



Human Rights Commission
Te Kāhui Tika Tangata

Submission on the Public Service Legislation Bill

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Submission of the New Zealand Human Rights Commission to the Governance and Administration Committee on the Public Service Legislation Bill

Introduction

1. The Human Rights Commission (“the Commission”) welcomes the opportunity to make this submission to the Governance and Administration Committee (“the Committee”) on the Public Service Legislation Bill (“the Bill”).
2. The Bill repeals the State Sector Act 1988 and replaces it with a new Public Service Act. The Bill’s Explanatory Note¹ describes its purpose in the following terms:

The Bill... can be regarded as implementing a single broad policy. That single broad policy is 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.

3. While the Bill does not directly refer to human rights within its text, it nevertheless has significant implications for human rights in New Zealand. The public service plays a central role, perhaps *the* central role, in the New Zealand State’s performance of its obligations under domestic and international human rights law.
4. These human rights obligations are not concentrated in one part of the public service. They apply indivisibly across the various tiers of the public service, from the heads of large government departments to those delivering public services to people in the community.

The nature of the human rights role and duties of the public service

5. International human rights norms reinforce the essential role of the public sector in advancing the realisation of human rights. The State has the primary responsibility and duty to promote and protect human rights and fundamental freedoms². This was

¹ The Explanatory Note also states that it is an omnibus Bill that will make small amendments to the Public Finance Act in addition to introducing the new Public Services Act. Following the Bill’s passage through the Committee of the whole House stage, it is intended that it will be divided into two Bills. The first will be the main Bill (the Public Service Bill) and the second will become a Public Finance Amendment Bill. The Commission’s submission is focused on aspects of the Public Service Bill.

² Preamble to the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by General Assembly resolution 53/144 of 9 December 1998.

elaborated upon in a 2013 report on the human rights role of the public service by the UN Office of the High Commissioner for Human Rights (OHCHR) which observed:

The role of the public sector as service provider or regulator of the private provision of services is crucial for the realization of all human rights, particularly social and economic rights.³

6. Accordingly, the OHCHR considered that a *human rights-based approach to public services* should be integral to the design, delivery, implementation and monitoring of all public service provision.⁴ Among other things, the OHCHR noted that:

...human rights principles can contribute to guiding and improving public service, complementing existing value systems such as public service ethos and other good governance principles such as efficiency, competency and integrity. This approach also leads to improved public service outcomes and better quality of public service.

7. At the conclusion of its report, the OHCHR recommended that States make a “sustained effort...to integrate human rights principles and standards into the public service and into governance more broadly.”⁵

Summary of the Commission’s position on the Bill’s human rights impact

8. Overall, the Commission welcomes the Bill and its goal of achieving a more diverse, inclusive and community-orientated public service. This goal is compatible with a human rights approach. However, while the Bill represents a progression on the State Sector Act in this respect, it is notable that its recognition of the human rights dimensions that apply to the public service is muted.
9. While the Bill does not cut across or breach human rights standards, neither the Bill, nor the Bill’s regulatory impact statement (RIS), includes any reference to the human rights duties and obligations that the public service must discharge when carrying out their functions. This is perhaps indicative of some lack of current awareness within the public service of the scope and fundamental nature of its human rights duties. The state’s human rights commitments are generally treated as a discreet and rather technical aspect of public sector work, rather than as a baseline aspect of public services operations.

³ Report of the United Nations High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights, A/HRC/25/27, Human Rights Council, 25th session, 23 December 2013, paragraph 11.

⁴ At paragraph 12.

⁵ At paragraph 75.

10. Accordingly, the Commission recommends – **as our primary recommendation** – that the Committee amend clause 9 of the Bill (its overarching purposive clause) to provide that *a purpose of the public service is to uphold New Zealand's domestic and international human rights commitments*. This recommendation is also endorsed by the Privacy Commissioner.
11. This would not constitute, by any means, a radical amendment. The Legislation Design and Advisory Guidelines states that New Zealand must “give full effect” to its human rights treaty obligations “or it will risk breaching its international obligations.”⁶ We also note that recent significant legislation has included explicit reference to commitments under international human rights treaties in their purposive clauses.⁷
12. Furthermore, by explicitly referring to the state’s human rights commitments, clause 9 will provide a platform for the development of a human rights-based approach to public services. The OHCHR have identified several practical measures that can engender this approach, including:⁸
- a. Providing human rights training and guidance;
 - b. Incorporating human rights into codes of conduct and practice;
 - c. Establishing transparent, responsive, inclusive and participatory approaches to public service;
 - d. Integrating and applying human rights standards across all services, alongside legal and financial implications;
 - e. Measuring the impacts of service delivery on the realisation of the state’s human rights commitments.
13. The Commission also notes that recent developments to core Government policy and legislation, in particular the addition of a well-being approach to budgetary planning under amendments to the Public Finance Act⁹ and the Child and Youth Well-being Strategy under the Children’s Act¹⁰, derive from human rights principles and concepts. It follows that a human rights approach will complement and enhance the capability of the public service in their work in these areas.

⁶ <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/international-issues/chapter-9/>

⁷ Section 5(1)(b)(i) Oranga Tamariki Act 1989; section 3(b) Privacy Bill.

⁸ A/HRC/25/27, Human Rights Council, 25th session, 23 December 2013, paragraph 77.

⁹ Public Finance (Wellbeing) Amendment Bill 2019, in particular clause 6 and clause 8.

¹⁰ Section 6A Children’s Act 2014.

14. On another note, the Commission welcomes the Bill’s establishment of new statutory provisions regarding the role of the public service in supporting the Crown’s Treaty of Waitangi commitments and improving the diversity and inclusivity of the public service workforce. However, the Commission considers that some of the obligations and processes created by these provisions should be strengthened.

15. In this submission, the Commission makes several recommendations which, read together, subtly adjust aspects of the Bill’s framework towards a human rights approach for the delivery of public services. A separate document summarising these recommendations is annexed to the submission.

Key functional aspects of the Bill

16. The Bill has the following three key functional aspects which the Commission will focus upon in this submission:

- a. It updates the purpose, principles and values provisions of the current legislation (Part 1 of the Bill);
- b. It “increases interoperability” and introduces a “flexible set of options for organisational arrangements” across the public service workforce (Part 2 of the Bill);
- c. It explicitly recognises diversity and inclusiveness among the public sector workforce and places some statutory duties on the Public Service Commissioner and departmental chief executives for this purpose (Parts 3 and 4 of the Bill).

A: Purposes, Principles and Values

17. The Bill sets out an expanded purposes, principles and values section as compared to the incumbent Act. It contains several clauses setting out purpose statements, sets of principles and values to be applied and reflected in practice.

Clause 3 – purpose of the legislation

18. Clause 3 sets out the statutory purpose of the legislation. Among these purposes are:

- a. Recognition and enhancement of current non-legislative conventions;
- b. Modernisation, including establishment of organisation forms and ways of working across agencies to achieve better outcomes for the public;

- c. Affirming “a spirit of service to the community”.

Clause 9 – purpose of the public service

19. The purpose of the public service itself follows in clause 9. Broken down into elements, clause 9 provides that the public service:

- a. Supports constitutional and democratic government;
- b. Enables both the current Government and successive governments to develop and implement their policies
- c. Delivers high-quality and efficient public services, supports the Government to pursue the long-term public interest; and
- d. Facilitates active citizenship.

20. It is notable that there is no explicit mention of human rights within these purposive provisions. However, human rights duties can be inferred through the reference in clause 9 to the role of the public service in supporting “constitutional and democratic government” and facilitating “active citizenship”.

Clause 10 – public service principles

21. The public service principles in clause 10 are set out under the following headings:

- a. Politically neutral;
- b. Free and frank advice;
- c. Merit-based appointments;
- d. Open government (or more specifically to foster a culture of open government); and
- e. Stewardship (which regards an agency’s long-term capability, its people, its institutional knowledge and information, systems and processes, assets and its legislation).

22. Again, there is no mention of human rights in this provision, although the principle of open government is an important democratic principle and one that fosters an environment in which human rights can be advanced.

Clause 11- spirit of service to the community

23. Clause 11 provides that a “fundamental characteristic” of the public service is acting with “a spirit of service to the community”.
24. It goes on to state that public service leaders (defined as the Public Service Commissioner, Deputy Commissioner or public service CEs) and the Boards of Crown agents must “preserve, protect, and nurture the spirit of service to the community that public service employees bring to their work.”¹¹
25. It is notable that “spirit of service to the community” is a non-defined term. We recommend that the term is elaborated on in order to define the attributes or components that underpin “a spirit of service”. This will assist with the development of a consistent understanding of its meaning and its application among the broader public service.
26. The Commission considers that such a definition should include the protection, promotion and enjoyment of human rights as a key component. After all, the primary duty to fulfil New Zealand’s human rights treaty obligations rests with the government.¹² It follows that human rights obligations and principles should be central to the ethos and practices of the public service when serving the community on behalf of the government.

Clauses 12 and 13 – Crown’s relationship with Māori

27. Clause 12 provides that the role of the public service “includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi”.
28. The relationship is therefore framed as a positive obligation to the Crown rather than to Māori directly. Obligations that the public service have towards Māori thereby must be interpreted as deriving from this positive obligation to support the Crown.
29. To this end, clauses 12 and 13 go on to prescribe the operational nature of that obligation (to develop and maintain public service capability), the employment obligations of public service agencies, and the leadership and reporting responsibilities.

¹¹ “Employee” is defined in the Bill as not including ‘any chief executive.’ It is also important to note that “chief executive” in turn is defined as a departmental or “functional” chief executive (a new role created in respect of interdepartmental ventures and entities with specified functions). It does not include the operational leaders of Crown entities. Such roles fall within the definition of “employee”.

¹² See n 2.

30. Clause 13(3) provides that departmental and functional chief executives and the boards of interdepartmental entities must report to the Public Service Commissioner on their progress in this area.
31. It should be noted that clauses 12 and 13 are new (rather than refreshed) provisions. There is no equivalent in the current State Sector Act 1988. They accordingly constitute an advancement and we welcome their inclusion. However, we consider that they could be strengthened to reflect in a more direct sense the partnership¹³, participation and active protection principles of the Treaty, particularly given how relevant these principles are to the design and delivery of public services.
32. This could be done by expanding the Bill's rather circumscribed requirement that the public service "develop and maintain capability" to "engage with" Māori and "understand Māori perspectives" to one that more explicitly acknowledges and reflects the principles that derive from the Treaty. This requires statutory language that clearly and unequivocally sets in place obligations upon the public service to actively involve, work with and duly seek and obtain informed consent from Māori when exercising their functions.
33. Not only would this approach more accurately reflect the Treaty partnership that underpins the Crown-Māori relationship, it would assist in bringing practices into closer alignment with the equivalent rights guaranteed under the UN Declaration on the Rights of Indigenous Peoples. These include:
- a. The right to distinct institutions (Article 3, 4 and 5);
 - b. The right to full participation in the political, social, economic and cultural life of the State (Article 5);
 - c. The right to free, prior and informed consent in respect of administrative and legislative measures that affect indigenous peoples (Article 19).
34. Specialised leadership and operational structures, not currently provided for by the Bill, will also be required to ensure effective, Treaty-consistent practices by the public service. We address these issues in more detail in Part B of the submission.

¹³See Waitangi Tribunal, *He Tirohanga O Kawa Ki Te Tiriti O Waitangi*, p 77 "Partnership can be usefully regarded as an overarching tenet, from which other key principles have been derived."
<https://waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf>

Clause 14 – Public service values

35. The public service values essentially form the basis for the minimum standards of public service integrity and conduct. The values are:

- a. *Impartial* – to treat all people fairly, without favour or bias
- b. *Accountable* - to take responsibility for work, actions, and decisions
- c. *Ethical* - to act with integrity and be open and transparent
- d. *Respectful* - to treat all people with dignity and compassion and act with humility
- e. *Responsive* - to understand and meet people's needs and aspirations

36. These values are a new addition to the statutory scheme and are, for the most part, consistent with human rights principles. However, for reasons already addressed in this submission, the Commission considers that these values should explicitly include respect for human rights, including protection from discrimination and other human rights standards.

Clauses 15-20 – the setting by the Public Service Commissioner of minimum standards of integrity and conduct

37. Clause 15 of the Bill provides that the public service values prescribed under clause 14 may only be given effect through the Public Service Commissioner's issuance of minimum standards of integrity and conduct. These include minimum standards that relate to "rights and responsibilities", alongside the public service values and principles set out in the Bill.¹⁴

38. Clauses 16 and 17 respectively provide for:

- a. A duty of compliance with the minimum standards on the part of public service entities, groups and individuals; and
- b. A discretionary power on the part of the Public Service Commissioner to issue guidance on the standards. Clause 17(2) provides that such guidance is not required to be limited to the standards themselves.

¹⁴ See clause 15(1)(a).

39. Clause 18 provides some specificity concerning the minimum standard of conduct regarding “rights and responsibilities”. It provides that any guidance issued by the Commissioner under clause 17 on rights and responsibilities must address:

- a. Rights and responsibilities relating to freedom of expression; and
- b. Rights and responsibilities of individuals who have obligations as members of a profession.

40. The singling out of freedom of expression (among the broad suite of human rights that exist) is intended to refer to the right to freedom of expression of public servants in their private lives.¹⁵ This is further reinforced by clause 20, which constitutes a statutory acknowledgement that public service employees have all the rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 and, by association, the statutory protections under the Human Rights Act 1993. While public service employees enjoy the benefit and protection of these statutes like anyone else, the Commission supports the inclusion of clause 20 as providing additional legal ballast against any future policy or legislative proposals that would seek to unduly limit their rights.

41. Overall, it is notable that the integrity and conduct clauses in the Bill explicitly acknowledge public servants as rights-holders on an individual, personal level but do not similarly explicitly reinforce that public servants are human rights duty-bearers when carrying out their work. We note that reports on New Zealand issued by UN human rights treaty bodies in recent years have recommended that the New Zealand Government take measures to increase human rights training and awareness across the public sector¹⁶, including wide dissemination of their periodic concluding observations.¹⁷

42. The Commission considers that minimum standards of integrity and conduct and accompanying guidance issued under the Bill should incorporate and expressly refer to the human rights duties of the public service. This would very likely lead to increased levels of awareness and application of human rights among the public service, via the execution of their statutory duty to comply with the minimum standards set by the Commissioner.

¹⁵ See the RIS at p 32.

¹⁶ For example, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of New Zealand, 21 October 2016, CRC/C/NZL/CO/5 paragraph 12(b).

¹⁷ For example, 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, paragraph 55.

Purposes, principles, values – recommendations

The Commission recommends:

- A.** That clause 9 is amended to provide that a purpose of the public service is to support constitutional and democratic government *and uphold the government's domestic and international human rights commitments*.
- B.** That the public services' "spirit of service to the community" referred to in clause 11 is defined to include the protection, promotion and enjoyment of human rights. This can be achieved through the inclusion of this definition in the interpretation clause of the Bill (clause 5). Alternatively, it should be included in any definition set by the Public Services Commissioner following the enactment of the Bill.
- C.** That clause 12 of the Bill is amended to incorporate statutory language that establishes clear and unequivocal obligations upon the public service, when exercising their functions, to *actively involve, work with and duly seek and obtain informed consent from Māori*.
- D.** That clause 14 of the Bill is amended to provide that *respect for human rights, including the right to protection from non-discrimination* is explicitly included within its list of public service values.
- E.** That minimum standards of integrity and conduct and accompanying guidance issued under clauses 15-20 of the Bill incorporate and expressly refer to the human rights duties of the public service.

B: Interoperability and increased flexibility among public service organisations

43. Part 2 of the Bill is designed to enable 'interoperability' and increased flexibility among public service organisations. It does this by creating three new statutory platforms:

- a. Interdepartmental executive boards;
- b. Interdepartmental ventures;
- c. Joint operational agreements.

Interdepartmental executive boards – clauses 23-29

44. Clauses 23-29 provide for the formal statutory establishment of "interdepartmental executive boards". These are essentially boards consisting of departmental chief

executives whose agencies have joint responsibility for a particular area of government work (defined by the Bill as a “subject-matter area”).

45. The purposes of interdepartmental executive boards are:

- a. To align and co-ordinate strategic policy, planning, and budgeting activities for two or more departments with responsibilities in a subject-matter area;
- b. To support those departments to undertake priority work in the subject-matter area;
- c. To support cross-department initiatives in the subject-matter area.

46. Clause 26 provides that members of the board are jointly responsible to the appropriate Minister for the board’s operation. Clause 27 provides that the Public Service Commissioner appoints the members of an interdepartmental board from the Chief Executives (CEs) of the designated departmental agencies. The Commissioner may also appoint one or more “independent advisers” (who are not CEs) to advise the board. The role of these independent advisers is advisory only, with clause 28 providing that they do not have any decision-making authority.

47. Once it is established, an interdepartmental executive board must publish its operating procedures on an internet site maintained by, or on behalf, of the venture.

Interdepartmental ventures – clauses 30-35

48. By contrast, “interdepartmental ventures”, established under clauses 30-35, are primarily concerned with operations, rather than strategy, planning and budgeting.¹⁸ The board of an interdepartmental venture consists of the CE’s of the relevant departments. The chairperson is appointed by the Public Service Commissioner, who prior to making the appointment, is required to invite the relevant Minister to identify any matters that should be considered in doing so. The Commissioner may also seek advice from other sources.

Joint operational agreements – clauses 36-39 (sub-part 2)

49. The third tier of formal interoperable arrangements under Part 2 are “joint operational agreements”. The purpose of these agreements is “to provide a formal structure for co-operative and collaborative working arrangements between public service agencies.”

¹⁸ Clause 30 provides that their purpose is to deliver services or carry out regulatory functions that relate to the responsibilities of two or more departments; and assist to develop and implement operational policy relating to those services or regulatory functions.

50. Joint operational agreements may be entered into by two or more CEs or boards of public sector agencies. These agreements must be approved by the Public Service Commissioner and must not, in any way, alter the current responsibilities of those departments as to their staffing and budget, nor alter their current responsibilities to their Ministers. CEs/boards are required to take reasonable steps to provide sufficient resources to achieve the goals of the agreement.

Observations

51. In some respects, the ways of working set out in Part 2 of the Bill are not new. There are current examples of multi-agency, “joined-up” working models within the public service which focus on one subject-matter area, such as the joint responsibilities of the CEs of “children’s agencies”¹⁹ under the Children’s Act 2014; or the family violence joint venture board.²⁰
52. Part 2 of the Bill therefore updates the legislative framework to incorporate and formalise multi-agency practices that have arisen as a response to complex, multi-dimensional contemporary social issues such as family violence and child poverty.
53. From a human rights perspective, this approach has positive implications. It potentially will enable better co-ordination of policy, budget planning and service delivery across government, which in turn should lead to better outcomes. The approach is also inherently suited to co-ordinating the implementation of the Government’s human rights and Treaty of Waitangi commitments, which extend across the government sector.
54. UN treaty bodies have issued recommendations to the New Zealand Government concerning the establishment of co-ordination mechanisms for this purpose²¹ and in recent years multi-agency groups such as the CE’s Group for Disability Issues (responsible for the CRPD)²² and a Children’s Convention Deputy CE’s Group²³ have been established.

¹⁹ MSD, MOJ, MOE, MOH, OT and the Police.

²⁰ consisting of the CEs from the Social Wellbeing Board – DPMC, MSD, MOJ, MOE, MOH, OT, TPK, ACC, Corrections and the Police.

²¹ For example, Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of New Zealand*, 21 October 2016, CRC/C/NZL/CO/5 paragraph 12(b). See also Human Rights Council, *Report of the Working Group on the Universal Periodic Review: New Zealand*, 23 January 2019, A/HRC/WG.6/32/L.1, para 6.39.

²² <https://www.odi.govt.nz/assets/Disability-action-plan-files/governance-disability-issues.pdf>

²³ <https://www.occ.org.nz/assets/Uploads/Getting-It-Right-Building-Blocks-Apr-2018.pdf>

The Commission also notes the Government's ongoing development of a multi-sector national plan on the UNDRIP²⁴, led by Te Puni Kokiri.

55. Part 2 of the Bill provides an opportunity to further develop structures and leadership roles within government to co-ordinate and develop its work towards meeting its human rights and Treaty of Waitangi commitments. Accordingly, the Commission recommends that the Committee consider amending the Bill to specifically provide for the establishment of interdepartmental executive boards that are responsible for the co-ordination and oversight of public service efforts to deliver Treaty of Waitangi and human rights consistent policies and practices across the public sector.
56. More generally, while interoperability offers a number of opportunities, it will require careful oversight. The creation of a multitude of interdepartmental entities and operational agreements – simultaneously working across one another at various different levels - could lead to problems identifying lines of accountability and result in inefficient decision-making.
57. The role of the Public Service Commissioner in monitoring these arrangements and ensuring transparency, in accordance with the principle of "open government" (as provided by clause 11) will be essential. At the public level, this should include the provision of easily accessible documentation that describes the purpose, composition and functions of each interdepartmental entity or joint venture, illustrates how they interact with other parts of the public service, and clearly identifies the Ministers and public service leaders to whom they are accountable.²⁵

Interoperability and increased flexibility – recommendations

The Commission recommends:

- F. Through the inclusion of a new clause 24A, the Bill is amended to provide for establishment of interdepartmental executive boards that are responsible for the co-ordination and oversight of public service efforts to deliver Treaty of Waitangi and human rights consistent policies and practices across the public sector.
- G. That the Public Service Commissioner monitor and regularly report on the work of all inter-operational entities established under the Bill; and provide accessible information

²⁴ <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>

²⁵ We note that the Bill provides that interdepartmental executive boards and the boards of an interdepartmental venture must publish their operating procedures on an internet site.

to the public on the composition, purpose, functions and accountability lines of these entities.

C: A more diverse and inclusive public sector workforce

58. The Bill's leadership and workforce provisions are set out in Parts 3 and 4 of the Bill. Overall, as with the operational provisions set out in Part 2 of the Bill, these provisions update the legislation to reflect current ways of working that have evolved to address complex, multi-agency issues. While they represent a clear progression from the current State Sector Act, they do not constitute a radical departure from contemporary practices.

Public Service Commissioner and Deputy Public Service Commissioners

59. The role of the Public Service Commissioner is the same as the current State Services Commissioner and is the head of the public service. The statutory process for appointment also remains the same. The Commissioner is appointed by the Governor-General and upon recommendation of the Prime Minister following consultation with the leader of each political party represented in Parliament.

60. The Public Service Commissioner's general functions are set out in clause 42. These functions include:

- a. Establishing and leading a public service leadership team to deliver better services to, and achieve better outcomes for, the public; and
- b. Promoting integrity, transparency and accountability by setting standards and issuing guidance; and
- c. Develop a highly capable workforce that reflects the diversity of the society it serves, and to ensure fair and equitable employment.

61. The role of the Deputy Public Service Commissioner is retained, with provision made for up to two appointments. The functions of a Deputy Commissioner are the same as those of the Public Service Commissioner and are subject to the control and direction of the Commissioner. The Deputy Commissioner may stand-in for the Commissioner in the case of a vacancy or may be assigned, by the Commissioner, objectives in one or more subject matter areas.

62. Neither the Public Service Commissioner, nor the Deputy Commissioners, have specific statutory functions regarding the public service's human rights and Treaty of Waitangi obligations. There is no express provision for responsibility or oversight in respect of either

area. However, it would appear to be possible for the Commissioner to assign a Deputy Commissioner with objectives in either one or both of those areas.²⁶

63. Another option could be to designate “system leader” roles with responsibilities for human rights and Treaty of Waitangi implementation under clause 54 of the Bill. System leaders are CEs who are appointed by the Public Service Commissioner to exercise leadership and co-ordinate best practice over a particular subject matter area across the whole, or part of, the public service. System leaders will be able to issue written standards and guidance relating to their designated subject matter area that will apply to public service agencies.²⁷

Part 3, subpart 4 – the Public service workforce

64. Clauses 63-94 set out the powers, duties and responsibilities of public service CEs as regards the public service workforce, including employment standards. These include:

- a. The good employer requirements (clauses 71-72);
- b. The duty to promote diversity and inclusion (clauses 73-74); and
- c. The process for pay equity claims (clauses 80-83)

Good employer requirements

65. The Bill does not update the equivalent aspects of the current legislation to any significant degree. The good employer requirements set out in clause 71 of the Bill are substantively similar to the requirements set out in s 57 of the current Act. The language used in respect of duties towards Māori, people with disabilities, women and minority ethnic groups is the same as the current legislation.

66. It is also notable that the Public Service Commissioner’s EEO functions under clause 72 are also substantively similar to the current functions under s 58 of the current Act. These are broadly framed as “promoting, developing, and monitoring equal employment

²⁶ We also note that Clause 48 of the Bill provides that the Public Service Commissioner may appoint 1 or more advisory committees to assist with the Commissioner’s functions. This assistance can include making inquiries, conducting research and issuing reports. Advisory Committee members are appointed by the Commissioner, who must have due regard to the nature of the community interest.

²⁷ The Explanatory Note to the Bill notes that a number of new statutory designations and entities currently exist in practice, if not in legislation. There is already a public service leadership team in place and the roles of system leaders and functional CEs are reflected in the current model of “functional leads” and “heads of profession.” The Bill formalises these roles by embedding them in primary legislation.

opportunities programmes and policies for the public service.” Given the Public Service Commissioner is also responsible for employing public service CEs²⁸, we consider that clause 72 should be amended to expressly include the application of EEO policies to this function.

The duty to promote diversity and inclusion

67. However, clauses 73 and 74 establish new duties upon public service CEs to promote diversity and inclusion among the public sector workforce.

68. The duties are:

- a. To have regard to the principle that, in order to achieve fairness in employment and a more effective public service, it is desirable for the group comprising all public service employees to, as far as practicable, reflect the makeup of society;
- b. Through employment policies and practices, endeavour to foster a workplace that is inclusive of all groups;
- c. Comply with guidance and standards set by the Public Service Commissioner.

69. Clause 74 goes on to specify the Public Service Commissioner’s function to develop and maintain guidance and standards regarding diversity and standards and to report on these to the Minister of Public Services every three years (as part of their periodic briefing on the overall stewardship of the public sector, as required under schedule 3, cl 15 of the Bill).

70. While the Commission welcomes the inclusion of specific diversity and inclusion provisions in clauses 73 and 74, the overall statutory duty created could be stronger. CEs are merely required to “have regard” to diversity or “endeavour” to foster an inclusive workplace. Compliance is only required in respect of any standards set by the Public Service Commissioner.

71. We therefore consider that clause 73 should be amended to place upon the public service CEs a stronger duty to *ensure* that the diversity principle is reflected in practices and *to actively foster* a workplace that is inclusive of all groups.

72. We further consider that clause 74 be amended to require the Public Service Commissioner to develop indicators to measure diversity and inclusivity in the public sector and set 3-yearly diversity and inclusion targets. Progress towards meeting the targets

²⁸ Clause 42(d).

should be reported in each briefing report required under clause 15, schedule 3 of the Bill. The briefing report should also contain an evaluation of the actions taken over the 3-yearly period to meet the targets.

73. We also consider that the Public Service Commissioner's development of guidance, standards, indicators, targets and evaluation/reporting under clause 74 should be undertaken in a manner that works in concert with the Human Rights Commission's EEO functions under s 5(2)(n) of the Human Rights Act 1993. These functions provide for:
- a. The evaluation, through the use of benchmarks developed by the Commission, the roles that legislation, guidelines, and voluntary codes of practice play in facilitating and promoting best practice in equal employment opportunities.
 - b. The development of guidelines and voluntary codes of practice to facilitate and promote best practice in equal employment opportunities (including codes that identify related rights and obligations in legislation).
 - c. Monitoring and analysis of progress in improving equal employment opportunities in New Zealand and reporting to the Minister on the results of that monitoring and analysis.
 - d. Liaising with, and complementing the work of, any trust or body that has as one of its purposes the promotion of equal employment opportunities.

Pay equity claims

74. The Bill also introduces new provisions (clauses 80-83) regarding the process to be taken in the event that public sector employees initiate a pay equity claim. The provisions are functional in nature and provide that the Public Service Commissioner may choose to be responsible for negotiations in respect of any pay equity claim. However, they must consult with the relevant CE or board before doing so.²⁹

Part 4 – Government workforce policy (clauses 95-101)

75. Part 4 enables the Public Service Commissioner to draft a government workforce policy statement for submission to the Minister for consideration. It must be developed following consultation with affected agencies and other parties the Commissioner thinks fit. If

²⁹ Alternatively, the Commissioner may delegate the negotiation role to a CE or board and may direct 2 or more of those entities to consult with one another before entering negotiations, presumably in respect of any claims that may affect the workforce across government departments.

approved by the Minister, public service agencies and Crown agents must give effect to a government workforce policy statement and any information requests made under it.

76. As with the pay equity claim clauses, the Bill's provisions regarding the government workforce policy statement are largely functional. Clause 97 provides that the policy may include (but is not limited to):

- a. Negotiation of collective and individual employment agreements;
- b. Development and implementation of workforce strategy;
- c. Effective management of employment relations;
- d. Workforce capacity and composition; and
- e. Data and information held by the public service regarding agencies contracted to deliver services.

77. It is therefore notable that the list of factors set out in clause 97 do not expressly refer to the government's human rights obligations concerning pay equity and workforce diversity, among other things.

78. It is also important to note that the development of a government workforce policy statement is a discretionary function of the Public Service Commissioner. They are not required to develop one. Further, a government workforce policy statement is not a legislative instrument, nor is it a "disallowable instrument" as defined by the Legislation Act 2012. This means it does not have to be presented to Parliament.

79. Overall, the provisions regarding pay equity claims and government workplace policy should be strengthened to align with the broader objective of improving diversity and equity within the public sector workforce. Given that a workplace policy statement will be an essential reference point for employment relations issues within the public sector, including pay equity claims, it is surprising that the Bill reduces it to a discretionary function of the Public Service Commissioner.

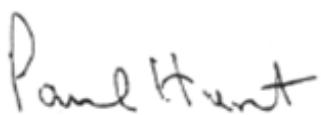
80. The Commission considers that the Bill should be amended to provide that the statement is a mandatory requirement and that it includes pay equity and workforce diversity within the list of policy areas specified in clause 97.

A diverse and inclusive public sector workforce – recommendations

The Commission recommends:

- H.** That the Public Service Commissioner assign responsibility for human rights and Treaty of Waitangi outcomes to a Deputy Public Service Commissioner under clause 45(4) or a systems leader appointed under clause 54.
- I.** That clause 72 is amended to provide that the Public Service Commissioner develop and apply EEO policies in respect of their function under clause 42 to employ public service leaders.
- J.** That clause 73 is amended to require public service CEs to *ensure* that the diversity principle is reflected in practices and *to actively foster* a workplace that is inclusive of all groups.
- K.** That clause 74 is amended to require the Public Service Commissioner to develop indicators to measure workforce diversity and inclusivity and set 3-yearly diversity and inclusion targets. Progress towards meeting the targets should be reported in each briefing report required under clause 15, schedule 3 of the Bill.
- L.** That the Public Service Commissioner's development of guidance, standards, indicators, targets and evaluation/reporting under clause 74/schedule 3 of the Bill is undertaken in concert with the Human Rights Commission, pursuant to the Commission's EEO functions under s 5(2)(n) of the Human Rights Act 1993.
- M.** That clause 97 is amended to require the Public Service Commissioner to produce a government workplace policy statement.
- N.** That a government workplace policy statement includes pay equity and workforce diversity among the areas it covers.
- O.** That the government workplace policy statement is required to be tabled in Parliament.

81. Thank you for your consideration of this submission. The Commission would welcome the opportunity to make an oral submission to the Committee on this important Bill.



Paul Hunt

Chief Commissioner



Saunoamaali'i Karanina Sumeo

Equal Employment Opportunities Commissioner



Meng Foon

Race Relations Commissioner



Paula Tesoriero

Disability Rights Commissioner

ANNEXURE

HUMAN RIGHTS COMMISSION SUBMISSION ON THE PUBLIC SERVICE LEGISLATION BILL

LIST OF RECOMMENDATIONS

Purposes, principles, values

- A. That clause 9 is amended to provide that a purpose of the public service is to support constitutional and democratic government and uphold the government's domestic and international human rights commitments.
- B. That the public services' "spirit of service to the community" referred to in clause 11 is defined to include the protection, promotion and enjoyment of human rights. This can be achieved through the inclusion of this definition in the interpretation clause of the Bill (clause 5). Alternatively, it should be included in any definition set by the Public Services Commissioner following the enactment of the Bill.
- C. That clause 12 of the Bill is amended to incorporate statutory language that establishes clear and unequivocal obligations upon the public service, when exercising their functions, to actively involve, work with and duly seek and obtain informed consent from Māori.
- D. That clause 14 of the Bill is amended to provide that respect for human rights, including the right to protection from non-discrimination is explicitly included within its list of public service values.
- E. That minimum standards of integrity and conduct and accompanying guidance issued under clauses 15-20 of the Bill incorporate and expressly refer to the human rights duties of the public service.

Interoperability and increased flexibility

- F. Through the inclusion of a new clause 24A, the Bill is amended to provide for establishment of interdepartmental executive boards that are responsible for the co-ordination and oversight of public service efforts to deliver Treaty of Waitangi and human rights consistent policies and practices across the public sector.
- G. That the Public Service Commissioner monitor and regularly report on the work of all inter-operational entities established under the Bill; and provide accessible information to the public on the composition, purpose, functions and accountability lines of these entities.

A diverse and inclusive public sector workforce

- H. That the Public Service Commissioner assign responsibility for human rights and Treaty of Waitangi outcomes to a Deputy Public Service Commissioner, under clause 45(4) or a systems leader appointed under clause 54.
- I. That clause 72 is amended to provide that the Public Service Commissioner develop and apply EEO policies in respect of their function under clause 42 to employ public service leaders.
- J. That clause 73 is amended to require public service CEs to *ensure* that the diversity principle is reflected in practices and to *actively foster* a workplace that is inclusive of all groups.
- K. That clause 74 is amended to require the Public Service Commissioner to develop indicators to measure workforce diversity and inclusivity and set 3-yearly diversity and inclusion targets.

Progress towards meeting the targets should be reported in each briefing report required under clause 15, schedule 3 of the Bill.

- L. That the Public Service Commissioner's development of guidance, standards, indicators, targets and evaluation/reporting under clause 74/schedule 3 of the Bill is undertaken in concert with the Human Rights Commission, pursuant to the Commission's EEO functions under s 5(2)(n) of the Human Rights Act 1993.
- M. That clause 97 is amended to require the Public Service Commissioner to produce a government workplace policy statement.
- N. That a government workplace policy statement includes pay equity and workforce diversity among the areas it covers.
- O. That the government workplace policy statement is required to be tabled in Parliament.