



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

State Sector and Crown Entities Reform Bill

11/04/2018

State Sector and Crown Entities Reform Bill

1. Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the State Sector and Crown Entities Reform Bill (Bill.)
- 1.2 As an initial comment, the application of the omnibus Bill procedure in Standing Order 263(a) seems somewhat strained in this case. The amendment to the Crown Entities Act 2004 appears completely unrelated to the amendments to the State Sector Act 1988, rather than an interrelated topic that can be regarded as implementing a single broad policy.
- 1.3 While the particular amendments are not so significant as to raise a serious concern under Standing Order 263, it is important that the safeguards around omnibus bills provided by Standing Orders are not inadvertently eroded over time.
- 1.4 The Law Society's submission deals only with the State Sector Act amendments and makes two key points:
 - a. A broader range of Inquiries Act 2013 provisions should apply;
 - b. Codes of conduct, when applied to agencies or particular office holders, should not interfere with the independent exercise of their statutory functions and powers.
- 1.5 The Law Society does not seek to be heard, but is happy to discuss its submission with the committee or officials advising the committee, if that would be of assistance.

2. Application of the Inquiries Act 2013

- 2.1 Clauses 8 and 11 of the Bill repeal and replace the current provisions in the State Sector Act 1988 (SSA, ss 25-26) for the conduct of inquiries by the State Services Commissioner.
- 2.2 Under the current provisions, the Commissioner has essentially the same powers as a commission of inquiry under the Commissions of Inquiry Act 1908. The Bill amends the State Sector Act to put in place a single investigation package aligned with the regime in the Inquiries Act 2013.
- 2.3 The explanatory note indicates that this “will promote greater consistency in the manner in which inquiries and investigations are conducted across government”.¹ The Cabinet paper notes that this will “... 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.”²
- 2.4 The updating of the SSA to reflect the new and more detailed scheme of the Inquiries Act is a welcome and timely reform. Inquiries by the Commissioner can engage important public and private interests. The detailed safeguards introduced by the Inquiries Act should therefore apply

¹ Explanatory note, p2.

² Cabinet paper, 8 February 2018, accessible at ssc.govt.nz/sites/all/files/sscerb-approval-feb2018.pdf, at [10.4].

except where there is either comprehensive equivalent provision elsewhere or where the provision is unworkable. A clear justification should be available for any departure from the Inquiries Act scheme. As explained below, that does not appear to be the case here.

- 2.5 Clause 8 inserts a new section 9A of the SSA, which applies some of the corresponding provisions of the Inquiries Act 2013 to any inquiry by the Commissioner.
- 2.6 However, the Bill does not adopt the following material provisions of the Inquiries Act:
- a. The express obligation of independence, impartiality and fairness (Inquiries Act, s 10);
 - b. The obligation to report and the required contents of any report (s 12). Instead, new section 9A(4)(c) provides a discretionary power to the Commissioner, who “may ... make a report to any person, or make any public report”;
 - c. The regime for the appointment of counsel to assist (s 13);
 - d. The provision for the designation of “core participants” – that is, people particularly affected by a given inquiry and who are, under the Inquiries Act, given express rights of participation (s 17);
 - e. The regime for the recommendation of publicly funded counsel for specified inquiry participants (s 18);
 - f. The provision for disclosure of material to participants (s 22); and
 - g. The provision for reference of questions of law to the High Court (s 34).³
- 2.7 The supporting material to the Bill does not explain these omissions.
- 2.8 There may be explanations for some of the omissions (for instance, it may be envisaged that it will in practice be unnecessary for the Commissioner to consider seeking the appointment of counsel to assist). However, clarity is needed in the legislation as to the applicable processes; it is not adequate to rely on expectations of practice or informal safeguards.
- 2.9 Several of the omitted provisions – for example, the reporting obligations (paragraph 2.6b above); protection for core participants (paragraph 2.6d); and mechanisms for funding and disclosure (paragraph 2.6e-f) – are integral to an effective, robust and fair inquiry. Such provisions provide important safeguards for individuals who are the focus of, or otherwise affected by, an inquiry. They also afford the practical benefit of forestalling disagreement over the powers and procedures of an inquiry, which can otherwise prove time-consuming and, potentially, lead an inquiry to act unlawfully by breaching natural justice requirements.
- 2.10 The general obligation of independence, impartiality and fairness in section 10 of the Inquiries Act should also apply to inquiries conducted by the Commissioner. While that obligation might be taken to be implicit as a matter of common law, it should be explicitly stated. The omission of a statutory obligation of such importance sends an unwelcome signal and risks creating legal uncertainty. The Commissioner’s existing express obligation to act independently (s 5 of the SSA),

³ Section 35 of the Inquiries Act, which relates to judicial review of an inquiry, is also not applied but - given that the Commissioner can be judicially reviewed on his or her own behalf - that does not appear material.

for example, does not extend to inquiries and applies only to matters relating to individual chief executives.

Recommendation

2.11 That the committee seeks advice from officials as to why these provisions have been omitted from the new section 9A, and should accept omissions from the Inquiries Act scheme only if and to the extent that the committee is satisfied that:

- there is a comprehensive equivalent provision in another statute; or
- it is plain that a given provision is unworkable in the context of an inquiry by the Commissioner.

3. Clause 12 – Commissioner may set minimum standards of integrity and conduct

3.1 Section 57 of the SSA authorises the State Services Commissioner to apply a code of conduct to Crown Entities and other specified agencies outside the core public service. Clause 12 of the Bill amends section 57 to state explicitly that any such code of conduct may be applied to persons within those agencies that are “undertaking particular functions, duties, or powers”.

3.2 Many entities⁴ and office holders⁵ covered by the amendment have an obligation to exercise their functions, duties or powers independently in accordance with their statute. In circumstances providing for independence, these functions, duties or powers must be exercised without interference, to preserve the rule of law.

3.3 It is therefore important that any code of conduct adopted under section 57 is consistent with agencies’ existing statutory obligations of independence. To ensure that this is achieved, clause 12 should expressly preserve existing statutory provisions and powers (as is proposed in clause 9 of the Bill, in relation to the parallel provision for the Commissioner's exercise of other functions in relation to Crown entities, in new s 11(6)). This would ensure that a code of conduct, when applied to agencies or particular office holders, cannot be implemented or constructed in a way that may interfere in the independent exercise of such statutory functions and powers.

⁴ Examples include: the Accident Compensation Corporation which has express statutory functions under section 262 of the Accident Compensation Act 2001, the Electoral Commission, which is required to perform its functions independently under section 7 of the Electoral Act 1993; the Independent Police Complaints Authority which is required to act independently in accordance with section 4AB of the Independent Police Conduct Authority Act 1988; the Commerce Commission which must act independently in performing its functions under section 8 of the Commerce Act 1986; the NZ Transport Agency which has statutory independence in exercising powers and functions relating to certification, enforcement and inclusion of activities into the land transport programme under section 95(2) of the Land Transport Management Act 2003.

⁵ Examples include: the Health and Disability Commissioner who is required to perform functions independently under section 14(2A) of the Health and Disability Commissioner Act 1994; a reviewer of accident compensation claims under section 138 of the Accident Compensation Act 2001; the Director of Civil Aviation who must perform certain functions and exercise certain powers independently under section 72I(4) of the Civil Aviation Act 1990, the Director of Maritime NZ who has similarly independent powers and functions under section 439(4) of the Maritime Transport Act 1994.

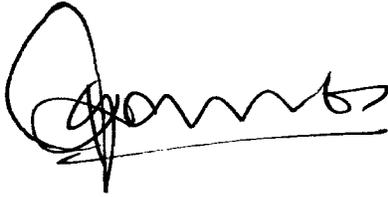
Recommendation

3.4 That an express ranking provision be inserted in clause 12, worded along these lines:

Nothing in this section—

(a) limits or affects any provision of this or any other Act; or

(b) affects or prevents the performance or exercise of any function or power conferred on or belonging to any agency, board, officer or employee.

A handwritten signature in black ink, appearing to read 'Tim Jones', with a horizontal line underneath it.

Tim Jones
Vice President
11 April 2018