



AIDE-MEMOIRE

IN-CONFIDENCE

Aide Memoire for Cabinet – Reform of the State Sector Act 1988

Date: 10 August 2018
For: Hon Chris Hipkins, Minister of State Services
Report No: SSC2018/827

Aide Memoire for Cabinet – Reform of the State Sector Act 1988

Purpose	Cabinet
Date of meeting	13 August 2018
Minister	Hon Chris Hipkins, Minister of State Services, State Services Portfolio
Proposal	You are proposing to release the public discussion paper for the reform of the State Sector Act 1988. You are proposing to repeal and replace the State Sector Act 1988 with an Aotearoa New Zealand Public Service Act.
Key issues	During the development of these papers a number of specific questions have been raised, responses have been prepared to address these issues (see annex 2).
Our advice	Speaking points have been prepared for you for the introduction of the public discussion document. We have included specific speaking points on the changes to the discussion document following the 7 August GOV meeting (see annex 1).
	<p>We recommend</p> <ul style="list-style-type: none"> that you release this aide-memoire in full once the public discussion paper of the State Sector Act reform is released for public consultation. Agree/disagree.

Proactive Release

Hon Chris Hipkins
Minister of State Services

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Annex 1: Speaking points

Please note the following has been prepared as speaking points for the introduction of the public discussion document at Cabinet. These speaking points are a modified version of speaking points for the 7 August GOV meeting.

I would like to introduce this discussion paper, which proposes to establish a new legislative framework for the New Zealand Public Service.

The reform of the State Sector Act is part of a wider reform package, which will be well-connected to any changes embedding intergenerational within the public sector, and changes to the Public Finance Act 1989.

The core proposals for a new Act are:

- articulated purpose, principles and values for the New Zealand Public Service and its role in supporting the Crown/Māori relationship;
- expanded definition of the New Zealand Public Service to a range of Crown entities (Crown agents, autonomous Crown entities) with the effect of applying the purpose, principles and values (set out in the new Act) to them;
- establishment of a Senior Leaders' Service and new collective responsibilities for chief executives;
- references to diversity and inclusion, and ethics and integrity, opportunities in the New Zealand Public Service;
- enabling stronger workforce provisions;
- provision for new organisational and governance arrangements for departments in the New Zealand Public Service to enable joined-up, citizen-centred services; and
- increased capability of the New Zealand Public Service to support successive governments.

Based on feedback received at the 7 August GOV meeting we have:

- worked with the Treasury to agree to additional references to changes to the Public Finance Act 1989 within the consultation material; and
- included a number of options within the discussion document regarding the constitution and appointment of a Public Service Commission or Commissioner based on feedback received at GOV. These options include: a shorter term for the Commissioner, multi-member Commission, and a chairperson Commission model.

Two documents will be released for public consultation, one will be a detailed discussion document, and the other will be a shorter consultation document to engage the general public.

Public consultation commences the week of 27 August (please note this aligns with Public Finance Act changes), and concludes 12 October.

The State Services Commission has been engaging with key stakeholders, including senior public service leaders, Public Service Association (PSA), Māori, public servants, and academics. These engagements will continue over the consultation period and inform final policy proposals.

Following public consultation, I will prepare proposed directions of travel. I intend to provide a paper outlining the proposed directions of travel by November 2018, with final recommendations to Cabinet in March 2019.

Annex 2: Feedback on earlier drafts of the discussion document

During the development of these papers a number of specific questions have been raised, responses have been provided to questions that may arise from the discussion at Cabinet. Please note that these responses are the same as the material prepared for the 7 August GOV meeting.

Supporting the Government's wider agenda

The objectives outlined in the reform of the State Sector Act include providing: better outcomes, better services; strengthening the constitutional role of the Public Service; and supporting a modern, agile and adaptive system. These objectives will help support the Government drive meaningful change through to public sector for New Zealanders.

Ministerial decision rights

The reform is not intended to change Ministerial decision-rights. The Cabinet Manual sets out expectations between the Public Service and Ministers; we think that legislating for shared purpose, principles and values will provide clarity for Ministers around the expectations of the Public Service.

Refer to paragraph 40 of the Cabinet paper.

Reference to the Treaty of Waitangi within the new Act

The current Act is silent on the Public Service's role in the relationship between the Crown and Māori. The discussion paper proposes a prominent stand-alone clause in a new Act to set out clear expectations of the New Zealand Public Service support the government of the day to foster a strong relationship with Māori and to better meet the needs and aspirations of Māori and its Treaty obligations. This clause would be aspirational, similar to those on the purpose, principles and values and not enforceable.

Refer to paragraph 24 of the Cabinet paper.

Operational provisions would strengthen and clarify the Commissioner's and chief executives' responsibilities. Chief executives would have explicit, enforceable responsibilities and accountabilities for partnership, participation and engagement with Māori, workforce cultural competency and composition, and delivering services and results.

Refer to paragraph 26 of the Cabinet paper.

If a Chief Executive or Crown entity board is not meeting the Treaty requirements under the new Act, he or she could be judicially reviewed. The ability to litigate could be limited with explicit provisions in the Act, similar to provisions in clause 28 of the Child Poverty Reduction Bill, which details the effect of targets.

Constitutional role of the Public Service

The State Sector Act is a component of New Zealand's constitutional framework. Reforming the Act is being carefully approached so that constitutional conventions are preserved or shifted appropriately (e.g. the proposal for the Commissioner to determine how the Public Service provides factual information during the Government formation process). Officials consider that the proposals in the discussion paper do not change constitutional conventions. Consultation will likely reveal other perspectives on these conventions and ways to secure them.

Refer to paragraph 14 of the Cabinet paper and pages 19-20 of the discussion paper.

Effect of proposals on community and voluntary organisations

Officials have considered how and to what extent the principles and values may apply to agencies of the community and voluntary sectors which are funded to provide public services but are not part of the Public Service. The discussion document outlines the mechanisms through which contractors can be bound to existing integrity standards. These are:

- where functions are delegated under section 41 of the State Sector Act the delegate can be required to comply with the Code of Conduct; and
- where outside contractors are used the contractor can be bound by the Code of Conduct if the agency is so bound

Refer to paragraph 35 of the Cabinet paper.

Role of the State Services Commissioner

We are aware that some commentators will propose a three-person Commission model through the consultation process. A single Commissioner position will continue under the current proposal to ensure that it is clear who is held accountable by Government, and New Zealanders, and for the integrity and performance of the Public Service. Additionally, a single Commissioner provides Ministers a single point of reference to ensure the Public Service responds quickly and decisively to ministerial priorities.

Refer to page 41 of the discussion paper.

Capturing the lessons from the Canterbury Earthquakes

There are a number of key lessons for the public service after the 2011 earthquake, including: citizen/business-centric service design, co-production, co-location, and information sharing to improve efficiency, (from Ombler and Washington, *Seismic Shifts: The Canterbury earthquakes and public sector innovation*). Lessons from the Canterbury Earthquakes are being considered in policy development.

Refer to page 27 of the discussion paper.

Consistency with the wider Employment Relations Framework

Common terms and conditions for the Senior Leaders Service could be seen to effect the ability for some public servants to negotiate terms of employment. The current Employment Relations Framework of negotiation of terms and conditions will remain, and we would envisage the current practice based on an offer and acceptance process, where there is a general ability to discuss terms of employment would remain. In our discussions with the Ministry of Business and Innovation (MBIE), we discussed this issue and the ways to design common terms and conditions, we intend to keep the public sector within the current employment relations framework. We will continue to engage with MBIE on this.

Litigation risks

The following is a summary of potential litigation risks with regard to the proposed purpose, principles and values. The current proposal is that these aspects of the Act are not enforceable.

Chief Executives and Crown entity boards are already expected to act consistently with the proposed purpose, principles and values. Similar statements exist in the State Sector Act and in the State Services Code of Conduct issued by the State Services Commissioner.

The intention is the legislation be drafted in accordance with the policy intention that the purpose, principles and values not be enforceable in law. Any litigation risk is low because we expect the Public Service to act in accordance with the purpose, principles and values. The values and principles are close to the criteria decision makers are already required to adhere

to in public law. The principal grounds of judicial review are illegality (acting outside the scope of the power conferred), unreasonableness, and unfairness (both procedural and substantive or actual).

Fiscal risks and costs

We are consulting on the proposals to ensure we take a citizen-centred approach to policy process. As part of this process, we will analyse potential fiscal risks and costs. This will occur during and after the consultation period.

Risks of over legislating

The intention of the public consultation process is to ensure that the policy proposals are appropriate. Legislation is one lever to create enduring change, non-legislative levers will also be considered through the consultation process.

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