Human Rights Commission
Te Kāhui Tika Tangata

State Sector Act 1988 – Reform Proposals

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Human Rights Commission submission: *State Sector Act 1988 – Reform Proposals*

Introduction

1. The Human Rights Commission (the Commission) welcomes the opportunity to provide the State Services Commission with this submission on its review of the State Sector Act (SSA).

2. The Commission notes that the legislative implications of this reform process extend beyond the SSA and will likely encompass both the Public Finance Act 1988 (PFA) and the Crown Entities Act 2004 (CEA).[1] The proposed outcome is a new Aotearoa New Zealand Public Service Act, which will repeal and replace the current SSA.[2]

3. The Commission also understands that the reforms are designed to respond to the introduction of a wellbeing framework which would be integrated with Government fiscal objectives and Treasury reporting. This framework will include the Child Poverty Reduction Act which amends the PFA to require annual budgetary reporting of appropriations necessary to meet the various child poverty reduction targets set under that Act. These changes to a fiscal policy framework that has been largely unchanged for 30 years are of considerable significance.

4. The Commission also welcomes the focus of the proposed reforms on building a more diverse, inclusive public service that responds more effectively to the needs and aspirations of Māori.

Summary of the Commission Position and Recommendations

5. The Commission supports the basis for these reforms. The current legislative pillars of the state sector, the SSA and the PFA, have been in place for a generation. While these statutes have provided our public services with a solid, enduring operational foundation, they were enacted at a time when human rights principles were largely absent from legislation, public policy and the prevailing political and economic discourse.

6. Not only has New Zealand human rights law and policy advanced considerably since then, the status of the Human Rights Commission as a National Human Rights Institution (NHRI) has also evolved. NHRIs have a specific role, independent from that of the State,

[1] State Services Commissioner Peter Hughes CNZM, Keynote address to delegates, Digital Government Conference, Wellington, 9 September 2018; also see https://www.havemysay.govt.nz/option-2/the-case-for-change/
[2] https://www.havemysay.govt.nz/option-2/a-new-public-service-act/

in international human rights monitoring and reporting procedures. They are accordingly subject to a set of international standards known as the Paris Principles, that were adopted by the UN General Assembly in 1993[3]. It is imperative that the proposed new legislation fully enables the Commission to meet these standards.

7. The Commission's submission can be distilled into two broad thematic recommendations:

    - **Firstly, that new legislation reflects, in full, the developments in human rights law, policy and practice that have occurred since the SSA's enactment in 1988.**

    - **Secondly, that new legislation enables the Commission to meet, in full, the international standards for NHRIs under the Paris Principles.**

Theme 1: Building a human rights-consistent legislative framework

A set of statutory principles

8. Human rights principles are today integrated into New Zealand's legislative and policy framework to a much higher degree than they were in the late '80s. In the years following the enactment of the SSA, the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA) were enacted and several significant international human rights treaties were ratified by the New Zealand Government.[4]

9. Furthermore, the Legislative Advisory Council Guidelines published in 2001,[5] since updated in 2014 and 2018, directed public servants to ensure that new legislation conforms with BORA, HRA and Treaty of Waitangi requirements and obligations. The 2001 LAC Guidelines also directed officials that *"as a matter of practice, those involved in preparing any legislation, whether new or amending or subsidiary, should identify and comply with the applicable international obligations and standards."*[6] This direction has been strengthened further under the 2018 Guidelines which provide that *"care must be*

[3] OHCHR, *Principles relating to the status of national institutions*, defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993
[4] CRC, CRPD, OPCAT, UNDRIP
[5] http://www.ldac.org.nz/assets/documents/LAC-Guidelines-2001-edition.pdf, see chapters 5-6
[6] Ibid, Chapter 6

taken to ensure that any proposed legislation does not inadvertently cause New Zealand to breach any of its existing treaty obligations."[7]

10. However, despite these requirements, neither the SSA, nor the PFA or the CEA, refer to the human rights obligations of the public service under domestic law or international human rights treaties.

11. The purpose of the SSA, set out in section 1A, makes no mention of human rights or any analogous concept or term. It is essentially a set of operational value statements that refer to a "spirit of service to the community", "a culture of excellence and efficiency" and so on. The section 1A purpose statements are all laudable. However, they lack any direct reference to the broader legal context in which the state sector operates.

12. Furthermore, while section 56 establishes a set of general principles that apply to personnel policies within the departments of state, it is notable that the SSA does not contain a set of overarching principles against which its overall purpose can be interpreted or contextualised.

13. The lack of any mention of human rights in the SSA and the PFA sits somewhat uncomfortably against the broad set of obligations that the New Zealand state has under the international human rights treaties it has ratified.

14. As the OHCHR has observed, the realisation of all human rights under these treaties "*presupposes at least the existence of a functioning State, actively committed to their fulfilment".*[8] New Zealand is, of course, a functioning State and one that is proud of its standing on the international stage as a free, democratic, peaceful nation. It follows that its active commitment to fulfilling human rights, as evidenced in legislation such as the BORA and the HRA, and in policy statements such as the LAC Guidelines, should be expressed in the legislation that governs the operational and fiscal mechanisms of the State sector.

15. This approach has been adopted in recent social sector legislation, such as the Children, Young Persons and Their Families (Oranga Tamariki) Legislation Act 2017. That Act, for example, expressly provides that the rights of children and young people under the United Nations Conventions on the Rights of the Child and the Rights of Persons with Disabilities must be respected and upheld.[9] Such an approach also responds to recent

[7] http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/international-issues/chapter-9/
[8] OHCHR, *Realising human rights through Government Budgets*, OHCHR New York and Geneva, 2017 p 18
[9] Clause 11, s 5(1)(b)(i)

recommendations of UN Treaty bodies that the New Zealand State take legislative measures, including reform of the PFA, to ensure that human rights impact assessments are undertaken in respect of resource generation and allocation decisions.[10]

16. **The Commission accordingly recommends that new public service legislation contain within its principles an explicit commitment, on the part of the public service, to comply with and advance the State's domestic and international human rights obligations.**

A diverse, inclusive public service

17. Currently, section 56 of the SSA establishes a set of general principles that apply to personnel policies within the departments of state. These principles include "an equal opportunities programme" and a requirement of "recognition" for the "employment requirements" of Māori, women and people with disabilities. The principles also provide for the recognition of Māori aims, aspirations and the need for greater involvement of Māori in the public service.

18. Recent reports by the Commission have highlighted that, despite the objectives of section 56 and recent developments such as the release of the Government Gender Pay Equity Principles for the public sector, disparities remain within the public sector workforce, particularly at senior levels.

19. Further, as the Commission has recently reported,[11] it is questionable whether current structures and government strategies are sufficiently reflective of these diverse communities and able to respond appropriately to meet their needs. Women are still under-represented in senior leadership positions in the public sector.[12] Māori, Pasifika and Asian ethnicities are all underrepresented in the top three tiers of public service management.[13] Disabled people, and particularly disabled women, are among the most marginalised groups in the New Zealand workforce.[14]

[10] Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fourth Periodic Report of New Zealand*, 1 May 2018, E/C.12/NZL/CO/4, para 15
[11] 2017 Submission to CERD, paras 6 and 7
[12] State Services Commission, Public Service Chief Executives (2018) http://www.ssc.govt.nz/ce-photo-file
[13] https://enz.govt.nz/assets/Uploads/The-Economic-Impact-of-International-Education-in-New-Zealand-2015-2016.pdf
[14] Human Rights Commission "Tracking Equality at Work" Summary and Recommendations June 27 2018 https://www.hrc.co.nz/files/2115/3013/8951/Tracking_Equality_Report_FINAL.pdf.

20. In addition, as noted in the review[15], it is important that a commitment to a principle of "merit selection", while intended to prevent bias of one kind, does not serve to further entrench other systemic biases. While the discussion paper recognises this risk, noting the "reality … that merit is constrained when anyone is effectively excluded from applying for a position", the discussion paper and the merit principle do not necessarily appear to fully recognise the benefits of diversity.

21. It is therefore important that the proposed principle of "merit selection" is defined to recognise that there is merit in diversity. It is also important to acknowledge that merit is not an entirely objective standard, and to acknowledge the role of the public service in developing and training a diverse workforce.

22. Merit selection which does not recognise the value of diversity, or the need for some disadvantaged groups to receive different treatment in order to achieve equality[16] can be inconsistent with the core human rights principles of equality and non-discrimination, inconsistent with the proposed ethical value of respect (encompassing diversity), and may frustrate the objective of developing a public service that is as capable and effective as possible.

23. The Commission also considers that a diverse workforce and leadership is essential to developing a public service that recognises and meets the needs of all New Zealanders. Further to this point, the Commission has had the opportunity to view in draft the submission of the state sector Diversity and Inclusion Network. The Commission agrees with the Network's concern that the reform proposals should better emphasise diversity and inclusion within the proposed system-level ethical value framework.

24. **Accordingly, the Commission recommends that that any statutory (or policy) principle regarding merit selection includes the following elements:**

    a. **An objective of ensuring merit by increasing the diversity and inclusivity of the public service.**
    b. **That the composition of the public service must reflect the demographic diversity of New Zealand's population.**

[15] https://www.havemysay.govt.nz/option-2/the-unifying-purpose-principles-and-values-of-the-new-zealand-public-service/

[16] See Human Rights Commission website "Positive actions to achieve equality" and the Commission's "Guidelines on Measures to Ensure Equality" linked from that page: https://www.hrc.co.nz/enquiries-and-complaints/faqs/positive-actions-achieve-equality/.

c. A requirement that merit selection is fully consistent with New Zealand's domestic and international human rights obligations regarding workplace equality, including measures to achieve equality (affirmative action)[17] and reasonable accommodation[18] principles.

25. **The Commission further recommends that the proposed system-level ethical value of "respectful" is expanded to "respectful and inclusive".**

Te Tiriti o Waitangi

26. The Commission welcomes indications that the review has taken steps to reflect the role of tangata whenua and to seek to create a public service fit for purpose in a Tiriti-based country. For example, we welcome the inclusion of "Aotearoa" in the proposed title of the Act. There are other symbolic steps that could support this approach, for example the key sections of the Act could be enacted bilingually.

27. However, to move beyond the symbolic, the Crown-Māori relationship should be more meaningfully recognised in the reform.

28. The discussion document references the 2011 Waitangi Tribunal Report "Ko Aotearoa Tēnei", which we agree is a highly appropriate starting point for envisaging a future public service. The "Ko Aotearoa Tēnei" transmittal letter describes the report's suggested reforms as "ambitious but not unrealistic".[19] We therefore urge the review to take on board the Waitangi Tribunal's challenge:

> "unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change… "We adjure those with the power to look to the Treaty of Waitangi for the guidance and vision necessary to avoid this path of failure."

29. **The Commission therefore recommends the development, with Māori, of an enhanced recognition of the Māori-Crown relationship in the new public service legislation.**

[17] Eg. Section 73, Human Rights Act, Article 1.4, UNCERD
[18] Eg. Article 5.3, UNCRPD
[19] Waitangi Tribunal WAI 262: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356054/KoAotearoaTeneiTT1W.pdf.

30. **Furthermore, the Commission recommends that, in addition to those specific proposals set out in chapter 4 of the discussion document, the following measures are considered:**

    a. **Including as a purpose of the public service (perhaps under "supporting the continuity of democratic government") "promoting the honouring of Te Tiriti o Waitangi"**
    b. **Including a principle of "Tiriti o Waitangi implementation" or "working in a Treaty relationship"**
    c. **Legislating for a Public Service Commissioner (Māori)**
    d. **That new legislation makes reference to *Te Tiriti o Waitangi* (in addition or in preference to *The Treaty of Waitangi* and its principles)**

Human rights practices – data

31. The Commission understands that data and the use of data analytics has been signalled as a key component of these reforms. A number of important related state sector policy and legislative initiatives are currently underway. These include policies such as the Social Investment Agency's Data Protection and Use Policy, Stats NZs Indicators Aotearoa framework, MSD's Privacy, Human Rights and Ethics (PHRAE) Framework and the legislative update of the Privacy Act.

32. In the Commission's 2018 paper *Privacy, Data and Technology: Human Rights Challenges for the Digital Age*, it is observed that:

> "…digital technology has created a symbiotic relationship of sorts. It enables us to access and share information for our own benefit. At the same time, the data we generate is of immense value to the public and private entities that facilitate and control our digital interactions. While this has the potential to produce great benefits and improve social outcomes, it also poses risks to our fundamental human rights. The surveillance and collection of vast amounts of personal information and meta data, and the processing of such data using new analytical techniques, has major implications for our right to privacy and our right to be free from discrimination."[20]

[20] https://www.hrc.co.nz/files/5715/2575/3415/Privacy_Data_Technology_-_Human_Rights_Challenges_in_the_Digital_Age_FINAL.pdf, p 5

33. Given the likely centrality of data and digital technology to the future operations of the public service, the Commission considers that it is essential that the policy and legislative frameworks governing such operations fully comply with, and explicitly reference, human rights principles and obligations. We commend current government policy work, such as the PHRAE and Indicators Aotearoa, that is intended to safeguard or advance human rights in this respect. **We therefore recommend that these reforms include the provision of specific policy and/or legislative principles that require all use of personal information and data by the public sector to meet the highest attainable human rights, privacy and ethical standards.**

Human rights practices - outsourcing

34. As the Productivity Commission has observed, delegation of the delivery of state services does not absolve the Government of its human rights responsibilities in respect of those services, whether it be the practices used, their objectives or their outcomes.[21]

35. The applicable framework for enabling human rights compliant government and private sector dealings is the UN Guiding Principles on Business and Human Rights (UNGPs).[22] In particular, its human rights due diligence model is of particular utility in procurement, investment, delegations and commissioning policy frameworks. This way of working is catching on internationally. France, for example, has recently adopted laws imposing due diligence procedures upon multi-nationals to prevent human rights abuses occurring in their global supply chains.[23]

36. The New Zealand Government has been slow to recognise the UNGPs, a matter that has been noted with concern by UN treaty bodies.[24] This reform process provides an ideal opportunity to incorporate the principles into legislation and practice.

37. **The Commission therefore recommends that a new legislative model provides that dealings between the public sector and the private sector, whether through procurement, commissioning or outsourcing practices, comply with international human rights standards, including use of human rights due diligence procedures.**

[21] https://www.productivity.govt.nz/sites/default/files/social-services-final-report-main.pdf, p 109
[22] https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[23] https://www.business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains
[24] Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of New Zealand, April 2018, paras 16 and 17

Theme 2: Ensuring full compliance with the Paris Principles

38. The UN Paris Principles provide the international benchmarks against which NHRIs are accredited. The periodic accreditation process is carried out by the Global Alliance of National Human Rights Institutions (GANHRI), who are based in Geneva. The Paris Principles require NHRIs to **protect** human rights, including by receiving, investigating and resolving complaints, mediating conflicts and monitoring activities; and to **promote** human rights, through education, outreach, the media, publications, training and capacity building, as well as advising and assisting the Government.[25]

39. The Paris Principles set out six main criteria that NHRIs are required to meet:[26]

    - Mandate and competence: namely, a broad mandate, based on universal human rights norms and standards;
    - Autonomy from Government;
    - Independence guaranteed by statute or Constitution;
    - Pluralism;
    - Adequate resources; and
    - Adequate powers of investigation.

40. The Paris Principles accreditation process evaluates NHRIs against these criteria. Fully compliant NHRIs are accredited with 'A' status, partially compliant NHRIs are accredited 'B' status and those that are non-compliant are accredited with 'C' status. Of the 121 NHRIs worldwide, a large majority (77) are 'A' status institutions. Thirty three have 'B' status and only 10 have 'C' status.[27]

41. Achieving 'A' status is particularly important for NHRIs. 'A' status provides NHRIs with full participation and voting rights in all GANHRI Bureau activities, including all regional and international work. Most importantly, they are designated with formal NHRI status by UN institutions and are able to participate in sessions of the UN Human Rights Council and take the floor under any agenda item, submit documentation and take up separate seating. By contrast 'B' status NHRIs may only observe such proceedings, may not carry NHRI badges and may not submit documentation to the Human Rights Council, nor take the floor to speak to Human Rights Council agenda items.

[25] https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx
[26] ibid
[27] As at 21 February 2018; https://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

42. The New Zealand Human Rights Commission is an 'A' status NHRI and had an important role to play in the formation of GANHRI and its predecessor, the International Co-ordinating Committee of NHRIs (ICC). Former Chief Commissioner Rosslyn Noonan was the Chairperson of the ICC from 2007-2011. Accordingly, the Commission enjoys a good reputation among NHRIs internationally, and regionally through its work with the Asia Pacific Forum (APF), the regional NHRI conglomeration.

43. However, the 2011 amendments to the CEA have placed the Commission's 'A' status under some jeopardy. The introduction of Statements of Performance Expectations (SPEs) under sections 149B-149M of the CEA threatens to compromise the autonomy and statutory independence from Government required under the Paris Principles. This is because SPEs provide that Ministers are involved in setting performance objectives for Crown entities, including independent Crown entities such as the Commission. SPEs, coupled with their control over the allocation of funding, allow the departments of State and their Ministers considerable leverage over the activities of Crown entities. It is notable that most Crown entities have not had an increase in their baseline allocations for several years.

44. While the Commission retained its 'A' status accreditation at its last review by the GANHRI Sub-Committee on Accreditation (SCA), the SCA noted its concern at the impact of the current model on the Commission's required level of independence under the Paris Principles. In the 2018 Ministerial Review of the Commission, Judge Coral Shaw reiterated these concerns and recommended that consideration be given to designating the Commission as an office of Parliament, to secure its independence from the Government.[28]

45. **Should these reforms will encompass the above aspects of the CEA, the Commission strongly recommends that priority is given to ensuring compliance with the Paris Principles**. Loss of 'A' status would be highly detrimental to the Commission's reputation and capability and would damage the New Zealand Government's international human rights reputation.

46. At a minimum, compliance with the Paris Principles requirements of independence could be improved by amending the current SPE framework in order to ensure that the Commission is sufficiently independent from Government.

[28] https://www.beehive.govt.nz/sites/default/files/2018-05/180515-HRC-Review.pdf, p 05, Rec 23

47. This issue also illustrates the pitfalls in taking an expeditious “one size fits all” approach to arranging the structure of the public service. Public sector entities come in a diverse range of shapes and sizes and, as such, careful due diligence is required to ensure that high-level restructuring does not risk leading to unintended consequences which are of detriment to the public interest or New Zealand’s international reputation.

48. While the Commission is keen to support moves to build on opportunities for increased cooperation across the broader public sector where appropriate, Independent Crown Entities (ICEs) carrying out “watchdog” functions need greater protection of their independence from Government.

49. The Commission understands that one option may be to exclude ICEs from this stage of the changes to the core public sector. If this course of action is pursued, it is important that the issues of ICE independence, particularly for core “watchdog” entities like the Commission, are addressed through other workstreams.