

In Confidence

Office of the Minister of State Services

Chair, Cabinet Legislation Committee

State Sector and Crown Entities Reform Bill: Approval for Introduction

Proposal

- 1 This paper:
 - 1.1 seeks final confirmation of the policy to be implemented by the State Sector and Crown Entities Reform Bill (the Bill);
 - 1.2 proposes that the Bill be approved for introduction to the House of Representatives, subject to final approval of the government caucuses and sufficient support in the House.
- 2 A bid has been submitted for the 2018 Legislation Programme proposing a priority category 2 for the Bill: must be passed in the year.

Policy

Summary

- 3 On 20 December 2017, the Cabinet Business Committee, having been authorised by Cabinet to have Power to Act, agreed to the policy to be implemented by the Bill, subject to submitting the draft Bill to the relevant Cabinet committee for final confirmation of policy [CBC-17-MIN-0091].
- 4 The Bill is an omnibus Bill to be introduced under Standing Order 263(a). It amends the Crown Entities Act 2004 and the State Sector Act 1988. The single broad policy of the Bill is to provide for greater integrity and accountability in the management of the State services by providing for strengthened and more consistent regulation of the conduct and remuneration of employees at the most senior level and a more consistent approach to the State Services Commissioner's investigatory and inquiry powers when dealing with agencies in the State services outside the public service. The Bill provides for a single integrated approach in the State services across these dimensions.
- 5 The amendments to the Crown Entities Act 2004 are to:
 - 5.1 require boards of statutory Crown entities (Crown agents; autonomous Crown entities; independent Crown entities) to obtain the State Services Commissioner's written consent to the terms and conditions of employment for a chief executive (similar to the existing requirement on district health boards and other Crown agents in the health sector, as well as tertiary education institutions);
 - 5.2 introduce terms of appointment for up to 5 years, able to be renewed, for future chief executives of statutory Crown entities (the same as for departmental chief executives and tertiary education institutions).

- 6 The amendments to the State Sector Act 1988 are to:
- 6.1 provide explicitly for the State Services Commissioner to set standards of integrity and conduct by applying a code of conduct to the board members of Crown entities that are subject to a code of conduct;
 - 6.2 bring the State Services Commissioner's investigatory powers under the ambit of the Inquiries Act 2013. This includes amendments to improve consistency in how inquiries and investigations are conducted across government, to improve consistency in the approach when the Commissioner is dealing with agencies in the State services outside the public service, and to deal appropriately with investigation material in relation to the balance between public disclosure and protection of witnesses and inquiry processes.

Contentious aspects

- 7 At present, the boards of statutory Crown entities are required to consult the State Services Commissioner about the terms and conditions of employment of a chief executive. The change to require them to obtain the Commissioner's consent may be contentious in terms of perceived consequences, such as a reduced ability to attract the best chief executives or a diminished sense of responsibility by the board for chief executive recruitment and performance.
- 8 The change to enable the State Services Commissioner to issue a code of conduct for Crown entity board members is likely to come under scrutiny, for example in terms of the potential interaction between a code and the board members' individual or collective statutory duties.
- 9 The scope and trigger for the Commissioner's investigatory powers is likely to be closely scrutinised.

Need for a Bill

- 10 The policy cannot be implemented without legislative change. Amendment is needed to:
- 10.1 change from the existing statutory requirement to consult the State Services Commissioner [Crown Entities Act 2004, s.117(1)] to a statutory requirement to obtain the Commissioner's consent to the terms and conditions of employment for the chief executive of a statutory Crown entity;
 - 10.2 introduce a term of appointment for the chief executive of a statutory Crown entity. At present there is none (unlike for chief executives of tertiary education institutions and public service departments);
 - 10.3 enable the State Services Commissioner explicitly to apply a code of conduct to Crown entity board members and require their compliance. The existing provisions in s.57(2) and s.57A(1) of the State Sector Act apply to agencies (including their employees, secondees and contractors). However, under s.15 of the Crown Entities Act, a statutory Crown entity is a legal entity separate from its board members, office holders and employees;
 - 10.4 enable the State Services Commissioner or investigators to provide assurance to witnesses in an investigation or inquiry about the protection of their evidence; also to enable the Commissioner explicitly to report publicly on the outcomes of integrity investigations; and to provide a uniform ability to require information directly from agencies.

- 11 Legislatively, the amendments constitute a small package of straightforward amendments.

Impact analysis

- 12 A Regulatory Impact Statement was not prepared in advance of the policy decisions made by the Cabinet Business Committee on 20 December 2017. The State Services Commission has prepared a Supplementary Analysis Report (SAR), which is attached to this paper. It is required to be published on the State Services Commission and Treasury websites before the Bill is introduced to Parliament.
- 13 As required, the SAR sets out the underlying problems, the practical options to address the problems, the preferred way forward and the risks and potential consequences of the proposals. The information and analysis summarised is largely qualitative, recognising the nature of the issues under consideration. Consultation has occurred with the departments that monitor Crown entities, but wider consultation has not been possible in the timeframe. Further opportunities for input to these proposals will occur as the Bill progresses. The State Services Commission considers, on the basis of the information available, the report supports the changes proposed in the Bill and largely meets the regulatory quality assurance criteria.

Treasury comment

- 14 The Regulatory Quality Team at Treasury has reviewed the Supplementary Analysis Report and in terms of the RIA quality assurance criteria.
- 15 Current arrangements are clearly set out. The value judgements underpinning the identified problems, and the risks and potential unintended consequences, are also reasonably well identified. However, the SAR is missing supporting evidence about the nature and extent of the harms now occurring. It is limited on analysis to underpin the assumptions or conclusions reached about the likely impact of either measure on board member behaviour and entity performance. This is particularly the case where the measures apply to quasi-commercial entities where the tensions between competing values are seen as most acute. This problem is exacerbated by the limited and tight timing of consultation undertaken.
- 16 It will therefore be important to take careful account of any advice or comment from stakeholders as the policy proposal is taken forward.

Compliance

- 17 The Bill complies with each of the following:
- 17.1 the principles of the Treaty of Waitangi;
 - 17.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (there are no inconsistencies);
 - 17.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to the paper);
 - 17.4 the principles and guidelines set out in the Privacy Act 1993 (paragraph 18 outlines the Privacy Commissioner's comments);
 - 17.5 relevant international standards and obligations;
 - 17.6 the *LAC Guidelines on the Process and Content of Legislation* (2014 edition).

Consultation

- 18 Targeted consultation on the draft Bill has taken place.
- 18.1 In relation to departments and other public bodies:
- 18.1.1 the draft Bill was provided to departments that monitor Crown entities: Department of Internal Affairs; Ministry for Culture and Heritage; Ministry for the Environment; Ministry for Primary Industries; Ministry of Business, Innovation, and Employment; Ministry of Education; Ministry of Foreign Affairs and Trade; Ministry of Health; Ministry of Justice; Ministry of Social Development; Ministry of Transport; Te Puni Kōkiri; The Treasury.
- 18.1.2 the draft Bill was also provided to the Ministry for Women and to the Tertiary Education Commission (which monitors the tertiary education institutions).
- 18.1.3 the Privacy Commissioner, Department of Internal Affairs and Ministry of Justice were also invited to consider clause 8 in particular, relating to the application of the Inquiries Act 2013 when the Commissioner investigates or inquires into a matter in the performance of his or her statutory functions or duties.
- 18.2 Private sector organisations were not consulted, and there was no public consultation process.
- 18.3 The government caucus, NZ First and the Green Party have been consulted.
- 19 Departments that monitor Crown entities are generally supportive of the draft Bill. The Treasury, which monitors the semi-commercial entities, and another department indicated that the Commissioner approving remuneration of chief executives could potentially impede the ability of boards to recruit the best possible candidate and manage the ongoing relationship with the chief executive.
- 20 Other departments indicated the interface between the statutory duties of board members and a code of conduct will need to be carefully considered. The Ministry of Justice raised a similar issue in terms of the impact of a code on the independence of the functions and powers of independent Crown entities. The State Services Commission is aware of these matters and believes they are manageable.
- 21 The Privacy Commissioner expressed concern that the Bill extends the State Services Commissioner's investigatory powers and provides for additional powers under the Inquiries Act 2013. The State Services Commission considers that the changes do not expand the Commissioner's powers, but extend the authority under which the powers may be exercised in investigating matters related to integrity and conduct. Similarly the Commission believes the Bill does not provide additional powers, but a modernised version of a power under the Commissions of Inquiry Act 1908. The attached disclosure statement provides further information.

Binding on the Crown

- 22 The Bill amends Acts that are binding on the Crown.
- 23 The Bill does not create new agencies or amend law relating to existing agencies.

- 24 The Bill will not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

- 25 The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

Associated regulations

- 26 Regulations will not be needed to bring the Bill into operation.

Other instruments

- 27 The proposed Bill does not include any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

- 28 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

- 29 There is no specific commencement date. The Bill is targeted to come into force on the day after the date of Royal assent by the end of September 2018.

Parliamentary stages

- 30 The Bill should be introduced on 12 February 2018 and passed by 27 September 2018.
- 31 It is proposed that the Bill be referred to the Governance and Administration Committee.

Recommendations

The Minister of State Services recommends that the Committee:

- 1 **confirm** the final policy to be implemented by the State Sector and Crown Entities Reform Bill
- 2 **note** that a bid has been submitted for the 2018 Legislation Programme proposing a priority category 2 for the State Sector and Crown Entities Reform Bill: must be passed in the year;
- 3 **note** that the Bill provides for greater integrity and accountability in the management of the State services by providing for strengthened and more consistent regulation of the conduct and remuneration of employees at the most senior level and a more consistent approach to the State Services Commissioner's investigatory and inquiry powers when dealing with agencies in the State services outside the public service;

- 4 **approve** the State Sector and Crown Entities Reform Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 5 **agree** that the Bill be introduced on 12 February 2018;
- 6 **agree** that the government propose that the Bill be:
 - 6.1 referred to the Governance and Administration Committee for consideration;
 - 6.2 enacted by 27 September 2018.

Authorised for lodgement
Hon Chris Hipkins
Minister of State Services

PROACTIVELY RELEASED BY THE MINISTER OF STATE SERVICES