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State Services Commission
PO Box 329
Wellington, 6140

By email: submissions@havemysay.govt.nz

Re: Reform of the State Sector Act 1988 – discussion document

Introduction

The New Zealand Law Society welcomes the opportunity to comment on the discussion document *New Zealand's Public Service Belongs to You, the People of New Zealand* – Reform of the State Sector Act 1988, Directions and Options for Change (discussion document).

The discussion document sets out several proposals recommending reform of the operation of the existing state sector in a bid to improve public service outcomes. This submission sets out some general observations on the discussion document including some specific concerns regarding questions 8-10 and 22-23.

General Comments: need for clarity/problem definition

The Law Society notes that the proposals in the discussion document are framed as being made within existing constitutional conventions, which include ministerial accountability to a democratically elected Parliament; the doctrine of ministerial responsibility for the administration and operation of departments; and the obligations of public servants to serve their Minister.

Against that backdrop and the questions raised, the discussion document also identifies some wider objectives for reform, for example in the three bullet points at p 6.[1] However, for the most part, it does not specify:

a. whether those objectives are not, or have on occasion not been, met in practice; and, if so
b. whether any past or current deficiencies in meeting those objectives are attributable to shortcomings in the State Sector Act 1988 (the Act); and
c. how the proposed statutory reforms would or might address any such shortcomings.

This lack of definition of either the problem(s) or the potential solution(s) has at least two consequences. First, the discussion document has not sought to identify empirical or other concrete indications of apparent deficiencies in the Act, despite such indications having been provided in published review work. The Law Society notes there is some limited discussion of previous reports at

[1] New Zealand's Public Service Belongs to You, the People of New Zealand – Reform of the State Sector Act 1988, Directions and Options for Change, discussion document, at p 6: "1. Deliver better outcomes and better services; 2. Create a modern, agile and adaptive New Zealand Public Service, and 3. Ensure its role in supporting New Zealand's democratic form of government."

p 9,[2] but most of that material is general and, with the exception of one study dating from 2011, more than a decade old. Secondly, without the discussion paper having engaged with that material on a detailed level, it is difficult to form any view on the necessity or efficacy of possible statutory reforms. This is unfortunate.

As an illustration, while the paper refers (at p 13) to the provision of free and frank advice, it does not comment on whether there is any current deficiency in this area or, if there is, whether that can or should be addressed by statutory reform. In that regard:

a. The Law Society understands there is evidence of a concerning decline in the capacity of officials to provide free and frank advice. For example, see the survey data and conclusions given in Eichbaum & Shaw "The Future of Public Administration: Speaking Truth to Power or fluffing the lines?".[3] More than half of the respondents to this survey commented that public servants were less likely, as at 2017, to provide free and frank advice. The survey also described instances of ministerial political advisers preventing advice from reaching Ministers. The authors go on to comment:

> "… the system [of provision of free and frank advice] is in a state of some disrepair. Moreover, these assessments stand in stark contrast to the Panglossian assessments that one repeatedly sees being offered by those with system-wide responsibilities …".

b. Similar empirical indications have been made about, for instance, the operation of the Official Information Act 1982; the broader question of the role of political advisers; and the difficulties of accountability and, particularly, securing cultural change in public bodies.

The Law Society considers it is necessary, in order for the various specific reform questions to be raised and addressed, for there to be thorough engagement with these potential deficiencies and, particularly, with whether statutory changes are needed or will likely be effective in addressing the deficiencies. It would be helpful if the discussion paper indicated:

a. whether the government accepts the above points, as valid; and, if so
b. whether (and to what extent) those indications reflect statutory shortcomings; or,
c. whether the observations reflect failure by those administering current legislation to comply with it; and
d. how any statutory reforms might address such problems. For example, it is possible that changes in the appointment and tenure arrangements for the State Services/Public Service Commissioner such as the bipartisan appointment procedure flagged at p 36, option 1, could support provision of free and frank advice and other stated objectives, but that is not explored in the discussion document.

Further, where the discussion document does refer to concrete problems (for example, there are references to uneven distribution of capability in the public service (pp 21-22) and to "struggles" in cross-government arrangements (pp 23)), it is not apparent:

a. what the nature or scale of those problems is;

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[2] Including the Logan Report of 1991, the report of the Ministerial Advisory Group of the Review of the Centre in November 2001 and the report of the Better Public Services Advisory Group in 2011.

[3] Eichbaum & Shaw "The future of Public Administration: Speaking Truth to Power or fluffing the lines?"[3] (New Zealand Political Studies Association, 2017).

b. whether those "struggles" result from the lack of appropriate statutory mechanisms or from administrative failings; and/or
c. whether greater centralisation and/or formalisation of such matters would likely alleviate such problems or introduce new difficulties, as in some of the matters discussed separately below.

The Law Society therefore considers that, on the basis of the current discussion document, it is not possible to comment on the necessity or potential efficacy of most of the specific questions raised in the discussion document.

Recommendation

The Law Society considers that, before proceeding with the reform exercise proposed, it is essential that the State Services Commission undertake further work to identify whether and to what extent present and past failures reflect statutory shortcomings. Doing so would allow the Commission to identify whether and how any statutory reform may, in practice, provide effective responses to those failures.

Chapter 3: The unifying purpose, principles and values of the New Zealand Public Service

Scope of the 'Public Service' (Qs 7-10, discussion document at pp 15-16)

The discussion document proposes to expand the "concept and legal definition of the Public Service,"[4] by including a broader array of entities, including Crown Agents and Autonomous Crown Entities. The discussion document goes on to state, "the proposals we make here will not in any way affect the concept or definition of the legal Crown."[5]

In response to question 7, the Law Society considers that the proposal to extend the definition of 'Public Service' raises several legal and constitutional issues that require further consideration because of tension that these entities will retain their essential status as separate legal entities under the Crown Entities Act 2004.

As such, the key legal and constitutional aspects that are relevant to this proposal include the fact that:

a. the Crown has specific legal and constitutional status which is distinct from the status of Crown entities, which are creatures of statute;

b. the Act is one of a number of statutes that have constitutional significance as it provides for the Public Service, which has obligations to serve the Minister of the day. The arrangements relating to the employment, control and oversight of the Public Service are central to maintaining core constitutional principles such as responsible government and the rule of law;

c. Crown entities are legally distinct from government departments and the Crown. This legal separation:

4 New Zealand's Public Service Belongs to You, the People of New Zealand – Reform of the State Sector Act 1988, Directions and Options for Change, discussion document, at p 15.

5 Ibid.

i. reinforces the principle that public power should not be concentrated and should instead be distributed in a way that enables consistent delivery of long-term legislative outcomes which are subject to parliamentary and judicial oversight;

ii. authorises and enables Crown entity boards to perform the functions and powers given to the entity by law. It also enables the boards to set the direction and resource the entity to achieve its statutory objectives;

iii. ensures that Crown entities are protected from ministerial interference in the performance of their functions and powers. This is reinforced by the fact that the ability for Ministers to add functions to Crown entities is clearly prescribed in law and requires a transparent process under section 112 of the Crown Entities Act to preserve Parliamentary accountability for the performance of the functions of the entity; and

iv. creates obligations and liabilities for the entity, office holders, board members and entity employees that are treated quite differently to those that attach to Ministers and departmental employees.

The Law Society further considers the proposed approach to include numerous Crown entities into the Public Service in order to apply the purpose, principles and values (PPV) to Crown entities, could undermine or weaken some of the constitutional protections that currently exist by virtue of Crown entities' separate legal status.

In particular, the discussion document states that the PPV of the Public Service will be provided for in law yet not be enforceable under that law.[6] In respect of Crown entities, it is proposed that the PPV of the Public Service be given effect through expectations on the board and through new powers for the Commissioner to issue instructions to require agencies to follow them on integrity and conduct matters.[7] The Law Society considers this approach would undermine the very transparent and constitutionally accountable framework that currently exists under the Crown Entities Act. It is under this framework that expectations and obligations on Crown entities are set in law and/or required to be made by ministerial direction (under law) with specific safeguards[8] to retain parliamentary accountability.

The proposal to include Crown entities within the public service could also create unhelpful constitutional tensions regarding the role and obligations of Crown entity employees. These employees are currently employees of the Crown entity and their duties and responsibilities are provided for under that entity[9] and often also under their empowering statute.[10] They do not have the same legal status, protection from liability and obligations to Ministers as existing Public Service employees. The Law Society considers the proposal does not adequately address and seek to resolve this legal distinction and could undermine the ability of Crown entity boards to meet their statutory obligations as there would be conflicting duties on employees.

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6 Ibid, at p 11.

7 Ibid, at p 16.

8 See sections 106-113 of the Crown Entities Act 2004.

9 See sections 116-118 of the Crown Entities Act 2004

10 Examples include section 74B(b) and 98A of the Commerce Act 1986; section 72G(3) of the Civil Aviation Act 1990, section 437(3) of the Maritime Transport Act 1994 and sections 33-34 of the Real Estate Agents Act 2008.

In light of the concerns raised above, the Law Society also considers that (in response to question 10) it would be inappropriate for independent Crown entities to be included in the scope of the Public Service. These enities include the Electoral Commission, the Privacy Commissioner, the Law Commission and the Financial Markets Authority. Their independence relates to the need to ensure that they are not subject to government policy, which preserves important constitutional principles, including the separation of powers (which is particularly relevant in relation to an entity like the Electoral Commission).

Chapter 6 – Organisational Arrangements

Collective Accountability for Chief Executives (Q 23 – discussion document at pp 24-25)

The discussion document proposes to introduce collective accountability for chief executives (CEs) for certain decisions.[11] This proposal also raises legal and constitutional issues. In some cases, Crown entity CEs have clear statutory mandates that relate to their specific statutory roles and responsibilities (many of which relate to specific regulatory outcomes, such as aviation[12] or maritime[13] safety). While many of those functions and powers are statutorily independent and will not be affected by the proposals, there are many that are not. How collective accountability for such decisions will be made in the context of competing initiatives (which are invariably related to the exercise of independent powers and functions) is presently unclear. If this remains unclear, it will erode the ability of Crown entity CEs to exercise their independent functions and powers, especially given the primary driver for these reform proposals is to achieve more cohesive public sector decision-making for system outcomes.[14]

Regulatory functions are often at the centre of public service delivery and system outcomes. However, an added complexity to this proposal is that, in some cases, the regulatory functions are exercised by the board of the entity itself (such as the Real Estate Agents Authority,[15] the Commerce Commission,[16] and the New Zealand Transport Agency[17]) and the proposals in the discussion document do not extend to the board.[18] This will result in inconsistent treatment of agencies under the proposal because the collective accountability provisions will not extend to all entities equally.

Public Service Executive Boards (proposal at pp 24-25)

It is unclear how the proposals to make provisions in the Act for Public Service Executive Boards will interact with the independent powers and functions of legally distinct Crown entities and their CEs. The proposal appears to relate to departments only, not Crown entities, but as many delivery functions sit with Crown entities, the objective of improved public services will not be able to be achieved transparently without addressing the separate legal status of Crown entities. This is also important as the proposals refer to collective accountability to administer an appropriation. Many

11 New Zealand's Public Service Belongs to You, the People of New Zealand – Reform of the State Sector Act 1988, Directions and Options for Change, discussion document, at p 24.

12 See section 72I of the Civil Aviation Act 1990.

13 See section 439 of the Maritime Transport Act 1994.

14 Discussion document, at pp 24-25.

15 See section 12 of the Real Estate Agents Act 2008.

16 See various provisions of the Commerce Act 1986, including sections 53ZD, 98, 98A.

17 See section 95 of the Land Transport Management Act 2003.

18 Discussion document, at p 16.

departments and most Crown entities are funded through regulated levies and fees for their activities, not appropriations.

The proposal is also potentially inconsistent with the development of a "regulator culture" identified as necessary for better performing regulatory regimes. For example, in recent work of the Productivity Commission, practical actions have been identified to promote a favorable regulator culture, such as a culture that places great value on *organisational independence* and impartiality.[19] An all of Government initiative, known as the Government Regulatory Practice Initiative,[20] has already resulted from these recommendations, and it is unclear how the proposals would align with such efforts. The Law Society considers it would also be helpful to address how the proposals in the discussion document might reflect the concept of *organisational independence* contained in Crown entity legislation.

Implications for Financial Management – p 28

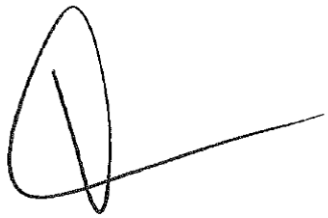
Finally, the discussion document identifies that the proposals have potential implications for the financial management settings of the Public Service and that changes may be required to the Public Finance Act to support them.[21] This is particularly so if independent Crown entities are included in the definition of the Public Service (see our earlier comment above).

Where regulatory functions are funded by charges, levies or fees, there can be a tension and lack of clarity over what functions should be funded from appropriations and what costs are to be met through direct charges. The legislative terminology may vary unhelpfully and the distinction between fees and levies is often confusing.[22] This may lead to an expectation that the costs of regulating a licensing or occupational regime should be paid for from general taxation as part of the public good. In turn, this could lead to confusion over who pays for regulatory oversight if these functions are delivered by an agency proposed to be part of the Public Service, rather than a regulator of those services. The Law Society considers the impact of the potential financial implications for public finance management needs to be further considered.

Recommendation

The Law Society recommends that the proposals discussed above should be revisited to address the constitutional and legal implications of including Crown entities within the Public Service.

Yours faithfully



Andrew Logan
Vice President

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19 Productivity Commission, *Regulatory Institutions and Practices* (June 2014), p 90.

20 See: https://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/regulatory-systems-programme/cross-cutting-issues/regulatory-capability-g-reg-initiative (last accessed on 26 September 2018).

21 Discussion document, at p 28.

22 Productivity Commission, *Regulatory Institutions and Practices* (June 2014), p 325.