NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Public Service Legislation Bill

14/02/2020

Submission on the Public Service Legislation Bill

1 Introduction

1.1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Public Service Legislation Bill (**the Bill**).

1.2. The Bill repeals the State Sector Act 1988 and makes associated amendments to the Public Finance Act 1989. The explanatory note states that the Bill advances a "single broad policy … to provide a modern legislative framework for achieving a more adaptive and collaborative public service, by expanding the types of agencies that comprise the public service, unified by a common purpose, ethos and strengthened leadership arrangements".

1.3. The Law Society does not wish to be heard but is happy to assist the select committee (**committee**) if there are any queries arising from this submission.

2 General comments

2.1. The Law Society does not intend to comment on the underlying policy of the Bill. Rather, the table that follows this submission contains a number of relatively detailed points for the committee to consider. In many cases, the Law Society invites the committee to seek further advice from officials on whether changes should be made to the Bill before it is reported back to the House.

2.2. As a general comment, however, the Law Society welcomes the proposals to codify existing conventions relating to the purpose and role of the public service, in particular the duty of the public service to serve the public interest and do so in an apolitical manner. This is a clear shift from the existing legislation, which is focused on structural, procedural and practical arrangements without capturing the essence and nature of public service.

3 Specific submissions

3.1. The specific submissions made in the table that follows are too numerous to summarise individually. However, the following points are identified as warranting particular attention:

3.1.1. A submission in respect of clause 9 that there is a need to better define what "facilitates active citizenship" means and entails.

3.1.2. A recommendation that clause 20 be removed from the Bill on the grounds that it is superfluous and potentially inconsistent with existing rights under the New Zealand Bill of Rights Act 1990.

3.1.3. A submission that clause 42(e) may be overly broad and that it potentially intrudes on the role of the Prime Minister.

3.1.4. Several detailed submissions regarding the employment law implications of the Bill for state sector employers and employees, including the need for provisions to be aligned with the Equal Pay Amendment Bill when that Bill is in its final form.

3.1.5. Several detailed submissions in relation to clause 90, regarding treating employment in the public service as continuous for the purpose of certain enactments.

3.1.6. A submission that the grounds for a ministerial waiver in clause 134 (amending section 45AA of the Public Finance Act 1989) may need to be tightened up, or removed, to ensure Parliament can adequately carry out its scrutiny role.

Clause	Details	NZLS submission
Part 1 – Preliminary provisions		
5	Definition of "employee, in relation to State services" / "public service employee"	"Employee" is defined, in relation to State services, as an employee in any "State services" agency. Separately, there is a definition of "public service employee" (in two places – clauses 5 and 63). The distinct references to "public service" employees and employees in any State services agency in clause 5 are hard to follow. Distinct definitions for public service employees and employees of State services agencies would be easier to follow if they were placed alongside the applicable sections of the Act or alongside each other.
5	Definition of "public service agency"	This definition provides that "public service agency" means any of the agencies listed in clause 8(a). However, there is an inconsistency in the way the term "agency" or "agencies" is used throughout the Bill, which can make it difficult to know what is being referred to. An example is in clause 42(e)(iii), which only refers to "agencies". It is not clear whether that relates to public service agencies as defined, or a broader set of agencies. It is clearly intended that "agencies" and "public service agencies" are distinct concepts (see paragraph (a) of the definition of "State services" in clause 5). Yet it is submitted that, in various places, the Bill does not clearly indicate whether it is referring to a public service agency or some other form of agency. It is therefore submitted that the committee should ask officials to review the Bill and replace the word "agencies" with "public service agencies" where that is intended, including in the definitions of "department", "departmental agency", "interdepartmental executive board", "interdepartmental venture", "public service agency" in clauses 5, 10(1)(e)(v), 10(2)(b), 42(e)(i), (ii) and (iii), 55(4), 59(2) and 106.
5	Definition of "public service chief executive" or "chief executive"	This definition provides that these terms only refer to chief executive officers of a department, departmental agency or a functional chief executive. However, Crown agents are included in the definition of "Public Service" in clause 8 for two subparts of the Bill. This interchangeable use of terminology means that Crown agent chief executives are public service chief executives for some parts of the Bill but not others. This makes the Bill complex and confusing to follow in certain areas. For example, in clause 10(2) and (3) the phrases "public service chief executives" and "chief executive" seemingly includes Crown agent chief executives, yet in clause 42(d) it seemingly excludes Crown agent chief executives and in clause 49 it clearly does not cover Crown agent chief executives. The inclusion of Crown agent chief executives as a distinct group in the list of persons in clause 57(c)(iii) reinforces that

Clause	Details	NZLS submission
		this distinction is intentional, but in most instances where the phrase "public service chief executive" is used, it is not as self-evident. The Law Society recommends removing this complexity by referring to public service chief executives only in the narrow sense associated with clause 8 and the more generic phrase "chief executive" for its wider use across the Bill in relation to chief executives of departments, departmental agencies and functional chief executives. This change would also require modification of the definition of "public service chief executive or chief executive" in clause 5, to separate these concepts.
8	This section defines the public service, which includes "departments, departmental agencies, interdepartmental executive boards and interdepartmental ventures" and it also includes "Crown agents" as defined in Schedule 1 of the Crown Entities Act for the purposes of Subpart 1 and 4 of Part 1 of the Bill	It is confusing to define "the public service" as "means" the public service agencies listed in clause 8(a) and "includes" Crown agents for the purposes of subparts 2 and 4 of Part 1. This has the effect that Crown agents are part of the public service for some parts of the Act (notably the application of the Act) but not for the other Parts of the Act and has made the Bill complex and confusing to follow. It is submitted that it would be less circular and clearer to revise clause 8 into two clauses; to *define* the public service as meaning the agencies listed in (a) and then *apply* subparts 2 and 4 to Crown agents as if they were public service agencies. This approach would then avoid the complexities and overlapping definitions. A suggested approach is: "8 **Public service defined** In this Act, the **public service** means public service agencies which are— (a) departments: (b) departmental agencies: (c) interdepartmental executive boards: (d) interdepartmental ventures. 8A **Application to Crown agents** This subpart and **subpart 4 of this Part** apply to Crown agents as if they were public service agencies as defined in section 8."
9	Purpose	The Law Society supports the codification of key constitutional conventions relating to the public service – specifically the focus on long-term public interest and the obligation of political neutrality.

Clause	Details	NZLS submission
		However, it is unclear what "facilitates active citizenship" means. If such a term is to be used, it would be helpful to define it, for example, in the public service principles in clause 10. Although clause 11 refers to the "spirit of service to the community" as a fundamental characteristic of the public service, this term is not reflected or captured in the purpose provision. It is unclear whether this is part of facilitating active citizenship and the Law Society submits that there is a need to better align these two concepts.
10(1)(e)(v)	Promote stewardship of the public service	This concept of stewardship of the legislation administered by agencies appears to expand on the obligation in section 32(1)(d)(ii) of the State Sector Act 1988. The Law Society notes the use of the word "agencies" in clause 10(1)(e)(v) is not defined and is different to the words used to define the public service in clause 8. It is recommended that this word be defined to ensure there is clarity about whether this includes all departments and agencies (including Crown agents) mentioned in clause 8.
12	Crown's relationships with Māori	In clause 12(2)(b)(ii) "operate" should be amended to "operating".
13	Who responsibilities are owed to, how these apply, and reporting to Commissioner Outlines responsibilities of Chief Executives and the Commissioner in person and when on boards in relation to clause 12	It is unclear how the various responsibilities outlined in this section will apply in practice and why a distinction is made in relation to general responsibilities and those relating to the Crown's relationships with Māori. The Law Society notes, for example, that clause 13(2)(d) appears to provide that in relation to the Crown's relationship with Māori, when chief executives serve on interdepartmental executive boards or a board of an interdepartmental venture, they are only responsible for "the operation of that board or venture" and not for the outcomes and outputs of the board or venture. Responsibility for outcomes and outputs presumably remains with the specific chief executive under clause 13(2)(b) and/or 13(2)(c). However, decisions of an interdepartmental board or venture can significantly impact the levels of control and decision-making of an individual chief executive in relation to their particular statutory functions. Further, the effect of clause 13(1) is unclear. This subclause provides that the responsibilities in clause 12 are owed "only to" Ministers. It is unclear what this would mean in practice – in particular, whether this section is intended to exclude the jurisdiction of the courts to enforce the statutory obligations under clause 12. Such provisions are constitutionally undesirable, and if enacted, should be expressed clearly.

Clause	Details	NZLS submission
		The Law Society recommends that the word "only" is removed from each of paragraphs (a)-(c) in subclause 1. If clause 13(1) is intended to expressly exclude certain claims, we consider such claims should be excluded in plain language in a separate sub-clause to clause 13. The Law Society notes that the Employment Relations Authority can, via section 137(1)(a)(v) of the Employment Relations Act 2000, order an employer's compliance with the current section 56 of the State Sector Act 1988 (and ss58, 77A and 77D of that Act). That section of the Employment Relations Act will require consequential amendment, to refer instead to the relevant clauses of the Bill, once enacted. Clause 13(3), although including reporting obligations for chief executives, does not include any equivalent reporting obligation for the Commissioner to the Minister. The Law Society recommends that to ensure accountability for the Commissioner's obligations in clause 12, a reporting obligation for the Commissioner is added to clause 13.
15	Commissioner may set minimum standards of integrity and conduct	It would be helpful if clauses 15(1)(a) and 15(1)(b) cross-referenced the location of the: • public service values – which are in clause 14 • public service principles – which are in clause 10 Otherwise, a person reading only clause 15 may not appreciate that those phrases are defined in those separate clauses.
20	Rights and freedoms of employees	The Law Society questions the value of including a provision like clause 20, which merely purports to restate rights that already exist in the New Zealand Bill of Rights Act 1990. Such restatement is unnecessary and, in this case, creates inconsistency and potential confusion because subclause (2) can be read as suggesting that an employee needs to take "action … to exercise or enforce … rights and freedoms" in order to receive Bill of Rights Act protection. This is false, as the Bill of Rights Act and the Human Rights Act 1993 apply regardless of whether action is taken to "exercise or enforce … rights and freedoms". The explanatory note clearly states that there is no intent for this provision to have legal effect beyond that which is already provided for in those statutes and, on that basis, it is recommended that this provision be omitted from the Bill.

Clause	Details	NZLS submission
Part 3 - working in the public service		
42	Commissioner's general functions	In relation to clause 42(c), specifically the phrase "fair and equitable employment", the Law Society notes that the Commissioner has an express role (as set out in clauses 80-82) in relation to pay equity. The Law Society recommends that the committee ask officials to consider whether the words "consistent with the Commissioner's responsibilities under sections 80-82" should be added to the end of clause 42(c). The Law Society also suggests that the committee examines whether the drafting of clause 42(e) is overly broad, in particular the words "review the design and operation of all areas of government in order to advise on the following matters …". The proposed function appears to extend into an area that is traditionally reserved for political decision-making by the Prime Minister and legislative decision making by the legislature – namely the design and operation of all areas of government. With one exception, the matters listed in this clause as those to be advised on, relate to the functioning of the core public service, not "all areas of government". The Law Society recommends that this subclause be amended to: "review the design and operation of the public service as defined in section 8(a), in order to advise on the following matters …". This change will make it clear that the Commissioner is only able to review the design and operation of the public service within the Ministries as created by the Prime Minister and also within the legislative governance and functional arrangements as legislated by Parliament – such as in the case of the Crown Entities Act. It will avoid the potential implication that the Commissioner could review the design and operation of such entities, which have been created by Parliament, including the functions they perform.
43	Duty to act independently when making decisions about public service chief executives	The Law Society welcomes the retention of this provision (see section 5 of the State Sector Act), which maintains the public service's conventional sphere of independence.
52	Duty to act independently in employment matters	The Law Society welcomes the continued recognition of the independence of chief executives when making decisions about individual employees. As with clause 43, this provision maintains the public service's conventional sphere of independence.
62	Secondments	Another reason for secondments in the public service is where some change is required for health and safety reasons, so the following addition is suggested to paragraph (1)(b): "including to meet the health and wellbeing needs of an employee or employees".

Clause	Details	NZLS submission
64	Public service employees: departments	The removal of employees under clause 64(b) is subject to "any conditions of employment in the employment agreement". It may be prudent to state that such removal is also subject to the Employment Relations Act 2000 – which contains procedural and substantive requirements in s 103A and good faith obligations in s 4, and provisions such as the need for a genuine reason for fixed term employment (s 66).
65	Public service employees: interdepartmental ventures Clause 65(b)	The submission made above in relation to clause 64 also applies to clause 65(b).
71	Good employer	The Law Society suggests that clause 71(2) could also include reference to equal pay and equitable pay, to align with the pay equity provisions in clauses 80-82.
77	Negotiation of collective agreements Clause 77(2)(b)	Please see submission below regarding clause 79. Clauses 77(2)(a) and 77(2)(b) treat the Commissioner as an employer for the purposes of initiating bargaining for a collective agreement. This would seem to require, in turn, that the Commissioner provide the requisite notices to employees when bargaining is initiated (as required by section 43 of the Employment Relations Act 2000) rather than their employer/agency doing so. The Law Society suggests the committee ask officials to check whether this is what is intended.
78	Collective agreements Clause 78(2)(b)	Please see submission below regarding clause 79. Clause 78(2)(b) provides that a collective agreement is binding on those employees who are or become members of the union and "whose work comes within the coverage clause of the collective agreement". However, the definition of "coverage clause" in the Employment Relations Act 2000 is broader than reference only to "work". A coverage clause can also operate by reference to "employees or types of employees" (see section 5 Interpretation, clause (a)(ii) in the definition of coverage clause in the Employment Relations Act 2000). The way in which coverage clauses operate has been the subject of litigation[1] so the Law Society submits that clause 78(2)(b) should be made consistent with the Employment Relations Act, by the additions indicated in square brackets as follows:

[1] For example, in *Aviation and Marine Engineers Association Ltd v Air New Zealand* Ltd [2013] NZEmpC 172 and in *Chief Executive of the Department of Corrections v Corrections Association of New Zealand Inc* [2017] NZEmpC 78 – upheld (in Corrections' favour) on appeal to the Court of Appeal.

Clause	Details	NZLS submission
		the employees of the department or interdepartmental venture who are or become members of the union [or unions] and [who are covered by or] whose work comes within the coverage clause in the collective agreement.
79	Delegation of Commissioner's powers to negotiate collective agreements	There is little substantive difference between (current) section 68 of the State Sector Act and clauses 77 and 78, but for the addition of the reference to interdepartmental ventures. However, the separation of the existing section into two separate clauses has not been reflected in clause 79 of the Bill. In particular, this clause provides that the Commissioner may delegate to a chief executive the Commissioner's powers under section 77, but section 78 is not referred to. While there are general powers of delegation in cl 5 of Schedule 3, the express reference to section 77, but not 78, in this context, renders it arguable that the powers and functions in section 78 cannot in fact be delegated. The fact that they are referred to in mandatory terms (e.g. every collective agreement … must be ...entered into by the Commissioner…") reinforces this. The Law Society submits that, to remove scope for such an argument to be made, this omission should be corrected by expressly referring in section 79 to the delegation of the Commissioner's powers, <u>duties and functions</u> under both sections 77 <u>and</u> 78. (The existing delegations section in section 70 of the State Sector Act has this effect because the substance of both clauses 77 and 78 is included in the existing section 68.)
80	Pay equity claims Clause 80(1) Clauses 80(2), 80(3) and 80(4)	The Law Society's preliminary observation is that it is difficult to comment on the pay equity provisions in this Bill in the absence of finality regarding the Equal Pay Amendment Bill, particularly with regard to multi-employer/union bargaining/negotiation, including whether claims by more than one employee can be raised, with or without union representation. These provisions will need to be aligned once the Equal Pay Amendment Bill is in its final form. In the meantime, the Law Society notes that the language is not mirrored: the Equal Pay Amendment Bill refers to *bargaining* for pay equity, not *negotiating*. Clause 80(1) currently refers to "employee or employees". A useful addition would be: "or union or unions acting on behalf of an employee or employees". Clauses 80(2), 80(3) and 80(4) refer to the Commissioner having the power to choose to assume responsibility for negotiating pay equity claims but does not impose an obligation and timeframe for chief executives to notify claims to the Commissioner. The Law Society recommends adding a provision

Clause	Details	NZLS submission
		to impose an obligation on every chief executive who receives a pay equity claim to notify the Commissioner within a certain number of working days. The Law Society also recommends that clause 80(2) be made more specific. It currently indicates that the Commissioner may "choose to be responsible for negotiations". The Law Society submits that this wording is unhelpfully vague. The Law Society recommends that the committee ask officials to consider whether this is intended to include conducting and concluding negotiations. If so, the Law Society recommends consideration be given to amending the language accordingly.
	Clause 80(4)	The explanatory note makes it clear the opportunity for the Commissioner to choose to conduct the negotiations ends when the parties "go into" mediation or "proceedings". Clause 80(4) does not make it clear what is the precise trigger point for the Commissioner ceasing to be involved. Accordingly, the Law Society recommends the language of clause 80(4) be made more specific by stating a) "a party referring the pay equity claim to mediation under the Employment Relations Act 2000"; or b) "commencement of proceedings in the Employment Relations Authority …".
	Clause 80(6) – definition of "pay equity claim"	The definition in clause 80(6) limits a pay equity claim for the purposes of sections 81 – 83 to one brought under the Equal Pay Act 1972 or Government Service Equal Pay Act 1960. However, equal pay claims can take many forms, including personal grievances, discrimination claims (under the Human Rights Act or Employment Relations Act) as well as pay equity claims. Therefore, the Law Society submits that the committee should ask officials to confirm whether the scope of the definition is broad enough.
81	Provisions relating to negotiation of pay equity claim	In clause 81(2), the Commissioner may require 2 or more chief executives to negotiate a claim or claims in consultation with each other. However, the Law Society considers that this provision lacks clarity on what precisely is required. The Law Society submits that the committee should ask officials to consider: • whether the claims must be related to the same or very similar work; • whether the chief executives are required to notify potentially affected employees and/or unions; • whether the chief executives are required to settle claims and/or litigate them as a class action; • what will the process be and how will it fit with the Equal Pay Amendment Bill? 9.1
89	Application of section 90 Clauses 89(1)(a) and (b)	Please see comment at clause 90(2)(a) below regarding references to the "position" in clauses 89(1)(a) and (b).

Clause	Details	NZLS submission
	Clause 89(1)(b)	It is not clear what "immediately after" captures. For instance, what happens if an employee takes time off, including on public holidays or during the standard Christmas break, between positions? What if employment with agency A ends on a Friday and employment with agency B commences on the following Monday? If an employee is working for both agencies at the same time, it is not clear how any holidays or leave taken during the period of overlap is treated or apportioned. The Law Society recommends the committee take advice on this point.
90	Employment in public service continuous for purpose of certain enactments	The Explanatory Note (p 4) describes the purpose of clause 90 as to enable "public servants to transfer accumulated annual leave and other statutory leave when moving between public service departments". It also provides that the "employee's employment…is treated as continuous in relation to the statutory entitlements to leave described in clause 90(1)(a) and (b) and the KiwiSaver scheme" (refer page 21 Explanatory Note). Given this purpose, it is not immediately clear to the Law Society why public holidays are included in clause 90(1)(a)(ii). Also, as drafted there is some risk that contractual entitlements could also be transferred. These points are discussed further below.
	Clause 90(1)	It is not clear how holidays and leave are treated in a situation where the terms and conditions of employment change between agencies, for instance if an employee works full-time at agency A, but moves to a part-time position at agency B. The Law Society suggests the committee may wish to seek further advice on this point. The term "continuous employment" is used several times in the Bill; however, it is not defined. A definition of this term, and minor amendments to clause 90(1) to clarify why continuous employment is relevant to the listed entitlements and the KiwiSaver scheme (see below), could assist and potentially remove the need for subclauses (2)(a), 3(a), and (5). A definition could also remove the issue identified at clause 90(2)(a) in relation to the words "the position" (see below). The relationship between clause 90(1), and clauses 90(2) and 90(3), is not clear. Clauses 90(2) and 90(3) appear to have broader application than clause 90(1) (see below). The Law Society suggests the committee may wish to check whether this is intended.
	Clause 90(1)(a)	Clause 90(1)(a) refers to the specific entitlement provisions in the Holidays Act, sections 16, 46, 63(1) and 72C, however other provisions relating to those entitlements may also be relevant to the transfer of

Clause	Details	NZLS submission
		holidays and leave, and it is not clear how these would apply. These specific references should be compared to the broader references to the Parental Leave and Employment Protection Act 1987 and the KiwiSaver Act 2006 in clauses 90(1)(b) and (c). The Law Society recommends the committee seek advice from officials as to whether these specific statutory references are too narrow.
	Clause 90(1)(a)(ii)	The Law Society submits that the committee should ask officials to advise why employment needs to be treated as continuous for the purpose of determining entitlement to public holidays in clause 90(1)(a)(ii). Perhaps it is because an assessment of whether a day would "otherwise be a working day" (i.e. looking at past work patterns under section 12 of the Holidays Act 2003) can be necessary to determine an entitlement to public holidays? But it does not seem to make sense that an employer should take into account an employee's work patterns when they worked for a previous employer, potentially in a different role with different work patterns and on different terms. Also, the Law Society notes that there is no reference to public or alternative holidays in clause 90(2)(a).
	Clause 90(2)(a)	As clause 90(2)(a) is drafted, the wording "the period of employment of the employee in the position in agency A" could suggest that "continuous employment" commences at the start of the employee's most recent position in agency A. This could mean that a period where the employee was employed in the same agency but in a different position may not be included in "continuous employment". This is inconsistent with the purpose of the clause. The Law Society submits that the committee should consider whether the references to "the position" could be removed from subclauses (2)(a), (3)(a) and (4).
	Clause 90(2)(b)	The committee may wish to take advice on why only payment for annual holidays is referred to in clause 90(2)(b). It is unclear how this provision would affect an employee's right to "cash up" annual holidays. The Law Society submits that the committee should consider whether paying out alternative holidays or exchanging alternative holidays for payment should also be referred to in this provision.
	Clauses 90(2)(c)(i) and (ii)	In clauses 90(2)(c)(i) and (ii) the use of the word "any" could be interpreted as agency B being required to recognise an employee's contractual entitlements as well as statutory entitlements to sick leave and annual holidays. The Law Society submits that the committee should consider whether this is intended, or whether the provisions need to be amended.
	Clause 90(3)(a)	The Law Society is unsure why clause 90(3)(a) is worded differently to clause 90(2)(a), i.e. see italics in second excerpt below:

Clause	Details	NZLS submission
		• 2(a) the period of employment of the employee in the position in agency A must be treated as a period of employment with agency B for the purpose of determining the employee's entitlement to annual holidays, sick leave, bereavement leave, and family violence leave; Compared to: • 3(a) the period of employment of the employee in the position in agency A *that ends with the date on which the employee moved to agency B* must be treated as a period of employment with agency B. The Law Society suggests the committee may wish to take advice on whether the drafting of these provisions should be aligned.
	Clause 90(3)(b)	The Law Society assumes that reference to "the Act" in clause 90(3)(b) is to the Parental Leave and Employment Protection Act 1987, but it is submitted that this should be clarified.
91	Liability of public service agencies for remediation in relation to continuous employment	Clause 91 leaves agency A with the liability for holidays entitlement. This appears to apply in all cases, including where agency A ceases to exist upon the creation of agency B and the transfer of employees to agency B. The Law Society is concerned that this may leave employees unprotected in terms of such entitlements if agency A has ceased to exist. The Law Society submits that the committee should ask officials to advise on whether the Bill should be amended to better protect employees in this situation.
94	Responsibility of departmental agency for health and safety of workers Clause 94(1) states that for the purposes of the Health and Safety at Work Act 2015 a departmental agency, and not its host department, is the PCBU in relation to workers who carry out the functions of the departmental agency.	The Law Society submits that clause 94 is inconsistent with the principles in the Health and Safety at Work Act 2015 (HSWA) as it absolves the host department from any responsibilities or liability in relation to the workers of its departmental agencies. One of the key principles in the HSWA is that more than one duty holder can have the same duty (section 33). In that situation they must both comply with their "reasonably practicable" obligations, but only to the extent that each can influence or control the matter. Each must also consult other PCBUs with the same duty. What this means in practice is that: • The departmental agency would be responsible for looking after most aspects of health and safety for workers that carry out its functions, if it houses and manages them, but the host department may need to do and be responsible for some things. Even if the host department has no contractual relationship with the worker, it could still on the wording of HSWA be liable if it influences or directs a worker's activities (s 36(1)(b)).

Clause	Details	NZLS submission
		• They would need to talk to each other and work out how to cooperate for the purpose of achieving better health and safety outcomes. The HSWA does not say that the employer "is the PCBU in relation to workers". There can be multiple PCBUs having responsibilities towards one employer's staff, e.g. where they all work together as part of a contracting chain, or where they end up working in the same place (e.g. Police / Fire). The Law Society submits that there is no apparent need to limit the HSWA in this way. Under that Act. the duties of each party will already be limited by what it is reasonably practicable for each to do, which may mean the departmental agency carries more responsibility than the host department anyway, for workers who carry out the agencies' functions. This would remain so where there is a 'working arrangement' decided upon by the relevant ministers pursuant to clause 22 of the Bill. For these reasons, the Law Society submits that the committee should ask for advice on why this provision is needed and then consider removing it from the Bill.
Part 5 – Offence, immunity, responsibility of departmental agencies under Privacy Act 1993, and public service re-organisations		
103	Offence to solicit or attempt to influence public service leaders	The Law Society suggests that the following type of actions be considered as express exclusions to add to clause 103(3), so that these types of actions will not comprise an offence, even though they are often a (lawful) "attempt to influence" the response or actions of a public service leader or leaders: • the bringing or raising of a personal grievance or dispute claim, a claim or complaint under the Human Rights Act 1993, or a contractual or statutory breach claim • making a complaint about a public service manager, for instance a complaint of bullying, discrimination or sexual harassment • making a disclosure under the Protected Disclosures Act 2000 • exercising an opportunity to comment or respond to a consultation proposal under the good faith provisions of the Employment Relations Act, including as specified in section 4 and section 103A(3)(c).

Part 7 – Amendments to Public Finance Act 1989		
115	Section 2 amended (Interpretation)	The Law Society submits that the committee should take advice on whether further amendments are needed to the definitions in the Public Finance Act 1989 (**PFA**). Numerous definitions in the PFA have not been identified as requiring amendment to accommodate the Public Service Legislation Bill. This appears to be an omission. For example, the word "department" has been proposed to be amended to accommodate the boards proposed under the Bill, yet the definition for the word "departmental" is not proposed to be amended to make the same accommodation. The same issue arises in relation to the existing PFA definitions for words like "non-departmental", "outputs" and "other expenses".
134	Section 45AA replaced (Contents of departmental agency annual report)	The proposed new section 45AB of the PFA provides that Minister may grant a waiver from the requirements to include the financial statements described in the proposed section 45AA. In the Law Society's view, this is problematic as reporting of this nature is being made to Parliament as a check on the Executive. If a waiver from reporting were needed or desirable it would seem this should be given by Parliament or one of its committees, not a Minister. The fact that the proposed section suggests that notice of a waiver should be given to the House of Representatives does not seem to be a sufficient check on public expenditure. The Law Society notes that this proposed provision is similar to what is already in section 41 of the PFA, but the grounds for the Minister to grant extension or waiver in that context is quite different and specific and it does not relate to reporting on financial statements. Under the current section 41 the only basis for a waiver is that a department is to be disestablished, which is a far narrower basis than what is proposed under this clause. There do not seem to be adequate checks and balances, as merely informing Parliament will not provide any remedy or recourse and Parliament may not be able to adequately carry out its scrutiny role. The Law Society recommends that the grounds for the waiver be tightened up, or that the clause be removed. As a matter of principle there needs to be a departmental agency that is clearly identified as responsible for reporting the financial statements in an annual report. The legislation should clearly specify the criteria for any waiver (more than just being "appropriate") and include a requirement that the annual report of the specified agency identifies which other agency will be reporting on the matters under section 45AA.
147	New section 82A inserted (Certain specified agencies with intelligence and security aspect treated as intelligence and security departments)	Proposed section 82A(1)(b)(ii) treats an interdepartmental executive board or interdepartmental venture as an intelligence and security department simply because one of its departments is an intelligence and security department and a Ministerial waiver has been given under proposed subsection (4). The Law Society submits that more specificity or criteria should be included to establish the basis for the

		Ministerial waiver, including that the functions of the board or venture must involve security and intelligence matters.
Schedules		
Schedule 1	Clause 8 – Code of conduct Clause 13 – Employees appointed to positions in departments	The cross-reference in clause 8(3) of Schedule 1 should be to clause 15(2) of the Bill (not 15(1)), as that is where the list of agencies is contained. The Law Society suggests that the committee take advice on whether this clause is worded too narrowly. It applies only to those employees who, immediately before the commencement date of the Act, "**held a position**" as an employee in a Department. The requirement for the employee to "hold a position" may exclude employees who are seconded (and have given up their substantive role for the duration), who are on parental leave, on long term sick leave, on leave without pay, or who have been offered employment to a generic role but have not yet commenced training (for instance, a Police or Corrections recruit, who first needs to attend training college).
Schedule 8	Employment provisions Clauses 4 and 5 – obligation to notify appointments; review of appointments Clause 6 – Medical examinations	The current State Sector Act provisions exclude applications to notify appointments that are *"acting, temporary or casual".* The proposed wording excludes (from notifying the appointment) only fixed term employment agreements (and Ministerial staff). The change seemingly extends the obligation to notify, to capture acting and casual employees. It is, however, likely to give rise to arguments as to whether some acting, temporary or casual arrangements are in fact fixed term employment, in terms of the definition of fixed term employment in section 66 of the Employment Relations Act. The Law Society therefore recommends that the committee ask officials to give careful consideration to the implications of this change. Currently a chief executive may **require** an individual to undergo a medical examination. It is proposed that this be amended to "may **request**". The change is consistent with the limitations on other employers or prospective employers to require a medical examination especially as regards mental health. It is not clear however what consequences are contemplated if the **request** is declined. The Law Society recommends the committee give consideration to this possibility.

Herman Visagie
NZLS Vice President
14 February 2020