

State Sector and Crown Entities Reform Bill

Government Bill

As reported from the Governance and Administration Committee

Commentary

Recommendation

The Governance and Administration Committee has examined the State Sector and Crown Entities Reform Bill and recommends that it be passed with the amendments shown.

Introduction

The State Sector and Crown Entities Reform Bill seeks to amend the Crown Entities Act 2004 and the State Sector Act 1988 to increase integrity and accountability in the management of the state services.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Recommended amendments to Part 1 (appointment of chief executives for statutory Crown entities)

Part 1 of the bill seeks to make amendments to the Crown Entities Act regarding the appointment of chief executives for statutory Crown entities.

Clause 4 seeks to amend section 117 of the principal Act. It would require the boards of statutory Crown entities to obtain the State Services Commissioner's written consent to the terms and conditions of employment for a chief executive. We acknowledge that Crown entities operate in a variety of contexts and each has unique circumstances. We consider that these differing contexts should be taken into account by the Commissioner when considering whether to give written consent. We recommend inserting clause 4, new section 117(2AA), which would require the Commissioner to have regard to:

- the legal, commercial, and operational context of the entity
- any information provided by the board of the entity (this information could include advice about a candidate's knowledge, skills, and experience)
- the public nature of the entity and role, and the related public interest in prudent stewardship of public resources
- relevant market information
- government expectations
- any other relevant factors.

We also recommend inserting clause 4, new section 17(2AB). This would require the Commissioner to provide reasons if consent for the proposed terms and conditions of employment for a chief executive is refused.

Some members wanted to include objective criteria against which the Commissioner would have to justify their decision.

We acknowledge a question from a submitter about whether the amendment the bill seeks to make to section 117 of the Crown Entities Act would be an implied repeal of certain provisions of the New Zealand Superannuation and Retirement Income Act 2001. The bill is not intended as such. However, the proposed amendment to section 117 is intended to limit the freedom of a board to pay a salary that is inconsistent with chief executive terms and conditions within the relevant parts of the state services.

Recommended amendments to Part 2 (launching inquiries and applying codes of conduct to board members of Crown entities)

Part 2 of the bill seeks to make amendments to the State Sector Act. The amendments relate to two areas:

- improving the State Services Commissioner's investigatory powers
- setting provisions for the Commissioner to apply codes of conduct to board members of entities that come within the Commissioner's existing mandate.

Including additional sections of the Inquiries Act

The bill seeks to update the Commissioner's investigatory powers under the Commissions of Inquiry Act 1908 by bringing them under the Inquiries Act 2013.

Clause 8, new section 9A(2), lists the sections of the Inquiries Act that would apply when the Commissioner investigates something in the course of their functions under the State Sector Act or any other Act. We consider that the bill would be improved by including additional sections of the Inquiries Act. We recommend amending clause 8, new section 9A(2), to insert paragraphs (aaa), (ca), and (j) to include sections 10, 17, and 34 of the Inquiries Act, and amending paragraph (d) to include section 22 of the Inquires Act.

Delegation for an inquiry

Both section 21 of the Inquiries Act and section 23 of the State Sector Act would allow the Commissioner to delegate certain powers of an inquiry, but on slightly different terms. We recommend inserting clause 8, new section 9A(3A), to make it clear that delegation under section 21 of the Inquiries Act must be carried out in accordance with section 23 of the State Sector Act.

Exempting inquiries from privacy principles 6 and 7 of the Privacy Act 1993

Section 55(b) of the Privacy Act 1993 provides that inquiries under the Inquiries Act are exempt from privacy principles 6 (access to personal information) and 7 (correction of personal information). The purpose of this exemption is to ensure that inquiries have access to the best evidence by allowing witnesses to provide evidence in confidence, without being concerned that a third party could access the information. We consider that this exemption should also apply to inquiries made by the Commissioner when the commission is using Inquiries Act powers. We recommend amending clause 8 to insert new section 9C in the State Sector Act. This would ensure that inquiries made by the Commissioner are exempted in the same way as other inquiries under the Inquiries Act.

Although we consider it important that this exemption applies to inquiries made by the Commissioner, we believe it should be limited to formal inquiries. We recommend that the bill provide a way to signal that an inquiry has been initiated and that the exemption applies. To do so, we recommend amending clause 8 to insert new sections 9A(1)(b) and 9B. These proposed new sections would require the Commissioner to make a written certificate in order to initiate an inquiry. New section 9B sets out what the certificate should include. New section 9B(2) makes it clear that the Commissioner's power to make a certificate could not be delegated.

As a further accountability and transparency measure, we recommend inserting new section 9B(3). This would require the State Services Commission's annual report to include the number of certificates made by the Commissioner and a summary of each inquiry.

We consider that this formal process of a written certificate and annual reporting provides the appropriate clarity and limitations around when the exemption would apply.

Evidence subject to confidentiality or privilege

Clause 8, new section 9A(2)(d) of the bill covers section 20(c) of the Inquiries Act, which enables an inquiry where privilege or confidentiality is claimed, to examine documents for the purposes of determining whether privilege or confidentiality applies. The bill as introduced also includes section 27 of the Inquiries Act, which would require a person who is claiming privilege or confidentiality to seek an order from the Commissioner protecting the material or limiting its use.

We consider that the bill would be improved by providing an external additional avenue for determining whether privilege or confidentiality applies. We recommend removing reference to section 27 of the Inquiries Act in clause 8, new section

9A(2)(e), and inserting new section 9D. Our proposed new section would provide a mechanism for a witness to apply to the court seeking an order to allow them to withhold privileged, confidential, or state-sensitive material.

Power of Commissioner to enter premises

Under the bill as introduced the Commissioner would have a relatively wide power to enter the premises of a state services agency where an inquiry is launched into integrity matters. We recommend inserting clause 8A to constrain this power. This provision would require the Commissioner to obtain the consent of the Minister of State Services before exercising the power to enter premises.

Applying codes of conduct to board members

The bill seeks to amend section 57 of the State Sector Act to enable the Commissioner to apply a code of conduct to boards and board members. This would apply to agencies where the chief executives, employees, secondees, and contractors are already included within the Commissioner's mandate to issue a code. We recommend amending clause 13, to insert section 57A(4) to clarify that the provisions enabling the Commissioner to apply a code of conduct would not limit or affect any other statutory provision. We consider this would encourage consistency between a code issued by the Commissioner and any existing statutory duties and requirements of board members and boards.

Appendix

Committee process

The State Sector and Crown Entities Reform Bill was referred to the committee on 20 February 2018. The closing date for submissions was 11 April 2018. We received and considered 7 submissions from interested groups and individuals. We heard oral evidence from 2 submitters at hearings in Wellington.

We received advice from the State Services Commission.

Committee membership

Brett Hudson (Chairperson)

Virginia Andersen

Kanwaljit Singh Bakshi

Hon Jacqui Dean

Paul Eagle

Hon Peeni Henare

Raymond Huo

Dr Jian Yang

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Chris Hipkins

State Sector and Crown Entities Reform Bill

Government Bill

Contents

	Page
1 Title	2
2 Commencement	2
Part 1	
Amendments to Crown Entities Act 2004	
3 Amendments to Crown Entities Act 2004	2
<u>3A</u> <u>Section 98 amended (Subsidiaries: rules applying only to statutory entities)</u>	<u>2</u>
4 Section 117 amended (Employment of chief executive)	3
5 Schedule 1AAA amended	3
Part 2	
Amendments to State Sector Act 1988	
6 Amendments to State Sector Act 1988	4
7 New section 2B inserted (Transitional, savings, and related provisions)	4
2B Transitional, savings, and related provisions	4
8 New section 9A inserted (Application of Inquiries Act 2013)	4
9A Application of Inquiries Act 2013	4
<u>9B</u> <u>Commissioner's certificate under section 9A(1)</u>	<u>6</u>
<u>9C</u> <u>Information privacy principles 6 and 7 do not apply during inquiry or investigation in accordance with section 9A</u>	<u>6</u>
<u>9D</u> <u>Immunities and privileges of participants in inquiry or investigation in accordance with section 9A</u>	<u>6</u>
<u>8A</u> <u>Section 10 amended (Power to enter premises)</u>	<u>7</u>

9	Section 11 replaced (Exercise of functions and powers in respect of other State services)	7
	11 Functions and powers can be exercised in relation to other State services	7
10	Section 23 amended (Delegation of functions or powers)	8
11	Sections 25 and 26 repealed	8
12	Section 57 amended (Commissioner may set minimum standards of integrity and conduct)	8
13	Section 57A amended (Agencies must comply with minimum standards except in particular circumstances)	9
14	Sections 57B and 57C repealed	9
15	Section 77ID amended (Conditions of employment of chief executive)	9
16	New Schedule 1AA inserted	9
17	Amendments to other enactments	9
	Schedule 1	10
	New Part 2 inserted into Schedule 1AAA of Crown Entities Act 2004	
	Schedule 2	11
	New Schedule 1AA inserted into State Sector Act 1988	
	Schedule 3	12
	Consequential amendments to other enactments	

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the State Sector and Crown Entities Reform Act **2018**.

2 Commencement

This Act comes into force on 31 October 2018.

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Part 1

Amendments to Crown Entities Act 2004

3 Amendments to Crown Entities Act 2004

This Part amends the Crown Entities Act 2004.

3A Section 98 amended (Subsidiaries: rules applying only to statutory entities)

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(1) In section 98(1)(c), delete “(but for this purpose, references to the responsible Minister in section 117 must be read as references to the parent)”.

(2) After section 98(1), insert:

(1A) Subsection (1)(c) does not apply to a statutory entity parent that is either of the following:

- (a) a district health board:
- (b) an organisation within the meaning of clause 1 of Schedule 6 of the New Zealand Public Health and Disability Act 2000.

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4 Section 117 amended (Employment of chief executive)

Replace section 117(1) and (2) with:

(1) A chief executive of a statutory entity is appointed for a term of not more than 5 years, but may be reappointed.

(2) The terms and conditions of employment of a chief executive of a statutory entity appointed by its board must be determined by agreement between the board and the chief executive.

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(2A) However, the board must obtain the written consent of the State Services Commissioner before—

- (a) finalising the terms and conditions; or
- (b) amending any or all of the terms and conditions once they have been finalised.

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(2AA) When considering the terms and conditions of a chief executive, the State Services Commissioner must have regard to the following (among any other relevant factors):

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- (a) the legal, commercial, and operational context of the entity;
- (b) any information provided by the board, which might include, for example, the board's advice about a person's knowledge, skills, experience, and performance;
- (c) the public interest in prudent stewardship of public resources;
- (d) Government expectations;
- (e) relevant market information.

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(2AB) The State Services Commissioner must provide reasons for refusing consent to any proposed terms and conditions.

(2B) The State Services Commissioner must provide the boards of statutory entities with advice and guidance on the terms and conditions of employment of chief executives of entities.

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5 Schedule 1AAA amended

(1) In Schedule 1AAA, before clause 1, insert:

Part 1
Provisions relating to Crown Entities Amendment Act 2013

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- (2) In Schedule 1AAA, after clause 4, insert the **Part 2** set out in **Schedule 1** of this Act.

Part 2

Amendments to State Sector Act 1988

- | | | |
|-----------|---|----|
| 6 | Amendments to State Sector Act 1988 | 5 |
| | This Part amends the State Sector Act 1988. | |
| 7 | New section 2B inserted (Transitional, savings, and related provisions) | |
| | After section 2A, insert: | |
| 2B | Transitional, savings, and related provisions | |
| | The transitional, savings, and related provisions set out in Schedule 1AA have effect according to their terms. | 10 |
| 8 | New section 9A inserted (Application of Inquiries Act 2013) | |
| | After section 9, insert: | |
| 9A | Application of Inquiries Act 2013 | |
| (1) | This section applies if the Commissioner exercises a power to investigate or inquire into any matter in the course of performing his or her functions and duties under this Act or any other Act, whether acting under a requirement imposed by or under the relevant enactment or on his or her own initiative. | 15 |
| (1) | <u>This section applies if the Commissioner—</u> | |
| (a) | <u>exercises a power to investigate or inquire into any matter in the course of performing his or her functions and duties under this Act or any other Act (whether acting under a requirement imposed by or under the relevant enactment or on his or her own initiative); and</u> | 20 |
| (b) | <u>has certified, in accordance with section 9B, that he or she is satisfied that, in order to perform those functions and duties, it is reasonably necessary that the provisions specified in subsection (2) apply in relation to the investigation or inquiry.</u> | 25 |
| (2) | The following provisions of the Inquiries Act 2013 apply in relation to an investigation or inquiry to which this section applies: | |
| (aaa) | <u>section 10 (which relates to the duty of an inquiry to act independently, impartially, and fairly):</u> | 30 |
| (a) | section 14 (which relates to the regulation of inquiry procedure): | |
| (b) | section 15 (which relates to the power to impose restrictions on access to an inquiry): | |

- (c) section 16 (which relates to the power to postpone or temporarily suspend an inquiry):
- (ca) section 17 (which relates to the designation of core participants of an inquiry):
- (d) sections 19 to ~~21~~ 22 (which relate to evidential matters): 5
- (e) sections 23 to ~~27~~ 26 (which relate to ~~witnesses, immunities, and privileges~~ witnesses and immunities):
- (f) section 29 (which relates to offences):
- (g) section 30 (which relates to penalties for offences):
- (h) section 31 (which relates to contempt proceedings): 10
- (i) sections 32 and 33 (which relate to the application of the Official Information Act 1982 and the Public Records Act 2005):
- (j) section 34 (which provides for questions of law to be referred to the High Court).
- (3) The provisions of the Inquiries Act 2013 applied by **subsection (2)** must be read— 15
- (a) as if the Commissioner were an inquiry established under that Act and the relevant Minister referred to in **section 11** were the appointing Minister; and
- (b) as if the terms document, information, and officer of an inquiry had the same meanings as in section 4 of that Act; and 20
- (c) with the other necessary modifications.
- (3A) A delegation under section 21 of the Inquiries Act 2013 must be made in accordance with section 23 of this Act.
- (4) In exercising any powers of the Inquiries Act 2013 under this section, the Commissioner— 25
- (a) has no power to determine the civil, criminal, or disciplinary liability of any person:
- (b) may make— 30
- (i) findings of fault:
- (ii) recommendations that further steps be taken to determine the civil, criminal, or disciplinary liability of any person:
- (iii) findings or recommendations for the improvement and benefits of the wider State services relevant to the findings of the investigation: 35
- (c) may receive a report from any person, make a report to any person, or make any public report regarding the matters investigated.

9B	<u>Commissioner's certificate under section 9A(1)</u>	
(1)	<u>A certificate made under section 9A(1) must—</u>	
	(a) <u>be in writing and signed by the Commissioner; and</u>	
	(b) <u>specify the person or persons who will be conducting the investigation or the inquiry; and</u>	5
	(c) <u>summarise the subject matter of the investigation or the inquiry; and</u>	
	(d) <u>set out the reason or reasons why the Commissioner is satisfied that, in order to perform his or her functions and duties, it is reasonably necessary that the provisions specified in section 9A(2) apply in relation to the investigation or inquiry.</u>	10
(2)	<u>The Commissioner may not delegate the power to make a certificate under section 9A(1).</u>	
(3)	<u>The Commission's annual report, required by section 43 of the Public Finance Act 1989, must include—</u>	
	(a) <u>a statement as to the number of certificates made by the Commissioner under section 9A(1)(b) during the year that is the subject of the report; and</u>	15
	(b) <u>for each certificate, a summary description of the matter that was the subject of the investigation or inquiry.</u>	
9C	<u>Information privacy principles 6 and 7 do not apply during inquiry or investigation in accordance with section 9A</u>	20
(1)	<u>Information privacy principles 6 and 7 do not apply in respect of personal information contained in evidence given or submissions made to an inquiry or investigation conducted in accordance with section 9A, until the Commissioner publishes a final report or otherwise concludes the inquiry or investigation.</u>	25
(2)	<u>In subsection (1), information privacy principle and personal information have the meanings given to them in section 2(1) of the Privacy Act 1993.</u>	
	<u>Compare: 1993 No 28 s 55</u>	
9D	<u>Immunities and privileges of participants in inquiry or investigation in accordance with section 9A</u>	30
(1)	<u>Witnesses and other persons (other than counsel) participating in an inquiry or investigation conducted in accordance with section 9A have the same immunities and privileges as if they were appearing in civil proceedings, and subpart 8 of Part 2 of the Evidence Act 2006 applies to the inquiry or investigation, to the extent that it is relevant, as if the inquiry or investigation were a civil proceeding.</u>	35

- (2) In addition to a Judge's powers under the Evidence Act 2006 as provided in **subsection (1)**, the Commissioner may make any order or direction that a Judge may make under section 52, 53, 69, or 70 of that Act.
- (3) An order or a direction made by the Commissioner under **subsection (2)** has effect as if it were an order or a direction of a Judge under the Evidence Act 2006. 5
- (4) Counsel appearing before an inquiry or investigation have the same immunities and privileges as they would have if appearing before a court.
Compare: 2013 No 60 s 27
- 8A Section 10 amended (Power to enter premises)** 10
- (1) After section 10(3)(a), insert:
(aa) entry shall be made only if the Commissioner has first obtained the agreement of the Minister:
- (2) After section 10(3)(d)(ii), insert:
(iii) evidence of the agreement referred to in **paragraph (aa)**: 15
- 9 Section 11 replaced (Exercise of functions and powers in respect of other State services)**
- Replace section 11 with:
- 11 Functions and powers can be exercised in relation to other State services**
- (1) The Commissioner must, if directed in writing by the Prime Minister, perform or exercise in relation to any part of the State services that does not form part of the Public Service any of the functions and powers specified in the direction that the Commissioner has under sections 6 to 10. 20
- (2) The Commissioner may, in performing any function under section 6(h) or (i), 57(2) or (4), or 57A, exercise any of the powers in sections 7 to 10 in relation to an agency in the State services as if it were a department. 25
- (3) The Commissioner may, if requested by the head of any part of the State services, and must, if requested by the Minister in charge of, or responsible for, any part of the State services, perform or exercise any of the functions and powers that the Commissioner has under sections 6 to 10. 30
- (4) The Commissioner may, if requested by the head of any part of the State services that does not form part of the Public Service, or of any corporation listed in Schedule 1 of the State-Owned Enterprises Act 1986, provide assistance in respect of the conditions of employment of its employees.
- (5) For the purpose of this section, sections 6 to 10 apply as if the relevant part of the State services or agency were a department and with the other necessary modifications. 35
- (6) Nothing in this section—

- 13 Section 57A amended (Agencies must comply with minimum standards except in particular circumstances)**
- (1) Replace section 57A(1) with:
- (1) Agencies, persons, and groups of persons must comply with any standards that apply to them under **section 57(3)**. 5
- (2) In section 57A(3),—
- (a) replace “an agency” with “an agency or a person or a group”; and
- (b) delete “applied to the agency”.
- (b) replace “applied to the agency” with “that apply under **section 57(3)**”.
- (3) After section 57A(3), insert: 10
- (4) Nothing in this section limits or affects any provision of this or any other Act.
- 14 Sections 57B and 57C repealed**
- Repeal sections 57B and 57C.
- 15 Section 77ID amended (Conditions of employment of chief executive)**
- In section 77ID(3), after “with the chief executive”, insert “or amending any or all of the conditions once they have been finalised”. 15
- 16 New Schedule 1AA inserted**
- Insert the **Schedule 1AA** set out in **Schedule 2** of this Act as the first schedule to appear after the last section of the principal Act.
- 17 Amendments to other enactments** 20
- Amend the enactments specified in **Schedule 3** as set out in that schedule.

Schedule 1

New Part 2 inserted into Schedule 1AAA of Crown Entities Act 2004

s 5(2)

Part 2

Provision relating to State Sector and Crown Entities Reform Act 2018 5

5 Transitional provision relating to amended section 117

- (1) **Section 117(1)** (as inserted by the amendment Act) applies only to the appointment or reappointment of a chief executive that is made after that subsection comes into force. 10
- (2) **Subsections (2) and (2A)** of section 117 (as inserted by the amendment Act) apply—
 - (a) to the appointment or reappointment of any chief executive that is made after those subsections come into force; and
 - (b) to the amendment of any terms and conditions of a chief executive (whether appointed or reappointed before or after those subsections come into force) that is made after those subsections come into force. 15
- (3) In this clause, **amendment Act** means the State Sector and Crown Entities Reform Act **2018**.

Schedule 2
New Schedule 1AA inserted into State Sector Act 1988

s 16

Schedule 1AA
Transitional, savings, and related provisions

5

s 2B

Part 1
Provision relating to State Sector and Crown Entities Reform Act 2018

- 1 Transitional provision relating to investigations or inquiries** 10
- (1) This clause applies to any investigation or inquiry begun by the Commissioner under this Act or any other Act, but not completed, before **section 9A** (as inserted by the amendment Act) comes into force.
- (2) The investigation or inquiry must be completed or otherwise dealt with as if the amendment Act had not been enacted. 15
- (3) In this clause, **amendment Act** means the State Sector and Crown Entities Reform Act **2018**.

Schedule 3

Consequential amendments to other enactments

s 17

Inquiries Act 2013 (2013 No 60)

In Schedule 1, repeal the item relating to the State Sector Act 1988. 5

New Zealand Public Health and Disability Act 2000 (2000 No 91)

Replace section 21(3)(h) with:

(h) sections 116 and **117(2)** to (3) (employment of employees and chief executives):

In Schedule 3, replace clause 44(5) with: 10

(5) This clause applies despite sections 25 and **117(2)** to (3) of the Crown Entities Act 2004, but **section 117(1)** of that Act applies to a chief executive of a DHB.

In Schedule 6, replace clause 29(5) with:

(5) This clause applies despite **section 117(2)** to (3) of the Crown Entities Act 2004, but **section 117(1)** of that Act applies to a chief executive of an organisation. 15

Legislative history

12 February 2018
20 February 2018

Introduction (Bill 20–1)
First reading and referral to Governance and Administration
Committee