



Review of the State Sector Act 1988

Date: Tuesday 13 March 2018
Report No: SSC2018/156
Contact: Peter Hughes, State Services Commissioner
Telephone: 9(2)(a) privacy

	Action Sought	Deadline
Minister of State Services (Hon Chris Hipkins)	Consider this briefing and agree that we prepare a paper for you to take to Cabinet	

Enclosure: No

Executive Summary

- 1 This briefing sets out an initial scope of issues for a review of the State Sector Act 1988, together with a process and timeline for your consideration.
- 2 Our point of departure is that the governing legislation for the Public Service should help us make progress on the major challenges facing the Public Service. We think these are:
 - 2.1 re-establishing a single, integrated, career Public Service with a common ethos and culture based on the spirit of service to the community
 - 2.2 ensuring that we fulfil our role and responsibilities, as part of the Executive Branch, to support and enable New Zealand's democratic form of government
 - 2.3 delivering better outcomes and services; continuous improvement towards citizen-centred services and achievement of Government priorities
 - 2.4 ensuring that the Public Service is able to respond flexibly and agilely to new circumstances and the demands of a diverse and fast changing, digitally enabled, society.
- 3 The provisions of the current Act present issues in relation to each of these challenges. This establishes the case for change.
- 4 The briefing provides some ideas for the way in which future legislation can be framed. We conclude with a proposed process and timeline for the review and for progressing a new Act.

Recommended Action

We recommend that you:

- a **note** that we have put in place preparations to conduct a review of the State Sector Act 1988
- b **note** that the usual process for the review of a statute will be followed, including consultation and involvement with stakeholders
- c **note** we have established an internal taskforce with participation from agencies including central agencies
- d **note** that we will ensure alignment with the work the Treasury is undertaking on the Public Finance Act and the work that we and the Treasury need to do jointly on the Crown Entities Act
- e **agree** that the issues raised in this briefing should constitute an initial scope for the review
Agree/disagree
- f **agree** the approach and timeline for the review
Agree/disagree
- g **note** that following your consideration of this briefing we would propose to prepare a paper for you to take to Cabinet to formally instigate the review on the basis of the scope and timeline set out here.
- h **agree** that we prepare a paper for Cabinet to formally establish the review
Agree/disagree

Hon Chris Hipkins
Minister of State Services

Purpose of Report

- 5 We have discussed with you the need for a review of the State Sector Act 1988. You have provided your views and indicated that you would like to proceed with this. This briefing is designed to firm up the scope for the review together with the approach and timeline.

Analysis

- 6 Our point of departure is that the governing legislation for the Public Service should help us make progress on the major challenges that the Public Service faces in delivering for New Zealand and New Zealanders. Legislation, of course, cannot solve all problems and is not the only way of making progress. But the legislation should be framed so as to help with the major issues we face. This is the benchmark against which the current Act should be evaluated, and it is also the aspiration against which any replacement Act should be formulated.
- 7 We consider that, at an overall system level, there are four key challenges facing the Public Service:
- re-establishing a single, integrated, career Public Service with a common ethos and culture based on the spirit of service to the community
 - ensuring that we fulfil our role and responsibilities, as part of the Executive Branch, to support and enable New Zealand's democratic form of government
 - delivering better outcomes and services – continuous improvement towards citizen-centred services and achievement of Government priorities.
 - ensuring that the Public Service is able to respond flexibly and agilely to new circumstances and the demands of a diverse and fast changing, digitally enabled, society.
- 8 This note discusses each of these in turn and then explores the implications for future governing legislation.

An Integrated Public Service

- 9 Within the Public Service it is common to meet and interact with Public Servants who are deeply and personally committed to the ethic of service to the community. But in the past few decades we have not, as a whole Public Service, worked to systematically develop or inculcate the spirit of service into our people. This lack is a result of our decentralised system which tends to focus people on their own agency and its functions rather than instilling a larger sense of the wider Public Service with its unifying common mission. Values and beliefs are powerful motivators and there is a risk that both the Public Service and the community is missing out on the benefits that could come from a more focused and emphatic approach to building the spirit of service on a system-wide basis.
- 10 The current situation also poses risks for the public reputation of the Public Service, and the level of confidence that the community has in us. Most people in the community know or are related to someone who works in the Public Service. But they will see their friend or family member simply as "working for department x" rather than as a Public Servant committed to a common ethic of service and unifying values. Public confidence is fundamental to what we do; it is the authorising environment of the

Public Service. The system needs to clearly and emphatically communicate both to Public Servants, and to the wider community, what public service is all about, and what its core values are. Acting, and being seen to act, from the spirit of service is a key foundation for ensuring that our public reputation is one of service, integrity, probity, and value for money.

- 11 Trust in government and civil institutions in NZ is still relatively high. It has decreased in other countries, including many of our close allies. Once gone, it will be hard to restore. We need to be pro-active and take real steps to enhance legitimacy, rather than take it for granted. The key to this is acting from a spirit of service with total client focus, a desire to be of service to others, and a desire to make a difference for the country.

Supporting democracy

- 12 The way in which the Public Service serves citizens and the Government of the day is of fundamental importance to the proper functioning of the Executive Branch of government. Public Servants have obligations to:

- provide free and frank advice: in this way we ensure that the elected Government can work with the best possible advice that we can provide
- be politically impartial: in this way we ensure that future governments can rely on the loyalty of a professional Public Service which serves successive administrations equally well
- ensure that appointments to positions are merit based: nepotism and cronyism are the enemies of an effective Public Service
- demonstrate commitment to transparency and openness and to direct engagement with the public
- be forward looking, anticipate the challenges and opportunities that will face society, to help governments shape the future.

- 13 Adherence to these principles is important for democratic government to function effectively and to enhance public legitimacy. Moreover, on each of these four foundations the public narrative of recent years has been frequently negative and doubting of our commitment to principle. That is a significant issue in terms of maintaining the public confidence that the Public Service depends on.

Building citizen-centred services and achieving outcomes

- 14 It is well recognised that the siloed nature of our Public Service is highly effective for the provision of services that are best provided by a single agency acting on its own. However, problems arise when closely related services are provided by different departments and citizens find themselves having to navigate across multiple agencies in order to get full information or to address a single problem. Problems also arise when there are complex cross-cutting outcomes that require the combined efforts of several departments to achieve. In these situations efforts to provide citizen centred services, and to achieve complex government priorities, are possible but difficult and slow to develop.

- 15 A related issue arises around the diversity and inclusiveness of our Public Service workforce. A workforce that reflects the diversity of New Zealand society is more likely to be able to, and be seen as able to, understand citizen and community needs and respond appropriately. Moreover, there is an opportunity to model good practice in employment practices in the Public Service, to influence expectations more broadly across society.

Flexible and agile response to change

- 16 There is a pressing need to respond more quickly and efficiently to changing demands and circumstances. Our institutional configuration is relatively fixed, and in terms of organisational form and function provides a very limited range of options. Moreover, the component parts of the system have become very dissimilar from each other in terms of operating models, information and data systems, human resource management, and leadership style. This makes it hard to respond agilely where major shifts, like the policy programme and priorities of an incoming Government, require reallocation of functions among departments, or the creation of new departments, or new forms of working arrangements between departments, and between departments and other agencies.

Progress to Date

- 17 We have made progress on the issues above, partly enabled by some relatively minor statutory changes in 2013, but mainly through mobilising the leadership of the system itself. We have emphasised and reinforced the spirit of service, and the ethical base of Public Service, in recent work on leadership development and the resolution of issues arising from investigations. We have also made progress:
- on open government through the Open Government Partnership and OIA reporting
 - on building alignment between departments through sector leadership, and through the cross-system work of designated functional and professional leads
 - on cross-agency collaboration on outcomes through the BPS Results.
- 18 As well as these developments the Government has recently made a start on updated legislation. The State Sector and Crown Entities Reform Bill, currently before the Governance and Administration Committee, will make a discrete set of amendments to the Crown Entities Act and State Sector Act. The changes will support greater integrity and accountability in the management of the State services. They cover three inter-related areas: Crown entity board member standards of integrity and conduct; the setting of Crown entity chief executive terms and conditions of appointment, including the introduction of fixed term appointments; and modernising and streamlining the State Services Commissioner's powers of investigation. The Bill is aligned with the direction which we propose for the general review of the State Sector Act.
- 19 Legislative change will not in itself achieve our ambition. But it is a significant enabler, and the point comes where the basic system settings embodied in the Act do need to change to enable quicker and deeper progress. Below we provide some initial observations on the fitness for purpose of the current Act and the overall directions for change.

The State Sector Act 1988 and implications for legislative change

- 20 We propose that the governing legislation for the Public Service should be framed in a way which helps us navigate through the challenges we face.

- 21 Since 1988 the State Sector Act has been amended 12 times. The case can be made that the sequence of amendments over time has resulted in a patchwork of uneven provisions that no longer set out a clear or consistent vision or system for public services. More substantive issues can be seen in relation to each of the four issues outlined above.
- 22 **An Integrated Public Service:** An omission from the current State Sector Act is the lack of a formal statement of the mission or values which should guide the Public Service. Nor is there a single statement of Public Service principles in the current Act. The Act is written in an opaque manner that is sufficient for technical experts but does not work to communicate the meaning and purpose of Public Service to either Public Servants or the public. It would help us to have an Act which described the purpose and values of the Public Service, based on the spirit of service to the community.
- 23 **Supporting democracy:** The current Act seems adequate in terms of the black letter law description of the traditional scope of Public Service ethics. Open Government is a striking omission. But overall the problem is not the law *per se* but the fact that the public narrative around our performance on ethical obligations is frequently negative. So we do have issues, and it will be worth exploring all possibilities to addressing them, including possible statutory amendments. Part of a legislative review therefore could be consideration of stronger mechanisms or powers to ensure ethical behaviour across the Public Service.
- 24 **Building citizen-centric services and achieving outcomes:** Progress is slow in this and the basic system settings embodied in the State Sector Act do create barriers. The Act is founded on an assumption of individual agency accountability for outputs when the reality of cross-cutting work is that joint accountability is needed to achieve outcomes that require collaboration. Furthermore, citizen-centred services require alignment between agencies and, despite some progress through functional leadership, it is hard to drive alignment when decision rights remain at the level of the individual department. The review of the Act needs to look at mechanisms for joint or collective accountability and also needs to look at what legislative provision should be made for other means of building capability for collaboration around services and outcomes. These include:
- development of the leadership cadre on a Public Service-wide basis
 - workforce development for greater diversity and inclusion
 - statutory provision for cross-system leadership of key functions like the adoption of new digital and data technologies.
- 25 **Flexible and agile response to change:** It is generally recognised that there are serious systemic issues arising from the fragmented nature of our public services. The current State Sector Act contributes to this by:
- establishing departments and other agencies as largely separate entities with incentives to focus on their individual activities and accountability to individual Ministers
 - entrenching an artificial distinction between public services delivered through departments and public services delivered through Crown entities.
- 26 Our institutional configuration is relatively fixed and inflexible, and in terms of organisational form and function provides a limited range of options. Moreover, the component parts of the system have become very dissimilar from each other in terms of operating models, information and data systems, human resource management,

and leadership development. This makes it hard to respond agilely where major shifts, like the policy programme and priorities of an incoming Government, require reallocation of functions among departments, or the creation of new departments, or new forms of working arrangements between departments.

27 There is a need to bring the system back together and this will require some reweighting to drive alignment and coordination where this is necessary to build the capability of the system for agility in the face of change. In this regard the review of the State Sector Act needs to consider how the legislation:

- can contribute to greater alignment and commonality between departments
- can provide for a wider range of organisational forms suitable for use as, amongst other things, joint venture vehicles between departments, or devolved service delivery vehicles at community level
- can otherwise assist in the flexible allocation and reallocation of functions and resources between departments.

The State Sector Act 1988 and possible directions for change

28 The current Act is divided into Parts relating to:

- The State Services Commissioner
- The Public Service
- Chief Executives
- Senior Leadership and Management capability
- Workforce and personnel provisions
- The Education Service

29 It appears likely that a reformed Act would continue to provide for each of these (with the exception of the Education Service provisions). However, it may be advisable to change the order as the starting point should be the identification of the integrated function (the Public Service as a unified body of people working with shared values for the benefit of New Zealanders) rather than the department and leadership roles which form components of the Public Service.

The definition and purpose of the New Zealand Public Service

30 The current Act defines the Public Service in a technical way as a group of organisations which share a common legal form and type of governance. One effect of this is to exclude, from the definition of the Public Service, an enormous range of organisations that provide necessary public services, including those of the health and education systems.

31 An alternative approach would be to define the Public Service in terms of common mission statement based on the spirit of service to New Zealanders and on supporting the effective functioning of the executive branch of government. This would result in a broader conception of the Public Service and one able to include a wider range of types of organisations including statutory Crown entities.

32 Internationally, there are examples, including Australia, of jurisdictions that have included values statements in their governing legislation. A statement of values, suitable for a unified and citizen-focused Public Service, should be considered for inclusion in a New Zealand Public Service Act. A statement of core values could include reference

to: commitment to service, political impartiality, integrity, accountability, and respectfulness.

- 33 Core principles should also be spelled out in legislation so that Public Servants, and the public, are clear on the expectations common to all Public Service roles. By law and established convention these include:
- The Public Service's role as a constructive, timely, free and frank advisor to Government, using the best and most complete information available to assist the Government plan and manage for the short, medium and long term interests of New Zealand and its people
 - The Public Service's role as a permanent, professional and politically impartial institution that loyally works for each successive government, supports the smooth transition from one Government to another, and maintains the continuity of public services
 - The requirement for all appointments and promotions to be on the basis of merit and through processes which protect from political or other improper influence
 - The need to demonstrate commitment to transparency, openness, and to direct engagement with the public
 - The stewardship responsibility to be forward-looking, and anticipate the challenges and opportunities that will face society, to help governments shape the future.
- 34 To these could be added more general good employer principles around operating within a legal framework for effective and fair employment, management, and leadership of New Zealand's Public Service employees.
- 35 The principle of diversity and inclusion could be addressed in a section on employment, or could stand on its own. Either way consideration should be given to formally instating the requirement that the Public Service operate to remove barriers to employment and promotion, to respecting the rights and heritage of all New Zealanders, and to reflecting the diversity of the community it serves through its workplace practices and in employment.

The Role of the Commissioner

- 36 The State Sector Act 1988 establishes the role of State Services Commissioner. All legislation governing the Public Service has provided for an analogous role; either in the form of a Commission or a Commissioner. The State Sector Act 1988 sets out the role of the Commissioner in recommending the appointment (which may be accepted or rejected by Government) of the administrative heads of departments. The Act further forbids any political or ministerial involvement in any other appointment decisions in the Public Service.
- 37 The role of the State Services Commissioner has undergone considerable development in recent years. The Commissioner has, under Cabinet decision, taken on the role of Head of State Services. In practice this means that the Commissioner takes responsibility for driving the reform of the Public Service and, to this end, convenes the chief executives of departments as a leadership team around the reform programme. This extensive development of the State Services Commissioner's role has been reflected in legislation by way of the 2013 amendments to the State Sector Act. These changes recognise that leadership and oversight of the system is part of the role, and that reviewing the State sector system is a function of the Commissioner. However, the legislative changes did not add tangible tools or levers to assist the Commissioner to deliver on these roles and functions. In the absence of tangible tools and levers the

ability to drive change remains relatively slow. Consequently we lack the statutory enablers for the system-wide and cross-agency work that we know is needed to deliver on complex government priorities and citizen-centred services.

38 The review of the Act should be an opportunity to look at a number of aspects of the Commissioner's role including whether and how they are to be expressed in legislation, including:

- the appointment of chief executives. The respective roles of the Commissioner and Ministers in appointment decisions have been framed in different ways under past Public Service legislation. We should consider whether the current formulation of the State Sector Act is still fit for purpose
- the levers and instruments the Commissioner has to foster a spirit of service to the community through a unified, professional Public Service, ensuring the capacity and capability to serve successive governments
- the ability of the Commissioner to assist Government transition including through the coordination and provision of pre and post election briefings, and supervising the provision of factual information by the Public Service for the purpose of coalition negotiations
- the ability of the Commissioner to set expectations, and allocate both individual and joint accountabilities for achieving priority outcomes and citizen-centred services
- the ability of the Commissioner to put in place new and innovative organisational forms which can assist the achievement of cross-cutting outcomes or the delivery of citizen centred services at the front line
- the ability of the Commissioner to deliver on the responsibility for leadership development across the Public Service
- the ability of the Commissioner to perform other functions for the good management of the system, including in relation to functional leadership.

39 In addition to the above issues there is the matter of the arrangements for appointment and employment of the Commissioner. Little consideration has been given recently to these matters. Are the current arrangements sufficient to guarantee that the statutory roles of the Commissioner are both performed, and seen to be performed, with the degree of independence that the statute envisages? There has been much public comment in recent years about this and the legislative review can provide an opportunity to consider how greater assurance can be given around the integrity of the role. This might, for example, lead to consideration of a single fixed length of term for which a Commissioner would be appointed.

40 The broadening of the definition of the "Public Service" also has implications for the role of the Commissioner. The review will need to address the relationship between the role of the Commissioner in relation to Crown entities, and the governance role of Crown entity Boards. A particular focus of the review will need to be the implications, in terms of the need for consequential amendments, to other major State sector legislation including the Crown Entities Act, and Public Finance Act.

Chief Executives

41 The current Act provides for the appointment of chief executives as the administrative heads of departments. In this briefing we have opted to use the 'chief executive' despite our reservations about it. Internationally we can find few examples of the term

chief executive being used in a public service context; it is a term imported from the corporate sector and the review may determine that some other term should be used for the administrative heads of the New Zealand Public Service.

- 42 Currently chief executives' accountabilities are framed almost entirely in terms of responsibility to an individual Minister for each departmental function. As explained above this 'single point' accountability is appropriate for many public services and outcomes but not for the achievement of complex cross-cutting outcomes or services.
- 43 The review of the Act is an opportunity to consider how we can build into the legislation provision for joint or collective accountability into the head of department role. This may be needed for two reasons:
- to ensure accountability of all heads of departments (and entities) for collectively ensuring the health of the system including such things as modelling the values and principles of the Public Service and the design and implementation of strategies to improve the performance of the Public Service
 - to allocate shared accountability to smaller groups of heads of departments (and entities) to achieve particular government priority outcomes and/or implement citizen-centred services across a group of agencies.
- 44 The review should consider ways in which these two forms of joint accountability can be formalised in practice. For the first, there is the option of a single Board of Public Service chief executives. For the second, there is the option of providing in legislation a means for groups of chief executives to be given formal joint accountability for implementing certain services in an integrated and citizen-centred way, or joint accountability for achieving some outcome or other government priority. A model for this exists in the specific purpose boards which were proposed by the Better Public Services work and which have not been incorporated into legislation.

Administrative Arrangements

- 45 Where agencies have 'common customers' there are perennial issues around how to align agencies to work together either to provide better services for the same group, or to achieve an outcome or result for a common population. In the past the alignment issue has been addressed in two ways; either through voluntary cooperation or else by merging functions from different agencies into the same department.
- 46 Recent work by the Public Service chief executives has clarified the range of options that can exist between these two extremes. These 'middle options' traverse a range including more structured inter-departmental projects, functional leadership, and semi-structural integration (including the ability to establish interdepartmental joint ventures). These can operate either at the national level or at the front line (multi-agency service delivery). These arrangements can complement and give effect to the more sophisticated approaches to joint accountability of chief executives outlined above.
- 47 There are ways in which legislative change can assist the system to take advantage of these possibilities. To some extent this can be seen already in the use we have made of the departmental agency form introduced in the 2013 changes to the State Sector Act.
- 48 We think there is merit in new legislation providing for:
- a new organisational form which could be established by two or more departments to function as a joint venture between them and hold assets in common

- provision for an executive agency model which could deliver services on behalf of two or more departments to, for instance, integrate face-to-face transactional services along the lines of Service Canada.

Senior Leadership Development

49 The 2013 amendment to the State Sector Act enlarged the role of the Commissioner in driving and coordinating the development and deployment of leadership talent for the system. The review should look at how successful this change has been. There is a case for further reform to be contemplated in this area; possibly including provision for a more formalised senior executive group than exists at present.

Proposed timeline and consultation process for new legislation

50 We understand you envisage enactment in late 2019. To that end we have drafted the following timeline for your consideration and endorsement if you agree. Note that to meet the initial target of completing drafting instructions by the end of November a number of the steps below will need to overlap or be undertaken concurrently.

51 The timeline is tight and will place constraints on both the scope of issues that can be considered in the review, and the scope and scale of consultation that can be undertaken. Within this we propose the following:

March 2018	Paper to Cabinet to formally institute the review
February-June	Policy process – development of detailed reform proposals, consultation with relevant Departments and key stakeholders, and consultation with Legislation Design and Advisory Committee
July/Aug	Formal public consultation process Commence indicative drafting instructions
August/September	Analysis of consultation feedback
September	Finalise proposals – analysis of feedback from input and your agreement of the final proposals to put to Cabinet. Prepare draft Cabinet decision papers and Regulatory Impact Statements.
October	RIS signed off
October	Final Cabinet approvals –Paper and RIS to Cabinet.
November	Final drafting instructions to PCO
December	Bid for 2019 legislative programme
March 2019	Introduction and First Reading
September	Select Committee report
November	Enactment and commencement

Consultation

52 To develop the strongest possible reform proposals and to support the smooth passage of the Bill through the Parliamentary Select Committee we are proposing an inclusive consultation and engagement process that will be tailored to the timeframe including:

- targeted consultation with experts and key stakeholders to test and refine the detailed proposals for reform. This would include targeted consultation with academics, public service unions, IPANZ, and the Law Commission. One option is to

bring these stakeholders together as an expert group to be involved in key stages of the policy formulation process over 2018

- a specific targeted consultation with Maori: we will work with TPK, Crown Law and the PCO on how best to do this
- a public consultation in July/August that would allow all interested parties – over and above those involved in targeted consultation – to be engaged. This form of the consultation would probably take the form of publishing consultation paper(s) on the SSC website and a series of round table discussions. The point of the public consultations process would be to:
 - clear up any misunderstandings and surface any gaps or significant points that we have missed
 - give us and Ministers a sense of any challenges we might have to manage
 - provide Ministers, Parliament and the Select Committee with a sense of confidence that good process has been followed, interested parties have been heard and their views have been taken account of
- a reference group of current public sector chief executives.

53 A specific question that we would like to discuss with you is whether or how best to bring other political parties represented in Parliament into the process.

RELEASED BY SSC UNDER OUR COMMITMENT TO OPEN GOVERNMENT