

Office of the Minister of State Services

Chair, Cabinet Business Cabinet

## CHANGES TO LEGISLATION FOR CROWN ENTITIES

### Proposal

- 1 This paper proposes a small number of discrete amendments to legislation affecting Crown entities to address specific issues in that sector.

### Executive Summary

- 2 Crown entities are bodies established by law in which the Government has a controlling interest - for example, through having the power to appoint and replace a majority of the governing members or by owning a majority of voting shares - but which are legally separate from the Crown.
- 3 Collectively they make up a significant portion of the state sector and carry out a wide variety of functions, running public hospitals and schools and performing a broad range of other service delivery or regulatory activities. Given their variety and individual autonomy, it is important that they remain connected under a unifying spirit of service to the community.
- 4 There are some discrete issues in this sector that warrant swift attention. I propose to progress a small number of stand-alone amendments to legislation in order to address:
  - remuneration setting for Crown entity chief executives
  - Crown entity chief executive terms of appointment
  - standards of integrity and conduct for Crown entity boards
  - the State Services Commissioner's powers to carry out investigations.
- 5 I believe amendments in these areas will align Crown entities better with other arrangements in the state sector and help to maintain public trust and confidence.

### Background

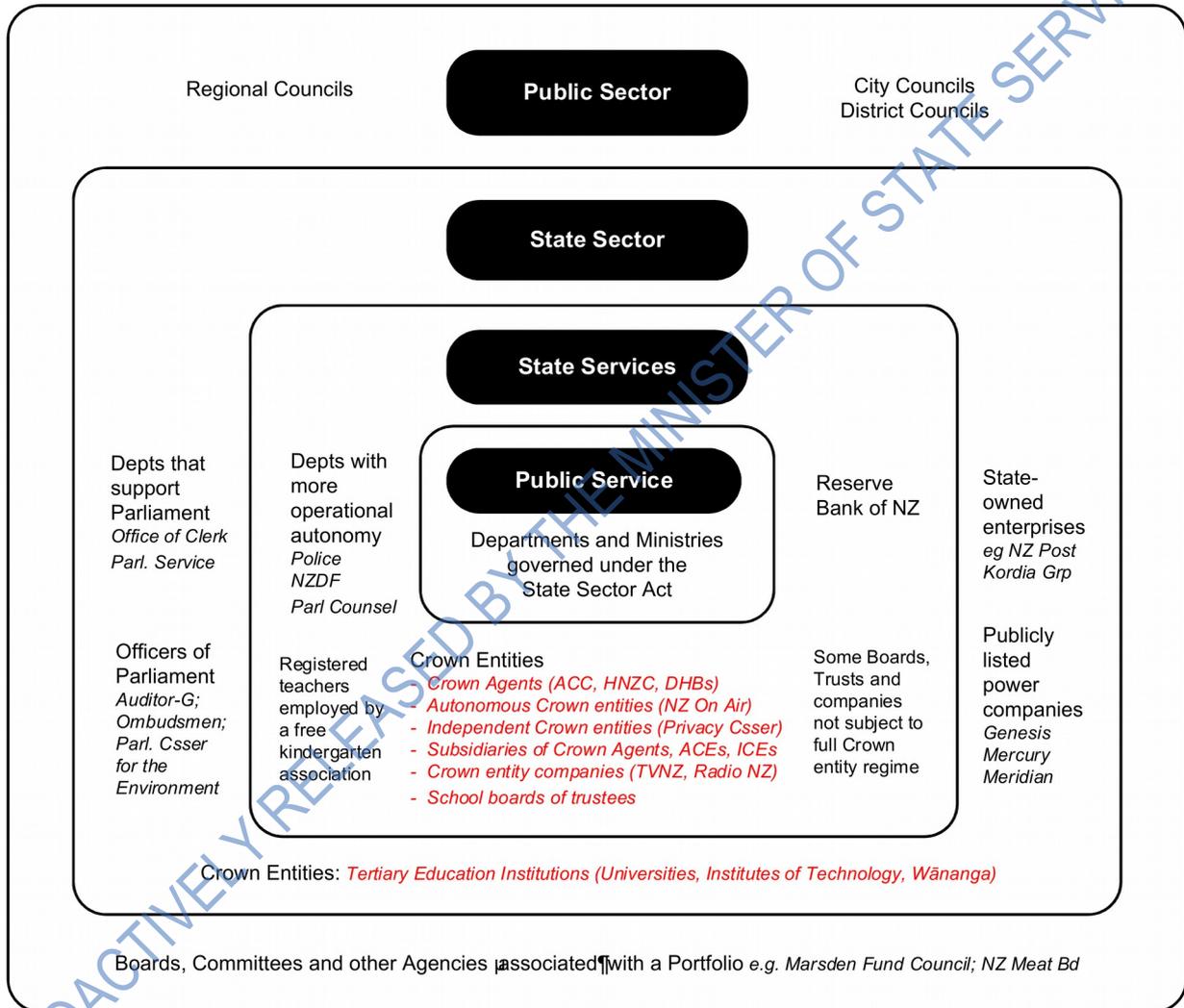
- 6 Two key pieces of legislation in the State Services portfolio - the State Sector Act 1988 (SSA) and Crown Entities Act 2004 (CEA) - together with the Public Finance Act 1989 (PFA) form cornerstone legislation governing the establishment, organisation, operations, relationships and accountabilities of agencies in the state sector. All three Acts were ground-breaking and world-leading when they were passed.
- 7 The CEA was fundamentally premised on the basis of each Crown entity's legal separation from the Crown, operating at arms-length from Ministers under the governance of boards. Influence from the centre is considerably more formalised and structured than for public service departments and ministries. It is time to reconnect certain aspects under a unifying spirit of service to the community. A small number of amendments would address issues relating to Crown entity chief executive terms of appointment and remuneration settings.

8 The SSA governs the core public service and integrity matters across the state sector, under the leadership and oversight of the State Services Commissioner. For example, it enables the State Services Commissioner to set standards of integrity and conduct by issuing a code of conduct for agencies and employees in most of the state services. But it should explicitly extend this mandate to apply also to Crown entity board members.

**Comment**

**The landscape**

9 The following diagram illustrates the myriad of agencies that make up the public sector in New Zealand, with very differing governance and accountability arrangements.



**Remuneration setting for Crown entity chief executives**

10 There has been much publicity and comment about the remuneration of Crown entity chief executives. The system for setting the terms and conditions of employment for a chief executive involves:

- the governing board is responsible for setting the terms and conditions
- the State Services Commissioner has varying levels of influence, as summarised in the following table.

<b>Chief executive</b>	<b>Role of State Services Commissioner in relation to conditions of employment</b>
Crown agent Autonomous Crown entity (ACE) Independent Crown entity (ICE)	Board must consult Commissioner and have regard to any recommendations about the terms and conditions. DHBs (Crown agents) must obtain the Commissioner's consent
Subsidiaries of Crown agents, ACEs, ICEs	Same as for parent Crown agent, ACE or ICE
Crown entity company	No role for Commissioner
School board of trustees	A school principal may be bound by a collective agreement (Commissioner is responsible for negotiating, but delegates to the chief executive of the Ministry of Education) or have an individual agreement (employer must obtain Commissioner's written concurrence to the conditions of employment; this is included in the delegation to the chief executive of the Ministry of Education)
Tertiary education institution	Council must obtain Commissioner's written concurrence to the conditions of employment

- 11 Several key provisions predate those in the CEA relating to Crown agents, ACEs, ICEs, and their subsidiaries:
- the provisions relating to the Education Service are in the SSA; of note, councils of tertiary education institutions must obtain the Commissioner's written concurrence to the conditions of employment for a chief executive
  - the provisions for DHBs are in the New Zealand Public Health and Disability Act 2000, requiring boards to obtain the Commissioner's consent to the terms and conditions of employment of a chief executive.
- 12 Under the CEA, boards of Crown agents, ACEs and ICEs are only required to consult the Commissioner about a chief executive's terms and conditions of employment and have regard to the Commissioner's recommendations. These provisions lack the 'teeth' in the system that applies to DHBs and tertiary education institutions.
- 13 An amendment to the CEA to require these entities to obtain the Commissioner's consent would seem highly appropriate in its own right, and especially in light of recent 'headline' cases.
- 14 At present, the only measures for not following guidance issued by the Commissioner is a requirement to consult the responsible Minister and have regard to the Minister's recommendations. While ultimately the Minister may choose not to reappoint a board chairperson (and has the power to remove members in the case of Crown agents and ACEs), I have asked officials to explore the feasibility of including other mechanisms to reinforce the Commissioner's influence.

### **Crown entity chief executive terms of appointment**

- 15 Currently chief executives of Crown entities must be appointed on an ongoing basis unless there is a specific time-bound reason for a fixed term appointment. This is unlike chief executives for the public service and tertiary education institutions. The SSA includes specific provisions that these chief executives shall be appointed for terms of not more than five years.
- 16 Having permanent appointments for Crown entity chief executives means that Crown entity boards are often responsible for chief executives whom they did not appoint and whose term extends beyond their own. It means they cannot easily make changes to terms and conditions of chief executives and are bound by previous custom and practice. It also affects their ability to manage the performance of their chief executives. Fixed term appointments enhances the accountability of the chief executives for their performance.
- 17 For these reasons, I propose an amendment to the CEA to insert similar provisions to those in the SSA for public service chief executives – appointment for a term of not more

than 5 years, and eligibility for reappointment from time to time. These provisions would apply in relation to future appointments of chief executives of Crown agents, autonomous Crown entities and independent Crown entities.

### **Standards of integrity and conduct for Crown entity board members**

- 18 Crown entity board members, as governors and leaders of their entities, should demonstrate and be held accountable for high standards of integrity and conduct.
- 19 Prior to some amendments to the SSA in January 2005, the State Services Commissioner's mandate to set standards of integrity through a code of conduct was limited to core public service departments and ministries. The mandate was extended in January 2005 to apply to all Crown entities (except tertiary education institutions, Crown research institutes – which are a type of crown entity company – and their subsidiaries), as well as to a small number of other agencies.
- 20 The mandate to apply a code of conduct explicitly covers the “agency”, including its employees and individuals working as secondees or contractors. Under the CEA, the “entity” is a body corporate that is legally separate from its board members, office holders and employees. I propose an amendment to the SSA to make it explicit that the Commissioner may set standards of integrity and conduct by issuing a code of conduct that applies to Crown entity board members collectively and individually.
- 21 I consider that applying a code of conduct to board members:
- is inherently the right thing to do. There is no reason from a public transparency and accountability perspective to treat board members differently to staff or contractors. If anything, public expectations are higher in terms of the behavioural standards by governors of these entities, given their senior positions and the impact of breaches on the reputation of both the entity and the broader sector.
  - would catch up with international practice, such as the *Code of Conduct for Board Members of Public Bodies*, issued by the UK Cabinet Office
  - is necessary for reconnecting the system around a unifying spirit of service to the community.

### **State Services Commissioner's powers to investigate**

- 22 The SSA gives the Commissioner various powers in relation to the exercise of the commissioner's statutory functions (to investigate, obtain information, enter premises, summon witnesses and receive evidence).
- 23 At present, there are differing thresholds and powers applicable to different functions. The powers available depend on whether the Commissioner is exercising functions in relation to the core public service, or in relation to the wider state services. In the latter case, there is a difference if the Commissioner is directed to act by the Prime Minister or requested to act by the Minister responsible for a particular part of the state services.
- 24 It is highly desirable to put in place a single investigation package that aligns with the regime in the Inquiries Act 2013. This would be possible with a relatively short, sharp and targeted set of amendments to the SSA designed to:
- promote greater consistency in the manner in which inquiries and investigations are conducted across government
  - provide one, consistent approach to the Commissioner's investigatory and inquiry powers, when dealing with agencies in the State services outside the public service
  - ensure that material relevant to the State Services Commissioner when investigating matters can be dealt with appropriately with regard to clarifying the

extent of public access to investigation material and maintaining an appropriate balance between public disclosure and protection of witnesses and inquiry processes.

## Consultation

25 This paper was prepared by the State Services Commission. Other agencies and Crown entities have not been involved at this stage. The Treasury and the Department of the Prime Minister and Cabinet have been informed.

## Financial Implications

26 This paper does not have financial implications. If the proposal proceeds and is well implemented, it will result in a slowing down of the rate of increase in Crown entity chief executive remuneration levels.

## Human Rights

27 Nothing in this paper is inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

## Legislative Implications

28 I propose to issue drafting instructions to the Parliamentary Counsel Office in December 2017, introducing a priority category 2 Bill for 2018. It would most likely be presented as an omnibus Bill that would be divided at the committee of the whole House stage into a Crown Entities Amendment Bill and a State Sector Amendment Bill.

## Regulatory Impact Analysis

29 The State Services Commission will engage with The Treasury to confirm whether these proposals are exempt from the regulatory impact assessment requirements.

## Publicity

30 I will make an announcement of the prospective changes to legislation early in 2018.

## Recommendations

31 The Minister recommends that the Committee:

1. **note** that I propose to introduce a Bill early in 2018 to make a small number of amendments to legislation affecting Crown entities
2. **agree** that the Crown Entities Act 2004 be amended to:
  - 2.1 require the boards of Crown agents, autonomous Crown entities and independent Crown entities to obtain the State Services Commissioner's written consent to the terms and conditions of employment for a chief executive
  - 2.2 insert provisions to the effect that future appointments of chief executives of Crown agents, autonomous Crown entities and independent Crown entities may be for a term of not more than 5 years, including eligibility for reappointment from time to time

3. **agree** that the State Sector Act 1988 be amended to:
  - 3.1 provide explicitly for the State Services Commissioner to set standards of integrity and conduct by issuing a code of conduct that applies to Crown entity board members collectively and individually
  - 3.2 bring the State Services Commissioner's investigatory powers under the ambit of the Inquiries Act 2013, including consequential amendments to the State Sector Act 1988 to the effect that:
    - 3.2.1 there is greater consistency in the manner in which inquiries and investigations are conducted across government
    - 3.2.2 there is a consistent approach to the Commissioner's investigatory and inquiry powers, when dealing with agencies in the State services outside the public service
    - 3.2.3 material relevant to the State Services Commissioner when investigating matters can be dealt with appropriately with regard to clarifying the extent of public access to investigation material and maintaining an appropriate balance between public disclosure and protection of witnesses and inquiry processes
4. **invite** the Minister of State Services to issue drafting instructions to the Parliamentary Counsel Office to give effect to the decisions in recommendations 2 and 3
5. **authorise** the Minister of State services to have the power to act with regard to decisions on minor policy and technical matters that may arise during the preparation of the necessary legislation
6. **note** that the legislation will most likely be introduced as an omnibus Bill that will be divided at the committee of the whole House stage into a Crown Entities Amendment Bill and a State Sector Amendment Bill
7. **agree** that the Bill have priority category 2 for 2018 (must be passed in the year).

Authorised for lodgement

Hon Chris Hipkins  
**Minister of State Services**

Date: