functions and powers conferred on them.

36 The SSA was silent about the overall role of the Commissioner. This is a separate issue to the purpose of the Act itself, which is discussed at the start of this paper.

Commentary

37 Common feedback from stakeholders including public servants in other departments indicated there was a general lack of understanding of the role of the Commissioner (and hence of the SSC, whose employees act as the Commissioner's agents). "What does SSC do?" was a relatively common question. In addition to the range of statutory functions included in the SSA, the Commissioner is regularly asked by Ministers or Cabinet to perform other functions that are not in the Act. Historic examples include administering the Mainstream Supported Employment Programme (transferred to MSD) and hosting the Learning State Industry Training Organisation (transferred to a stand-alone company). Current examples include administering the Fees Framework for members appointed to Crown bodies as well as administering the State Sector Retirement Savings Scheme and Kiwi Saver in the State sector. The variety of the Commissioner's functions and underlying mandates contributes to a lack of clarity about the role of the Commissioner.

38 To ensure the SSA is fit for purpose and meets the current and ongoing needs of the State services, it was desirable to include a provision setting out the role of the Commissioner. Articulating the Commissioner's role would provide clarity about the purpose of the Commissioner, and therefore the SSC.

Past role

39 To arrive at an accurate statutory expression of the role of the Commissioner now and for the future, it is useful briefly to review the past. Going back to the origins in 1912, the Public Service Commissioner (and two assistants) were appointed with the two objectives of building a unified career service and of promoting efficiency and economy in the Public Service. The particular concern was to combat the abuses of political patronage; it was assumed efficiency and economy would follow[13].

40 In 1946 the form of control changed to a Public Service Commission (PSC) of three members. In 1962, the McCarthy Commission commented on the range of factors why the PSC "has been unable to deal adequately with the wider aspects of efficiency and economy. It has not been able to give the imaginative and forceful leadership which the Public Service requires" (ch 3.40). The McCarthy Commission wanted to "dispose of the erroneous but common view that the [PSC's] chief function is to act as a personnel authority independent from political control". It wanted the PSC's role "to be changed and strengthened so that it can, and will, become the chief adviser to the Government on matters of Government administration" and that the PSC be "charged with, and indeed exercising, the wider responsibilities needed if it is to provide dynamic and imaginative leadership in a changing world" (ch. 43-44).

Present role

41 When Hon Stan Rodger introduced the State Sector Bill to the House of Representatives in December 1987, his emphasis was not about the role of the Commissioner and SSC but about the personnel and industrial relations regime in which people charged with the management of public sector organisations could be held to account for their stewardship. The main feature was that heads of departments would be called chief executives appointed on individual contracts, and they would be the employer of their staff. Chief executives would be responsible to the Minister for the management and general conduct of their departments.

42 Despite the title of "State Sector Act", when promulgated in 1988 the SSC's[14] principal functions were limited to the Public Service (except that negotiating conditions of employment for employees extended to all of the Education service). Subsequently, two important functions were extended beyond the Public Service: the mandate to set standards of integrity and conduct now extends to most of the State services, and the mandate to review the machinery of government now extends across all areas of government. Also, upon request by the head of any part of the State services or of any State owned enterprise, the Commissioner may now provide assistance in respect of the conditions of employment of its employees. These extensions to the Commissioner's mandate were in response to the recommendation in the 2001 Review of the Centre to enhance the Commissioner's ability to provide leadership to State sector organisations beyond the Public Service.

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13 McCarthy Report, ch 3.32-33

14 The State Services Commission as a body of up to 4 persons was replaced in 1989 by the offices of State Services Commissioner and Deputy State Services Commissioner

Role to meet current and ongoing needs

43 The next section in this paper will discuss the Commissioner's principal functions, i.e *what* the Commissioner does. This part of the paper outlines proposals for a statutory expression of *why*, i.e. the overarching purpose of the Commissioner's office (as distinct from the purposes of the SSA) and hence of the SSC.

44 The Commissioner's purpose is more than a list of statutory and non-statutory functions. The Commissioner's position is a leadership role. In 1912, the Hunt Commission recommended that a Board of Management, subject to review by Cabinet, should be set up as the managing head of the whole Government Service. The Hunt Report stated: "it is to our mind essential that there should be one controlling head ... to hold the whole Service together, and make it work as one well-oiled and efficient machine"[15]. As mentioned above, a call for leadership was explicit in the McCarthy Report in 1962 and the Review of the Centre in 2001.

45 The theme of leadership is inherent in the role of the Commissioner. Arguably, it was part of the raison d'être for the existence of the role, although leadership was not mentioned explicitly in the Hunt Report in 1912. During the past half century, leadership has been called for explicitly.

46 Leadership is central in the BPSAG report, e.g. pages 8, 12:

- "[t]he single most critical driver of successful change is leadership".
- "Starting from the top, the Group considers that the State Services Commissioner needs to be unambiguously charged with leading the leaders: a clearly mandated Head of State Services"
- In this capacity, the Commissioner would be "accountable for overall performance of the state services and empowered to:
    - appoint sector leads
    - determine functional system-wide leadership roles and appoint chief executives into these roles
    - deploy chief executives and second and third tier leaders to critical roles across the system".

47 A statement of the Commissioner's role should be pitched at a level that both cascades from the purposes of the SSA and provides the overarching and enduring framework for the Commissioner's functions discussed in the next section in this paper.

Recommendations to Cabinet

48 In order to reflect the substance of the leadership role described in the previous paragraphs, the Commissioner's role could have been proposed in a single statement along the lines of proving leadership and oversight of the State services. The alternative, preferred by officials, was to include the leadership dimension while also making the Commissioner's role cascade explicitly from the purpose of the SSA. Accordingly, BPS Cabinet paper six proposed that the Commissioner's role should include the following concepts (subject to drafting refinements): To provide leadership and oversight of the State services by –

[15] Report of Commission Appointed to Inquire and Report Upon the Unclassified Departments of the Public Service of New Zealand – 1912 (Hunt Report), pgs 18-19

- promoting a spirit of service to the community
- promoting a spirit of collaboration among agencies
- selecting and appointing high calibre leaders (changed in the Introduction Bill to "identifying and developing high calibre leaders")
- working with leaders across the State services to ensure they are well led and trusted (changed in the Introduction Bill to "working with State services leaders to ensure that the State services maintain high standards of integrity and conduct and are led well and are trusted")
- maintaining oversight of employment arrangements for the Public Service (changed in the Introduction Bill to "overseeing workforce and personnel matters in the State services")
- advising on the design and capability of the State services in the system of government (the Introduction Bill omitted the phrase "in the system of government")
- evaluating performance and promoting excellence and efficiency across the State services
- supporting the achievement of good results by the State services.

49 The concepts in the two bullet points immediately above were re-ordered and rationalised in the Introduction Bill to the following two concepts:

- evaluating the performance of Public Service leaders, including the extent to which they carry out the purpose of this Act
- supporting the efficient, effective, and economical achievement of good outcomes by the State services. A definition of "outcome" was inserted into the Bill, replicating the definition of the term in the PFA.

50 Of note, BPS Cabinet paper six did not single out the concept of stewardship for explicit mention as part of the Commissioner's role. At that stage, the dimensions of stewardship were considered to be included in the combined concepts of the design, capability and performance of the State services. However, during the process of legislative drafting (to insert a definition of "stewardship"; and to describe the stewardship responsibility of chief executives) it became very clear that stewardship constituted such a pivotal concept that it required explicit mention within the Commissioner's role. Accordingly, the Introduction Bill included as part of the Commissioner's leadership role "promoting a culture of stewardship in the State services".

51 The emphasis on collaboration and working with other leaders (not just as part of the Commissioner's role but also in other provisions in the SSA, eg in relation to senior leadership development) was intended to foster a cultural shift in preference to a more coercive role, which traditionally lacked effectiveness.

Select Committee process

52 No changes were made to the Bill during the Select Committee process in respect of the Commissioner's role. The Institute of Public Administration of New Zealand preferred a single statement of leadership and oversight, but departmental advisers preferred the transparent cascade from the list of purposes of the SSA to the various dimensions of the Commissioner's role.

Principal Functions of Commissioner

53 A clear and strong message from the workshops referred to in paragraph 19 was that the current list of principal functions of the Commissioner was pitched too lowly at a mechanical level. The functions should be reframed, lifted up, and cascade from the higher level purposes of the SSA and role of the Commissioner. This feedback reinforced the view already held in the SSC that the list needed to be revised in order to reflect contemporary practice and to better fit the medium and longer term needs of the State services.

The Act

54 Section 6 of the SSA provided as follows.

Functions of Commissioner

The principal functions of the Commissioner are-

(a) to review the machinery of government across all areas of government, including-

(i) the allocation of functions to and between Departments and other agencies; and

(ii) the desirability of, or need for, the creation of new Departments and other agencies and the amalgamation or abolition of existing Departments and other agencies; and

(iii) the co-ordination of the activities of Departments and other agencies:

(b) to review the performance of each Department, including the discharge by the chief executive of his or her functions:

(c) to appoint chief executives of Departments and to negotiate their conditions of employment:

(d) to promote and develop senior leadership and management capability for the Public Service:

(e) to negotiate conditions of employment of employees in the Public Service:

(f) to promote and develop personnel policies and standards of personnel administration for the Public Service:

(g) to promote, develop, and monitor equal employment opportunities policies and programmes for the Public Service:

(h) to provide advice on the training and career development of staff in the Public Service:

(ha) to provide advice and guidance to employees within the State services (except Crown Research Institutes) on matters, or at times, that affect the integrity and conduct of employees within the State services:

(i) to provide advice on management systems, structures, and organisations in the Public Service and Crown entities:

(j) to exercise such other functions with respect to the administration and management of the Public Service as the Prime Minister from time to time directs (not being functions conferred by this Act or any other Act on a chief executive other than the Commissioner).

Commentary

55 The list of principal functions in s6 sets out the main responsibilities of the Commissioner at a 'headline' level. Broadly, they can be rationalised into functions that concern the system of government, and those that concern the people and culture in the system. It is particularly the functions concerning people and culture that are expanded upon through more detailed operational provisions in other parts of the SSA.

56 The Commissioner's principal functions should be expressed in a way that is enduring, and therefore should not contain operational or 'mechanical' detail that could be restrictive or subject to regular change. The SSC considered there should be a cascade from the principal functions in s6 to operational detail elsewhere in the SSA.

57 Accordingly, some of the current operational functions would be better transferred, in modified form if need be, to other parts of the SSA. With regard to the current list of functions in s6, the SSC considered that:

- there was a gap in so far as a new overarching function should be inserted giving effect to the Commissioner's leadership and oversight role, with up-front emphasis on the objective of performance improvement at agency, sector and system-wide level
- function 6(a), dealing with the machinery of government, should be rephrased by including explicit reference to the governance dimension and to inter-agency operations and performance as a system
- function 6(b) should be expanded in anticipation of future departmental agencies (as discussed among the proposals relating to Part 2 of the SSA); at the same time, other provisions suffice to cover reviewing performance by the chief executive of his or her functions
- function 6(c) should be expanded in anticipation of the future establishment of departmental agencies and clarify that, de facto, the Commissioner employs Public Service chief executives; the function includes reviewing their performance, without necessarily linking performance as a chief executive to performance of the department or departmental agency
- function 6(d) should be modified in a way that does not limit leadership development to senior leadership and management, nor focus solely on the Public Service
- function 6(e), dealing with negotiating conditions of employment, should be removed as a principal function of the Commissioner on the basis that operational level details are adequately covered elsewhere in the SSA
- function 6(f), concerning personnel policies and standards, should be elevated to cover workforce matters at a more strategic level, including a more overarching, proactive leadership role pertaining to people matters in the State services
- function 6(g) should be retained, but be transferred to part 5 covering personnel provisions
- function 6(h) should be deleted as a stand-alone principal function, with its substance incorporated in other provisions relating to capability development

- function 6(ha) should be transferred to the operational details in Part 5 relating to matters of integrity and conduct; instead the principal function in s6 should provide a more fundamental mandate expressed in terms of setting and reinforcing standards, and include specific focus on promoting transparent accountability
- function 6(i), dealing with advice on management systems and structures, should be deleted as a stand-alone principal function, with its substance incorporated in the amended function relating to machinery of government
- function 6(j) should be retained without modification.

Recommendations to Cabinet and legislation drafting processes

58 BPS Cabinet paper six reflected the thinking in the previous paragraph by recommending that the Commissioner's principal functions in s6 be replaced along the lines shown in the table in the next paragraph [CAB Min (12) 16/10, paragraph 82 refers].

59 Iterative refinements were made to the wording during the legislation drafting process, as anticipated, and as reflected in the Introduction Bill.

CAB Min (12) 16/10, para 82	Introduction Bill
Cabinet agreed that s6 be replaced so that the principal functions of the Commissioner would be (subject to drafting refinements):	"For the purpose of carrying out the Commissioner's role, the principal functions of the Commissioner are to -
to review the system of government agencies and processes, with the objective of advising on ways to improve agency, sector and system-wide performance	(a) review the State sector system in order to advise on possible improvements to agency, sector, and system-wide performance; and
to review agency and inter-agency governance, structures and systems across all areas of government, including advice on: • the allocation and transfer of functions and powers to and between agencies • the operation of agencies as a system in delivering services • the establishment, amalgamation and disestablishment of agencies	(b) review governance and structures across all areas of government, in order to advise on – (i) the allocation and transfer of functions and powers; and (ii) the cohesive delivery of services; and (iii) the establishment, amalgamation, and disestablishment of agencies; and
to review the performance of each department and each departmental agency	(c) review the performance of each department and each departmental agency; and
to appoint leaders for the Public Service, including: • acting on behalf of the Crown as the employer of chief executives of departments and heads of departmental agencies • reviewing the performance of each chief executive of a department and each head of a departmental agency	(d) appoint leaders of the Public Service, which includes – (i) acting as the employer of chief executives of departments and chief executives of departmental agencies; and (ii) reviewing the performance of chief executives of departments and chief executives of departmental agencies; and

CAB Min (12) 16/10, para 82	Introduction Bill
to further the development of leadership capability for Public Service departments and other agencies	(e) promote leadership capability in departments and other agencies; and
to promote excellence in workforce development, strategies and practices	(f) promote strategies and practices concerning government workforce capacity and capability
	(g) promote good-employer obligations in the Public Service; and
to set and reinforce standards of integrity and conduct and promote transparent accountability	(h) promote and reinforce standards of integrity and conduct in the State services; and
	(i) promote transparent accountability in the State services; and
to exercise such other functions with respect to the administration and management of the Public Service as the Prime Minister from time to time directs (not being functions conferred by this Act or any other Act on a person other than the Commissioner)	(j) exercise such other functions with respect to the administration and management of the Public Service as the Prime Minister from time to time directs (not being functions conferred by this Act or any other Act on a chief executive other than the Commissioner)"

60 The function in s6(g) was inserted in the Introduction Bill to maintain the Commissioner's 'visibility' in the area of good-employer obligations, in the context of transferring the function relating to equal employment opportunities [previously in s6(g)] to Part 5 of the SSA. The insertion of s6(g) was consistent with the structure of the SSA whereby the Commissioner's functions cascade from, and contribute to, the purpose of the SSA and the Commissioner's role.

Select Committee process

61 No changes were made to the Bill during the Select Committee process in respect of the amendments to s6 of the SSA.

62 Consequential amendments were made to the Clerk of the House of Representatives Act 1988 and to the Parliamentary Service Act 2000. A clause was inserted to amend those Acts to the effect that, when exercising the s6 functions in relation to the Office of the Clerk and the Parliamentary Service, the Commissioner do so in a manner consistent with the independent functioning of the legislative and executive branches of government. The Office of the Clerk submitted that, because the functions in s6 are linked to the new purpose of the SSA, and because the purpose includes a system that operates in the collective interests of government, such provisions could undermine agencies in the legislative branch that operate independently from the executive. The Parliamentary Service made similar comments. The departmental advisers concurred that the proposed amendments would be appropriate, even if only for the avoidance of doubt rather than to prevent any realistic misunderstanding or mischief.

Powers of Commissioner

The Act

63 Sections 7-10 set out the powers of the Commissioner: all such reasonably necessary or expedient powers (s7); power to conduct inspections and investigations (s8); power to obtain information (s9); and power to enter premises and require the production of information and answering of questions (s10).

Commentary

64 Prior to amendments to the SSA in 2005, the powers in ss7-9 applied to Public Service departments. As from January 2005, some of the Commissioner's functions extended beyond the Public Service to other parts of the State services and even beyond. In particular, the function of reviewing the machinery of government extended to all areas of government [existing s6(a)]; and functions relating to integrity and conduct extended to most of the State services [s6(ha) was inserted and s57 expanded].

65 To reinforce and support the exercise of these functions, there was an equivalent extension of some of the Commissioner's powers:

- the power in s8 extended to any part of the State services that comes under the scope of the function in s6(ha) relating to advice and guidance on integrity and conduct
- the power in s9 extended to: all areas of government for the purpose of reviewing the machinery of government under s6(a); the State services that come within scope of s6(ha); and to Crown entities for the purpose of advising on management systems and structures under s6(i).

66 Among the current amendments to the provisions concerning integrity and conduct (see the explanation in relation to part 5 of the SSA), the SSC proposed that s8(1)(b) be deleted on the basis that it is already included in s57C(1).

67 The SSC's primary proposal was that the power in s9 to require the supply of information in connection with the exercise of the Commissioner's functions should extend to any agency in the State services in respect of any of the Commissioner's functions (ie, not restricted to the limited range of functions and specified groups of agencies as summarised above).

Recommendations to Cabinet

68 In recommending the broadening of the application of the power in s9, BPS Cabinet paper 6 commented that, while agencies generally co-operate in supplying information, the existence of this power would overcome potential reluctance on the part of an agency to supply relevant information. The paper also noted that the power in s9 would not override provisions in other legislation that specifically permit the withholding of certain information.

Select Committee process

69 None of the submissions to FEC commented on the broadening of the application of the power in s9.

Grounds to Appoint Acting Commissioner or Acting Deputy Commissioner

The Act

70 Section 14 provides for the Governor-General to appoint an acting Commissioner or an acting Deputy Commissioner, as the case may be, "in the event of the incapacity of the [Commissioner/Deputy Commissioner] by reason of illness or absence or any other cause".

Commentary

71 There may be occasions where it is appropriate to appoint an acting Commissioner or acting Deputy Commissioner because the incumbent must stand aside for reasons other than incapacity. Potentially, for example, conflict of interest situations could arise if the exercise of their functions or powers involves a close friend or relative. In this case the need to stand down does not arise, strictly speaking, from incapacity.

72 It was desirable that the SSA clarify the ability of the Governor-General in Council to appoint an acting Commissioner or acting Deputy Commissioner in circumstances that require the incumbent to stand down from performing a particular function. The Cabinet paper process that prepares advice for the Governor-General in each case would explain the circumstances and justification for making an acting appointment.

Recommendation to Cabinet

73 Cabinet agreed with the recommendation that the SSA provide for the appointment of an acting Commissioner or Deputy Commissioner in the event of incapacity or any other reasonable cause that requires the incumbent to stand down.

Select Committee process

74 None of the submissions to FEC commented on this amendment.

Part 2: The Public Service

75 Part 2 of the SSA defines the Public Service, provides for Ministers to delegate their functions and powers to departmental chief executives, and provides for reorganisations within the Public Service, including related personnel provisions.

76 A major issue for the review was the need to enable some form(s) of cross-agency governance and accountability. The potential arrangements described in this section of the paper would have implications for chief executive responsibilities, as discussed in relation to part 3 of the SSA.

77 In addition, proposals were developed to:

- disapply certain employment-related provisions to Ministerial Advisers
- rationalise and streamline the various provisions pertaining to reorganisations, redeployment and redundancy compensation.

New Organisational Forms

Context

78 The report of the BPSAG had significant implications for the way departments are organised and governed.

The Act

79 The SSA is constructed around the responsibilities of the State Services Commissioner and Public Service chief executives. Traditionally, this construct has been considered appropriate generally for accountability purposes, in so far as people/officers are better able than agencies to be held accountable for functions and powers conferred on them.

80 However, the SSA was thin in provisions concerning the Public Service as a collective entity, let alone treating the State services as parts of a cohesive system. Yet government policy and the cross-agency nature of many government objectives and priorities require departments and other agencies to participate in inter-agency or system-wide initiatives.

Commentary

81 It was evident from early discussions within the SSC and latterly through the BPSAG that the focus in the current SSA on vertical responsibilities between departmental employees, the chief executive and Minister was seen in the contemporary context as being less than optimal for fostering whole of government interests. It was perhaps timely to recall that, in 1912, the Hunt Report commented: “The Public Service should be treated as a whole and not as a number of separate watertight compartments, and officers of the Service should feel that they are officers of the Public Service as a whole, and not officers of special Departments only”[16]. While the Hunt Report made this comment in the context of employee transfers between departments, the underlying notion remains applicable to other aspects of departmental administration and operations.

[16] Pg. 23, Report of Commission Appointed to Inquire and Report Upon the Unclassified Departments of the Public Service of New Zealand – 1912 (known as “Hunt Report”)

82 Without ignoring the purpose and utility of inter-departmental committees (especially for cross-departmental coordination), taskforces (especially for time-limited specific issues), joint teams (especially for cooperation on policy development or programme delivery), or establishing 'heads of professions' (e.g. in the area of finance), such arrangements did not raise issues with implications for the purpose of this legislative review.

83 Officials were more concerned with circumstances where a major policy or operational activity requires some form of joint governance. Two possible new models to provide effective governance of joined-up or connected government arrangements were proposed:

- boards comprising chief executives, in two potential forms:
  - a board established by Cabinet, under an agreed terms of reference
  - a board established as a separate administrative unit within the legal Crown, under a new Schedule to the SSA listing the constituent departments within the board's remit
- departmental (or executive) agencies.

New Organisational Forms: Sector Boards

84 The BPSAG report proposed some significant changes to the organisation and leadership of New Zealand's system of State services. The first significant change was: "to reconfigure the system much more directly around those results or outcomes that matter most to New Zealanders – something that the state services have struggled to deliver collectively over the years."[17] As part of this, the BPSAG proposed "a new modus operandi for state agencies – where sectors mobilise around specified results, deliberately tackling complex issues, or matters that might fall between the responsibilities and accountabilities of individual agencies, taking opportunities to harness better results in places where more integrated working practices across agencies make sense". The BPSAG envisaged that it may make sense to "hard wire" certain arrangements, for example, in the justice sector by bringing the balance sheets of the three biggest departments together under one sector-wide chief financial officer, or having a justice sector-wide policy framework.

85 The BPSAG also suggested a broader spectrum or menu of organisational arrangements was needed than was previously available, providing greater flexibility for Ministers. One option was to establish "hard" or "soft-wired" sector boards, intended to get better traction on results through more clearly defined accountabilities and all parties having some serious "skin in the game". Soft-wired arrangements would be by mutual consent between the agencies; hard-wired sector boards would have more formal mandates, financial arrangements and reporting arrangements.

86 The associated policy thinking envisaged two types of sector boards: sector leadership boards, and sector specific purpose boards. A sector leadership board would be established when sector results involve most of the activities of the component or participating agencies. Key characteristics would include:

- legally, the board would be an administrative unit comprising the chief executives of the component or participating agencies
- the chief executives could act as equals, or a chair with a casting vote could be appointed. In both cases, the participating chief executives would be bound under a collective responsibility once decisions are made
- the board would be responsible for strategic policy and financial decisions for the sector (both purchase and ownership)
- the participating chief executives would be responsible for operational management within the policy and financial boundaries agreed by the board. They would remain responsible for all of their agency's operations that are not part of the sector arrangement.

87 A sector specific purpose board would be established when sector results involve a small proportion of the activities of the component agencies. Legally, a sector specific purpose board would be the same as a sector leadership board, i.e. it would be an administrative unit comprising the chief executives of the component agencies who would be held under a collective responsibility to any decisions made. The key difference is that of scope: only specifically defined activities of component agencies would come under a sector specific purpose board; under a sector leadership board, all activities of the participating agencies would be within scope unless they are specifically defined as being out of scope.

[17] Better Public Services Advisory Group Report, November 2011, pg 6

88 In order to "hard wire" or bind a group of Public Service chief executives to collective decision making and collective responsibility, a sector board would need to be a statutory administrative unit. Otherwise, an individual chief executive's responsibilities in s32 of the SSA and s34 of the PFA would always 'trump' a non-binding collective decision. When it comes to responsibility for the department's activities and finances, a chief executive was singularly responsible under current legislation. Effectively, the BPSAG proposal to "hard wire" sector board arrangements would entail a very significant and fundamental shift in the current public management system. It would represent a genuine "step change" that would require a new way of thinking and working between and among chief executives and their departments. The radical introduction of a legally-binding collective responsibility would require amendments to the existing responsibilities of Public Service chief executives. There would also be significant implications for the PFA: sector boards would be part of the Crown, as defined in the PFA.

89 The SSA would need several new provisions and several amendments to current provisions. First, the SSA would need to provide for the establishment of sector boards. The SSC proposed that the Act include provision for Orders in Council to be made that would add the name of each board to a new schedule to the Act (and could remove a board from it, or change the name of a board), including the names of the departments whose chief executives constitute the board.

90 The concept of collective responsibility connotes decision making among equals. However, in order to future-proof for all circumstances, the SSA would need to provide the flexibility to enable a chair to be appointed who would have a casting vote. In addition to a casting vote, the chair would also need the power to request information from a department whose chief executive is a member of a board such information as is necessary to enable the board to discharge its functions and duties: the department would be required to comply with the request.

91 Options for the appointment process for a board chairperson could include:

- appointment as specified in the OIC, on the recommendation of the State Services Commissioner
- appointment by the Commissioner, after consultation with appropriate Ministers. This option would be preferable if it was envisaged there may be circumstances where it would be advantageous to have an independent chair who is not the chief executive of one of the component agencies.

92 Provision would also need to be made for a chair to be replaced. The process should be the same as that for appointment, ie either through an OIC or by the Commissioner.

93 Of critical importance, the SSA would need to clarify a chief executive's responsibilities when acting individually as head of his or her department, and when he or she is acting under a collective responsibility as part of a board. At a minimum, a new section would need to be inserted to specify how the collective responsibilities would play out. This is covered in the discussion relating to Part 3 of the SSA.

94 There would be implications for the State Services Commissioner's responsibility to assess the performance of chief executives and departments. The Commissioner would:

- continue to appoint each Public Service chief executive as the head of his or her department, as at present
- continue to review the performance of each department under s6

- continue to review the performance of each chief executive under s43
- be responsible for reviewing the performance of each sector board, both collectively as a unit and in terms of the manner and quality of each chief executive's participation and contribution. In practice the sector reviews would be undertaken jointly by the central agencies.

Recommendations to Cabinet

95 BPS Cabinet paper four set out a comprehensive description, rationale, and detailed recommendations for the potential establishment of boards. The paper referred to them as "specific purpose boards", but commented in paragraph 19 that they could be used for sector arrangements that involve the dominant portion of each department's activities, or where a smaller (not dominant) portion of each department's activity is within scope. The paper focussed on the two different mechanisms for establishing boards with collective responsibilities owed to the appropriate Ministers:

- a board established by Cabinet, under an agreed terms of reference, which lists the constituent departments within the board's remit
- a board established as a separate administrative unit within the legal Crown, under a new schedule to the SSA which lists the constituent departments within the board's remit.

96 The Cabinet paper noted that collective responsibility on the part of constituent chief executives would not be legally binding in the case of a board established by Cabinet under a terms of reference. In contrast, collective responsibility would be legally binding and take precedence over individual responsibilities in the case of a board established under the SSA.

97 The Cabinet paper commented there were some implications for ministerial arrangements. The constituent chief executives' collective responsibility to the board could impact on how Ministers are organised (ie whether a responsible/lead Minister or a Ministerial Group is established) and the responsibility arrangements between boards, Ministers and Parliament.

98 As recorded in CAB Min (12) 16/10 paragraph 45, Cabinet declined the proposal that boards be established under a new schedule to the SSA.

99 Cabinet agreed to a comprehensive set of proposals relating to the establishment of boards determined by Cabinet and set out in the board's terms of reference. But such arrangements are not matters for inclusion in the SSA.

New Organisational Forms: Departmental Agencies

100 The BPSAG report proposed that departmental (or 'executive') agencies be provided for as part of the broader menu of organisational options. They would sit within the Crown under the leadership of a larger department, but held to account for their own operational responsibilities. The report referred to them as a new organisational form – to help avoid either having few large, multi-functional departments or many small agencies.

101 The SSC favoured the notion of departmental agencies based on the UK Executive Agency (EA) model, but with modifications to fit the New Zealand system of State services. The SSC supported the BPSAG's broad objective and, more specifically, saw potential for the use of departmental agencies in two major instances:

- to transfer functions from Crown entities back into the legal Crown in a manner that retains their distinctiveness. This could be appropriate if it was desirable to bring the functions within scope of a sector board, or otherwise to bring them closer to ministerial oversight and direction
- to cluster similar service delivery or regulatory functions from different agencies that serve similar objectives and priorities, especially if doing so would shore up capabilities and produce back office efficiencies.

102 In the UK model, EAs had the following characteristics.

- EAs were part of the Crown and did not usually have their own legal identity. They served as a mechanism for government to ensure that agencies operate in accord with government dictates to produce the desired results, without normally intervening in operating detail. Most EAs delivered a service (either to the public or to other service providers) or had a regulatory role. Many also had a technical policy role in addition to their operational functions.
- EAs were headed by a chief executive appointed in most cases by the Minister on the advice of officials, usually by open competition, for a fixed term. The appointment needed to be cleared with the Cabinet Office, the Office of the Civil Service Commissioners and the Treasury. EA staff were civil servants employed on civil service terms, conditions and pension arrangements and were subject to the Civil Service Code.
- EAs did not have governing boards but generally had a management board made up of senior staff and two or three external members (sometimes including a sponsor from the parent department).
- EAs operated within the context of their Framework Document. This set out the key elements of the policy and resources framework for the agency and the relationship and respective responsibilities of the chief executive, the relevant Minister, the departmental Permanent Secretary, the appropriate Treasury expenditure team and other departments, agencies and organisations with which it will have a relationship. The Framework Document had to be approved by the Minister (or joint Ministers if applicable) before publication.
- EA-specific targets were set by the responsible Minister and were announced to Parliament before the start of the financial year. EAs had to prepare and usually publish annual Corporate and Business Plans.
- EAs had to be capable of being made separately accountable. They had to produce Annual Reports and Accounts.

103 Key features of the EA model included direct accountability of the chief executive, and right of access, to the responsible Minister. While EAs generally had operational autonomy, the Minister could have direct input.

104 In the New Zealand system, the EA model could be transformed into a 'departmental agency' legally hosted within a department. A precondition was that the agency's outputs or services must be capable of being separately described and accounted for (this could be within the host department's report or a sector board's report). Key features of the model in New Zealand would include:

- each departmental agency would be listed by Order in Council in a new schedule to the SSA. The schedule would name the agency and its host department. Relevant sections in the Act (eg responsibilities of departmental chief executives and heads of executive agencies) would apply to departments and agencies as listed in the schedule
- the head of a departmental agency would be appointed by the State Services Commissioner, in consultation with the chief executive of the host department. This is a critical difference between the New Zealand model and the UK model (where the Minister usually made the appointment). The Commissioner would also be responsible for reviewing the performance of the agency and the head of the agency, in consultation with the chief executive
- the head of a departmental agency would be directly responsible to the appropriate Minister for the agency's activities
- legally, the chief executive of the host department would be the employer of the agency's employees, but must delegate employment decisions to the head of the agency as appropriate.

105 The departmental agency model potentially would have major implications for the PFA (administration of appropriations; accountability and reporting; balance sheet/asset control). The Treasury's PFA review covered these issues.

106 As a technical corollary to the proposed new organisational forms, the definition of "Public Service" in s27 of the Act (i.e. "the Departments specified in Schedule 1") would need to be amended.

Recommendations to Cabinet

107 BPS Cabinet paper three set out the key features of the proposed departmental agency model, including detailed recommendations for the required changes to both the SSA and PFA.

108 The subsequent process of translating Cabinet's decisions into workable, as well as sufficiently clear and detailed legislative provisions, was a collaborative and iterative process between the SSC and Parliamentary Counsel Office. The detail was incorporated in the Introduction Bill mainly in:

- clause 11 (Commissioner's functions as employer in relation to the appointment and performance review of chief executives), in conjunction with clause 28 (the chief executive of the host department must be included on the appointment panel for the chief executive of a departmental agency), clause 33 (the Commissioner must consult the chief executive of the host department before removing a chief executive of a departmental agency), and clause 36 (the Commissioner must consult the chief executive of the host department when reviewing the performance of the departmental agency chief executive)
- clauses 17-19 (new definition of the Public Service, including the meaning of department, departmental agency and host department; relationship between departments and departmental agencies; delegation of Minister's functions or powers; provision for amendments to Schedules 1 and 1A)
- clauses 25-26 (new responsibilities of chief executives, including chief executives of departmental agencies; 'boundary lines' between the responsibilities of the host department's chief executive and the chief executive of a departmental agency; duty to act independently in relation to employees)
- clause 48 (provision for the chief executive of the host department to be deemed by new s59(2) to have delegated to the chief executive of the departmental agency the employee-related rights, duties and powers specified in that subsection). The inclusion of this clause was a key legislative clarification of the departmental agency model, as it would work in the New Zealand context. The provision caters for:
    - the departmental agency legally being part of the host department, and its employees legally being employed within the host department, and
    - the departmental agency chief executive having de facto employer rights, duties and obligations as part of his or her autonomous responsibilities for the performance of functions or duties or exercise of powers by the departmental agency. Of note, the provisions in SSA s69(b) and 70 (relating to collective employment agreements) continue to be the domain of the chief executive of the host department: these provisions do not transfer to the chief executive of the departmental agency.

Select Committee process

109 Through the Departmental Report process, advisers proposed two technical amendments to the Introduction Bill:

- amend clause 48 [new s59(2)(a)(ii)] so that the requirement in s60 for appointments to be on merit is included among the duties that are deemed to be delegated to the chief executive a departmental agency. Appointments on merit should be part of the package of responsibilities relating to individual employees working in the departmental agency
- amend clause 48 to replace new s59(3) with a provision that would not run the risk of being interpreted as preventing the chief executive of a departmental agency from delegating the rights, duties and powers that are deemed to be delegated to him or her by the chief executive of the host department.

Ministerial Advisers

The Act

110 The SSA treated Ministerial Advisers in the same way as any other public servant: the same provisions applied without distinction in terms of recruitment, appointment, other employment matters and the application of standards of integrity and conduct.

Commentary

Role of Ministerial Advisers

111 The term "Ministerial Adviser" covers the quasi-political appointees recruited to support Ministers with policy management and media advice. There were around 100 appointees engaged in political functions in the Beehive. This number included Senior Private Secretaries (including three Chiefs of Staff), Political Advisers, and Communications staff.

112 Legally, Ministerial Advisers are members of the Public Service. They are engaged on events-based employment contracts by the chief executive of the Department of Internal Affairs (DIA). The "events-based" nature of the contract means employment can be terminated for reasons such as the re-allocation of Ministerial responsibilities, the end of the parliamentary term, or a break-down in the relationship between employee and Minister.

113 The role of Ministerial Advisers is varied and complex. Their tasks fall generally into three categories:

- engaging with the political executive
- managing relations between the executive and legislative branches
- connecting the formal policy-making apparatus with external interests[18].

114 There is an undeniably "political" aspect to some of the tasks. Representing the Minister's interests in negotiating political business with other parliamentary parties is indicative of that political aspect. While it is impossible to determine the extent to which Ministerial Advisers as a group behave in ways that are – or are not – politically neutral, it would stretch credibility to suggest that senior advisers, particularly Chiefs of Staff, are not intensely political, or that following an election they could work equally well with, and would be politically acceptable to, new Ministers from a former opposition party.

Application of the Act

115 On occasions, a Minister may suggest or indicate the person he or she wants to be appointed to a particular position, e.g. as Chief of Staff. Instances of Ministerial involvement in appointments raised questions about compliance with the requirements in the Act. Relevant provisions included:

- s33, which requires chief executives to act independently from Ministers in appointing staff
- s56, setting out the 'good employer' provisions, particularly subsection (2)(c) requiring the impartial selection of suitably qualified persons
- s60, which requires chief executives to give preference to the person who is best suited to the position

[18] Eichbaum, Chris, Minding the Minister? Ministerial Advisers in New Zealand Government, December 2007

- s61, which requires a chief executive to notify a vacancy
- s65, which requires a chief executive to put into place a procedure for reviewing appointments made.

116 On the basis that Ministerial involvement in the appointment of Ministerial Advisers may be necessary or desirable from time to time because of the Advisers' role and responsibilities, the SSC considered that the provisions referred to in the preceding paragraph should not be mandatory in the case of those particular Ministerial Advisers whose appointment is made under political influence. The provisions would continue to apply to the rest of the Public Service and would still serve as good practice guidance for application to Ministerial Adviser positions, to the extent possible in any particular case.

117 The SSC's proposal would keep Ministerial Advisers within the Public Service 'fold', while acknowledging the individual circumstances of their roles and responsibilities. Other countries have gone further: in Australia (Federal), Ministerial Advisers are not public servants, but are hired by Ministers under the Members of Parliament (Staff) Act 1984; in the United Kingdom, they are "temporary civil servants" appointed by the relevant Minister under the Civil Service Order in Council 1995. Canadian Ministerial Advisers are often referred to as "exempt staff" because they are exempt from the normal public service hiring processes and regulations.

Cabinet decisions

118 This part of this paper covers the employment-related provisions in the SSA that affect Ministerial Advisers. Part five of this paper covers the application of a code of conduct to Ministerial Advisers. In combination, the respective amendments to the SSA provided a comprehensive package of statutory measures to cater for Ministerial Advisers.

119 On DIA's recommendation to SSC, BPS Cabinet paper six referred to "Core Ministerial Office Staff" rather than Ministerial Advisers. The paper noted that, while DIA is always solicitous to adhere to the relevant provisions (SSA ss33, 56, 60, 61 and 65) to the extent practicable and as a matter of good practice, strict adherence was not always feasible.

120 BPS Cabinet paper six was careful to note that this position is one which would specifically affect all political parties. Accordingly, the paper proposed that the Commissioner be directed to consult with selected parties represented in the House on three specific proposals. Instead, the Cabinet minute [CAB Min (12) 16/10 paragraph 87] directed the Commissioner to consult on the three following decisions:

- that the SSA be amended to the effect that s33 require the chief executive of the department responsible for appointing Core Ministerial Office Staff to take into account the wishes of the Minister
- the SSA be amended to the effect that ss61 and 65 (standard provisions relating to appointments) will not be binding on the chief executive of the department responsible for appointing Core Ministerial Office Staff
- Core Ministerial Office Staff comprise the appointees recruited on events-based employment agreements to support Ministers.

121 All parties represented in the House were selected for the consultation that was led by the SSC[19]. No objections were raised to the proposals and they were included in the Bill, as noted in the paper to LEG seeking approval to introduce the Bill.

Legislation drafting process

122 During the legislation drafting process:

- as a matter of PCO drafting, the term "core ministerial office staff" changed to "ministerial staff member" and then to "ministerial staff" in the Introduction Bill
- in addition to not applying s61 (obligation to notify vacancies) and s65 (review of appointments) in relation to ministerial staff, the Introduction Bill also provided for the non application of s60 (appointments on merit) and s64 (notification of appointments) in their regard. The non application of ss60 and 64 was considered to come within the scheme of the policy decisions made by Cabinet.

Select Committee process

123 Several submissions to FEC[20] commented to the effect that the definition of "ministerial staff" in the Introduction Bill was too loose and could be interpreted to include staff who are not appointed by DIA or who work for ministers elsewhere than in the minister's office. The clear policy intent was to apply the provisions solely to the quasi-political appointees employed to work in ministers' offices on events-based employment agreements by the chief executive of DIA. Accordingly, departmental advisers recommended a tighter definition of "ministerial staff" which was inserted into the Bill.

[19] John Ombler, Deputy State Services Commissioner, and Gordon Davis, Chief Legal Advisor

[20] Dr Chris Eichbaum and Associate Professor Richard Shaw; Public Service Association; Council of Trade Unions; Institute of Public Administration of New Zealand

Reorganisation, Redeployment, Redundancy Provisions

The issues

124 The provisions in the SSA relating to reorganisations, redeployment and redundancy gave rise to two broad issues. The first was an issue associated with the implementation of structural change that would be resolved by broadening the provision enabling the Commissioner to appoint an acting chief executive. This issue relates to s40 of the SSA and is covered in the discussion relating to Part 3 of the Act concerning chief executives.

125 The second issue concerns streamlining the provisions in the SSA that deal with reorganisations.

The Act: reorganisation provisions

126 There are two places in the SSA that dealt with issues relating to reorganisations in the Public Service and redeployment, redundancies and transfers of employees: sections 30A to 30L in Part 2, and sections 61A and 61B in Part 5.

127 Sections 30A to 30L were added to the SSA by the State Sector Amendment Act 2003. The principal drivers for the amendment were to provide generally for reorganisations in the Public Service, including provisions limiting compensation for redundancy in cases where the redundancy is merely technical because, as a consequence of transfer of functions from one department to another, the employer changes but the employee is offered an equivalent job or chooses to accept another job in the new department. The sections also provided for recognition of changes to contracts and other documents to reflect the change in responsibility for administering the functions.

128 Section 61A was added by the State Sector Amendment Act (No 2) 1989. The principal driver for section 61A was to provide a measure of protection to employees should their position be made redundant because there were too many employees or where their duties would no longer carried out by their department. They could be appointed to positions in another department or be appointed to another position in their department without the need to go through a merit based advertised employment process or have their appointment reviewed.

129 Section 61B was added by the State Sector Amendment Act 1991. The principal driver for section 61B was to ensure employees transferred between departments would be no worse off than they were in their original department: their conditions of employment would be as favourable as those they enjoyed under their employment agreements at the date of transfer.

Commentary

130 The amendments in sections 30A to 30L and sections 61A and 61B appear to have been of a slightly haphazard nature, designed to deal with different issues as they arose rather than to design a cohesive scheme which would deal with reorganisations and employee redundancies and transfers.

131 The SSA deals with a mix of reorganisations within the Public Service and what happens to employees in cases where:

- there are more employees carrying out certain duties than are necessary for the efficient carrying out of those duties

- the duties that the employee carries out are no longer to be carried out by the department
- there is a reorganisation and the duties the employee carries out are to be carried out by another department or agency.

132 The amendments were designed to ensure employees are treated fairly when their positions become redundant, and to confer on them preferential treatment for appointment to other positions without needing to go through the usual merit based appointment process as required under sections 60, 61 and 65.

133 Before sections 30A to 30L were enacted it was possible for employees to claim redundancy payments when they had not suffered loss of employment, that is, they were appointed to equivalent positions on no less favourable terms and conditions of employment in the Public Service. This was because section 61A required any appointment of an employee covered by that section to be subject to the relevant employment agreement. Many employment agreements did not contain technical redundancy clauses and employees became entitled to a redundancy payment even when they were offered a similar position in the department to which the functions transferred on no less advantageous conditions. The SSA was amended to ensure that employees who were offered such a position could not claim redundancy whether they accepted the offer or not. It was to cover this situation specifically that section 30E was introduced.

134 Section 30C required an Order in Council before sections 30E to 30G could be applied. This was a requirement imposed at the time to ensure employees' rights were protected through Cabinet oversight. The need to obtain an OIC was arguably unnecessarily time consuming and overly regulated, especially as there will be a Minute recording Cabinet's agreement to the transfer of functions.

135 The existence of sections 30A to 30L and sections 61A and 61B led to confusion, given that both groupings of sections had similar effect in relation to employees but were located in different Parts of the SSA. Those using the Act were uncertain as to when and why one scheme should be preferred over the other. Both schemes used slightly different language. While sections 30I to 30L dealt more comprehensively with the circumstances arising when functions transfer (the treatment of employees being a subset of those considerations), sections 61A and 61B were more easy to follow and dealt exclusively with employees.

136 An anomaly existed in section 30D: it permitted sections 30A and 30B to apply in the case of the transfer of employees from Crown entities to Departments, but did not provide for transfers from Departments to Crown entities.

Recommendations to Cabinet

137 BPS Cabinet paper six proposed that the SSA deal with the situations relating to employees in one Part of the Act, Part 5, which is about 'Personnel Provisions' (part 5 of this paper covers those aspects of the amendments to the SSA).

138 The Cabinet paper proposed that matters dealing with reorganisations, such as the making of Orders in Council to establish new departments, references to contracts and documents and other business-related aspects would be best left in Part 2, which is about the 'Public Service'. In relation to those aspects of the amendments to the SSA, it was considered desirable to:

- retain s30A where an OIC would amend Schedule 1 if a department is abolished, its name is to be changed or where a new department is established
- retain s30B which provides that chief executives and employees do not transfer when functions transfer from one department to another despite the sections that provide for the amendment of contracts in such an event (an offer of appointment is required first)
- retain s30H which deals with changes to references to departments following reorganisations
- retain s30I which deals with consequential changes to references to chief executives following reorganisations
- retain s30J dealing with the application of consequential changes to references
- retain s30K which deals with other savings and transitional matters arising from reorganisations within the Public Service
- retain s30L which deals with the effect of reorganisations within the Public Service.

139 BPS Cabinet paper six recommended that:

- s30C (dealing with the application of employee provisions to reorganisations between departments) be deleted as it is not necessary to have Cabinet decisions reinforced by way of OIC in these circumstances
- s30D (dealing with the application of employee provisions to transfers from Crown entities to departments) be transferred to SSA Part 5, with amendments to: remove the requirement for an OIC to give effect to the provisions; and insert a new subsection that applies the provisions to transfers of employees from departments to Crown entities
- s30E (dealing with the restriction of compensation for technical redundancy arising from reorganisations) be repealed along with s61B and replaced with a new section in SSA Part 5
- s30F (dealing with the reappointment of employees following reorganisations) be repealed along with s61A and replaced with a new section in SSA Part 5
- s30G (dealing with the application of collective agreements to employees following reorganisations) be transferred to SSA Part 5.

Legislation drafting process

140 During the legislation drafting process, the following amendments were inserted into the Introduction Bill as technical changes coming within the scope of Cabinet's decisions:

- replace "abolished" and "abolition" wherever they appear in s30 with "disestablished" and "disestablishment" respectively
- after s30A(1) insert subsection (1A) to provide for amendments to Schedule 1A relating to departmental agencies
- insert a reference to "departmental agency" in all relevant places, ie s30A(2); the heading to s30H and in s30H(1),(2),(3) and (4); s30I(1),(2),(3) and (4).

Select Committee process

141 Through the Departmental Report, advisers proposed technical changes to s30H to insert new provisions catering for changes to references to employees of a particular department if that reference is no longer appropriate because the department's name has changed, the department has been disestablished, or functions transfer elsewhere in the Public Service. In those cases the reference would be read as a reference to employees of the department under its new name, or of the new department, or to the employees who perform the relevant functions.

Part 3: Chief Executives

142 A major policy driver for the proposals relating to Part 3 of the SSA was to articulate more explicitly the responsibilities of chief executives across two dimensions:

- to take a broader, outward-looking and more collective view of their role (eg with regard to inter-agency collaboration and achieving sector results)
- for strategic and medium term management of their department.

143 As noted above in the discussion about the purpose of the SSA, concepts about the collective interests of government and stewardship were prominent among the early proposals for changes to the Act. The BPSAG report elevated these concepts, along with leadership, to critical shifts needed to deliver better services and results. The report envisaged amendments to the SSA to include chief executive responsibilities: in cross-agency arrangements; for whole-of-government interests; and for the stewardship of their department, and for services to the public.

144 The prospective establishment of sector boards and departmental agencies clearly had implications for a Public Service chief executive's responsibilities. In addition to clarifying and updating individual responsibilities of chief executives, the SSA needed to be amended to:

- provide for new collective ('joint and several') responsibilities of chief executives when acting as part of a sector board (subject to Cabinet agreement to legislate for sector boards)
- clarify the respective responsibilities of chief executives and heads of agencies in departmental agency arrangements.

145 Other matters for review in part 3 of the SSA included:

- providing for more flexibility in the composition of the appointment panel for chief executive positions
- reconsidering the location of provisions for the selection criteria for chief executives
- enabling the Commissioner to transfer chief executives between departments
- simplifying the process for determining the conditions of employment of chief executives
- broadening the provision for appointments to the position of acting chief executive
- clarifying and broadening the scope of a chief executive's power to delegate
- simplifying the process for reviewing the performance of chief executives
- reviewing the special provisions applying to certain chief executives.

Chief Executive Responsibilities

The Act

146 Prior to the amendments, s32 set out the principal responsibilities of Public Service chief executives in the following terms.

"The chief executive of a Department shall be responsible to the appropriate Minister for -

(a) the carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and
(b) the tendering of advice to the appropriate Minister and other Ministers of the Crown; and
(c) the general conduct of the Department; and
(d) the efficient, effective, and economical management of the activities of the Department."

147 Section 33 charged chief executives to act independently and not be responsible to the appropriate Minister in matters relating to decisions on individual employees.

148 Section 34(b) of the Public Finance Act 1989 is also relevant. It made chief executives responsible to the Minister for –

"the financial management and financial performance of the department".

Commentary

149 Officials at the workshops referred to in paragraph 19 expressed a view that the responsibilities currently set out in s32 were at a mechanistic level. Though the responsibilities were important and should be retained, they represented day to day routine management. Officials thought that responsibilities in a revised SSA should be more dynamic and outward looking. Early proposals for change included:

- the addition of some explicit individual responsibilities, essentially across two dimensions:
  - "looking across" – taking a horizontal, collective, big picture perspective
  - "looking ahead" – taking a longer-term, sustainability perspective
- some relatively minor, but symbolically important, amendments to existing responsibilities in s32.

New individual responsibilities

Collective perspective

150 A frequent criticism of the SSA was that it focussed on chief executive responsibilities for their own department (the vertical dimension) and was silent on whole of government or collective interests (the horizontal dimension). While the Act did nothing to prevent departments from taking broader interests or impacts into account when preparing advice or implementing government policy, it did not encourage or promote all of government or cross-agency perspectives. The SSA was perceived as 'lacking teeth' to require departments to act in the greater interest, whether to collaborate in service delivery improvements or to participate in initiatives that would lower overall costs to government.

151 The State Services Commissioner's leadership role and the proposal for binding, collective governance arrangements (in statutorily established sector board arrangements, if agreed to by Cabinet) would provide the 'hard wire' solutions that were called for. The early thinking was that those initiatives should be reinforced by placing on chief executives a statutory responsibility for: the department's strategic planning (including but not limited to how the Department intends to act with regard for the collective interests of government). Those interests would not be a matter for definition in the SSA, but it would be incumbent on any chief executive to be aware of system-wide influences on the department, system-wide opportunities and connections that the department should make, and the reciprocal system-wide impacts and implications of the department's own policies and activities as well as those of related agencies. These matters should be fundamental to a chief executive's level of performance, and should be made an explicit rather than implicit responsibility.

Longer-term, sustainability perspective

152 Another fundamental aspect of a chief executive's responsibilities is the strategic, longer term dimension. The SSC's earlier discussion paper referred to it as "stewardship". A "steward" is commonly defined as a person who manages another's property or finances, or who administers something as the agent of another.

153 As mentioned in the discussion relating to the purpose of the SSA, good stewardship of an agency will include positioning it to meet its medium and long term objectives and strategies; and ensuring there is appropriate infrastructure, management systems and succession planning in place to enable it to do so. A goal of stewardship is to ensure the long term sustainability, financial viability and organisational health of the agency. The SSC considered that stewardship of the department should be fundamental to the responsibilities of a chief executive, and should be made explicit in the SSA. The initial thinking considered the elements of stewardship potentially being incorporated in a phrase along the lines of being responsible for: the longer term sustainability, financial viability and organisational health and capability of the department.

154 SSC's discussion paper at one point included a recommendation that would set out the relationship between Ministers and chief executives, largely by codifying existing principles in the Cabinet Manual. While that proposal as a whole did not proceed, the importance of providing free and frank advice to Ministers was recognised by including it in the eventual Cabinet paper as part of the stewardship concept.

Responsibilities under the Public Finance Act 1989

155 Officials also considered it would be useful to add to the current list of responsibilities in s32(a)-(d), even with the proposed responsibility for stewardship. A new subsection 32(e) should specify that a chief executive's responsibilities include: the additional financial and reporting responsibilities under the Public Finance Act 1989. The primary reason for cross-referencing to the PFA would be to clarify that performance reviews by the Commissioner cover all aspects of chief executive performance, including the important responsibilities in the PFA.

Amendments to existing individual responsibilities

156 The SSC proposed relatively minor, but symbolically important, amendments to some of the existing individual responsibilities: expanding the responsibility in s32(b), and rationalising the elements in s32(c) and (d).

157 Section 32(b) made a chief executive responsible for: the tendering of advice to the appropriate Minister and other Ministers of the Crown. The SSC proposed the insertion of "... tendering of free and frank advice ..." (in addition to including free and frank advice in the concept of stewardship). These changes would firmly codify a well established role of a Public Service chief executive, which in practice was a de facto responsibility. Putting the tendering of free and frank advice to Ministers on a legislative footing would be consistent with s9(2)(g) of the Official Information Act 1982 which permits withholding official information in order to "maintain the effective conduct of public affairs through (i) the free and frank expression of opinions ... to Ministers of the Crown...".

158 Section 32(c) made a chief executive responsible for: the general conduct of the Department. Rather than being responsible for a department's general conduct, in reality a chief executive has more control or influence over the management of the department's activities. The SSC proposed that s32(c) be rephrased to make a chief executive explicitly responsible for: the management of the activities of the Department.

159 If s3(2)(c) was amended as proposed, parts of s32(d) would become redundant as currently expressed, ie responsibility for: the efficient, effective, and economical management of the activities of the Department. There would be an opportunity to turn this responsibility into one that is more consistent with the outward looking, results oriented themes in the BPSAG's report, ie responsibility for: the efficient and economical delivery of the services to be provided and the results intended to be achieved.

Recommendations to Cabinet

160 Cabinet agreed to the revised, updated and expanded set of chief executive responsibilities as recommended in BPS Cabinet paper 6 [CAB Min (12) 16/10, paragraph 88 refers], and as set out in the table on the next page.

161 A number of important changes were made during the legislation drafting process, as explained in the paragraphs following the table on the next page.

SSA, s32	CAB Min (12) 16/10, para 88	Introduction Bill
Section 32: The chief executive of a Department shall be responsible to the appropriate Minister for - (a) the carrying out of the functions and duties of the Department (including those imposed by Act or by the policies of the Government); and (b) the tendering of advice to the appropriate Minister and other Ministers of the Crown; and (c) the general conduct of the Department; and (d) the efficient, effective, and economical management of the activities of the Department.	Cabinet agreed that (subject to drafting refinements) chief executives will have responsibilities to the appropriate Minister for: 1 the department's responsiveness on matters relating to the collective interests of government 2 the longer term sustainability, organisational health and capability of the department and the capacity of the department to offer free and frank advice to successive governments 3 the carrying out of the functions and duties of the Department (including those imposed by act or by the policies of the government) 4 the tendering of free and frank advice to the appropriate Minister and other Ministers of the Crown 5 the management of the activities of the Department 6 the efficient and economical delivery of the services to be provided and the results intended to be achieved 7 the financial and reporting responsibilities under the Public Finance Act	Section 32(1): The chief executive of a department or departmental agency is responsible to the appropriate Minister for – (a) the department's or departmental agency's carrying out the purpose of this Act; and (b) the department's or departmental agency's responsiveness on matters relating to the collective interests of government; and (c) the stewardship of the department or departmental agency, including of its medium and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments; and (d) the stewardship of - (i) assets and liabilities on behalf of the Crown that are used by or relate to (as applicable) the department or departmental agency; and (ii) the legislation administered by the department or departmental agency; and (e) the performance of the functions and duties and the exercise of the powers of the department or departmental agency (whether imposed by any enactment or by the policies of the Government); and (f) the tendering of free and frank advice to Ministers; and (g) the integrity and conduct of the employees for whom the chief executive is responsible; and (h) the efficient and economical delivery of the goods or services provided by the department or departmental agency and how effectively those goods or services contribute to the intended outcomes.

Legislation drafting process

162 The legislation drafting process resulted in a range of refinements to better reflect the Cabinet decisions, or specifications to highlight more detail.

Significant changes

163 The Introduction Bill clarified explicitly that provisions applying to a chief executive of a department under the SSA would apply wherever appropriate to a chief executive of a departmental agency. The responsibilities in new s32(1) apply equally to chief executives of departmental agencies in relation to that part of the department that comprises the departmental agency. This clarification was consistent with BPS Cabinet paper 3 and CAB Min (12) 16/10 paragraph 32.

164 An important specification was made by inserting new s32(1)(a) to link a chief executive's responsibilities explicitly to carrying out the purpose of the SSA. This was consistent with the structure of the SSA commencing with a legislative statement of the purpose of the SSA that would set the scene and framework from which all other provisions cascade or are derived.

165 The responsibility for stewardship was subject to the most discussion and the most substantive drafting changes during this part of the process in relation to chief executive responsibilities. The changes were noted in the joint SSC/Treasury report referred to in paragraph 194.

- *Stewardship of the department* – BPS Cabinet paper 6 encapsulated the concept of stewardship in three dimensions: longer term sustainability; organisational health and capability; and the capacity to offer free and frank advice to successive governments. These concepts were explicitly linked to stewardship of the department. In conjunction with the definition of stewardship in new s2, stewardship would encompass active planning, management and advice in light of the medium and long-term interests relating to departmental sustainability, health and capability, and capacity to offer free and frank advice.
- *Stewardship of other instruments or resources of the state* – There are other dimensions to stewardship that were not captured explicitly in the elements outlined above. From a legislative drafting perspective, the SSC preferred to employ a concept with overarching application rather than take a more mechanical or list approach. However, because of the emphasis and attention that were likely to be placed on this new concept in the SSA, the Introduction Bill incorporated additional elements so that stewardship was not seen simply as stewardship of the department. The term encompasses a set of administrative responsibilities concerning other resources or instruments of the state for which chief executives have a duty of operational care and proactive risk management, with a view to looking after and improving the matters within the care. These administrative responsibilities include legislative instruments as well as non-departmental assets and liabilities of the Crown administered by the department (in addition to responsibilities under the PFA for all appropriations administered by the department).

- *Stewardship of the system* – The Introduction Bill did not go so far as to include system care, management and improvement as an explicit component of the stewardship responsibility (eg, as though the Secretary for Education and the Director-General of Health have a stewardship responsibility for the education and health systems respectively). The non-inclusion of system stewardship was for two reasons. First, in practical terms, there would be substantial overlap with the separate responsibility in s32(1)(h) for: the efficient and economical delivery of the goods or services provided by the department or departmental agency and how effectively those goods or services contribute to the intended outcomes. Second, there are multiple players with leadership or governance roles in the education system, health system, and other systems at sector-wide level; they too would have elements of a stewardship responsibility with system impacts.

166 The Introduction Bill also included an explicit responsibility in new s32(1)(g) for: the integrity and conduct of the employees for whom the chief executive is responsible. This specification was part of the legislative scheme that links a chief executive's primary responsibilities explicitly to the purpose of the SSA. The phrase "the employees for whom the chief executive is responsible" caters for the separate groups of employees who come under the responsibility of a departmental agency chief executive or the chief executive of the host department.

Minor changes

167 Officials considered that there was sufficient overlap between the concepts in CAB Min (12) 16/10 paragraph 88.3 (carrying out functions and duties) and paragraph 88.5 (management of activities) such that they should be combined into a single responsibility. This is expressed in new s32(1)(e) as a responsibility for: the performance of the functions and duties and the exercise of the powers of the department or departmental agency (whether imposed by any enactment or by the policies of the Government).

168 The concepts in paragraph 88.6 in the CAB Minute are included in new s32(1)(h) in modified form. The rephrasing provides a better articulation of the relationship between the concepts of efficiency, economy (which relate to outputs) and effectiveness (which relates to outcomes, ie what is achieved).

- "efficient and economical delivery of the services to be provided" is modified to "efficient and economical delivery of the goods or services provided"
- "and the results intended to be achieved" is modified to "and how effectively those goods or services contribute to the intended outcomes"
- new s2 includes a definition of "outcome". Deliberately, it is the same definition as that inserted into the PFA in January 2005.

169 A chief executive's financial and reporting responsibilities under the PFA differ in the case of a departmental, or a departmental agency, chief executive. Primarily for this reason, but also to avoid unnecessary legislative duplication, it was considered preferable that the PFA alone set out the respective financial and reporting responsibilities of chief executives of a host department and of a departmental agency.

Select Committee process

170 Very few submissions commented on the amendments to the responsibilities of chief executives. The submissions were favourable, particularly relating to stewardship and responsiveness to the collective interests of government. The PSA considered that s32 should go further and include responsibilities for collaboration with other public entities and have regard to the need for stewardship across the system. Associate Professor Bill Ryan considered the amendments relating to stewardship would benefit from a "more sweeping and historically-aware" definition. The submissions did not lead to any amendments to the chief executive responsibilities during the Select Committee process.

Chief Executive Responsibilities: Sector Board Arrangements

171 As noted in the discussion about sector boards, in relation to Part 2 of the SSA, Cabinet declined the proposal that boards be established under a new schedule to the SSA (CAB Min (12) 16/10, paragraph 45). Consequently, there was no need to legislate for chief executive responsibilities in board arrangements. However, the following few paragraphs record the policy thinking, as a matter of historic record and also in the event of a potential future appetite for such arrangements.

Policy intention

172 In sector board arrangements, the chief executives of the member departments would have joint and several responsibilities to the appropriate Ministers. The responsibilities would include:

- the board's strategic planning
- the carrying out of the functions and duties of the board
- the tendering of free and frank advice to the appropriate Ministers
- the disclosure of such information of their departments as is necessary to enable the board to discharge its functions
- the financial and reporting responsibilities that fall within scope of a board under the Public Finance Act 1989.

173 The purpose of joint and several responsibilities would be to bind the member chief executives into collective decision making (eg consensus on recommendations to Ministers concerning sector priorities or resource allocation). Once the board makes a decision, each chief executive would be bound into what was agreed collectively, in much the same way as Ministers have collective Cabinet responsibilities, such that a chief executive cannot fall back on his or her individual responsibilities under the Act. Accordingly, the SSA would need to make it clear that the joint and several responsibilities take precedence over a chief executive's individual responsibilities in respect of departmental matters that fall within scope of a board's remit, as agreed by Ministers.

174 For the avoidance of doubt, the SSA would also need to clarify that the member chief executives on a sector board remain jointly and severally responsible, even when a decision was made by a chair with a casting vote. The principle of collective responsibility would continue to apply.

Recommendations to Cabinet

175 BPS Cabinet paper 4 set out the details and proposals for sector boards. The paper recommended changes to the SSA covering the above policy intentions, with additional specifications to the effect that:

- the SSA will provide that the collective responsibilities of both a Public Service chief executive and a non-Public Service chief executive board member will take precedence over individual responsibilities to a Minister or Ministers
- for the avoidance of doubt, the collective responsibilities of a Board member exclude any specified independent statutory functions under any Act for which a Public service chief executive is not directly responsible to a Minister or Ministers (e.g. Director of the Serious Fraud Office under s30(1) of the Serious Fraud Office Act 1990).

- for the avoidance of doubt, the collective responsibilities of a Board member who is a non-Public Service department chief executive shall exclude any specified independent statutory functions under any Act for which that chief executive is not directly responsible to a Minister or Ministers (e.g. s16(2) of the Policing Act 2008).

Chief Executive Responsibilities: Departmental Agency Arrangements

Policy intention

176 In relation to the chief executive responsibility aspects of the proposed departmental agency model, a key feature is that the head of the agency would be directly responsible to the appropriate Minister for all the operational or service delivery functions of the agency. This feature would overcome the inherent difficulty in the current arrangements for departmental semi-autonomous bodies (SABs) because, despite the appearance of autonomy, the chief executive of the host department remains legally responsible for all the SAB's activities.

177 To give effect to the intended arrangement for departmental agencies, the SSA would need to be amended to specify that:

- the head of a departmental agency is directly responsible to the Minister for the operational/service delivery functions of the agency, agreed by the appropriate Ministers
- the chief executive of the host department is not responsible to the Minister for those functions.

178 In departmental agency arrangements, the chief executive of the host department would remain responsible for the employment and financial matters of the agency, but would delegate relevant matters to the head of the agency.

Recommendations to Cabinet

179 BPS Cabinet paper three dealt with departmental agencies. It included recommendations to amend the SSA to give effect to the above policy intentions, with the additional specifications that:

- persons working on departmental agency business will be employees of the host department, but the chief executive of the host department will delegate his or her employer responsibilities for these employees to the chief executive of the departmental agency
- a chief executive of a departmental agency is responsible for complying with obligations under the Official Information Act in relation to the departmental agency
- provisions applying to a chief executive of a department under the SSA will be amended to apply to a chief executive of a departmental agency, with the exception of provisions relating to the employment of staff.

180 In addition, amendments to the PFA would set out the financial responsibilities of the respective chief executives of host departments and of departmental agencies.

Legislation drafting process

181 One of the key provisions in the Introduction Bill centred on the employer responsibilities of a chief executive of a departmental agency, specifically to give effect to Cabinet's decision that the host department's chief executive will delegate his or her employer responsibilities to the departmental agency's chief executive. As noted earlier in this paper in relation to Part 2 of the SSA, cl48 in the Bill replaced s59 in the SSA and included a "deemed" delegation mechanism to:

- recognise that employees who work 'in' a departmental agency are legally employees of the host department
- ensure that the host department chief executive delegates to the departmental agency chief executive his or her employer responsibilities in relation to individual employees 'in' the departmental agency.

182 As a consequence of the deemed delegation mechanism, the Bill had to:

- specify the range of provisions that comprise the package of employer responsibilities of a departmental agency chief executive (these were specified in cl48 [new s59(2)] in the Bill)
- amend s33 consequentially to impose on departmental agency chief executives the same duty that chief executives of departments (including host departments) have to act independently in matters relating to decisions on individual employees.

183 Elsewhere throughout the Introduction Bill, provisions that apply to a chief executive of a department under the SSA would also apply to a chief executive of a departmental agency, eg the Commissioner acts as their employer and reviews their performance. As noted above in the discussion relating to the individual responsibilities of departmental chief executives, the responsibilities in new s32(1) apply equally to chief executives of departmental agencies in relation to that part of the department that comprises the departmental agency.

184 Officials considered it unnecessary to specify in the SSA that a chief executive of a departmental agency is responsible for complying with obligations under the Official Information Act in relation to the departmental agency. This is the practical effect of new s27A (definition of department, departmental agency, host department) in combination with revised s32 (chief executive responsibilities).

Select Committee process

185 Few submissions on the Bill commented on this aspect of the departmental agency model. No amendments were made to the Bill, apart from the minor technical changes mentioned above in relation to part 2 of the SSA (new organisational forms: departmental agencies).

Panel Composition for Chief Executive Vacancies

The Act

186 Section 35(4) required a panel to be established for each chief executive vacancy, and stipulated that the panel was to comprise the Commissioner as chairperson, the Deputy Commissioner and one or more persons appointed by the Commissioner after consultation with the appropriate Minister or Ministers.

Commentary

187 There are instances where it is relatively straightforward to fill a particular chief executive vacancy and it is disproportionate in terms of time and commitment to require the full participation of both the Commissioner and the Deputy Commissioner. The SSC proposed that there should be flexibility to permit the Deputy Commissioner to substitute for the Commissioner as chairperson of a panel, and for the Commissioner to appoint another employee in the State Services Commission to substitute for the Deputy Commissioner. The substitute for the Deputy Commissioner should come from within the SSC on the basis that the appointment of Public Service chief executives is the SSC's core business and single most important function.

Recommendation to Cabinet

188 Cabinet agreed with the proposal above, as submitted in BPS Cabinet paper six.

Select Committee process

189 No changes were made during the Select Committee process to the amendment in cl28(3) and (4) of the Bill.

Criteria for Selecting Chief Executives

The Act

190 Section 35(12) set out a list of criteria to which the Commissioner or Governor-General, as the case may be, had to have regard in deciding upon the person to be appointed as chief executive of a department[21].

Commentary

191 The SSC considered that it was unnecessary to retain subsection (12) of s35 in the SSA, primarily for two reasons. First, the content in subsection (12) largely duplicated the content in other sections where they are better located or expressed in more detail, notably:

- the revised and expanded chief executive responsibilities in new s32(1), in conjunction with the link between those responsibilities and the new purpose to the SSA
- the good employer and EEO related principles and responsibilities that remained in s56.

192 Second, the selection criteria are standard matters for a chief executive position description. Locating the criteria in the position description provides more flexibility to refine them over time or to tailor them to the particular position.

Recommendation to joint Ministers

193 The proposal to remove subsection (12) was developed after the suite of seven BPS Cabinet papers was submitted in May 2012.

194 Consequently, in July 2012 the proposal was submitted as part of a joint SSC/Treasury report to the Ministers of State Services and of Finance, who were authorised by Cabinet to "make decisions on minor and policy decisions that arise during the drafting of the legislation" [CAB Min (12) 16/10, paragraph 3.2].

Select Committee process

195 No changes were made during the Select Committee process to the amendment in cl28(10) of the Bill.

[21] A person who: (a) can discharge the specific responsibilities placed on that chief executive; (b) will imbue employees of the department with a spirit of service to the community; (c) will promote efficiency in the department; (d) will be a responsible manager of the department; (e) will maintain appropriate standards of integrity and conduct among employees of the department; (f) will ensure that the department is a good employer; (g) will promote equal employment opportunities

Transfer of Chief Executives between Departments

The Act

196 Section 35 sets out for the process for the appointment of chief executives. The SSA requires a separate appointment process for the chief executive of each department when there is a vacancy. A merit-based transparent process is required in keeping with the requirements of the SSA and the obligations of the Commissioner as a 'good employer'. Section 36 sets out the process for the reappointment of chief executives.

Commentary

197 The desirability of allowing the Commissioner to transfer chief executives between Public Service departments in certain circumstances was identified in the first version of SSC's internal review paper in January 2010.

198 While the existing chief executive appointment process could be unnecessarily cumbersome and obstruct the Commissioner from acting decisively when circumstances require (eg, if there is a sudden departure of a chief executive and urgent need for someone to step into the role), there was no desire to move away from the requirements to follow a transparent, merit-based appointment process; this process is vital to underpin political neutrality.

199 Nonetheless, the ability to transfer a chief executive from one department to another could be desirable where the Commissioner believes that it is in the best interests of the Public Service to do so, particularly where there is an immediate need to fill a critical vacant position or impending vacancy. The ability to transfer chief executives in this situation would provide the flexibility to adapt quickly to the needs of the system at any given time, would foster a development path for chief executives, provide opportunities for chief executives to gain a wider range of skills and experience, and ensure they are working where they can be most effective.

200 SSC officials considered that a transfer should occur only following prior discussion with the appropriate Minister(s) and would follow a process similar to that applying for reappointments – from s35(6) of the SSA onwards. The Commissioner would still be required to forward the person's name to the Minister, for referral to the Governor-General and a decision on whether to accept or decline the Commissioner's recommendation.

201 The requirement for a chief executive to be appointed in the first instance through the full s35 process would remain. Only an incumbent chief executive could be transferred into a vacant chief executive position, or impending vacancy. The vacancy created by that transfer could potentially be filled through another transfer of an existing chief executive, but ultimately the position left vacant following a transfer or series of transfers would have to be filled by an appointment made under the full process in s35 (ministerial input on relevant matters; notification of the vacancy; appointment panel process).

Recommendations to Cabinet

202 The BPSAG's report went further than the SSC's proposal above to enable the transfer of incumbent chief executives into vacant chief executive positions or impending vacancies. Chapter 5.18 in the report considered that the Commissioner should be supported by greater powers and authorities than at present, in particular (among other leadership initiatives) to:

- "proactively deploy chief executives and specified second and third tier staff to anywhere within the State services in response to system needs, and
- designate some positions as fixed-term developmental roles and jointly agree appointments with chief executives".

203 BPS Cabinet paper two set out a range of proposals covering the Commissioner's leadership role in relation to: leadership development; working with chief executives to fill senior positions in departments; and transferring existing departmental chief executives between departments. The deployment of second and third tier staff could occur in the context of designating and filling key positions in the Public Service. This aspect of the legislative changes is discussed below in relation to Part 4 of the SSA.

204 In relation to the transfer of chief executives, Cabinet agreed with the recommendation that the SSA be amended to permit the Commissioner to transfer an existing chief executive into a vacant chief executive position in any Public Service department, with the concurrence of the chief executive, and following consultation with the appropriate Minister(s), if the Commissioner reasonably believes it is in the public interest to do so.

Legislation drafting process

205 The process of drafting the legislative changes ensured the following refinements were incorporated in cl31 in the Introduction Bill:

- provision was made in new s37A for departmental agencies, whereby the chief executive of a department or departmental agency could be transferred into a vacancy in the position of chief executive of that department or departmental agency, as applicable, or any other department or departmental agency
- provision was made for transfers into a vacancy or impending vacancy in a chief executive position
- the effect of new s37A(4) – not requiring the notification of the vacancy, establishing a panel or examining other applicants – was to make such transfers non-contestable.

Select Committee process

206 During the Select Committee process, advisers considered the potential scenario where an existing chief executive may transfer into a vacancy in the position of Government Statistician (chief executive of Statistics New Zealand). The Commissioner makes an appointment to this position directly, without referral to the Governor-General in Council. The Departmental Report recommended that, in the same way, a transfer into that position should be exempt from the process requirements in s35(7) to (10) in the SSA (which do apply to other transfers under cl31 in the Bill – new s37A).

207 On subsequent drafting advice from PCO, the Revision Tracked version of the Bill for FEC's consideration changed the cross-references in s35 from s35(7) to (10) to s35(6) to (11). This technical change provides for a consistent legislative regime for:

- the appointment or reappointment of the Government Statistician (under s37(3) of the SSA, nothing in subsections (6) to (11) of s35 applies in these cases)
- the transfer of an existing chief executive into the position of Government Statistician under new s37A.

208 Nonetheless, despite the non-application of s35(10)(b) of the SSA, the Departmental Report recommended that the Bill should require the Commissioner to publicly announce the appointment of a Government Statistician, as is done for other chief executives. This is now provided for explicitly in s37(2) of the SSA.

Process for Determining Conditions of Employment of Chief Executives

The Act

209 In accordance with s38(3), the conditions of employment of chief executives are determined in each case by agreement between the Commissioner and the chief executive. As part of the process to finalise the conditions of employment, the Commissioner first had to obtain the agreement of the Prime Minister and the Minister of State Services to the conditions.

Commentary

210 The requirement in s38(3) for the Commissioner to obtain the agreement of the Prime Minister and the Minister of State Services to a chief executive's conditions of employment ensured that the Commissioner complies with government policy relating to those conditions. It also corresponds with other legislative provisions requiring Crown entity boards, DHBs and TEIs to consult the Commissioner on the terms and conditions of employment for their chief executives. Together, these provisions prevent extravagant expenditure of public funds, and ensure consistency across the State services.

211 While a technical amendment to this requirement may not have any real effect in practice because the same administrative process would be required, the SSC considered that the same objective would be achieved by the Commissioner "consulting" the Prime Minister and the Minister of State Services on proposed terms and conditions. This amendment would preserve the requirement for the Commissioner to take into account government policy while at the same time upholding the Commissioner's independence in negotiating with chief executives and ensuring consistency across the State services by aligning the SSA with corresponding legislation.

Cabinet process

212 Cabinet agreed with the recommendation in BPS Cabinet paper six that the SSA be amended to require the Commissioner to consult the Prime Minister and the Minister of State Services (rather than obtain their agreement) when determining the conditions of employment of a chief executive [CAB Min (12) 16/10 paragraph 92].

Select Committee process

213 No changes were made during the Select Committee process to the amendment in cl32(2) of the Bill.

Appointment of an Acting Chief Executive

The Act

214 SSA s40 made provision for an acting chief executive in situations where:

- there was a vacancy in the position of a chief executive, or
- the incumbent was absent from duty and unable to delegate his or her responsibilities under the SSA to any other person.

215 In these situations, the Commissioner could direct the chief executive of another department or an employee in the State services to exercise or perform the chief executive's functions, powers or duties.

Commentary

216 As noted in the discussion relating to Part 2 of the SSA concerning reorganisations, an issue associated with the implementation of structural change would be resolved by broadening the provision enabling the Commissioner to appoint an acting chief executive.

217 From time to time governments decide to transfer functions from an existing department to a new department that will be established on a future date. This could happen when some functions transfer from an existing department that will still continue to carry out a reduced or changed range of functions, or as a transfer of functions when an existing department is to be disestablished.

218 In such situations, offers of employment are required to be made to employees whose services will be sought in the new department. However, offers technically could not be made until a chief executive or acting chief executive of the new department was appointed, as it is the chief executive who is required to make the offer of employment. This situation was unwieldy and often artificial, where employees could not be provided with certainty and the government was delayed in implementing its decisions when it is simply rearranging activities and functions.

219 A solution would be to broaden the provision in s40 that enables the Commissioner to appoint an acting chief executive. The provision should be broadened across two dimensions:

- the situations for appointing an acting chief executive should be expanded to include appointing an acting chief executive when a new department is to be established on a known date
- the range of persons who may be appointed as an acting chief executive should be expanded to include any person whom the Commissioner considers suitable to discharge the responsibilities that will be placed on the acting chief executive. Such a person could be, for example, a retired former departmental chief executive who is prepared to step into the role for several months, or some other suitable person from elsewhere in the wider public sector, or a previous senior public servant who was currently in the private sector.

220 An acting chief executive would require the power to act, for example, to commence preparations for the operation of the new department including making offers of employment to employees in the department(s) from which functions are to transfer. The offers and any other obligations would be subject to the new department coming into existence, and would take effect as from that date. An acting chief executive would only be a temporary appointment: as soon as practicable after the formal commencement of the new department, a chief executive must be appointed under s35 of the SSA.

Recommendation to Cabinet

221 Cabinet agreed with the proposals above, as submitted in BPS Cabinet paper 6 and as recorded in CAB Min (12) 16/10, paragraphs 93-95. However, the wording of the Cabinet paper and, more importantly, paragraph 93 in the CAB Minute had the effect of tying the Commissioner's ability to appoint any person as an acting chief executive to situations where a new department is to be established.

222 The policy intention was to propose that the Commissioner be able to appoint any person as an acting chief executive also in the existing situations in s40, ie when there is a vacancy or a chief executive is absent from duty. Giving the Commissioner this ability explicitly would avoid any perception of a "work around", as under the existing legislation. In situations where the Commissioner wanted to appoint a person who was not an incumbent departmental chief executive or an employee in the State services, the Commissioner appointed them to the Public Service Consulting Group, effectively making them an employee of SSC, thereby qualifying them to act under the Commissioner's direction as an acting chief executive.

223 Accordingly, in July 2012 officials submitted a policy clarification proposal as part of the joint SSC/Treasury report referred to in paragraph 194. The report commented that the proposal would in effect clarify the existing practice of occasionally appointing an acting chief executive from outside the State services. A person appointed from outside the State services would still need to be employed in the State services for the duration of the acting period to allow the Commissioner to set terms and conditions of employment and for payroll purposes. In effect, the proposed amendment would not significantly change current practice or process, but would clarify the Commissioner's ability to appoint any person as an acting chief executive, avoid perceptions of a "work around", and promote the message of better public services by engaging talent from both the public and private sectors.

Legislation drafting process

224 In addition to the substantive amendments, PCO included technical amendments in the Introduction Bill to refer explicitly to departmental agencies as well as departments, and to the Commissioner appointing, rather than directing, persons to act as an acting chief executive.

Select Committee process

225 No changes were made during the Select Committee process to the amendment in cl34 of the Bill.

Chief Executive Powers to Delegate

The State Sector Act and Crown Entities Act

226 There are differing powers of delegation in the various parts of the State services.

227 In the Public Service, s41 of the SSA conferred on chief executives the authority to delegate their functions and powers to another "chief executive or an employee". Section 2 defines "employee" in relation to the State services as meaning "an employee in any part of the State services, whether paid by salary, wages, or otherwise". There were some critical considerations in relation to any delegation:

- a chief executive who delegated a function or power may continue to exercise that function or power (s41(7))
- the chief executive remains responsible for the actions of any person acting under the delegation (s41(7))
- the chief executive may revoke the delegation in writing at will (s42).

228 The Crown Entities Act spells out in s73(1) the range of people to whom the board of a Crown Agent, autonomous Crown entity (ACE) or independent Crown entity (ICE) may delegate the entity's functions or powers:

- a member or members (i.e. of the board)
- the chief executive or any other employee or employees, or office holder or holders, of the entity
- a committee (i.e. of the board)
- any other person or persons approved by the entity's responsible Minister
- any class of persons comprised of any of the persons listed in the four previous bullets
- a Crown entity subsidiary of the statutory entity.

229 As with Public Service chief executives, a Crown entity board that delegates may continue to exercise the functions and powers, remains responsible for the actions of the delegate, and may revoke the delegation at will.

230 A Crown entity board clearly had a more extensive power to delegate than a Public Service chief executive. By virtue of CEA s73(1)(d) the board may delegate to "any other person or persons" as long as they are approved by the entity's responsible Minister. A Crown entity has the power to delegate, for example, to the chief executive of a state-owned enterprise, or to the head of a community based or private sector organisation that may be better placed to deliver certain services to a group of clients.

Commentary

231 The previous sections in this paper comment on the desirability of making a whole of government flavour explicit in the SSA, including the proposal that operating in the collective interests of government should be reflected in the purpose of the SSA as something that the state sector system should promote and uphold.

232 In the SSC's view, the SSA should facilitate operating in the collective interests of government by providing for a permissive system of seamless and widespread powers to delegate the exercise of statutory functions and powers between agencies, and even to non-government service providers where that is warranted. A delegation regime of this scope would facilitate:

- locating decision making with those who are better placed than the department to make decisions in certain circumstances
- improving the efficient and effective delivery of services, by delegating functions in certain circumstances to those who are better placed to deliver
- potentially avoiding the need for structural change in certain cases.

Delegations inside the Public Service

233 The SSC's initial proposal for agencies within the legal Crown (ie, departments, prospective sector boards and departmental agencies), was for a legislative regime whereby:

- a chief executive may generally delegate any statutory function or power to any person in the Public Service who would have the power to subdelegate
- for the avoidance of doubt, a delegation may be made to a secondee or contractor working in or for the agency
- in all cases, the legislation would continue to make it clear that:
    - the chief executive who grants a delegation would continue to be able to exercise the functions and powers, would remain responsible for the actions of the delegate, and could revoke the delegation in writing at will
    - the power to delegate is subject to any express statutory provision that states a particular function or power may not be delegated.

Delegations outside the Public Service

234 In order for a chief executive within the legal Crown to delegate a statutory function or power to a person or agency outside the legal Crown (eg, Crown entity; non-government organisation) it would be appropriate for reasons of transparency and accountability to Parliament to impose certain checks and balances on such delegations. The SSC's initial proposal included the following measures:

- the Minister's approval should be required. The advice to the Minister should explain why a delegation is appropriate rather than solely contracting with the other party for the provision of services
- there should be no power to subdelegate, to avoid the risk of widespread dissemination of functions and powers that Parliament allocated to the Crown and for which Ministers are ultimately responsible
- the delegation should be explicitly accounted for in the annual report.

Recommendations to Cabinet

235 Cabinet agreed [CAB Min (12) 16/10, paragraph 90] with the recommendation in BPS Cabinet paper 6 that the SSA be amended to enable departmental chief executives to delegate the exercise of any of their statutory functions or powers:

- within the legal Crown to any person who would have power to sub-delegate to another person within the legal Crown
- to a person or agency outside the legal Crown: subject to the appropriate Minister's approval; subject to the restriction that the delegate may not subdelegate; and with an obligation to account for the delegation in the annual report.

Legislation drafting process

236 The legislation drafting process added a number of technical details to help give effect to Cabinet's policy decisions.

237 The Introduction Bill clarified that the power to delegate applied to chief executives of departmental agencies as well as departments.

Delegations inside the Public Service

238 New s41(1A) in the Introduction Bill clarified that a chief executive may delegate to any other Public Service chief executive or Public Service employee, or to anyone "working in the Public Service as a contractor in relation to a function, duty, or power of the Public Service". This phrasing in relation to contractors was to distinguish between individuals contracted to work on departmental business (who could be delegates), and others such as cleaners or trades people doing electrical or other repairs inside departmental premises, but not contracted to carry out departmental business.

239 An amendment to s41(2) clarified that delegations by a delegate under new s41(1A) may be made to the same range of persons, ie any Public Service chief executive or employee, or a contractor as defined in the preceding paragraph.

Delegations outside the Public Service

240 Three new subsections were inserted to set out the regime for delegations to persons outside the Public Service.

241 New s41(2A) provided for three aspects of the regime:

- the Minister may approve a person outside the Public Service to be a delegate
- any person could be approved, ie delegations were not limited to persons within the Public Service or even the wider State services; "person" includes individuals or "legal persons" such as companies
- a delegate outside the Public Service did not have the power to subdelegate.

242 New s41(2B) required the delegating chief executive to note the delegation in the annual report and indicate how effectively it was carried out.

243 New s41(2C) specified that the same statutory obligations that apply to delegations carried out within the Public Service (eg, obligations under the Official Information Act 1982 and the Ombudsmen Act 1975) apply also to delegations carried out by approved persons outside the Public Service.

Select Committee process

244 The initial joint SSC/Treasury Briefing to the Finance and Expenditure Committee on the State Sector and Public Finance Reform Bill, February 2013, noted that existing provisions would remain intact and continue to apply, including:

- the delegating chief executive will remain responsible for the delegated function or power, as currently the case under s41(7)
- the power to delegate under SSA s41 is subject to any other statutory provision that prohibits, restricts or places conditions on a power to delegate.

245 The submissions to FEC focussed mainly on concerns and perceived risks relating to the ability to delegate functions or powers to persons outside the Public Service. Advisers acknowledged the views expressed in the submissions and agreed that certain amendments would enhance the provisions in the Bill. Accordingly, the Departmental Report recommended amendments to:

- amend s41(1) in the SSA to clarify that delegations are to be in writing, and that functions or powers delegated to a chief executive by a Minister or the Commissioner may not be delegated without their prior written approval
- amend new s41(1A) to limit delegations to a "function or power" (the current scope of what may be delegated), not a "function, duty, or power" as provided for in cl35(2) of the Bill
- insert a clarification in new s41(2A) to the effect that the Minister's approval to delegate a function or power outside the Public Service must be in writing and made prior to the delegation occurring
- insert a new provision such that a delegate outside the Public Service must also comply with all relevant obligations in a code of conduct set by the Commissioner under s57(2)
- insert a new specification in s41(3) such that a delegate is "subject to the same restrictions" as the chief executive in exercising functions or powers in the same manner and with the same effect as if they had been conferred on that person directly by the SSA; for example, an important set of restrictions, if a delegation includes financial authority, is the need to follow Treasury instructions and other requirements regarding public financial management
- insert a new provision to the effect that, in cases where the chief executive or delegate writes to a third party to inform him or her of an action taken by the delegate, the written document must state that the action was taken by a delegate of the chief executive; it must give the delegate's name and office; and inform that a copy of the delegation may be inspected at the chief executive's office.

246 Separately from the amendments in response to submissions, advisers also recommended in the Departmental Report:

- an amendment to new s41(1A) to include secondees from elsewhere in the State services as potential delegates in relation to a function or power of the Public Service: it was the explicit intention that they be included within the scope of a chief executive's power to delegate, and the omission of a provision to that effect was an oversight in the Bill drafting process
- the insertion of a provision to clarify explicitly the ability of a delegate in the Public Service (including contractors and secondees in relation to a function or power of the Public Service) to subdelegate within the Public Service; this was in contrast to delegations outside the Public Service, which may not be subdelegated.

247 FEC discussed in depth the delegation provisions in the Bill, especially in relation to delegations to persons outside the Public Service. FEC requested departmental advisers for written information on: "whether there should be provision for additional safeguards in relation to delegating functions and powers outside the Public Service, for example, conflict of interest safeguards particularly in relation to delegating regulatory powers".

248 The advisers' response, April 2013, can be located on the parliament website[22] and internally within SSC (doc #2024851). Rather than summarise the advice in this paper, it would be preferable for the reader to refer directly to the source material.

249 At a subsequent meeting in April 2013, FEC requested further written information on the following:

- "clarification regarding the distinction between contracting and delegating, with examples, in the context of proposed amendments to s41 that would enable a Public Service chief executive to delegate functions or powers to persons outside the Public Service, including to the private sector. The request arises principally out of concerns about the impact on accountability through the availability of performance information for Parliament, particularly risks of access to information being denied, eg on grounds of commercial sensitivity
- "consideration of inserting in the Bill a statement of principle to the effect that rights of access to performance information should be no less than if the function or power were carried out within the department; alternatively, an assurance that there would be no lessening of accountability in connection with a delegation outside a department
- "at the FEC meeting on 10 April 2013, advisers referred to statutes that place limitations or restrictions on a chief executive's power to delegate, such as s33 of the Serious Fraud Office Act 1990: FEC has asked what other legislation is in place that restricts chief executives from delegating powers".

250 The advisers' response is on the parliament website([23]) and is available internally within SSC (doc #2024852).

251 At a following meeting, FEC "requested consideration of a conflict of interest provision, possibly based on wording from the Cabinet Manual, to apply to delegations outside the Public Service".

252 Readers can go to the parliament website[24], or within SSC to internal doc #2024854, for a copy of the advisers' response. In the end, a further safeguard was inserted into new s41(2A) such that a chief executive may delegate to persons outside the Public Service only after "satisfying himself or herself that any potential conflicts of interest will be avoided or managed". This safeguard was in addition to obtaining the appropriate Minister's prior written approval.

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22 http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCFE_ADV_00DBHOH_BILL11610_1_A327692/response-to-information-requests-redundancy-provisions

23 http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCFE_ADV_00DBHOH_BILL11610_1_A328837/response-to-further-information-requests-contracting-v

24 http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCFE_ADV_00DBHOH_BILL11610_1_A331599/response-to-information-requests-delegations-workforce

253 The Revision Tracked version of the Bill incorporated a small number of other amendments and legislative tidy-ups:

- new s41(1A) was drafted to continue the ability of a chief executive to delegate to "the holder for the time being of any specified office" in the Public Service (ie, in addition to specifying that delegations may be made to other Public Service chief executives and employees, and to secondees and contractors in relation to a function or power of the Public Service); delegations to an office, eg chief legal advisors, chief financial officers, and the Government Chief Information Officer, do not need to be refreshed if the office holder changes
- new s41(2A) required delegations to persons outside the Public Service to be of "a clearly identified function or power"; this specification was designed to avoid uncertainty or ambiguity; prevent 'scope creep' of what was included in a delegation; and prevent generic delegations, eg "all my functions under [a named] Act"
- new s41(2D) was added to clarify that information held by a delegate outside the Public Service in relation to a delegated function or power is, for the purposes of the Official Information Act 1982, deemed to be held by the delegating chief executive; this provision was designed to facilitate the operation of the OIA in relation to any function or power delegated to persons outside the Public Service; in the SSA this provision is in s41(2E)
- new s41(2E) was added to specify that the OIA and the Ombudsmen Act 1975 apply to a delegate outside the Public Service, in relation to a delegated function or power, as if the delegate were an organisation named in Schedule 1 of the Ombudsmen Act 1975; in the SSA this provision is in s41(2F).

Process for Performance Review of Chief Executives

The Act

254 Section 43 makes the Commissioner "responsible to the appropriate Minister or appropriate Ministers for reviewing, either generally or in respect of any particular matter, the performance of each chief executive".

255 Section 2 defines "appropriate Minister" in relation to a department as "(a) the Minister responsible for the department; or (b), where 2 or more Ministers are responsible for different functions of a Department, the Minister responsible for the relevant function of the Department".

Commentary

256 The practice was to include in the review process every Minister responsible for any function of the department. This practice had built up an expectation that all appropriate Ministers would be included in the annual performance review of a departmental chief executive. From time to time the practice had proven unnecessarily onerous. A performance review may cover matters relating to only one or two of the Ministerial portfolios in a Department, or may relate to a subset of the Department's overall functions. An example of when this might occur was the former Ministry of Economic Development, where there were nine Ministerial portfolios and four Associate Ministers.

257 Preliminary feedback on SSC's discussion paper for the review of the SSA suggested that the Act should include a provision to clarify that the Commissioner has discretion to determine which Ministers to include in a review process, having regard to the scope of functions under review.

258 The SSC Legal Team's view was that an amendment to this effect seemed unnecessary in light of:

- s43 specifically providing for the Commissioner to review "either generally or <u>in respect of any particular matter</u>" a chief executive's performance; and
- s2 distinguishing between "appropriate Ministers" in cases where a chief executive is responsible to more than one Minister for different functions.

Cabinet and legislation drafting process

259 No recommendation was made to amend s43.

260 During the drafting of the Bill, PCO made a technical amendment to the definition of "appropriate Minister" in s2, to include reference to the Minister responsible for a departmental agency, and for functions of a departmental agency.

Special Provisions in Relation to certain Chief Executives

The Act

261 Section 44(1) provided that sections 35, 36, 38, 39, 43 and 91 did not apply to the Solicitor-General, the Controller and Auditor-General, Commissioner of Police, Director of the Government Communications Security Bureau (GCSB) and the State Services Commissioner. These sections provide for:

- the appointment process for Public Service chief executives (s35)
- the reappointment process (s36)
- the Commissioner to set conditions of employment of chief executives (s38)
- the removal from office of chief executives (s39)
- the review of the performance of chief executives (s43)
- transitional provisions with the coming into force of the SSA (s91).

Commentary

262 Redundant references to the Controller and Auditor-General, Commissioner of Police, and s91, are covered later in this paper under the heading of technical amendments.

263 Notwithstanding exemption from the provisions referred to in s44(1), the Solicitor-General, Director of GCSB and the State Services Commissioner are Public Service chief executive positions. The question was whether and how they should be treated differently to other chief executives of Public Service departments.

Solicitor-General

264 There is no statute that provides for the employment of the Solicitor-General or that relates to the Crown Law Office (a Public Service department). Accordingly, there are no statutory provisions that apply to the appointment, term and conditions, removal from office or review of the performance of the Solicitor-General. The Solicitor-General holds office 'during the pleasure' of the Governor-General.

265 The question was whether the SSA should include provisions for the appointment, term and conditions, removal from office and review of the performance of the Solicitor-General. There are considerations of constitutional, legal and operational independence to many aspects of the Solicitor-General's position. SSC's discussion paper on the review of the SSA commented that this should not, however, prevent the Act from providing for the appointment, setting of the term and conditions and removal from office of the Solicitor-General. Such provisions should not impact upon the constitutional role and independence required of the Solicitor-General. They would be consistent with modern administrative arrangements that help bring about enhanced levels of transparency and accountability.

266 Reviews of performance, as with those applying to the Commissioner of Police and those that could apply to the State Services Commissioner, should not include how the Solicitor-General acquits his or her constitutional role. Neither would such reviews inquire into legal decisions that must be made independently by the Solicitor-General, such as decisions on stays of execution, prosecutions, appeals, opinions and the like.

267 Reviewing the performance of the Solicitor-General in acquitting his or her duties as chief executive of the Crown Law Office as a department would, however, fall within scope. Such reviews would be entirely consistent with the recent review of the role and functions of the Solicitor-General and the Crown Law Office by Miriam Dean QC and David Cochrane. Their report, among the consolidated recommendations, includes the recommendation that "Only the Chief Executive functions of the Solicitor-General be subject to performance review by the State Services Commissioner".

Director of GCSB

268 Relatively recently, Cabinet directed that, when the opportunity arises, amendments should be made to the Government Communications Security Bureau Act 2003 that would introduce more specific provisions in that Act for the appointment, term and conditions, removal and review of performance of the Director of GCSB (DES Min (10) 3/1).

269 As a result, at the time of the review of the SSA, no recommendation was put forward to amend s44 in respect of the Director of GCSB.

State Services Commissioner

270 Provisions relating to the appointment, term and conditions of employment and removal from office of the State Services Commissioner (and his or her Deputy) are provided for in the SSA separately from ss 35-36 and ss38-39. Accordingly, the exemptions provided for in s44 should continue to apply to the Commissioner.

271 There was no provision, however, for a review of the performance of the Commissioner, similar to that in s43 in relation to other Public Service chief executives. The question was whether or not the SSA should provide for reviews of the performance of the Commissioner. If yes, a separate review provision would be required because reviews of the performance of chief executives under s43 are undertaken by the Commissioner. A review of the performance of the Commissioner would be in respect of the Commissioner's performance when undertaking his or her responsibilities as chief executive. The Commissioner's independent statutory functions and powers would not be included among the matters under review, similarly to performance reviews of the Commissioner of Police under the Policing Act 2008.

272 Feedback on the SSC's discussion paper was silent on the possibility of inserting a performance review provision in respect of the Commissioner. Specifying who might be responsible for the review remained an unanswered question. In the end, no recommendation was advanced to insert such a provision in the SSA.

Recommendations to Cabinet

273 Cabinet agreed with the recommendation that the SSA be amended to remove the exemption applying to the Solicitor-General from chief executive performance reviews by the Commissioner. Specifically, Cabinet agreed that the reviews would apply explicitly and solely to the Solicitor-General's responsibilities as the chief executive of a department, and explicitly exclude performance of the independent and constitutional functions of the office of the Solicitor-General [CAB Min (12) 16/10 paragraphs 97-98].

Select Committee process

274 No changes were made during the Select Committee process to the amendment in cl37 of the Bill.

Part 4: Senior Leadership and Management Capability in Public Service

275 Part 4 of the SSA covers senior leadership and management capability in the Public Service. The provisions have been modified several times in an attempt to put in place a suitable, workable statutory regime for senior leadership and management development and capability.

276 When SSC commenced its review of the SSA in 2009, the provisions in Part 4 were not yet 'right': there was still a need to design and implement a statutory regime that was pitched at the right level for the Commissioner and chief executives, and that would meet present and future needs.

Revised Legislative Scheme

Background

Senior Executive Service

277 With the passage of the State Sector Act in 1988, the Commissioner ceased to be the employer of all public servants, as departmental chief executives became the employers of staff in their departments. The Commissioner's main functions in relation to Public Service employees were to negotiate conditions of employment, issue a code of conduct, carry out certain responsibilities relating to equal employment opportunities, and to "be responsible, in consultation with chief executives, for developing the senior executive service" [SSA s47(1)]. Accordingly, the Commissioner's responsibility in relation to capability development was pitched at the level of senior employees and was limited to the Public Service.

278 For a variety of reasons, the provisions relating to the senior executive service (SES) stagnated and the SES was effectively moribund within a few years. When the SSA came into force in April 1988, it included a raft of detailed provisions relating to the employment and training of SES members to the effect that:

- the SSC may designate senior positions in departments as forming a part of the SES (appointments were to be made by the chief executive of the department, who was required to consult the SSC before making an appointment; it was an explicit requirement to give preference to the best suited person)
- the number of positions forming part of the SES was not to exceed 500
- no awards or agreements applying to any position in the SES were registered under the Labour Relations Act 1987
- appointments to SES positions were for fixed terms of no more than 5 years; a person could be reappointed
- the chief executive was required to consult the SSC before finalising the conditions of employment of persons in the SES
- subject to any contract of service, the departmental chief executive could remove an SES employee from office for just cause or excuse, after consulting the SSC
- if an SES member was not reappointed, or if the appointment was terminated before the expiry of the term, the departmental chief executive had to notify the SSC of the decision and the reasons for it. In these cases, the SSC had to either:

  - employ the person in the SSC for a period determined by the SSC, but not for less than 2 years (the person was not entitled to receive any payment in respect of the completion of the preceding term of office); or
  - terminate the person's employment (in accordance with provisions in that person's contract); in the case of termination, the SSC determined the provisions that were to apply upon the termination
- the SSC was responsible for arranging for training of SES members and other people who, in SSC's opinion, had potential to be appointed to SES positions
- departmental chief executives had a duty to comply with all reasonable requests by the SSC to make their employees available for training purposes for up to 15 days in any 12 month period.

Management Development Centre

279 A number of amendments were made to the original provisions by the State Sector Amendment Act (No. 2) 1989. But, with the virtual stagnation in practice of the legislative provisions for the SES, in 1994 the Commissioner, Don Hunn, and Public Service chief executives obtained the Government's authorisation to establish the Management Development Centre (MDC) Trust.

280 The purpose of the Trust was to establish a Management Development Centre to promote excellence in the education, training and the development of Public Service leaders and senior managers; to carry out research and disseminate related information; and to carry out relevant education, training and development projects. The Trust was to serve as a co-operative arrangement between the Commissioner and chief executives to deliver senior leadership and management development for the Public Service.

281 The MDC Trust was formally categorised as a Crown entity as from 24 November 1994. With the subsequent coming into force of the Crown Entities Act on 25 January 2005, the MDC Trust and five other Trusts ceased to be Crown entities and were listed instead in a new Schedule 4 to the PFA thereby retaining them within the State services and as part of the government reporting entity under the PFA. At the same time, the Trust was renamed as the Leadership Development Centre (LDC) Trust.

State Sector Amendment Act 2004

282 In parallel with the development of the CEA, a number of significant amendments to the SSA were also developed. They included the total substitution of part 4 of the SSA to remove all the provisions relating to the SES and replace them with a new statutory regime for senior leadership and management capability in the Public Service. The amendments, via s9 of the State Sector Amendment Act (No 2) 2004, came into force on 25 January 2005.

283 The main policy intentions underlying the amendments in 2005 were to:

- establish shared responsibility for the Commissioner and departmental chief executives for developing senior leadership and management capability (in contrast to the previous regime under which the Commissioner was responsible for arranging for training); this would play out through –
  - the Commissioner being responsible for developing the overall strategy for developing senior leaders and managers in the Public Service, and issuing related guidance to chief executives

  - chief executives being responsible for senior leadership and management development within their respective departments, having regard to any such guidance issued by the Commissioner

- replace the SES (a defined group of persons subject to detailed employment provisions) with an executive leadership programme (ELP). The ELP would provide training and development for people in the programme
- enable the Commissioner to use his or her influence to assist the development of people in the ELP in a number of ways, mainly by requesting chief executives to make them available for training and development, and by arranging secondments for those people to assist their development (subject to their agreement and that of the respective chief executives)
- enable the Commissioner to use his or her influence to assist senior leadership and management development elsewhere in the State services by sharing his or her strategy and related guidance with other agencies, and also by inviting employees in the State services to participate in development activities being provided for public servants; the Commissioner would need to consult the employee's chief executive. The policy understanding was that participation by state servants who were not part of the Public Service would be on a user-pays basis (it was not considered necessary to include this detail in the SSA).

Commentary

284 Despite the intention underpinning the 2005 amendments to remove detailed provisions such as those relating to the former SES, some aspects of the new provisions were still too detailed to be placed in statute and proved unworkable in practice. In particular, in relation to the ELP, the Commissioner in consultation with chief executives would:

- set standards for entry to the ELP by Public Service employees
- approve the entry of Public Service employees to the ELP
- approve the development programme for each participant in the ELP, in consultation with that person
- arrange for any employee in the ELP to be seconded to a Public Service department or other agency in the State services, subject to the agreement of the employee and chief executives concerned (this was a discretionary provision for the Commissioner).

285 Further, and importantly, in the context of the BPS reform agenda –

- the shared responsibility of the Commissioner and chief executives, as provided for in s46, did not sufficiently identify the Commissioner's leadership role and responsibilities in this area
- chief executives were responsible for leadership development in their departments and for co-operating with the Commissioner in relation to the ELP, whereas there was a need for a broader requirement to assist the Commissioner to fulfil his or her responsibilities more generally and to actively support and participate in the development of senior leadership across the Public Service.

286 The report of the BPSAG had major implications for the SSA. As indicated in the discussion about the role of the Commissioner in part 1 of the SSA, the report considered that the Commissioner "needs greater influence over the development of leaders and more active management levers to make the system more responsive" (paragraph 5.18). The report also considered the Commissioner should be supported by greater powers and authorities, including to:

- "proactively deploy chief executives and specified second and third tier staff to anywhere within the State services in response to system needs, and
- designate some positions as fixed-term developmental roles and jointly agree appointments with chief executives".

Recommendations to Cabinet

287 BPS Cabinet paper two, on better system leadership, supported the aims of flexible deployment but fell short of implementing the BPS report's recommendations in full. The paper noted that research shows 70% of development comes from on-the-job experiences, indicating the desirability of being able to offer flexible professional development pathways to people who want experience across a wide range of roles and agencies. The thrust of the proposals was to facilitate flexible deployment by establishing in statute the Commissioner's leadership role in relation to:

- identifying and developing members of the leadership talent 'pool' across the Public Service
- working with chief executives to fill senior positions in departments
- transferring existing departmental chief executives between departments. This proposal is discussed above in relation to part 3 of the SSA dealing with chief executives.

Developing the leadership talent 'pool'

288 In relation to identifying and developing members of the leadership talent 'pool' across the Public Service, the Cabinet paper proposed replacing the existing provisions in ss46-48 with new provisions to the effect:

- to establish the Commissioner's leadership role
- to define the Commissioner's responsibility for developing and implementing a strategy for developing senior leaders
- as part of the strategy, one of the prospective development mechanisms would be the ability to deploy individuals to developmental roles in departments, subject to their agreement and in consultation with appropriate chief executives
- at some point, the Commissioner could invite other departments and agencies in the wider State services to participate in these initiatives.

289 Though not explicit in the Cabinet paper (and apart from cases where a person is a successful applicant through a merit-based appointment process to a different position as part of a career development pathway), the policy thinking included that flexible deployment would normally occur by way of relocation (eg as part of a joint agency project team or taskforce, possibly on a part-time basis) or collocation (eg as part of a joint agency hub) or secondment to a different agency. It was desirable to continue the Commissioner's ability to arrange for secondments (with the agreement of all relevant parties) for the purpose of senior leadership development. The Commissioner's ability to do so would:

- be part of the Commissioner's implementation of the strategy for the development of senior leadership and management capability
- continue to involve the State services where relevant
- continue to be exempt, as already provided for in s49(2), from the requirements in ss60, 61 and 65 of the SSA (relating to merit appointments; notification of vacancies; review of appointments).

290 It was also part of the policy thinking that the Commissioner's ability to arrange for secondments as part of the implementation of the strategy would in no way affect or diminish the ability of chief executives to agree on secondments for their employees without reference to the Commissioner. Chief executives retain their rights and powers as employers, including their duty to act independently in relation to decisions on individual employees.

Filling senior positions in departments

291 In addition to ensuring that the Commissioner is able to secure the on-ongoing assistance of all Public Service chief executives in systems to facilitate the identification and development of leadership talent in the Public Service, there was also a need to ensure that the Commissioner is able to deploy senior leaders appropriately to areas of critical need in the Public Service. To this end, the Cabinet paper proposed that the SSA be amended to enable the Commissioner to designate certain positions in the Public Service as key positions which must be filled only by agreement between the relevant chief executive and the Commissioner, and that the SSA include an appropriate appointment process for such positions.

292 The policy intention for this proposal was to provide the Commissioner with an ability to influence the filling of senior positions with the aim of ensuring that:

- appropriate consideration is given to system-wide leadership development in the filling of positions
- positions in areas of critical risk are identified and the widest range of suitable candidates for appointment are considered.

293 The Cabinet paper specified that a position would constitute a key position by virtue of its developmental potential for senior leaders, or by virtue of the critical nature of the position in terms of the operation of the department.

294 It is important to note that, while secondments arranged by the Commissioner under the senior leadership development strategy (as well as any other secondments agreed between chief executives without involving the Commissioner) are exempt from the requirements in ss60, 61 and 65, these requirements do apply to appointments to key positions, ie: appointment on merit; notification of the vacancy; ensuring the appointment is subject to review.

Legislation drafting process

295 With reference to the appointment process for key positions, cl40 of the Bill:

- enabled the Commissioner to designate a position as a key position after consulting the chief executive of the department or departmental agency
- set out the criteria that a position had to meet in order to be designated as a key position
- required the Commissioner to publish a list of key positions on an Internet site maintained by or on behalf of the Commissioner
- enabled chief executives to appoint employees to key positions only with the Commissioner's agreement.

296 Cabinet specifically agreed, as part of the proposals pertaining to the flexible deployment of senior leaders across the system, that s33 be amended to clarify that the independence of chief executives in employment matters is subject to the new provisions [CAB Min (12) 16/10, paragraph 111]. This was reflected in cl26 of the Bill providing that the independence of chief executives is subject to the requirement that a chief executive may only appoint an employee to a key position with the Commissioner's agreement.

Select Committee process

297 Very few submissions commented on the amendments to the provisions relating in Part 4 of the SSA, and no changes were made to the Bill during the Select Committee process.

Part 5: Government Workforce Policy and Personnel Provisions

298 Part 5 of the SSA was restructured by:

- expanding the heading to part 5 from "Personnel provisions" to "Government workforce policy and personnel provisions"
- inserting a new subpart 1 – Government workforce policy. The existing personnel provisions formed a new subpart 2.

299 There were three main issues relating to part 5 of the SSA:

- inserting new provisions relating to the development and application of government workforce policy
- expanding the Commissioner's ability to apply a code of conduct with variations to meet differing circumstances
- streamlining and bringing consistency to the provisions relating to redeployment and technical redundancy.

Government Workforce Policy

Background

300 The provisions relating to government workforce policy originated in discussions within the SSC in relation to part 6 of the SSA. Initially, the issue for part 6 was to define the Commissioner's contemporary role in relation to the Employment Relations Act 2000. Those considerations soon broadened to the Commissioner's mandate concerning workforce matters more generally, as part of the Commissioner's system leadership role.

301 It would be beneficial for readers to refer first to the background to these matters, as set out in relation to part 6 of the SSA. The discussion includes SSC's initial thinking about potential amendments to part 6. In the end, no proposal was put forward to change the existing provisions concerning employment relations.

302 Other aspects of the proposal advanced and developed into the government workforce policy provisions that are now located in part 5 of the SSA.

Recommendations to Cabinet

303 As part of the shift in focus from responsibilities for negotiating collective employment agreements to a broader, strategic level concerning responsibilities for workforce matters, BPS Cabinet paper 6 proposed that:

- to assist employers to make informed and prudent decisions on employment matters, the Commissioner's role would be to prepare standards on workforce matters for approval by the government. Of note reference to:
    - "standards" was preferred to the preparation of "guidelines" as a term that would add some 'starch', so that the standards were seen unequivocally as government policy and therefore must be followed

  - "workforce" matters was explicitly intended to be broader than negotiations about collective bargaining. Broadly speaking, workforce matters would cover things such as workforce strategies and the Government's Expectations for Pay and Conditions.
- once approved, the standards would be issued as government policy by way of Order in Council
- the OIC mechanism was intended to make the existing government workforce policy process more transparent, both procedurally and substantively, and provide a mechanism for how it would be applied: once issued by OIC, departments would be required to implement the policy (in the same vein as they must implement other government policy), Crown agents would be required to 'give effect' to the policy and autonomous Crown entities would be required to 'have regard' to the policy (similarly to their respective obligations under s103 and s104 of the CEA relating to government policy directions issued by their responsible Ministers).

Legislation drafting process

304 During the drafting of the Bill, the SSC and PCO agreed that the Bill should include a number of specifications and clarifications:

- workforce policy must relate to workforce matters from a State sector system perspective
- workforce matters include both employment and workplace matters, and could address things such as:
  - principles relating to pay or conditions; this specification was intended to lift focus and avoid perceptions of dictating bargaining limits or determining pay or conditions
  - workforce strategy guidance
- the Governor-General, by OIC, would approve government workforce policy as a "Government Workforce Policy Order" (GWPO)
- just as government policy can apply to groups of agencies or even individual departments or Crown entities, a GWPO would be able to be issued to groups of, or even individual, departments, Crown agents or ACEs; the GWPO itself would specify which agencies it applies to
- as a matter of process and for the sake of consistency in relation to Crown Agents and ACEs, the Bill should include provisions equivalent to:
  - s115(1) in the CEA to the effect that the Commissioner must consult with affected Crown entities before recommending a standard for approval as government policy
  - s115(3) in the CEA to specify that a GWPO may be amended, revoked or replaced in the same way as it was given
- a provision should require an OIC to be published on the Internet.

305 In terms of the nature and effect of a GWPO, the Bill clarified that:

- a GWPO would not constitute a regulation

- a GWPO would not override the independence of departmental chief executives in s33 of the SSA
- and for the further avoidance of doubt, a GWPO would not override existing employment and other legal obligations.

Select Committee process

306 FEC discussed in depth the provisions in the Bill relating to government workforce policy. Twenty-three submissions as well as 1308 form submissions commented on GWPOs, all but three of them having a high degree of congruence in opposing the amendments.

307 Separately from the submissions, departmental advisers had already agreed to propose a number of amendments to the Bill as introduced to the House. The initial Briefing to FEC, February 2013, signalled that the Departmental Report would recommend:

- a change in wording from "Government Workforce Policy Order" to "Government Workforce Policy Statement", to better reflect the intended purpose and effect of government policy on workforce and employment matters
- a further change to clarify the content of government workforce policy by replacing "principles relating to pay and conditions" with "government's expectations about the negotiation of collective agreements and individual employment agreements in the State services (being expectations that do not determine pay or conditions)". It was never intended to interfere with the collective bargaining process or to override negotiated agreements about pay and conditions.

308 The Departmental Report also proposed a change in process such that Government Workforce Policy Statements would not be issued by the Governor-General by OIC, but would be approved by the Minister of State Services and be published on an Internet site maintained by the Commissioner, who must send any such Statement to all affected agencies. This process would align better with similar processes for the development and promulgation of government policy.

309 SSC also considered it would be beneficial to include a more specific avoidance of doubt clause about not overriding existing legal obligations (despite legal advice that the existing clause did not require any further clarification). Based on the test for legislative effect in s39(1) of the Legislation Act 2012, the Departmental Report proposed a provision to the effect that a Government Workforce Policy Statement may not:

- "create, alter or remove employment or other legal rights or obligations, or
- determine or alter the content of the law applying to employees or chief executives or the State Services Commissioner".

310 The provisions in the Bill [new section 33(3) and 55C(1)] that a Government Workforce Policy Statement would not override the independence of chief executives under s33 were superfluous. Decisions on individual employees would remain statutorily independent, unaffected by any policy statement about government's overarching policy position relating to approaches to employment relations and workforce capability across the State services. Accordingly, the Departmental Report recommended that the relevant references in the Bill be removed.

311 Departmental advisers agreed with certain points made in the submissions, some of which were addressed – at least in part – by the amendments summarised in the preceding paragraphs. In addition, advisers agreed with a further clarification recommended by the Law Society: to delete reference to workforce policy relating to workforce matters "from a State sector system perspective" (wording that was considered too wide and unclear) and replacing it with a more specific statement: "for the purpose of fostering a consistent and efficient approach to such matters across the State sector". This phrase would still reinforce the high level nature of the policy settings.

312 FEC discussed at length the provisions relating to Government Workforce Policy Statements and requested departmental advisers for written information on the following:

- comment on FEC's concern that the emphasis on efficiency in s55B(2) – (that) sets out the purpose of government workforce policy in the following terms: Government workforce policy must relate to workforce (including employment and workplace) matters for the purpose of fostering a consistent and efficient approach to such matters across the State sector – placed the emphasis on efficiency and may shift the balance of considerations towards a focus on cost related matters
- FEC asked for officials to consider a specific requirement to consult other interested parties in the drafting of a workforce policy (perhaps in s55B(1) to ensure avoidance of doubt about the process)
- FEC queried how the practicalities play out for agencies that must "give effect to", and those that must "have regard to", government workforce policy statements.

313 The advisers' response is included in the document referred to in paragraph 252. The response indicates that a number of amendments were being prepared for the Revision Tracked version of the Bill:

- the purpose of government workforce policy was expanded to "fostering a consistent, efficient, and effective approach to such matters across the State sector". As FEC commented in its Report to the House, this phrasing would represent a balance of impartial objectives, with each term carrying equal weight without bias; it would also set an enduring framework within which successive governments can set their workforce policies
- in addition to consulting affected agencies during the drafting of government workforce policy, the Commissioner would also consult "any other parties that the Commissioner considers appropriate". Although the Introduction Bill did not impose limits on consultation, it was appropriate to amend the Bill to reflect the broader consultation that may occur.

Variations to Code of Conduct

The Act

314 Under s57 of the SSA, the Commissioner may set minimum standards of integrity and conduct and may do so by issuing a code or codes of conduct. Subsection (3) gave the Commissioner authority to vary a code for all or any Crown entities, the Parliamentary Counsel Office or the Parliamentary Service in specified circumstances, i.e. considering the legal or commercial context of the agency.

Commentary

315 The SSA did not authorise the Commissioner to vary a code for the Public Service or for particular groups or types of employees.

316 There are times when it might not be appropriate for a code of conduct to apply in its entirety to a Public Service department or to persons or groups of persons undertaking particular functions. Examples may include a person seconded to a role or having secondary employment where that person should be able to criticise government policy or not follow government policy, eg when a person undertakes part time lecturing at the Victoria University School of Government or secondment to the New Zealand Productivity Commission.

317 The issue was particularly pertinent for Ministerial Advisers. As explained more fully in relation to part 2 of the SSA, their roles and responsibilities are such that they cannot always be expected to act in a politically neutral way. But the standards issued by the Commissioner under s57 seek to build a unifying ethos across the State services: impartiality is one of the four elements, at the core of which is the principle of political neutrality. The Parliamentary Service, which is within the mandate of the Commissioner, is another area where major political neutrality issues also arise, for example regarding constituent secretaries. Already in late 2008, the Minister of State Services in the previous government was briefed on the issues and on SSC's proposal to develop a code of conduct for Ministerial Advisers. Soon after the change of government, the same issue was placed on the "Trust" agenda at a meeting on 5 February 2009 between the new Minister of State Services, Hon Tony Ryall, and the Commissioner.

318 In the current context of comprehensive amendments to the SSA, the SSC proposed that the Commissioner have more flexibility in applying a code of conduct, across two dimensions:

- scope – by including Public Service departments among the agencies to which a variation or variations may apply, and also by enabling variations to apply to persons or groups of persons within an agency
- basis – by allowing for variations to apply, not solely on grounds of the legal or commercial context of the agency as a whole, but also on grounds of the legal, commercial or operational context of the agency or of persons or groups of persons in the agency.

Recommendation to Cabinet

319 Cabinet agreed with the recommendation in BPS Cabinet paper six that the Commissioner's ability to vary a code of conduct may apply to any agency in s57 or to persons or groups of persons undertaking particular functions in the agency that the Commissioner thinks appropriate, taking into consideration the legal, commercial or administrative context of the agency or of the persons or groups of persons in the agency [CAB Min (12) 16/10, paragraph 104.2].

320 The Cabinet paper explained that the provision would be used sparingly and only in circumstances where it was unreasonable for a generic code to apply to individuals or groups of individuals.

Select Committee process

321 As recorded in the Departmental Report, a number of submissions commented negatively on this amendment; the majority of submissions demonstrated a misunderstanding either of the Commissioner's existing ability to alter the code or of the effect of the amendment in the Bill.

322 There was no amendment to cl44 in the Bill during the Select Committee process.

Redundancy Related Provisions

The Act

323 This part of the paper should be read in parallel with part two of this paper under the heading: “Reorganisation, redeployment, redundancy provisions”.

Commentary

324 In accordance with the discussion in part two, the main proposals were concerned with rationalising and streamlining the dual sets of provisions that were in s30E/s61B and in s30F/s61A. Related, and more minor proposals, were to transfer s30D (with amendments) and s30G t0 part 5 of the SSA.

Recommendations to Cabinet

325 The main policy proposals in BPS Cabinet paper six were to rearrange part 5 of the SSA so that there would be one provision or an incremental series of provisions that:

- provide for redundancies to occur in certain situations
- continue existing provisions in the SSA that allow preferential treatment to affected employees, so as to encourage redeployment and minimise liability for redundancy compensation
- prevent the payment of technical redundancy compensation when no real loss is suffered. The policy intent was to be fair to both employees and taxpayers by preventing double-dipping from public funds.

326 Legislatively, the first two policy proposals would be achieved by repealing s61A and s30F and replacing them with a new section to the effect that:

- a chief executive may make one or more employees redundant if:
  - more persons are employed than the chief executive considers necessary for the efficient carrying out of the department’s duties, or
  - their duties in their current department will no longer exist in a different department to which the functions of their existing department are to transfer
- the existing provisions in the SSA that allow preferential treatment to affected employees would continue (ie, ss60, 61 and 65 would not apply if an employee is made redundant in either of those two situations and is offered another position in their existing department or any other department).

327 The third policy proposal would be achieved by replacing s61B and s30E with a new section to the effect that an employee will not be entitled to receive any redundancy payments if he or she is to be made redundant, and -

- within the notice period and prior to their employment ceasing -
- they are offered an alternate position -
- in the State services -
- on substantially similar conditions -
- and on terms that treat service within the State services as if it were continuous service.

328 The concepts underlined above were discussed in depth during the Select Committee process, as indicated below.

Legislation drafting process

329 Relatively early during drafting discussions with PCO it was clarified that the Bill does not need to include specific provisions for a departmental chief executive to have the power to make employees redundant in the situations described above, on the basis that the provisions would have the effect of repeating what employment law already covers.

330 Making provision for the restriction of redundancy payments in certain situations was more complicated. Discussions centred on the two scenarios already covered in s30E, ie where an employee who is to be made redundant:

- is offered equivalent employment, or
- is offered, and accepts, other employment.

331 This table sets out the respective provisions that existed in s30E and those in the Introduction Bill.

	SSA s30E	SSPFR Bill
Redundancy situation	Position in Dept A ceases as a result of a transfer of functions from Dept A to Dept B. Could apply also (by OIC) to transfer of functions from a Crown entity to Dept B NB: "Dept" means a Public Service dept	Notice of redundancy for any reason Transfer of functions from a Crown entity to any Dept (ie Public Service)
Offer and acceptance	Employee is offered, and accepts, other employment in Dept B	Employee is offered and accepts another position in the State services
Offer	Employee is offered equivalent employment in Dept B (whether or not the employee accepts)	Employee is offered an alternative position in the State services
Tests	Equivalent employment is - (a) In substantially the same position (b) In the same general locality (c) On terms and conditions no less favourable than those that apply immediately before the offer of equivalent employment (including any service-related, redundancy, and superannuation conditions) (d) On terms that treat the period of service with Dept A (and any other period of service recognised by Dept A as continuous service) as if it were continuous service with Dept B	Alternative position is - (i) A position with comparable duties and responsibilities (ii) In substantially the same general locality or a locality within reasonable commuting distance (iii) On terms and conditions (including redundancy and superannuation conditions) that are no less favourable overall (iv) On terms that treat service within the State services as if it were continuous service
Timing of offer and acceptance or offer	In connection with that transfer of functions [s30E(1)(b)]	Before the employee's employment has ended

Select Committee process

332 This set of amendments attracted considerable comment in the submissions to FEC and was discussed in depth by FEC. As the Departmental Report noted, all 24 submissions and 1309 form submissions opposed the proposed amendments. The general theme was that the provisions would substantially lessen the value of existing redundancy compensation clauses in collective agreements across the public sector.

333 Departmental advisers agreed with certain points made in the submissions and recommended changes to the Bill as introduced:

- it was intended to retain the scope of the restriction on redundancy compensation to employees in the Public Service and to Crown entity employees where functions transfer to the Public Service. It was not intended to expand the scope to other employees in the State services, or to other situations affecting Crown entity employees. The Bill was amended to make this explicit in s61A(1).
- the requirement for an offer to be on no less favourable overall terms and conditions, and on terms that treat service in the State services as continuous service, should also apply to the offer and acceptance of another position in the State services (not just to the offer of an alternative position).

334 Separately from the submissions, advisers recommended an amendment to block a potential 'gap' in case an offer might be made but the re-employment wouldn't be available immediately. The Bill was amended to clarify that the offer and acceptance of another position, and the offer of an alternative position, must relate to a position that begins before, on, or immediately after the date on which the employee's current employment ends.

335 FEC discussed the effect of the changes and the impact on collective agreements negotiated under the existing provisions. Specifically, FEC requested departmental advisers for written information on the following:

- in relation to "comparable" duties and responsibilities:
  - whether alternatives to "comparable" were considered, and what options might be possible
  - whether there are legal definitions of "comparable" and "similar", including examples (e.g. different subject matter in apparently the same job)
- the possibility of "staged" implementation and savings arrangements for the proposed changes to the redundancy provisions.

336 The advisers' response is included in the document referred to in paragraph 248. Rather than summarise the advice in this paper, it would be preferable for the reader to refer directly to the source material.

337 At a subsequent meeting in April 2013, FEC requested further written information on the following:

- the meaning, including examples, of "no less favourable overall" ... relating to terms and conditions of employment
- the meaning of "immediately after", in relation to the additional protection recommended by the Departmental Report for redundancy situations
- further advice on how transitional scenarios would play out in relation to the commencement of the new redundancy provisions.

338 The advisers' response is included in the document referred to in paragraph 252.

339 In addition to accepting the recommendations in the Departmental Report, FEC recommended two further changes that were incorporated in the Bill:

- the deletion of the test that an alternative position had to be on terms and conditions of employment that were no less favourable "overall". Whereas the policy intent had been to clarify that each term or condition did not necessarily have to be the same on a line by line comparison, but that the collective package of terms and conditions should be no less favourable, FEC was satisfied that existing law caters for that intention. FEC's Report recommended deleting the word "overall" on the basis that no change was intended to the existing law in respect of the interpretation of the "no less favourable" test.
- the insertion of a transitional provision in the Bill (new s61AB) so that the existing law would continue to apply for 3 years from the Bill's enactment. As explained in FEC's Report, this would avoid any retrospective application of the Bill to agreements, whether individual or collective, already negotiated. The amendment would treat both collective and individual agreements equally by allowing either to be renewed or renegotiated until the end of the 3-year period.

Part 6: Application of Employment Relations Act 2000

340 The Commissioner's role in employment relations is set out in parts 6, 7 and 7B of the SSA as well as certain other Acts. The key issue was to establish the Commissioner's appropriate role and apply it consistently.

State Sector Act 1988			Crown Entities Act 2004; SOE Act 1986	New Zealand Public Health and Disability Act 2000	Individual Acts[25]
Public Service departments	**Education Service (excl. TEIs)**	**Tertiary Education Institutions**	**Crown Entities and SOEs**	**District Health Boards**	**Departments outside Public Service**
Chief Executive conditions of employment					
* Determined between SSCer and Chief Executive [s38(3)][26] * SSCer must first obtain agreement of PM and MOSS [s38(3)]	*School principal may have collective or individual agreement – see below*	* Council negotiates [s77ID(3)] * Council must obtain SSCer's written **concurrence** [s77ID(3)]	* Crown Agents, ACEs, ICEs & their subsidiaries must **consult** SSCer [CEA ss98, 117] * SOE may request SSCer's assistance [SSA s11(6)]	* Board negotiates * Board must obtain SSCer's **consent**	General Manager of Parliamentary Service: SSCer determines terms & conditions with Speaker's agreement (not remuneration – Remuneration Authority)
Collective Agreements					
* SSCer responsible for negotiating (except for GCSB: s34 GCSB Act) * SSCer must negotiate with employees' union and consult chief exec [s68(3)] * SSCer may delegate to chief exec [s70(1)], who must consult SSCer [s70(2)]	* SSCer responsible for negotiating [s74(1)] * SSCer must negotiate with employees' union and consult chief exec of MoE [s74(4)] * **SSCer may delegate** to employer/s [s74B(1)], who must **consult** SSCer and MoE chief exec [s74B(2)]	* Chief exec of TEI responsible for negotiating [s74C(2)] * Chief exec must **consult** SSCer [s74C(3)]	* Crown Agents, ACEs, ICEs, Crown entity companies & SOEs must consult SSCer only **if required to do so by OIC** *(NB no such OIC issued to date)* * Crown entities & SOEs may request SSCer's assistance [SSA s11(6)]	* OIC requirement to consult SSCer not applicable to DHBs * Chief execs of DHBs to consult the Director General of Health	Parliamentary Service; Office of the Clerk; PCO: heads of depts must consult SSCer Police; NZDF Civil Staff: Police Csser and CDF must consult SSCer who has right to participate in negotiations NZSIS: no SSCer involvement; ERA does not apply
Individual Agreements					
* Employer negotiates	* Employer negotiates: must obtain SSCer's written **concurrence** [s75(2)]	* Employer negotiates: for senior positions, must **consult** SSCer [s74D(1)]	* Employer negotiates: may request SSCer's assistance	* Employer negotiates	NZDF Armed Forces: CDF must consult SSC: has right to participate

[25] Statutes and Drafting Compilation Act 1920; New Zealand Security Intelligence Service Act 1969; Clerk of the House of Representatives Act 1988; Defence Act 1990; Parliamentary Services Act 2000; Policing Act 2008

[26] SSA s38(3) does not apply to the Solicitor-General or Director of the Government Communications Security Bureau

Role of Commissioner

Background

341 It is evident from the summary of the various statutory provisions in the table on the previous page that the Commissioner's involvement varies from agency to agency, at three levels:

- chief executive conditions of employment
- collective employment agreements
- individual employment agreements.

342 Historically, the Commissioner has delegated the responsibility for negotiating every collective agreement applicable to employees of any department of the Public Service to the chief executive responsible for the employees in his or her department. There are good reasons for this. Departmental chief executives are best placed to understand the specific issues relating to their employees and understand their business requirements; and in negotiating terms and conditions for their employees (including collective agreements), they retain responsibility for the management of their departments consistent with their overall responsibilities under the Act.

343 The thrust of the most recent statutory amendments to the Commissioner's role in employment relations was to devolve the Commissioner's influence. The general principle underpinning the relevant provisions in the Crown Entities Act 2004 is that:

- the Commissioner's role should be at the chief executive level: the board of a statutory entity and of a subsidiary of a statutory entity (Crown Agent; autonomous Crown entity; independent Crown entity) must consult the Commissioner over a chief executive's terms and conditions
- at the level of collective agreements applicable to other employees, Crown entities should be free to negotiate terms and conditions of employment without the Commissioner's involvement
- however, it is desirable to retain a 'reserve' or 'safety net' mechanism whereby an entity could be required by Order in Council to consult the Commissioner over collective agreements. The same applies to State-Owned Enterprises following an amendment in 2004 to the State-Owned Enterprises Act 1986.

344 When considering an appropriate contemporary role for the Commissioner in employment relations, it should be recognised that the Government is responsible for ensuring that conditions of employment are fiscally responsible and services to the public represent value for money. The Commissioner's role now requires him or her to communicate government policy and promote adherence to it; to promote an appropriate measure of consistency across government so that unreasonable variants or extravagant levels of remuneration are avoided; to promote workplace productivity; and to maintain an overview of the system to ensure it meets these requirements.

345 The way in which the Commissioner could best acquit these responsibilities was not certain when SSC commenced its review of the SSA. The Commissioner's statutory role lacked consistency and – more importantly – did not reflect the overview role now played, as described in the previous paragraph. Moreover this overview role was increasingly being contested by some parts of the State services who wished to have independence in

decision making in this area, which in turn resulted in the Commissioner being less effective in employment relations than Ministers expect.

Commissioner's role: options

346 The SSC's initial broad proposal was that, as part of the Commissioner's system leadership role, the Commissioner's mandate in workforce matters should extend beyond bargaining processes to encompass broader aspects of workforce and employment arrangements. The dimensions would encompass strategic workforce planning and development activity, pay and employment conditions, and bargaining processes. Leadership and talent development were closely related, and are discussed in relation to part 4 of the SSA.

Chief executive conditions of employment

347 The current regime for chief executive conditions of employment generally works well, whereby:

- Public Service conditions are determined between the Commissioner and the chief executive, with agreement of the Minister of State Services and the Prime Minister. However, the SSC considered it would be desirable to grant the Commissioner some flexibility to consult the Minister and Prime Minister rather than being required seek agreement in every case. This progressed as a separate proposal in relation to part 3 of the SSA.
- TEI councils and DHB boards must obtain the Commissioner's concurrence and consent respectively
- boards of statutory Crown entities and their subsidiaries must consult the Commissioner.

Workforce and employment relations

348 There appeared to be three broad options to form the statutory basis for the Commissioner's role, based around the current mandate regarding collective employment agreements: status quo; centralised control; uniform compliance with the Commissioner's expectations.

349 The first option was to maintain the status quo in legislation. But this did not reflect the actual role that the Commissioner currently performed and did not adequately address the need for consistency and impact.

350 A second option could be to formally devolve responsibility for collective bargaining to the chief executives of every agency, but require the Commissioner to consent to all collective and individual agreements before they could take effect. This would in effect require agreements to fall within bands or ranges for groups of positions as set by the Commissioner, and would result in more centralised control over employment terms and conditions. This option would counter the devolution process and return to a central control model similar to that existing prior to the commencement of the current SSA. This would militate against chief executives' independence in setting the terms and conditions of employment for their employees.

351 A third option would be to confirm in legislation the current practice within the Public Service and generally extend those arrangements to other parts of the State services. The Commissioner would provide expert advice to the respective employers on employment relations issues across the system, to assist them in making informed and prudent

decisions on employment matters. Heads of agencies would be formally responsible for collective agreement negotiations and would be required to comply with any expectations set by the Commissioner and to consult the Commissioner.

352 Preliminary thinking within SSC was that the third option could include the following details:

- agencies would be required to **comply** with any **guidelines** that the Commissioner may set regarding the workforce
- the purpose of the guidelines would be to give effect to Government policy around employment and workforce matters. Examples of current items that would fall into this category included the Government's Expectations for Pay and Conditions in the State Sector, and Workforce Strategy Guidance
- the SSA would need to include a definition of "workforce". Given the variable and changing nature of workforce matters, the definition would comprise a non-exhaustive list of key components, for example:
    - matters relating to strategic workforce and employment issues arising across the State sector system
    - matters relating to the pay and conditions of State sector employees
- the Commissioner would be able to provide advice to assist agency compliance with the guidelines. There would need to be an ability for the Commissioner to require the provision of information to assess whether or not the guidelines are being complied with
- agencies would be required to **consult** about proposed collective bargaining, and then **have regard** to the Commissioner's consultation feedback
- if the workforce guidelines were not being complied with or regard wasn't being given to consultation feedback, the Commissioner would need the ability to **require** the employer (e.g. chief executive of a department or board of a Crown entity) to obtain the Commissioner's **approval** to a proposed course of action
- the Commissioner would not have the power to step in and conduct bargaining, either alongside or without the employer, other than for military personnel in accordance with the Defence Act 1990 and for the New Zealand Police. The Commissioner's ability to intervene would be as above, i.e. an ability to require approval rather than consultation if an employer was not complying with the workforce guidelines or having regard for consultation feedback.

Recommendations to Cabinet

353 Iterative discussions throughout the preparation of the BPS Cabinet papers led to a range of modifications and refinements to the early proposal in option three above. In the end, no proposal was put forward to formally devolve responsibility for collective agreement negotiations to the heads of agencies, while retaining an ability to require them to seek the Commissioner's approval if they do not act consistently with the Government's Expectations. SSC considered it was just as effective in practice to leave the responsibility with the Commissioner who delegates to the heads of agencies, on the proviso that they consult the Commissioner.

354 Other aspects of the proposal advanced. These are set out in relation to part 5 of the SSA, where the respective legislative provisions are located in a new subpart 1 to part 5.

Part 7, 7A, 7B: Education Service, Personnel, Senior Appointments

355 Parts7, 7A and 7B of the SSA deal with the Education service, personnel provisions in relation to the Education service, and senior appointments in the Education service. The Commissioner's role in employment relations in respect of the Education service was covered in the previous section of this paper: ultimately, no proposal for change was advanced.

356 There was also an issue about the adequacy of the provision in s77 that protects chief executives and employees in the Education service from personal liability. The same issue was prominent in relation to the Public Service, as provided for in s86 in part 8 of the SSA. The next part of this paper covers this issue in relation to both s77 and s86.

357 Another issue relating to the Education service provisions in the SSA was whether it was necessary to retain the Commissioner's role in relation to assessing the performance of teachers.

Performance Assessment of Teachers

The Act

358 Section 77C(1) provided that: "The chief executive of the Ministry of Education may from time to time, with the agreement of the State Services Commissioner, prescribe matters that are to be taken into account by employers in assessing the performance of teachers".

Commentary

359 While matters of integrity and conduct are the domain of the Commissioner, the performance assessment of teachers is not. Such matters belong to the chief executive of the Ministry of Education who – in SSC's view – should not be required to obtain the Commissioner's agreement or even to consult the Commissioner in that regard.

360 Removing the unnecessary statutory requirement to have the Commissioner's agreement would not remove any ability of the chief executive of the Ministry of Education to discuss teacher performance assessment matters with the Commissioner on a voluntary basis.

Cabinet, legislation drafting and Select Committee processes

361 Following Cabinet agreement, s77C(1) was amended accordingly as progressed via cl52 in the Bill.

Part 8: Miscellaneous Provisions

362 There was a need to ensure that s86 of the SSA, which provides for protection from personal liability for Public Service chief executives and employees in certain circumstances, continues to meet the purpose for which it was intended.

Protection from Liability

The Act

363 Section 86 of the SSA provided as follows.

> ***Protection from liability***
> No chief executive, or employee, shall be personally liable for any liability of the Department, or for any act done or omitted by the Department or by the chief executive or any employee of the Department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the Department or of the chief executive.

364 Section 77 provided the same type of protection from personal liability for chief executives and employees of any institution in the Education service (as that term is defined in s2).

Commentary

365 Before the decision of the Supreme Court in *Couch* v *Attorney General* [2010] NZSC 27, it was believed within the Public Service that the policy behind s86 had always been to provide Public Service chief executives and employees with immunity from civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers. There was however a variance of views as to whether s86 had a corresponding effect of removing liability of the Crown. One view was that s86 meant that the Crown could not be liable because of the provision of s6(1) of the Crown Proceedings Act 1950 (an action in tort can only be brought against the Crown where the act or omission could give rise to an action against the Crown servant responsible for the act or omission). The alternative view was that s86 could not have been intended to remove the right to seek redress against the Crown, but any proceeding must be brought against the Crown and not its servants. In such circumstances the Crown would be vicariously liable for the acts of its servants.

366 The Court in *Couch* rejected the argument that s86 provided to the Crown and Public Service chief executives and employees immunity from liability. The Court held that such a major change to the liability of the Crown was inconsistent with the provision read in context and was not the purpose of the Act. The majority in *Couch* held that, while s86 protects chief executives and Crown employees who have acted in good faith from being sued by their department, it does not protect them from being sued by members of the public in respect of those acts. There is some uncertainty surrounding the scope of the majority approach and whether or not the judgment preserves the liability of chief executives and employees to be liable on a secondary basis.

367 It was likely that, in law, chief executives or employees of the Public Service would be entitled to be indemnified by their employer for any act or omission carried out in good faith in the course of their duties.

368 However, in the SSC's view, there are sound public policy reasons why immunity should also be provided. It provides a level of certainty that indemnity, considered on a case by case basis, does not provide. Section 86 was based on important public policy objectives:

- public servants are responsible for serving the government of the day and providing or administering a wide range of public functions and services
- these functions require public servants to undertake them without being too conservative or unduly risk-adverse, and to do so without fear or favour
- government departments must be able to attract and recruit capable employees who are able to carry out the Crown's core functions without fear of liability for their actions undertaken in good faith in the course of their employment.

369 The Supreme Court's majority interpretation meant that s86 no longer met the purpose for which it was intended. SSC considered it desirable to amend s86 so that the section does achieve its intended purpose, to protect Public Service chief executives and employees from personal liability when acting in good faith in the performance of their functions and powers. At the same time, it should be made explicit that the section does not extend a blanket protection to the Crown from liability for the acts and omissions of its servants: a proceeding should be able to be brought against the Crown as being vicariously liable for the acts of its servants.

370 The Crown Entities Act 2004 contains a provision that is intended to provide immunity from civil liability. S121(2) of the CEA provides that "An officer holder or employee is not liable to any person in respect of an excluded act or omission". An excluded act is defined in s126 as meaning "an act or omission by the member, office holder, or employee in good faith and in the performance or intended performance of the entity's functions".

371 The SSC's initial proposal was that legislation (preferably, the Crown Proceedings Act 1950, as the substantive statute dealing with claims by or against the Crown) be amended to contain:

- a provision similar to that in the CEA, ie that no departmental chief executive or employee is liable to any person in respect of an act or omission by the chief executive or employee in good faith and in the performance or intended performance of the department's powers and functions
- a specific reference such that an action against the Crown is not prevented in respect of the acts or omissions of its servants.

Recommendations to Cabinet

372 Concurrently with the development of the suite of BPS Cabinet papers, the Law Commission was commencing work to review the law relating to Crown liability and the use of immunities and indemnities. The SSC was in discussion with the Law Commission, who preferred an indemnity approach rather than immunity for public servants: the public servant would be sued personally and the Crown would meet the costs.

373 The SSC was concerned that the Law Commission's report was likely to be some time away and a delay would not meet the policy objective of protecting public servants while at the same time preserving the ability for the public to sue the Crown. While recognising that the Law Commission's project might result in further legislative change, BPS Cabinet paper 6 recommended that:

- s86 in the SSA be amended to incorporate the proposal outlined in the preceding paragraphs
- s77 be amended in the same way in respect of chief executives and employees in the Education service.

374 The recommendation to amend s86 included an additional proposal to extend the protection from personal liability to those acting under delegation of a chief executive. This would be consistent with the proposals to broaden a chief executive's power to delegate, as discussed in relation to part 3 of the SSA.

Legislation drafting process

375 Clause 54 in the Bill replaced s86 with a straightforward provision to make the policy clear and provide Public Service chief executives and employees with immunity from civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.

376 Because *Couch v Attorney-General* concerned the relationship between SSA s86 and the Crown Proceedings Act, that Act was consequentially amended by cl57 of the Bill. New subsection (4A) was inserted into the Crown Proceedings Act to provide that a Court may find the Crown itself liable in tort in respect of the actions or omissions of Public Service chief executives and employees, despite the immunity provided for those particular Crown servants provided in new s86.

377 Including delegates within the scope of s86 was not pursued. The 'mischief' caused by the *Couch* decision related to Public Service chief executives and employees: this was the scope of the intended legislative solution. The extended ability of chief executives to delegate functions or powers to persons outside the Public Service, as provided for through amendments to SSA s41, would normally be implemented by way of contract with the delegate. In the case of contractors, the standard safeguard mechanism would normally be expected to continue, by way of insurance protection.

Select Committee process

378 The provision in the Bill to clarify the immunity of public servants from personal liability in civil proceedings attracted comment in some parts of the media and in a small number of submissions to FEC. Some media raised a spectre of public servants getting away scot-free, with no recourse for the public who may have been wronged.

379 The Law Commission expressed its view that an indemnity approach is the cleanest and most conceptually "pure" approach to providing protection for Public Service employees. It commented that the status of liability of Public Service employees was a key issue for the Commission's own review of the Crown Proceedings Act 1950. The Legislation Advisory Committee supported the Law Commission's submission.

380 FEC discussed in depth the difference between an immunity v. indemnity approach to Public Service liability. FEC asked advisers to provide written information on:

- an exposition of the pros and cons of an immunity protection for public servants
- details of the competing views of SSC and the Law Commission on indemnity v. immunity for public servants
- details of the arrangements for public servants in comparable jurisdictions.

381 The advisers' response is included in the document referred to in paragraph 248. Key points are that:

- the ability of people to sue the Crown will not be affected
- public servants acting in bad faith, or outside their duties, can still be sued
- indemnities create difficulties, in terms of: who gets to run the litigation; public servants being too concerned about being sued to do their jobs properly (a chilling effect, especially in exercising significant coercive powers on behalf of the Crown); the potential personal effect on the public servant
- although the indemnity approach is used elsewhere in the world, an immunity approach is more consistent with the protections that currently apply to other State servants in New Zealand
- the Law Commission will be able to continue its work in this area
- Parliament will be able to fully consider a move to an indemnity approach, if it thinks this appropriate once the Law Commission has reported its findings.

382 FEC's report to the House noted the Law Commission's work in this area, but "[To] resolve the present uncertainty, we concluded that it was preferable to retain the immunity approach taken in the bill and thus restore what was widely understood to be the status quo, in the knowledge that it would be open to Parliament to amend the provision once the Law Commission's review was concluded if there were a compelling case to do so".

383 During the initial drafting of the Bill, officials vacillated about the necessity of amending s77 in relation to the Education service. As noted in preceding paragraphs, the main point was that the amendment to s86 addressed the 'mischief' caused by the *Couch* decision, which related to Public Service chief executives and employees. In the end, the Departmental Report recommended that s77 be amended as initially agreed by Cabinet, providing for consistency between the respective provisions in the SSA.

Technical Amendments

Issues

384 In addition to the substantive changes to the SSA as discussed throughout the previous sections of this paper, a small number of technical amendments were also desirable to:

- make the statutory definitions of "Crown entity" consistent
- transfer the Commissioner's function relating to EEO from Part 2 of the SSA to the personnel provisions in Part 5
- clarify how the appointment and review provisions fit together
- streamline the provisions for advice on matters of integrity and conduct
- remove a small number of redundant provisions.

Cabinet and Select Committee processes

385 Cabinet agreed with each recommendation to make the technical changes outlined in the following paragraphs.

386 The Select Committee process made no changes to the Bill in respect of these technical amendments.

Definition of "Crown entity"

The Act

387 The following definition of "**Crown entity**" was inserted into the SSA as from 25 January 2005, when the Crown Entities Act 2004 (CEA) and the State Sector Amendment Act (No 2) 2004 came into effect.

Crown entity –

(a) means a Crown entity within the meaning of section 7 of the Crown Entities Act 2004; but

(b) does not include a tertiary education institution or a Crown Research Institute or any of their subsidiaries

388 Also as from 25 January 2005, the definition of "**State services**" was amended to include the following subsections –

(ab) includes a Crown entity; and

(ac) includes a Crown Research Institute.

Commentary

389 The inclusion of subsection (b) in the definition of Crown entity was a legislative mechanism to exclude Tertiary Education Institutions, Crown Research Institutes, and their subsidiaries, from the Commissioner's mandate under s57(1)(b) to set minimum standards of integrity and conduct that are to apply in Crown entities. As from 25 January 2005, the Commissioner's mandate to set such standards was extended from the Public Service to the other agencies included in s57(1), except that the mandate was not to include TEIs, CRIs, and their subsidiaries.

390 In the SSC's view, it would be preferable to delete subsection (b) from the definition of Crown entity and replace it with a subclause in s57(1) that excludes these particular Crown entities from the Commissioner's mandate, rather than having a definition of "Crown entity" in the SSA that differs from that in the CEA. TEIs, CRIs, and their subsidiaries, are all Crown entities as defined in s7 of the CEA, and there should be no confusion on that point.

391 Making these changes would also require consequential amendments to the definition of "State services" in s2 and to the description of some of the Commissioner's functions in s6:

- subsection (ac) in the definition of "State services" should be deleted. It would no longer be necessary, as CRIs would be included in the Crown entities referred to in subsection (ab). Regrettably, during the drafting of the Bill, the consequential amendment to delete subsection (ac) from the definition of "State services" was not picked up. This amendment should be progressed at the earliest opportunity, possibly as part of a Statutes Amendment Bill
- s6(ha) was inserted as from 25 January 2005. The mandate to provide advice and guidance on matters of integrity and conduct was intended to extend to all the State services, except CRIs and their subsidiaries [POL Min (03) 26/8, Annex 1, paragraph 11]. Note that TEIs and their subsidiaries are automatically excluded by virtue of not being part of the State services. To avoid doubt or confusion, s6(ha) – if it were to remain a stand-alone provision – should be amended to ensure CRI subsidiaries are also outside the scope of this function. In the end, this issue was subsumed in the further technical change discussed below under the heading of advice on integrity and conduct.
- s6(i) – if it were to remain a stand-alone provision – would need to be amended to exclude TEIs, CRIs, and their subsidiaries from the scope of the Commissioner's function. In the end, this issue dissolved as part of the amendments to the Commissioner's principal functions in s6.

Transfer of Commissioner's Function relating to EEO

The Act

392 As stated in the discussion relating to Part 1 of the SSA, some of the Commissioner's principal functions in s6 of the Act were at a mechanical or operational level, and would be better transferred – in modified form, if appropriate – to the more operational parts of the Act.

Commentary

393 Effectively, in accordance with other proposals throughout this paper, most of the existing functions of the Commissioner in s6 would be retained in modified form, or be subsumed within the scope of other provisions.

394 The exception was the function previously located as s6(g), i.e. "to promote, develop, and monitor equal employment opportunities policies and programmes for the Public Service". This is a specific provision that was not covered within other proposals. The function is an ongoing activity for the State Services Commission. The SSC recommended that it be transferred from s6 as a principal function and relocated to part 5 of the Act – personnel provisions – probably as a subsection in s58. The amendment progressed via cl47(1) in the Bill.

Appointment and Review Provisions

The Act

395 Section 60 provides:

> ***Appointments on merit***
> A chief executive, in making an appointment under this Act, shall give preference to the person who is best suited to the position.

396 Section 65 provides:

> ***Review of appointments***
> (1) The chief executive of each department shall put into place for the department a procedure for reviewing those appointments made within that department that are the subject of any complaint by an employee of that department

Commentary

397 The effect of s65(1) is that an appointment made under s60 is in fact provisional pending the lodging and outcome of a review. It is possible, and there are examples in the past (especially in the early years after the passage of the SSA in 1988), where an appointment to a Public Service position has been overturned upon review, with the appellant appointed instead of the original appointee, or both persons are interviewed again, or the appointment process starts over again.

398 The Act should clarify the provisional nature of an appointment during the review process. The amendment progressed via cl48 in the Bill.

Advice on Integrity and Conduct

The Act

399 There were two provisions in the SSA relating to the issuing of advice on matters of integrity and conduct:

- under s6(ha), one of the Commissioner's principal functions was "to provide advice and guidance to employees within the State services (except Crown Research Institutes) on matters, or at times, that affect the integrity and conduct of employees within the State services"
- under s57C(2), one of the Commissioner's powers when setting and enforcing minimum standards of integrity and conduct included "providing advice and guidance on matters like the interpretation of the standards and the application of a code of conduct in specific cases".

Commentary

400 In accordance with the discussion relating to part 1 of the SSA, the function in s6(ha) should transfer to the 'operational detail' provisions in the Act, and be replaced in s6 by a different statement of the Commissioner's principal function relating to integrity and conduct. The operational detail was in s57 which already included s57C(2): though described as a "power", the act of providing advice and guidance is a function, not a power.

401 The SSC proposed that the functions in s6(ha) and s57C(2) should combine into a single function to be inserted, probably, as a new subsection 57(4). The policy intention behind 57C(2) was to provide for advice and guidance specifically pertaining to the standards in a code of conduct. The policy intention behind 6(ha) was to provide for advice and guidance on matters of integrity and conduct that are not necessarily or explicitly linked to a code of conduct, such as advice and guidance for State servants in the period leading to a General Election. The scope of 6(ha) is broader than the scope of 57C(2). The amendment proceeded via cl44(3) in the Bill.

Redundant Provisions

The Act

402 Section 44(1) provided that sections 35, 36, 38, 39, 43 and 91 did not apply to the Solicitor-General, the Controller and Auditor-General, Commissioner of Police, Director of the Government Communications Security Bureau (GCSB) and the State Services Commissioner. These sections provided for:

- the appointment process for Public Service chief executives (s35)
- the reappointment process (s36)
- the Commissioner to set conditions of employment of chief executives (s38)
- the removal from office of chief executives (s39)
- the review of the performance of chief executives (s43)
- transitional provisions that applied to any person holding the position of permanent head of a Public Service department under the State Services Act 1962 (s91).

403 Section 44(2) continued to refer to the Commissioner of Police as chief executive in respect of the Police Department (civilian staff).

Commentary

404 When the Act was promulgated in 1988, the Audit Department and the Police Department (civilian staff) were departments of the Public Service. The following year, the Police Department (civilian staff) was removed from the list of Public Service departments. In 2001, the Audit Department was disestablished as a Public Service department and the Controller and Auditor-General was established as an officer of Parliament.

405 Section 44 should therefore be amended to remove subsections (1)(b) and (c) because this part of the SSA did not apply to the Controller and Auditor-General and the Commissioner of Police or their agencies.

406 Section 44 should also be amended to remove subsection (2)(d) since reference to the Commissioner of Police and the Police Department (civilian staff) was redundant. The Policing Act 2008 deals with the organisational arrangements for the New Zealand Police and the relationship between the State Services Commissioner and Commissioner of Police.

407 Section 91 had been redundant for many years and should now be removed from the SSA.

408 These technical amendments were all incorporated in the Bill.

Annex 1: Summary of Main Amendments to State Sector Act

The SSA has been amended from time to time by Amendment Acts as well as by other Acts.

Amendment Acts

1 State Sector Amendment Act 1989

- Inserted a new definition of "Education service" to reflect the changes made by the School Trustees Act 1989
- Incorporated provisions relating to employment in the Education service to reflect the State Services Commissioner's responsibility for negotiating awards and agreements
- Inserted personnel provisions applying to the Education service
- Provided for appointment of senior staff in the Education service and Commissioner's responsibility for setting their employment conditions
- Transitional provisions

2 State Sector Amendment Act (No 2) 1989

- Changed the State Services Commission from a body of up to 4 persons to a single State Services Commissioner, statutory officer and chief executive of the department called the State Services Commission
- In respect of the functions and powers of the State Services Commissioner (added 3 new functions to s6) amended references to the State Services Commission to the State Services Commissioner
- Provided for the appointment of a State Services Commissioner and Deputy State Services Commissioner, and for the setting of their terms and conditions of appointment
- Changed the definitions of
    - "Chief executive" by extending it to chief executives of tertiary education institutions
    - "Education service" by including reference to tertiary institutions; and
    - "Employer" to reflect changes made by the Education Act 1989
- Added the power to transfer employees and provided for protection of terms and conditions of employees on transfer
- Amended provisions dealing with appointment and reappointments of chief executives
- Amended provisions relating to the Senior Executive Service
- Provided for delegation of the State Services Commissioner's power to negotiate conditions of employment for employees in the Education service and for the period during which the State Services Commissioner would negotiate awards and agreements for employees in tertiary education institutions

- Added provisions relating to the appointment of chief executives of tertiary education institutions and provided for State Services Commissioner's role relating to the chief executive's terms and conditions of employment
- Provided for recognition of the PSA as a union
- Other technical amendments

3 State Sector Amendment Act 1990

- Provided that employers in the State services could establish superannuation schemes for employees and set the requirements within which any scheme must operate

4 State Sector Amendment Act 1991

- Amended the SSA to reflect the provisions of the Employment Contracts Act 1991 and the Commissioner's responsibilities relating to employees in the Public Service and to the Education service
- Amended provisions dealing with transfer of employees and protection to employees being transferred

5 State Sector Amendment Act 1997

- Amended the SSA so that it no longer applied to kindergartens

6 State Sector Amendment Act 1999

- Technical amendments to Schedule 1

7 State Sector Amendment Act 2003

- Enabled amendments to be made to the First Schedule by Order in Council
- Provided for reorganisations in the Public Service including provisions to limit technical redundancy payments in the case of transfers of staff as a consequence of transfers of functions from one department to another and for recognition of other changes to documents and other things when functions transfer
- Applied provisions relating to transfers of functions to abolitions of Departments of Social Welfare and Courts

8 State Sector Amendment Act (No 2) 2003

- Omitted from paragraph (a)(ii) of the definition of the term employer the words "Part 9 of"

9 State Sector Amendment Act 2004

- Inserted provisions dealing with strikes in the Education service including giving the State Services Commissioner powers to suspend during strikes and providing for technical redundancies where schools are closed or merged

10 State Sector Amendment Act (No 2) 2004

- Amendment at the time of enactment of the Crown Entities Act 2004 and Public Finance Amendment Act 2004, extending some of the State Services Commissioner's powers to the wider State services

  - Extending s6(a) to enable the Commissioner to review the machinery of government across all areas of government
  - Inserting s6(ha) to enable the Commissioner to provide advice and guidance to employees within the State services (except Crown Research Institutes) on matters or at times, that affect the integrity and conduct of employees within the State services
  - Extending s6(i) beyond the Public Service to enable the Commissioner to provide advice on management systems, structures and organisations in Crown entities
  - Extending s57 beyond the Public Service to enable the Commissioner to set minimum standards of integrity of conduct to most Crown entities, the Parliamentary Counsel Office and the Parliamentary Service, requiring agencies to comply with them and providing the Commissioner with enforcement power
- Removing the provisions relating to the Senior Executive Service and replacing them with responsibilities for developing senior leadership and management capability in the Public Service and enabling the Commissioner to promote the development strategy to organisations in the State services (not limited to the Public Service)
- A number of technical changes

11 State Sector Amendment Act 2007

- Amended the section 33 duty on chief executives to act independently in making decisions about individual employees to reflect the fact that the Senior Executive Service no longer exists

Other Acts

1 New Zealand Public Health and Disability Act 2000

- Amended the SSA by
  - repealing the definition of Health Service
  - omitting Health Service from the definition of State services

2 Education Standards Act 2001

- Amended the definition of Education service by including service as a registered teacher in the employment of a free kindergarten association

3 Government Communications Security Bureau Act 2003

- Amended s44(1) by inserting references to the Director of the Government Communications Security Bureau and the State Services Commissioner; and amended s44(2) by inserting that the Director of the GCSB is the chief executive of the GCSB

List of abbreviations and acronyms

Advisers	Departmental advisers to FEC on the Bill
ACE	Autonomous Crown Entity
Bill	State Sector and Public Finance Reform Bill
BPS	Better Public Services
BPSAG	Better Public Services Advisory Group
CAB Min	Cabinet Minute
CDF	Chief of Defence Force
CEA	Crown Entities Act 2004
“cl”	Reference to a particular clause of a Bill
Commissioner	State Services Commissioner
CRI	Crown Research Institute
Csser	Commissioner
Deputy Commissioner	Deputy State Services Commissioner
DHB	District Health Board
DIA	Department of Internal Affairs
EA	Executive Agency
EEO	Equal Employment Opportunities
ELP	Executive Leadership Programme
ERA	Employment Relations Act 2000
FEC	Finance and Expenditure Committee
GCSB	Government Communications Security Bureau
GWPO	Government Workforce Policy Order
Hon	Honourable Minister
House	House of Representatives
ICE	Independent Crown Entity
LDC	Leadership Development Centre
LEG	Cabinet Legislation Committee
MDC	Management Development Centre
MoE	Ministry of Education
MOSS	Minister of State Services
MSD	Ministry of Social Development
NZDF	New Zealand Defence Force
NZSIS	New Zealand Security Intelligence Service
OIA	Official Information Act 1982
OIC	Order in Council
PCO	Parliamentary Counsel Office

PFA	Public Finance Act 1989
PM	Prime Minister
POL Min	Cabinet Policy Committee Minute
PSC	Public Service Commission
PSA	New Zealand Public Service Association
“s”, “ss”	Reference to a particular section (“s”) or sections (“ss”) of an Act
SAB	Semi-autonomous body
SES	Senior Executive Service
SOE	State-Owned Enterprise
SSA	State Sector Act 1988
SSC	State Services Commission
SSCer	State Services Commissioner
TEI	Tertiary Education Institution