



**National Integrity Systems**  
**Transparency International**  
**Country Study Report**

**New Zealand 2003**

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## Acknowledgements

Many have willingly given their time to assisting with this study. Particular thanks are due to Paul Bellamy, who worked as a research assistant for John Henderson. David MacDonald helped with the editing. Jill Dolby skilfully put together the many drafts, and provided other essential administrative support.

In December 2002 a half-day workshop considered a draft. Amongst those attending were:

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We are most grateful to these and others for giving up their time to provide constructive comments and other help.

To all of those who helped, thank you. Remaining errors and shortcomings are those of the authors alone.

The *National Integrity Systems TI Country Study Report New Zealand 2003* was made possible with the funding of the UK Government's Department for International Development.



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# Contents

<b>Abbreviations .....</b>	<b>4</b>
<b>Executive Summary .....</b>	<b>6</b>
<b>Country Overview.....</b>	<b>9</b>
<b>Corruption Profile.....</b>	<b>11</b>
<b>The National Integrity System.....</b>	<b>13</b>
Executive .....	13
Legislature.....	14
Elections .....	18
The Electoral Commission.....	19
Political Party Funding .....	19
Supreme Audit Institution.....	21
Judiciary.....	23
Civil Service.....	25
Police and Prosecutors .....	29
Public Procurement .....	30
Ombudsman .....	32
Investigative/Watchdog Agencies .....	33
Media.....	36
Civil Society.....	38
Regional and Local Government .....	40
The Governance of Crown/Maori Relations .....	43
<b>Conclusion.....</b>	<b>45</b>
<b>Recommendations .....</b>	<b>46</b>
<b>References .....</b>	<b>49</b>
<b>Bibliography.....</b>	<b>51</b>
<b>Legislation.....</b>	<b>53</b>
<b>Appendix 1 – SSSB First Report.....</b>	<b>54</b>
<b>Appendix 2 – SSSB Report on the Ethos of the State Sector.....</b>	<b>63</b>

## Abbreviations

A-G	Attorney-General
APEC	Asia Pacific Economic Cooperation Arrangement
ASIO	Australian Security Intelligence Organization
BSA	Broadcasting Standards Authority
CCMAU	Crown Company Monitoring and Advisory Unit
CEO	Chief Executive Officer
DHB	District Health Board
DPMC	Department of Prime Minister and Cabinet
EEO	Equal Employment Opportunity
FEC	Finance and Expenditure Committee
GST	Goods and Services Tax
IMF	International Monetary Fund
IRD	Inland Revenue Department
JALO	Judicial Appointments Liaison Office
JCC	Judicial Conduct Commissioner
JCLO	Judicial Complaints Lay Observer
LGA	Local Government Act
MMP	Mixed Member Proportional Electoral System
MP	Member of Parliament
NGO	Non-Governmental Organisation
NIS	National Integrity System
NZISO	New Zealand Industrial Supplies Office
OAG	Office of Auditor General
OIA	Official Information Act
OTS	Office of Treaty Settlements
PCA	Police Complaints Authority
PFA	Public Finance Act
RBNZ	Reserve Bank of New Zealand
RIS	Regulatory Impact Statement
RMA	Resource Management Act
SFO	Serious Fraud Office
SIS	Security Intelligence Service
SOE	State Owned Enterprise
SOI	Statement of Interest
SSA	State Sector Act
SSC	State Services Commission
SSSB	State Sector Standards Board
TI	Transparency International

TINZ	Transparency International New Zealand
TVNZ	Television New Zealand

# New Zealand

## Executive Summary

New Zealand rightly scores very highly by international standards in terms of the absence of public sector corruption (defined generally for the purposes of this study as the misuse of public power for private gain). While there have been and will continue to be individual instances of fraud and corrupt behaviour, there is an absence of systemic and large-scale corruption of the kind prevalent in many countries. The absence of any systemic public sector corruption in New Zealand hitherto can be attributed to the mutually supportive role played by key elements of the NIS, underpinned by social norms in the context of a small and relatively cohesive society.

While New Zealand scores well in terms of the absence of large-scale systemic corruption, this study also assesses New Zealand's NIS against a higher yardstick – namely, the overall effectiveness of the country's governance systems in achieving the aims of effective and efficient government through democratic means. The instruments used to measure corruption across countries are not well suited to exploring these more subtle issues of governance in a developed country such as New Zealand. To that extent, New Zealand's high rating on TI's Corruption Perceptions Index may induce a false sense of security about the overall quality of governance in this country.

This study, therefore, goes beyond a focus on corruption and the features of the governance framework that are likely to constrain corruption. The narrative sections and the recommendations also assess governance in New Zealand against higher standards, reflecting citizen expectations, legal requirements, and international best practices (although the Questionnaire follows the standard NIS format in order to enable this study to be included in an international data set that is more focused on the issue of corruption). This study identifies areas where action is required to strengthen transparency and accountability in New Zealand and make the NIS more effective on a sustainable basis.

### Ethical Culture

A recurring theme of this study is that what matters is not so much anti-corruption laws and rules, as the maintenance and promotion of a general culture in which unethical behaviour is unacceptable throughout society. While this report recommends a range of reform measures, it recognises that writing down guidelines and codes of conduct does not mean that they will necessarily be followed. That will depend on the wider ethical culture.

It is important, therefore, to establish just what the level of commitment to 'clean' government is in New Zealand. Surveys should be undertaken to reveal the level of understanding of what constitutes acceptable conduct amongst politicians, the public and the private sectors, and the level of commitment to adherence to this conduct. The results of these surveys would provide guidance for follow-up ethics promotion across the state sector and the general public.

### Parliamentary Political Leadership

The achievement and maintenance of high ethical standards require politicians to lead by example, at both the national and local levels, and to promote the values of honesty, integrity and loyalty.

The code relating to ministerial conflict of interest should be extended to cover all MPs. This code should include the public disclosure of private interests and assets, a record of gifts and hospitality received, and time restraints on types of employment immediately following a career in politics. But the point needs to be stressed that it is the actual behaviour of political leaders rather than written codes of leadership that matters.

This report recommends the repeal of the just-enacted Remuneration Authority (Members of Parliament) Amendment Act 2002, which purports to strengthen transparency and accountability in the setting of MPs' allowances. The outcome of the legislation, and the process by which it was achieved, give the unfortunate appearance that MPs acted in a self-serving manner. MPs' allowances should be determined by an independent authority.

## **Local Government**

Political leadership is also required at the local government level. This report endorses the obligation under the Local Government Act 2002 that requires all Councils to adopt a code of conduct applying to councillors.

## **Judicial Leadership**

Public confidence in the integrity and independence of the judiciary is a key component of an NIS. This report therefore supports the proposed establishment of a Judicial Conduct Commissioner (JCC), as announced in principle by the Government in March 2003. The JCC will have the power to initiate a new process for the investigation of serious complaints and possible removal by Parliament of a judge from office. This will strengthen the independence of the judicial complaints process. The government is to be commended for acting now to clarify and strengthen these accountability arrangements. The government is also investigating the establishment of a Judicial Appointments and Liaison Office to centralise functions related to the recruitment of judges that are currently carried out by several agencies. (It should be noted that the details of these proposals had not been completed at the time of writing this report.)

## **Elections**

The maintenance of a democratic society requires free and fair elections. This report suggests a range of reforms, the most important of which is the closing of the loopholes that enable financial contributions to political parties to be made anonymously. The operation of 'front' organisations to fund parties should be made more transparent by applying the same rules that govern the funding of political parties. There is also a need to revisit the issue of the form and extent of state funding of political parties.

## **State Sector**

Much of this report is concerned with the performance of the state sector. The key role of the State Services Commission is recognised, and the report recommends that the responsibilities of the State Services Commissioner for the promotion of ethical conduct be extended to cover the entire state sector (as provided for in a Bill currently before Parliament).

The governance structures of some Crown entities should be strengthened to reflect modern governance principles. There is also a need for the introduction of legislative requirements for greater transparency and objectivity in appointments to the Boards of public bodies.

The same requirements advocated for politicians should also apply to senior officials. This includes such issues as a register for gifts received and restrictions on post-public service employment.

## **The Governance of Crown/Maori Relations**

The deep division of views over the place of the Treaty of Waitangi<sup>1</sup> in contemporary New Zealand society may represent the main challenge to the continued effectiveness of the NIS. To the extent that the fundamental legitimacy of the state is challenged, the rule of law and the effectiveness of democratic institutions are threatened. The current risks to democracy and a high-integrity society are illustrated by the distinctly divergent views across different groups in New Zealand towards the importance of democracy, the legitimacy of current democratic institutions, and on what constitutes corruption.

The Government must ensure that Maori collective organisations that are publicly funded to deliver public services are seen to be required to meet the same transparency and accountability requirements as all other entities in receipt of public monies.

The Government should also initiate public education initiatives – such as the one recently announced – to try to reduce the current polarisation of views over the Treaty and the Treaty settlements process.

### **Other Governance Issues**

This report identifies a number of specific measures which could improve standards of governance. These include:

- An independent regulatory task force to review existing regulations should be considered.
- Enhancement of the understanding and implementation of the Official Information Act across the state sector. The coverage of the OIA should be extended to include the Parliamentary Service.
- The publishing by the Government of annual statements of the cost of tax breaks/concessions (tax expenditures), which result in foregone tax revenues.
- The reinforcement of the independence of the Police Commissioner (as provided for in the Police Amendment Bill (No 2) currently before Parliament).
- The inclusion in relevant curricula of appropriate components in ethics and civics.
- Reviewing by the Government of the process for the regulation of gambling machines and the allocation of the profits of gambling machines by local community trusts.

### **Future Developments**

There is a need for the establishment of a Task Force, comprising both official and civil society representatives, to oversee the maintenance and reform of New Zealand's national integrity system. An early analysis should be undertaken of the reforms suggested in this report.

Private sector governance which is not addressed in this report, should be the subject of future research.



## Country Overview

New Zealand is a small democracy of just over 4 million people. It is a parliamentary democracy with a unicameral Parliament of 120 members elected for a three-year term by a proportional electoral system (MMP, Mixed Member Proportional; first used in 1996). The Head of State is the British Monarch, Queen Elizabeth II, whose responsibilities as Queen of New Zealand are exercised by a Governor-General chosen by the New Zealand Government. The unwritten constitution follows the Westminster model, with a Cabinet drawn from, and held accountable to, the legislature. The Prime Minister is the leader of the parliamentary party that on its own or, as has become more common since the implementation of MMP in 1996, in coalition with other parties, commands a majority in Parliament.

By international standards, New Zealand's NIS has proven very effective to date – but it is coming under increasing strain. The absence of any systemic public sector corruption in New Zealand hitherto can be attributed to the mutually supportive role played by key elements of the NIS, underpinned by social norms in the context of a small and relatively cohesive society.

There are a number of areas where New Zealand represents best international practice in public sector transparency and accountability. These include the breadth of coverage of the Official Information Act,<sup>2</sup> and the legislative frameworks providing for transparency and accountability in the conduct of monetary and fiscal policy.<sup>3</sup>

The laws and conventions that regulate the basic structure of New Zealand society derive from the British Westminster system of Government. They are scattered amongst a number of statutes and documents, and qualified by conventions and practices that have no formal legal standing. While some initiatives have been taken in the last two decades to codify important constitutional provisions in law, any of these laws can in effect be overturned by a simple majority of Parliament,<sup>4</sup> and "unlike virtually every other free state, we have no fundamental constitutional measure that permits the courts to strike down a statute which infringes it".<sup>5</sup>

From another perspective, it is also important to ask whether the lack of a written constitution in New Zealand is a serious deficiency. Recent debate in New Zealand highlights some key trade-offs in the choice of whether to enshrine key provisions in a written constitution, with enforcement by the courts.<sup>6</sup> On the positive side, some see the introduction of a written constitution as reducing the risk of abuse of powers and infringement of rights – especially minority rights – by a future Government. It might also have an educative effect, reinforcing some of the currently unwritten conventions and norms.

On the other hand, concerns are expressed about increasing the power of appointed judges at the expense of elected representatives, and about the difficulty of agreeing on which core values to enshrine in a constitution. The latter point reflects in particular the division of views on whether or not the Treaty of Waitangi has the status of a basic constitutional document. (See section on Governance of Crown/Maori Relations for more information on the Treaty of Waitangi.)

There is also a very sharp contrast between the perception amongst some Maori that the media scrutinises the actions of Maori organisations much more closely than other groups, and the perception amongst some Pakeha (descendants of European settlers) that political correctness is increasingly constraining the legitimate public debate of Maori issues.

Ultimately, if New Zealand does not strengthen key elements of the NIS – as recommended in this study – and does not resolve the place of the Treaty of Waitangi and differing views over the legitimacy of Westminster-derived democratic norms, then a stronger case may emerge for a written constitution to attempt to shore up a disintegrating consensus. On the other hand, if there is success in resolving fundamental issues about the legitimacy of the state, and in strengthening the NIS, then the question of whether to introduce a

written constitution would remain somewhat academic. Prudence strongly suggests that resolution of these issues should be the objective.

## Corruption Profile

### Level of Corruption

In New Zealand the incidence of corruption by politicians and officials is low by international standards. Corruption is defined as the misuse of public power for private gain. New Zealand has rated highly in international surveys seeking to measure honesty and integrity in the Government process. Transparency International ranked New Zealand second equal with Denmark, and behind only Finland, in its 2002 Corruption Perceptions Index.<sup>7</sup> New Zealand has been ranked no lower than third equal in the CPI since its inception in 1996. New Zealand is one of the few countries where corruption is not a significant problem. There is little evidence that politicians and officials have used their positions in Government to enrich themselves, or their families or friends.

### Changes for the Worse?

But there are indications that this is changing. How much? We really do not know. There is a need for hard data from surveys of public servants, politicians and the public. It is important to establish attitudes towards, and levels of understanding of, corruption, and their impact on the governing process.

Concern about growing corruption has been evident at the highest level in the Public Services, as is demonstrated in the discussion of the issue in the State Services Commissioner's 2000 Annual Report.

There have been a number of recent issues of concern. While these do not point to systematic corruption, they are warnings against complacency. These include:

- The 1997 Conviction of a former Auditor-General on charges of fraud.
- Convictions in the late 1990s of an official in the Immigration Service for accepting bribes and of four employees of the Inland Revenue Department and Department of Work and Income for the sale of personal information held by those departments to debt-collection agencies.
- The resignation in October 2002 of a senior public figure, a wealthy businessman and former senior political party official, appointed by his former political opponents to chair New Zealand Post, the publicly owned Industrial Research Institute and Television New Zealand. The resignation was prompted by the allegation that he claimed he could obtain "first mover advantage" for some in the issue of Government contracts in public/private partnerships.
- The suspension from her party of an MP for alleged misuse of public funds. (This was still being investigated at the time of writing.)
- The 2002 conviction on fraud charges of a senior public servant from the former Economic Development Ministry.
- The Conviction in 2001 of a serving police officer for perjury relating to use of a firearm.
- The possible purchase of language results by immigration applicants, accusations regarding the operations of the fisheries quota system, and accusations of buying off objectors to consents under the Resource Management Act. The case relating to the Resource Management Act was first raised in the news media, and in that case the facts were not disputed; the question was whether or not the payment represented a legitimate settlement for the loss of a property right or a buying off. The other cases have been raised several times in Parliament.

More generally, there are some generic sources of risk to the high-integrity environment in New Zealand. These include:

- **Globalisation.** New Zealand is increasingly becoming part of a globalised world. It has become exposed to different cultures and ways of doing business and politics, which are relatively new to New Zealand. Society itself is becoming more diverse as the sources of immigration stretch beyond traditional European (mainly British) sources. There is a need to ensure that the growing heterogeneity of New Zealand society does not form a self-justification for breaching widely accepted traditional standards of conduct in politics and business.
- **State Sector reforms.** The reforms of the 1980s introduced a greater degree of private sector practices into the Public Service. In terms of the integrity of the political and bureaucratic process, the results have been mixed. The introduction of competitive processes and the removal of protective licensing, both of which accelerated after 1984, diminished the scope for politicians to deliver rewards to their supporters in the private sector. But the reforms also diluted well-entrenched public sector ethics, which emphasised the importance of process and co-operation rather than competition. Those principles that had guided the State Service in the past were called into question because of their impact on economic efficiency. Within the State Sector, staff retention and morale are crucial to the preservation and promotion of values and attitudes toward integrity. Staff restructuring can have long-term costs - which offset the intended benefits of the restructuring if institutional memory is diminished - and uncertainty harms staff morale. The reforms led to the increased employment of consultants and other "outsiders" who were not always aware of, or concerned about, public service ethics. The overall result has been a decline in the general standards of ethical behaviour in the Public Service.
- **Electoral Reform.** The introduction of a proportional electoral system (MMP, see section on Elections) makes it likely that governments will be dependent on the support of one or more small political parties. This has, and is likely to continue to have, the effect of giving considerable influence to a small party and its backers. MMP has increased the influence of political lobbyists, who recognise the crucial role a small party, or group of MPs, can have. On the other hand, it has also introduced a higher degree of transparency about how political influence is exercised.
- **Political Alienation.** The introduction of MMP has not resolved, and indeed may have helped foster, the growing level of political alienation amongst the public of New Zealand - manifested in a gradual decline in voter turnout. This has been a long-term process, but it was hastened by the radical nature of the economic and social reforms of the 1980s referred to above. The lack of a clear political mandate for these reforms may have further undermined public confidence in the democratic process.
- A change in the egalitarian nature of New Zealand society and, with it, an increase in the "greed" factor. The economic and social reforms from the mid-1980s to the mid-1990s diminished the egalitarian ethos that New Zealand had traditionally espoused.

As in other developed countries, there is a worrying level of lack of public trust in public institutions, including Parliament. The new MMP electoral system is still questioned by significant sections of the public. Polls show a general indifference to the Treaty of Waitangi and the taxpayer-funded social safety net. Levels of voting turnout at elections have been declining (albeit from a relatively high level). New Zealanders, it seems, are less committed to their democracy. It is a trend which, if not reversed, may provide fertile ground for the growth of corrupt practices.

# The National Integrity System

## Executive

The current New Zealand Executive has 28 members, comprising 20 Cabinet Ministers, six Ministers outside of Cabinet and two Under-Secretaries. Ministers outside of Cabinet have portfolio responsibilities but do not sit in Cabinet Meetings; the Under-Secretaries are not Ministers, but assist Ministers in particular portfolios. There is no set size of the Executive. All members of the Executive must be Members of Parliament. They are appointed, on the advice of the Prime Minister, by the Governor-General exercising the authority of the Head of State, the Queen of New Zealand, who is also the Queen of England and several other Commonwealth countries such as Australia and Canada. The Governor-General invites the party leader who can command a majority of the House of Parliament to become Prime Minister.

New Zealand cabinets are, by convention, bound by collective responsibility, whereby once agreement is reached within Cabinet all Ministers are bound to support it whatever their views may have been prior to the event.

Ministers have statutory responsibility for the exercise of specific roles connected with their portfolios - for example, the Minister of Finance is responsible for the exercise of specific powers under the Public Finance Act.

Since the first election held under New Zealand's proportional electoral system, in 1996 (see below), New Zealand has had majority and minority coalition governments.

The current minority coalition Government has members from two parties, but is dominated by the Labour Party, with only one Minister being a member of another party. Parties have different rules for determining Cabinet membership. Labour Prime Ministers choose the number of Cabinet Ministers there will be, then the Labour caucus (all the Members of Parliament who are members of the Labour Party) choose who will be members of the Cabinet. The Prime Minister then allocates portfolio responsibilities. The number of Cabinet positions allocated to other parties is done by negotiation between the party leaders. In practice, the Prime Minister is influential in determining which caucus members get chosen to be a Cabinet Minister. The current Government enjoys support from a third party, which is not currently represented in the Executive.

The other party that has regularly been in Government over the last 54 years is the National Party. When in Government, National allows its leader to determine the number of Ministers, who they will be, and which portfolios they will have.

Abuse of power by the executive has not been a major problem in New Zealand politics. There are legal sanctions – judicial review is discussed below in the section on the Judiciary - but the main sanctions for politicians are political. These include exposure by the media and political opponents and the political costs that would follow.

## Ministerial Disclosure

In order to ascertain whether a Cabinet Minister's action might constitute – or appear to be – a conflict of interest, it is necessary to know what the Minister's financial interests are. The Cabinet Manual (a record of the detailed conventions and practices that govern the Cabinet decision-making system) requires Cabinet Ministers to declare in writing financial interests and assets that they hold, including shares and property. This declaration must be made within two months of their appointment and on 31 December each year. Major changes in assets or interests must be notified at the time they occur.

The Cabinet Office, a separate unit within the Department of Prime Minister and Cabinet, maintains the Register of Ministers' interests. The Secretary of Cabinet, a politically neutral public servant, heads the office and monitors the Cabinet agenda to ensure that Ministers

do not risk conflicts of interest. The Register is tabled in Parliament, thereby becoming a public document and open to scrutiny by the media.

Although there are no statutory or other mechanisms for enforcing the provisions of the Cabinet Office Manual, there have been no recent occasions when Ministers have refused to disclose their assets. This acceptance of the Register has been helped by the fact that it records interests rather than wealth, and by the general acceptance of the importance of avoiding conflicts of interest. However, Ministers' declarations are not audited by the Auditor-General, and the sanctions are political, not legal, and rest with the Prime Minister. Cases where the Prime Minister has considered it necessary to act have been rare. In 1995 a Cabinet Under-Secretary was forced to resign from office when he refused to relinquish a bank directorship.

Ministers are required by the Cabinet Manual to declare at Cabinet, a Cabinet Committee, or in Parliament, any personal interest they or members of their family or whanau (the Maori word for family) may have in a matter under consideration. This declaration is recorded. The Cabinet Manual notes that a Minister's personal interest may make it inappropriate for the Minister to receive official papers on a particular issue. In these cases, the matter will be dealt with by the Department, or another Minister. If the conflict of interest is 'substantial and enduring', it may be necessary for the Prime Minister to change the Minister's portfolio responsibilities.

Ministers should not become involved in the day-to-day operation of any business enterprise. These requirements do not include interests held in common with the public – for instance, interests in education where the Minister has school-aged children, or agricultural interests where the Minister has a farm.

Ministers must take particular care to avoid any appearance of a conflict of interest when dealing with matters related to procurement and tendering. For instance, controversy arose in 1993 when the Minister of Police allegedly interceded on behalf of a company owned by a personal friend that was tendering for the supply of police flak jackets.

## **Gifts and Hospitality**

The Cabinet Manual (s. 2.75-2.91) places limits on Ministers receiving fees, gifts, excessive hospitality, or engaging in activities that endorse a commercial product. Ministers may retain gifts with a value of under NZ\$500. Gifts that exceed this level must be relinquished when the Minister leaves office, except where the Prime Minister gives express permission. Ministers must not solicit or accept gifts in cash or in kind from commercial enterprises. Appearance fees paid to Ministers must also be declared in the Minister's schedule of interests. Fees may, with the Prime Minister's approval, be paid directly to a recognised charity. Unsolicited fees should be returned. Moreover, it is an offence to offer a bribe to a Minister or an MP and an offence to accept a bribe. There have been no such cases recorded.

## **Post-Ministerial Employment**

There are no restrictions on post-ministerial office employment. Indeed, several former Ministers and MPs have become professional advisers, political lobbyists, or have opened businesses in the fields in which they were Ministers. This report recommends that a "decent interval" (of around 12 months) needs to be respected to maintain the integrity of the political system.

## **Legislature**

New Zealand has one House of Parliament comprising 120 members elected under a mixed member proportional (MMP) electoral system. (See Elections below.)

With no written constitution the Parliament is sovereign, and is able to pass legislation with only a simple majority of MPs. The only exception to this is section 268 of the Electoral Act, which requires that elections be held every three years.

Parliament does have its own rules of procedure, its Standing Orders, which are enforced by the Speaker. Standing Orders can be suspended by a simple majority of MPs, so long as 60 MPs are present in the House. Any Standing Order may be amended or revoked provided there is one sitting day's notice of the proposed change.

## Corruption

There are legal sanctions against corruption by MPs, and MPs who are found guilty of corruption lose office. The Electoral Act 1993 stipulates that an MP's seat becomes vacant if the Member is convicted of a crime punishable by imprisonment for a term of two years or upwards, or is convicted of a corrupt practice as defined by the Act, or is reported by the High Court in its report on the trial of an election petition to have been proven guilty of a corrupt practice under the Act (III, 55 (d)).

Parliament may also take action against MPs who have acted improperly, and treat as contempt the acceptance of a bribe by an MP. However, it is noteworthy that there has never been a case where an MP has been found to have been paid a bribe, and no MP has been forced to resign because of a corrupt practice.

## Disclosure

Unlike Ministers, backbench MPs are not required to disclose their financial interests and assets in a register, but they must declare any pecuniary interest that relates to a matter on which they are speaking in a Parliamentary debate. Nor are they required to disclose any gifts they receive. However, this may change as the Prime Minister has indicated her support for changes that would subject MPs to the same disclosure requirements as Ministers.

MPs must be wary about accepting gifts or excessive hospitality, or appearing to endorse a commercial product. For instance, controversy arose in 1999 after an MP accepted an expenses paid visit to Fiji to address a conference organised by an investment organisation. Several hundred New Zealanders lost large sums of money in a scam devised by the conference organiser (*Dominion*, 17.5.02) although the MP concerned had no role in the deceit, nor knowledge of the organiser. The MP's only involvement was to give a speech at the conference.

At the collective level, there have been serious concerns expressed recently about the long-standing existence of tax-free allowances received by MPs, and the murky boundary between MPs' legitimate expenses and personal expenses. Following an investigation by the Auditor-General and a ruling by the Inland Revenue Department (IRD), it is clear that substantial proportions of these allowances were in the nature of income and should have been taxable. The lengthy delay by Parliament in reforming the allowance system, and the failure of the IRD to pursue the matter, gave the highly undesirable impression that MPs are above the law. The late 2002 Remuneration Authority (Members of Parliament) Amendment Act does not achieve the objectives recommended by the Auditor-General of removing the overlap between the Higher Salaries Commission and the Speaker in the setting of MPs' allowances. In declaring all allowances to be tax-free, the new Bill gives special treatment to MPs compared to ordinary tax-payers. This outcome, and the process by which it was reached, give the extremely undesirable appearance that MPs are above the law, and is damaging to the rule of law in this country. The Act should be repealed, and there should be an immediate review of the law to strengthen transparency and accountability in this symbolically very important area.

## Regulations

Regulations may be contained in laws passed by Parliament, or they may be introduced by the Executive under the authority of laws enacted by Parliament. Many statutes grant the Cabinet the right to make laws for very specific purposes specified in the statute. (For this purpose, the Cabinet is called the Executive Council. It is presided over by the Governor-General who is not a member of the Council.) Regulations can be enforced by the Courts.

The Cabinet Office Manual specifies the procedure by which regulations are to be passed, including the requirement that regulations not come into effect until 28 days after they have been passed by the Executive Council. This is explicitly to allow new laws to be known before they come into effect. However, the Cabinet Office Manual also spells out circumstances, such as emergencies or where the regulation will not have an effect on the general public, where the 28-day requirement can be waived. The Cabinet Office Manual cannot be enforced by the Courts, nor can its breaches be sanctioned by the Courts or Parliament.

Parliament's Standing Orders require the establishment of a Regulations Review Committee. This Committee, which is by convention chaired by an Opposition MP, reviews all regulations and hears complaints from citizens about the effect of regulations.

The Committee has the right to refer regulations to the whole Parliament. This occurs where the Committee considers the statute under which the regulation was created does not provide for such a regulation, where there has not been the consultation required by the statute (there are Court rulings in New Zealand which indicate that consultation must be real and not hollow) or where the regulation creates unusual power, does not provide for the jurisdiction of the courts or infringes on personal rights and liberties.

The Committee does not have the right to strike regulations down. However, the Courts can declare a regulation to be *ultra vires*, in other words not provided for by the legislation under which it was promulgated, and strike it down.

Some changes have been introduced in recent years to improve the regulation making process in New Zealand – for instance, the establishment of the Regulations Review Committee, and the detailed work it has been conducting. Nevertheless, a number of observers have expressed concern about the quality and transparency of regulation in New Zealand by a number of observers. These include Parliament's Finance and Expenditure Committee in 1994, and the Regulations Review Committee itself, which in its 1998 report expressed concern about the proliferation of deemed regulations (regulations imposed by government departments on the approval of a Minister, without the need for Cabinet approval or other checks and balances). A recent study points to serious concerns about excessive government regulation, flawed regulatory design, and the lack of compensation for regulatory takings.<sup>8</sup>

These concerns and problems are increasingly serious, and point to a need for initiatives to improve transparency, accountability and regulatory quality. First, there is a lack of clarity over who is accountable for the content of a Regulatory Impact Statement (RIS). An RIS is intended to inform the Cabinet (and public) of the likely impact of a proposed regulation. At present an RIS is prepared by the sponsoring Department, but is attached as an annex to the Minister's paper to Cabinet recommending a new or amended regulation. In this situation it is not clear who is accountable for the content of the RIS, the Minister or the Chief Executive. For the public to be fully informed of expert opinion on the expected impact of new regulations, it would be desirable for the content of the RIS to be clearly the responsibility of the relevant Chief Executive. There should also be transparency requirements to that effect – in a similar manner to the requirement for the Secretary of the Treasury to sign off that the Budget Estimates have been prepared using his or her best professional judgment. This would help to reduce the risk of politicisation of the public service.

One way forward would be to introduce a Regulatory Responsibility Act containing a statement of principles of good regulatory practice, clear assignment of accountability, and a disclosure regime to facilitate monitoring of compliance with the principles. This would provide a legislative safeguard against misuse of regulation-making powers by future governments.

The concept of an independent Regulatory Task Force should also be considered. Such a task force, which could review the continuing effectiveness and relevance of existing regulations and periodically report on what changes should be made, was favoured by officials but rejected by the previous National government.



Finally, there is a potential tension between the adoption by New Zealand of international regulatory standards, and the ability of New Zealanders to make representations to standard-setters, and to hold them accountable. This is illustrated most clearly where responsibility for setting standards in New Zealand is allocated to a single transnational institution - such as the Australia-New Zealand Food Standards Authority where New Zealand sits alongside the Government of Australia, and the six state and two territory governments of Australia, to set common food standards for both countries. All these entities have equal voting rights, which means New Zealand's vote effectively equates to those of each of the states and territories of Australia. Where New Zealand is integrating with an international standard, there is a need to consider carefully the options for building in safeguards that provide continuing opportunity for the exercise of a New Zealand voice.

## Appropriations

In order to prevent the misuse of public funds, there is a long-standing convention under the Westminster form of government in New Zealand that no spending of public monies can occur without the prior appropriation of funds by Parliament. This is recognised in section 22 of the Constitution Act 1986, which provides that it shall not be lawful for the government, except by or under an Act of Parliament, to levy a tax, raise a loan, or spend any public monies. In addition, the Public Finance Act 1989 (S. 4) provides that no expenditure shall be made, or expense or liability incurred, other than in accordance with an appropriation by an Act of Parliament.

Most appropriations are for one year. Although multi-year appropriations of up to 5 years are provided for in the Public Finance Act, they have been used only once to date, to authorise expenditure for Vote Treaty negotiations for settlement of historical claims of breaches of the Treaty of Waitangi (see section on the Governance of Crown/Maori Relations). Permanent Legislative Authority (PLA) is also used in some circumstances where a measure of commitment to continuity of spending, or to constitutional independence, is required. For example, PLA is used to provide for debt servicing and repayment of government borrowing, and to fund the salary of Judges and Officers of Parliament.<sup>9</sup>

Various pieces of legislation help to regulate the budgetary process. The Public Finance Act 1989, the Financial Reporting Act 1993, and the Fiscal Responsibility Act 1994 together represent international best practice in public financial management and transparency, and have attracted considerable international attention. Their requirements are adhered to in practice to a very large extent. However, when judged against best practice standards, the Auditor-General has identified some deficiencies in the information presented to Parliament to support the Executive's request to spend public monies. These include a lack of information on the outcomes sought from spending, deficient information on risks and departmental capability, and concerns over the use of Imprest Supply. Nor does the government in New Zealand publish any information on tax expenditures (tax concessions or breaks - see section below on Supreme Audit Institution).

The recent initiative to require all Departments to table a Statement of Intent (SOI) in Parliament, setting down the outcomes sought, the intervention logic linking outputs to outcomes, and the Department's capability, is an important step in remedying these deficiencies. It will be extremely important to ensure that Ministers, and not Chief Executives, are seen to be accountable for the outcome targets set out in SOIs, so that there is no "blurring" of roles and politicisation of the public service. It will also be important that attention is given to improving the specification of outputs, which has become increasingly uneven and inadequate in many areas; and that vaguely worded "feel-good" outcome statements are avoided. Overall transparency and accountability could be weakened, rather than strengthened, if the current public management system is substituted by vaguely worded outcome statements unconnected to the (poorly specified) outputs of government.<sup>10</sup>

## Elections

New Zealand has a mixed member proportional (MMP) electoral system. Voters exercise two votes: one for a local representative, the other for the party of their choice. Parties present the electorate with a list of their candidates ranked in the order in which they will enter Parliament. Voters choose a party, not a member on its list. Candidates can contest local electorates and be on the party list, or they may be represented only on the party list or contest only a local electorate. A candidate who wins a local electorate is removed from the party list. Those who remain on the party list are then added to their party's successful electorate members according to their list-ranking until the party's share of the seats in Parliament equates to their share of the party vote. It is also possible to contest local electorates as independent candidates.

There are 120 Members of Parliament (MPs), 69 of which represent geographical electorates. The other 51 are allocated among parties registered with the Electoral Commission, which attain either 5 per cent of the party vote or one electoral seat. The list seats are added to the constituency seats so that each party gets approximately the same proportion of seats in Parliament as their proportion of the party vote.

There are currently seven parties in Parliament, the same number as in the last Parliament (1999–2002). Since the 1996 election, the first under MMP, all governments have been either coalitions or minority governments.

Section 268 of the Electoral Act requires that elections must be held every three years and is the only provision in any New Zealand statute that cannot be repealed or amended by a simple majority of Parliament. To change Section 268, a 75 per cent majority of MPs or a simple majority of voters in a national referendum is required. Section 268 has never been repealed or amended. However the Electoral Act, of which Section 268 is a part, is not "entrenched" and can be amended or repealed by a simple majority of MPs.

By convention, elections may be held more frequently than three years if the Prime Minister requests the Governor-General to dissolve Parliament. The Governor-General can accept a Prime Minister's request for dissolution of Parliament and an election, or can invite another parliamentary party leader to try and form a government. If no other leader can form a Government then an election will be held. None of these conventions have any statutory basis and no Governor-General has ever invited another leader to try and form a government during the life of a Parliament. There have been only three early elections since 1951.

Seven of Parliament's 69 electorate seats are for Maori voters (Maori are the indigenous people of New Zealand, and represent approximately 15 per cent of the population). There have been separate Maori seats since 1867. The whole country is divided into seven Maori electorates. Those of Maori descent can choose whether they want to go onto the Maori electoral roll or the general electoral roll. It is not possible to be on both. As the 61 General Electorates also cover the whole country, there are two MPs for every part of New Zealand, a general MP and a Maori MP. There are many Maori who choose to enrol on the general roll and some Maori successfully contest general electorate seats. There are currently 16 Maori in Parliament; seven of them in Maori electorate seats, 1 in a general electorate seat and eight are list MPs. There are no Maori-only parties in Parliament. The eight Maori MPs in list seats are members of five different political parties, all of whom have non-Maori members.

Thirty-seven women were elected at the 2002 election. The current Prime Minister is a woman, as was her predecessor who in 1997 had become the first woman Prime Minister of New Zealand. (The Governor-General and the Chief Justice are also women.) In 1893 New Zealand became the first country in the world to allow women to vote. In 1919 women were allowed to stand for Parliament and in 1933 the first woman was elected to Parliament.

Elections in New Zealand meet the democratic requirement that they be "free and fair". Corrupt practices have not featured in New Zealand elections.

Electoral administration in New Zealand is currently divided between four agencies – the Electoral Commission; the Chief Electoral Officer; the Chief Registrar of Electors, and the Representation Commission. This fragmentation can give rise to confusion over responsibility, and it is recommended that consideration be given to a single election authority.

- The Electoral Commission will be considered separately below.
- The Chief Electoral Officer is responsible for the conduct of elections and referendums. He or she acts independently of government, although formally an employee of the Ministry of Justice, and responsible to the direction of the Secretary for Justice and the Minister of Justice. There have, however, been no cases where the Chief Electoral Officer's independence has been questioned.
- The Chief Registrar of Electors is the Chief Executive of New Zealand Post Ltd. a state-owned enterprise. Enrolment duties are mostly delegated to the manager of the Electoral Enrolment Centre within New Zealand Post. Although formally answerable to the Minister of Justice, the Chief Registrar operates independently of government but in accordance with statute.
- The Representation Commission determines the electorate boundaries after every five-yearly census. Public Service officials, *ex officio*, make up most of the commission's membership. The Commission is traditionally chaired by a District Court Judge. Representatives of the Government and Opposition are members of the Commission, but they are always in a minority.

## The Electoral Commission

The Electoral Commission is responsible for registering political parties and their logos, supervising registered parties' financial disclosure, allocating election broadcasting time and funds, advising the Minister and Parliament on electoral matters, and promoting public awareness of electoral matters.

The Electoral Commission normally consists of four members: a serving or retired Judge of the District Court or the High Court or the Court of Appeal, who is appointed as the President of the Commission; the Secretary of Justice *ex officio*; the Chief Judge of the Maori Court *ex officio* and one person who is also appointed by the Governor General on the recommendation of the Minister of Justice. A President (a retired Judge) and the Chief Executive cannot be removed except by the Governor General, acting upon an address from the House of Representatives. The only grounds for removal are misbehaviour or incapacity to discharge the functions of the office (Electoral Act 1993). The remuneration of the appointed members is set by the independent Higher Salaries Commission.

When the Electoral Commission is conducting its responsibilities concerning election broadcasting, it has two further members: one to represent the Government and one to represent the Opposition parties. The Electoral Commission has statutory independence and, in practice, has upheld relevant electoral regulations in an independent, effective and fair manner.

## Political Party Funding

Political party funding is regulated by the Electoral Act 1993 (and amendments in 1995 and 2002) and by the Broadcasting Act 1989 (last amended 1996). The Electoral Act limits campaign advertising during the three months immediately prior to election day, and requires disclosure of substantial donations.

During the three months prior to election day, party expenditure is limited to NZ\$1 million if the party nominates a party list, and another NZ\$20,000 for each constituency candidate it stands. The limit excludes spending by the party's electorate candidates on their personal campaigns (see below), travel costs, parties' election broadcasting allocations,

voluntary labour, the costs of opinion polls and surveys, and the replacement of damaged or vandalised materials. Except for broadcast promotions for the party, party expenditure outside the three-month period is not limited. Expenditure for activities that occur both outside and during the three-month period is apportioned accordingly. The Commission must make returns and audited reports available for public inspection. The three-month provision gives some advantage to the parties in government, which presumably will have inside knowledge on when the election will be called.

By 30 April each year, registered parties must report to the Electoral Commission donations exceeding NZ\$10,000 received in the previous calendar year. Parties' returns of donations have to be audited. Anonymous donations over NZ\$10,000 must be recorded in the returns. The Commission must make returns and auditors' reports available for public inspection. Candidate spending is also limited. An electorate candidate may not spend more than NZ\$20,000 on self-promotion in the three-month period prior to election day. For by-elections, expenditure is limited to a maximum of NZ\$40,000. The limit excludes the cost of running the candidate's personal car. Money spent by list candidates must be authorised by their party, and must be included in the total election expenses of the party. It should also be noted that incumbent MPs have the advantages of support staff and travel entitlements (commonly referred to as perks, that is the allowances mentioned above), which continue through the election period. The candidate's returns must disclose campaign donations over NZ\$1,000, including anonymous donations over that amount.

The Broadcasting Act provides for the independent Electoral Commission to allocate time and money to political parties for broadcasting at general elections. As has been noted, in carrying out this function it has two additional members: one each to represent the Government and the Opposition parties. The time allocated by the Commission is that provided by broadcasters free or at discounted rates, although state-owned radio and television broadcasters are obliged by law to provide time for parties' opening and closing addresses. The money allocated by the Commission is that appropriated by Parliament for the purpose (NZ\$2 million since the allocation system began in 1990). In allocating time and money, the Commission must have regard to a number of criteria, including a party's number of MPs at the previous election, number of party members, and opinion poll ratings. It is illegal for parties to purchase additional broadcasting time during the election period or at any other time.

In practice, the Electoral Commission carries out its duties in an effective and fair manner. In the period 1999-2000, the Commission reported to the police the secretaries of eight registered parties for failing to return election expenses and the auditors' reports, as required by the Electoral Act. In 1999 the Electoral Commission sought a declaratory judgment in the High Court, and then in the Court of Appeal, concerning the power to obtain a breakdown of the ACT party's election expenses. On gaining a favourable ruling the Commission did not seek further information – having achieved its objective of establishing its right to demand a full breakdown of election expenses (*Sunday Times*, 22 April 2001, p.1).

However, problems remain. Ways around the provisions concerning disclosure of donations are widely exploited. While donations to a party must be declared, they can be listed as 'anonymous', or be paid through a front group. For instance, in 2000 the National Party received a donation of NZ\$15,000 from the New Zealand Free Enterprise Trust, which was headed by a former National Party President (*Sunday Star Times*, 6 May, 2001, p.2). In 1999 National received NZ\$570,000 from this Trust. Prior to the disclosure laws coming into effect in 1996, businessmen arranged NZ\$2.8 million for the ACT Party's election campaign. Part of this funding was raised by organising anonymous donations of under NZ\$10,000 – using family members and business contacts (*Sunday Star Times*, 22 April, 2001). Other parties have also made use of the anonymous loophole. In 1999 political parties received a total of NZ\$2.09 million from "anonymous" sources, and NZ\$1.62 million from named sources (*The Press*, 28 April 2001, p.11).

Changes have been advocated to counter these problems. The 1986 Royal Commission on the Electoral System proposed state funding of political parties based on the previous election's results. It suggested NZ\$1 per vote up to 20 per cent of the vote cast, then 50

cents per vote up to 30 per cent of the total vote. However, these recommendations have not been acted upon. (See Electoral Commission Annual Report, 2001/02, p.16.)

Registered parties are required to provide audited returns to the Electoral Commission. Candidates must provide their returns of expenditure (which do not have to be audited) to the Chief Electoral Officer. All of these requirements are strictly enforced. Party returns are due 50 working days after the declaration of results and candidate returns are due 70 working days after election day. The Electoral Commission must make all returns available for public inspection. In 2001 the Alliance Party President asked why only the Alliance had disclosed a NZ\$20,000 contribution from Telecom, when a similar donation had been made to all parties.

The Electoral Commission may undertake investigations on its own initiative. For instance, its investigations into allegations in May 2002 that the National Party had not declared 1996 donations from merchant bankers, Fay Richwhite, concluded that the donation had been made before the disclosure laws came into effect. The Commission is obliged to refer a matter to the Police if its investigations reveal any irregularities.

## Supreme Audit Institution

The Controller and Auditor-General (A-G) play a key role in maintaining the integrity of the New Zealand political and administrative processes. The Office enjoys a very high level of independence. With the passage of the Public Audit Act 2001, the A-G is now legally an Officer of Parliament. The appointment of Officers of Parliament is guided by long-standing conventions, involving the unanimous resolution of Parliament following consultation with party caucuses.

The A-G is appointed by the Governor-General on the recommendation of Parliament for a single term of 7 years. The A-G has the same protection from removal that Judges have. Section 9 of the Public Audit Act requires the A-G to act independently, and provides the freedom to determine his or her own auditing approach, and freedom from political direction as to work programme priorities. Section 17 of the Public Finance Act provides the process for setting the annual budget of Officers of Parliament. This is independent of the executive branch, with Parliament itself deciding the budget. The Public Audit Act empowers the A-G to appoint his or her own staff and determine the entity's organisational form. There is no requirement for the appointment of the A-G to be based on professional criteria, nor any specific set of auditing standards that the Office must meet. There is an obligation, however, for the A-G to report every three years to Parliament on the auditing standards that have or will be applied.

The office of the A-G is actively involved in international standard-setting bodies. The Deputy Auditor-General is currently a member of the Public Sector Committee of the International Federation of Accountants and chairs one of its Steering Committees. The Office is also the secretariat for the South Pacific regional body of Auditors-General (SPASAI), and participates in a number of activities of the world body (INTOSAI).

There is no formal mechanism in New Zealand requiring the executive to respond to a report or recommendations of the A-G within a certain time (as there is in a number of other countries, and as there is in New Zealand with respect to Select Committee inquiries). In 2002 Parliament's Finance and Expenditure Committee (FEC) formed a sub-committee to consider each of the A-G's reports to Parliament but the sub-committee has not been active since the 2002 election. In addition, following the aftermath of a number of critical reports by the A-G on inquiries into governance issues relating to Crown entities – in particular, the Tourism Board in 1999 whereby the A-G found that retirement payments made to former directors were unlawful (which led to the resignation of the Minister) – internal arrangements were established within the Treasury and the State Services Commission to review the A-G's reports from the point of view of possible risk to the Executive. However, these arrangements are informal and there is no mechanism to report back to the A-G or Parliament. How well these new arrangements will work remains to be seen. The A-G has recommended consideration of a formal requirement for the

executive to respond to recommendations. One option worth considering is that in operation in Australia at the federal level. There, departments must report to Parliament every three months on the status of actions to remedy deficiencies identified by the Auditor-General, until the deficiency has been put right or it is otherwise agreed that the matter is closed.

To summarise, by international standards the A-G enjoys a high degree of independence in law and in practice. For instance, judged against the standards in the IMF's Code of Good Practices on Fiscal Transparency, the New Zealand arrangements exceed the standard, and generally meet the best practice requirements (see IMF (2001), pp. 66-68). One initiative worthy of consideration would be for the OAG to formally assess New Zealand's compliance with the IMF's Fiscal Transparency Code. The Treasury conducted a self-evaluation exercise on compliance with the Code in 2000, and for a while the assessment was posted on the Treasury's web site, although it has since been removed. In the OAG's Third Report for 1999 on the Accountability of Executive Government to Parliament, the OAG provided a wide-ranging and commendable report on accountability and transparency of public spending in New Zealand. There would be merit, however, in going the extra step, as recommended by the IMF, and having the independent A-G formally assess New Zealand's compliance with the internationally recognised IMF Code.

All public expenditures are subject to annual audit. The mandate of the A-G under the Public Audit Act is very broad, covering all public entities, including local government, Crown entities, and State-Owned Enterprises. The Public Audit Act 2001 extends the full mandate of the OAG to review effectiveness and efficiency beyond the core central and local government to the whole public sector. The only exceptions to the latter are the Reserve Bank of New Zealand (RBNZ) and any public sector owned registered banks (where the A-G is auditor in every respect except efficiency and effectiveness audits and the conduct of inquiries); and the A-G's own financial statements, where Parliament appoints the auditor, who has all the powers of the A-G.

All public expenditures are declared in the official budget, including those subject to permanent appropriation (such as debt-servicing expenses). The A-G has, however, raised concerns about the paucity of information provided to Parliament on the uses to which Imprest Supply will be put, about the lack of effective parliamentary scrutiny of Supplementary Estimates, and about the lack of transparency of District Health Board spending financed by Area Health Board deficits. (The issue being that the deficits were funded by the Crown as capital payments rather than as part of recurrent health spending, and therefore the combined amount of the deficits was never included in Vote Health in the Crown's Statement of Financial Performance for the relevant years.) In addition, New Zealand does not publish any information on tax expenditures except on introduction to Parliament – tax expenditures are defined as tax incentives, holidays, deferrals and any other departures from the normal tax codes. These are increasingly disclosed by OECD countries. It is a basic requirement of the IMF's Code of Good Practices on Fiscal Transparency that tax expenditures be disclosed with the annual budget. The Treasury has recommended regular reporting of tax expenditure statements, and New Zealand's "McLeod Tax Review", noting it received numerous submissions arguing for tax incentives, recommended that reporting of tax expenditures be investigated.<sup>11</sup>

Finally, the A-G has a duty to report to Parliament at least once a year (besides the A-G's own annual report). In practice, a number of reports are typically presented to the House each year (in 2002, 18 public reports were published). The A-G also has a wide-ranging power to report to a Minister, Select Committee, public entity or any person in respect of any matter arising from his or her functions. In New Zealand, the Finance and Expenditure Committee (FEC) and subject Select Committees of Parliament together fulfil the function that a single Public Accounts Committee fulfils in other Westminster-model jurisdictions, i.e. scrutiny of the annual estimates, and financial reviews of departments and other entities. The A-G plays a very active role in providing written and oral briefings to Select Committees (157 reports were provided in 2002), with senior staff assigned as advisers on a permanent basis.

## Judiciary

New Zealand is a Common Law Westminster jurisdiction where, by convention, the decisions of the Judiciary cannot be influenced by the Executive or the Legislature. If the Executive wishes to change the administration of the law, it must do so without seeking to influence specific decisions of the Court or to influence cases while they are being heard by a Court. Parliament's Standing Orders prevent Members of Parliament commenting on specific cases while they are before a Court, and this has been vigorously enforced by all Speakers of the House.

There are four layers in the hierarchy of courts in New Zealand, with the District Court forming the lowest level. Under specific circumstances, District Court decisions are able to be appealed in the High Court, while High Court decisions are able to be appealed in the Court of Appeal. In very limited circumstances, Court of Appeal Decisions can be appealed before the Privy Council in London. However, in 2002 the Government announced that the Right of Appeal to the Privy Council will be removed and that a new superior Court would be established to replace the Privy Council. There is vigorous opposition to this proposal from some sectors.

There are also specialist Employment and Environment Courts, along with a Court to adjudicate on Maori land disputes. Maori land is owned collectively, and its administration is separated from all other land titles.

There are also 19 specialist tribunals that administer the law in very specific fields, covering for example tenancy disputes, small value commercial disputes, copyright, immigration and issues relating to legal and medical practitioners.

Most actions by Ministers and all public officials are subject to judicial review by the Courts. Judicial review is the review by a Judge of the High Court of any exercise, or any refusal to exercise a statutory power of decision, in order to determine whether that decision or action is unauthorised or invalid. It is one of the old common law prerogative remedies, which was streamlined and simplified in statute in the Judicature Amendment Act 1972 (S. 4). Judicial review is an appeal of the process, not the decision itself. The general grounds of challenge are illegality, unreasonableness, and unfairness (both procedural and substantive). An applicant for judicial review is entitled to discovery, involving the provision of a list of all relevant documents, and the opportunity to inspect and receive copies of documents. Judges have a wide range of discretionary powers, including to set the decision aside as unlawful, and to direct the decision-maker to reconsider the decision.

In practice, judicial review is quite widely used. Legal aid is available to litigants seeking judicial review on the same basis as for any other legal action. The most famous case was *Fitzgerald v Muldoon* (and others) 1976, in which the newly elected Prime Minister was found to have acted illegally in declaring the government superannuation scheme closed in advance of tabling legislation to that effect in Parliament. The Court found the Prime Minister in breach of the Bill of Rights (1688) in a decision of major constitutional significance. However, former Prime Minister and now Constitutional Lawyer, Sir Geoffrey Palmer, has commented that the contribution of the courts in New Zealand to checking the use of the regulation-making power in recent years "has not been great". He suggests it would be desirable on constitutional grounds if the courts were more willing to apply a "reasonableness" test to regulations.<sup>12</sup> Wilkinson has also observed that greater scope exists for judicial review of takings of private property under the power of eminent domain. Wilkinson (and others, e.g. Dugdale (2000)) is concerned, however, about the risk of undesirable judicial activism.<sup>13</sup>

One of the protections against undesirable judicial activism is better law-making by Parliament. The Law Commission has observed (for example, in its 1995 Annual Report) that there are serious concerns about the quality of some legislation. Some laws are not easily understandable, some are introduced prematurely, and some are simply not needed. At times, laws are passed with vague clauses that effectively leave it to the Courts to determine what the law will be. There is much out-dated legislation on the Statute books that needs to be up-dated. These are serious deficiencies that undermine the rule of law.

One response would be to increase the visibility, and strengthen the application, of the Legislation Advisory Committee's Guidelines, which were revised in 2001.

## Appointments

The only current statutory qualification for appointment as a Judge is a requirement that he or she has held a practising certificate as a barrister (solicitor) for at least seven years. Currently, expressions of interest are called for by public advertisement, and nominations may be sought from a wide range of interests. In March 2003 the government announced that it is investigating the establishment of a Judicial Appointments and Liaison Office (JALO), as recommended in a report by Sir Geoffrey Palmer commissioned by the government.<sup>14</sup> This Office is intended to administer the process of recruiting judges and to advise the Attorney-General on specific appointments. It would centralise functions currently carried out by several agencies, and would report to the Solicitor-General so that it would be free from any possibility of interference by the Executive. This report supports the establishment of a JALO, which could reduce the risk of an unsuitable candidate being appointed to the bench.

## Removal

Judicial appointees are protected from removal without relevant justification. Judges are appointed on permanent tenure until the age of 68 (except for Masters of the High Court who are appointed for a five-year term). S. 23 of the Constitution Act 1986 provides that a Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General acting on an address of the House of Representatives. This address may be moved only on the grounds of that Judge's misbehaviour or incapacity to fulfil the functions of office. A Judge of the District Court may be removed from office by the Governor-General on grounds of inability or misbehaviour (S. 7 of the District Courts Act 1947). A Judge's tenure is accordingly not absolute. However, in practice, removal powers have never been invoked in New Zealand, and the exact process that might be followed has not been established.

In March 2003, the Government announced its intention in principle to establish an office of Judicial Conduct Commissioner (JCC). The JCC will have the power to initiate a new process for the investigation of serious complaints and possible removal by Parliament of a Judge from office. "The government believes it desirable for this process to be set out before it is required, as a hastily devised process could damage public confidence and risk judicial independence."<sup>15</sup> This report supports this move to clarify and strengthen these accountability arrangements.

## Independence

Judicial independence is buttressed through a range of practices. These practices include: the exclusion of Judges from political office; the convention that they do not comment on political matters; the convention that Ministers should not comment on judicial decisions or the performance of a Judge (buttressed by Sections 5.141-5.143 of the Cabinet Office Manual); judicial immunity from suit for damages that might arise from the conduct of their duties; and the contempt powers of the judiciary.

Independence is further enhanced by the funding of judicial salaries from Permanent Legislative Authority, the provision in the Constitution Act 1986 that the salaries of High Court Judges shall not be reduced during their commission (S. 24), and the ability to appeal to the United Kingdom Privy Council. With respect to the latter and as has been pointed out, the government has declared its intention to establish a Supreme Court of New Zealand. The government's judgment is that the value of independence is outweighed by knowledge of local conditions. This is of concern to those (e.g. some Maori observers, and the New Zealand Business Roundtable) who view independence and specialised expertise as particularly valuable.

While it is fundamental to the rule of law that the judicial branch be independent of the other two branches of government, it is also necessary that the public retain confidence in



the competence, impartiality and honesty of Judges. This is the ultimate guarantor of judicial independence.

## **Accountability**

As indicated above, in March 2003 the Government announced its intention in principle to establish a Judicial Conduct Commissioner. It is envisaged that the JCC would function as a clearing house for all complaints against judges, referring most – those deemed to be not serious – to the JCLO (see below). Details of this proposal are still being developed. What follows is a description, at the time of writing, of the means by which the judiciary are held accountable for their actions.

Judicial accountability in New Zealand is promoted in broad terms through hearings in public (except for the Family Court), the requirement for written reasons for decisions, and the right of appeal. In addition, and as has been noted, the government in 1999 established a judicial complaints procedure and the office of Judicial Complaints Lay Observer (JCLO). Complaints about the conduct of a Judge may be made in the first instance to the relevant Head of Court, who will investigate. If a complaint is found to have substance, the Head of Court may ask a Judge to apologise to a complainant, or offer the Judge appropriate assistance to avoid a recurrence. If the complainant is dissatisfied with the review by the Head of Court, the JCLO has the power to review the complaint and its handling, and to request the Head of Court to reconsider the complaint.

There are some weaknesses in the current judicial complaints process. There is a lack of independence, given that the JCLO may only request reconsideration by the Head of Court, but cannot require any further action.

There are also no formal guidelines or code of conduct setting out clear expectations of Judges and a basis for reviewing the appropriateness of behaviour in individual cases. Such a set of guidelines, developed by the judiciary itself, would be an important additional element of accountability supporting the independence of the judiciary. They might have assisted in the management of a case involving a judge in 1997. The Judge was acquitted by a jury of a charge of fraudulently claiming expenses, while a fellow District Court Judge pleaded guilty to a similar charge. There was strong public disquiet about the fact that the acquitted judge continued in office (although he was transferred to different judicial activities).

Finally, as noted, the media and public are denied access to the Family Court. This is a matter of concern to some sectors of the community, and there have been a number of proposals in recent years to increase the transparency of the Family Court.

While there have been no prosecutions of officials of the judicial branch in the past three years (to May 2003), it should be noted that a Judge resigned from office in 2001 following allegations of inappropriate behaviour. Thus, while the ultimate sanction of removal of a Judge has never taken place, judicial resignations have occurred and reflect the force of expectations about the behaviour expected of Judges.

## **Civil Service**

New Zealand has a non-political career public service divided into three broad areas. The first group is those departments and ministries directly responsible to a Cabinet Minister, which either provide policy advice to the Executive, or which administer and implement government policies. This sector of the public service is overseen by the State Services Commissioner (see watchdog agencies below), and is considered to be the “core public service”. These departments and ministries and their Ministers are accountable to Parliament for their operation and their expenditure of public money.

Secondly there are a large number of different publicly controlled agencies, referred to as Crown Entities which are established by an Act of Parliament and funded by Parliament, and which report to Ministers but also have Boards of Directors appointed by Ministers. These miscellaneous agencies cover various functions such as the provision of education,

transport safety, local health service provision, and also censorship and human rights protection. These agencies and their boards of directors and the Ministers to whom they report are accountable to Parliament for their operation and their expenditure of public monies.

Thirdly, there are publicly owned commercial enterprises which include New Zealand Post (the major provider of New Zealand's postal services), several airports, some research institutes and radio and television networks. These organisations also report to Ministers through boards of directors and are monitored by the Crown Company Monitoring and Advisory Unit (CCMAU).

Since 1984 there has been a major restructuring of the core public service which has in many cases separated departments/ministries responsible for policy formulation and advice from those that administer and implement government policies.

Public servants are subject to criminal and administrative sanctions for bribery and corruption. Apart from the normal criminal codes, those sanctions that apply specifically to all public officials are contained in the Crimes Act 1961 (sections 100-105). These relate to judicial corruption, corruption and bribery of a Minister of the Crown, corruption and bribery of a Member of Parliament, corruption and bribery of a law enforcement officer, corruption and bribery of a public official, and corrupt use of official information. The Public Finance Act 1989 (s.76 and 77) contains offence provisions and penalties related to the improper use of, and management of, public money. Some departmental officers (for instance, in the areas of Inland Revenue, Defence, Corrections, Customs, Police and the Serious Fraud Office) are subject to particular statutes.

## Political Independence

Beyond the criminal and administrative sanctions, there are rules stressing the political independence of the civil service. S.5 of the State Sector Act 1988 imposes a duty on the State Services Commissioner – who has the statutory function of appointing Chief Executives of departments and negotiating their terms and conditions (S. 6(c)) – to act independently of the Minister in decisions on individual employees. S. 33 of the Act imposes the same requirement on individual Chief Executives in matters relating to decisions on their individual employees.

Requirements for appointment on merit (see below) further strengthen political independence. S. 85 establishes an offence of attempting to influence the Commissioner or any Chief Executive with respect to such decisions. The State Services Commissioner appoints each Chief Executive for a period of up to five years. The Cabinet may reject a proposed appointment but must publish a notice to that effect in the *Gazette* (S. 35(11)). Since the passing of the State Sector Act there has been only one occasion when a Government has not appointed the candidate recommended by the State Services Commissioner. In 1990 the Labour Government declined to appoint the nominee of the State Services Commissioner for the position of Secretary of Defence (the public servant who heads the Ministry of Defence) although the government did not formally reject the appointment. A temporary appointment was made. There was a change of government in the 1990 election and the initial nominee was subsequently appointed Secretary of Defence (all secretaries are now called Chief Executives, although many still also have the formal title of Secretary, often because legislation refers to "Secretary of..."). More generally, the Human Rights Act prohibits discrimination on the grounds of political opinion, and this would apply to public service employment decisions. (For more detail on the appointment of Chief Executives of government departments, see below: section on The State Services Commission.)

The political neutrality of the public service is reinforced by a long-standing convention that public servants are obliged to provide Ministers with "free and frank" advice. This is recognised through specific reference to "free and frank" advice in the Official Information Act 1982. The Government also acknowledged the importance of such advice in its Statement of Commitment to the State Sector in 2001 (see below). Moreover, if a public servant is elected to Parliament, he or she is deemed to have resigned from the public

service (S. 53 of the Electoral Act). That Act also contains provisions for public servants standing as candidates to be placed on leave of absence from the day of nomination.

The New Zealand Public Service Code of Conduct outlines the requirement of public servants to be politically neutral, and to act in such a way that their department maintains the confidence of its present Minister and also of future Ministers. The Code is formally part of every Chief Executive's employment contract and, in turn, forms part of the employment contracts of all public servants. The Code is written at the level of general guiding principles to establish minimum conditions. Departments may add additional requirements to fit their own circumstances. The Cabinet Office Manual also contains provisions relating to the political neutrality of public servants – for instance, that officials should not be required to offer comment or opinion on clearly political topics.

More extensive guidance on these issues is contained in other State Services Commission publications. The Government in its statement of commitment to the State Sector recently reinforced the expectations that all public servants behave with integrity and undertook that Ministers would treat public servants in a professional manner.

In practice, the requirements for political neutrality and political independence are widely observed. In fact it has been suggested that the State Sector Act may have tilted the influence too far in the direction of independence, given instances where Ministers have lost confidence in the capability of a Chief Executive.<sup>16</sup> In 2001 a Chief Executive sued the State Services Commissioner, alleging political interference in the decision not to reappoint her - but the Courts found no evidence of political interference.

Nevertheless, it has been widely observed that the political neutrality and independence of the public service is under increasing pressure. Concern has been expressed at the increasing visibility of Chief Executives and the increasing level of public criticism of public servants by senior politicians.<sup>17</sup> In 1993 the Treasury, in the course of costing opposition party policies, proffered comment on those policies, which was widely seen to have been damaging to the reputation for political neutrality of the public service. More recently, concerns emerged over alleged attempts by senior officers of the Army to directly influence Ministers and MPs over the allocation of funds within the Defence Force. These actions triggered a series of inquiries and caused a change in the method of appointment of the Commander-in-Chief of the armed forces.

## **Crown Entity Governance**

Serious concerns have been expressed about the level of political patronage in government appointments to public sector boards.<sup>18</sup> The *Sunday Star Times* analysis of 3 February 2002 found 41 individuals with formal political party links to the then government had been appointed to 59 positions on a wide variety of public sector boards. This number covered only people who had been electoral candidates for the party or senior party officials and did not include other political allies of the government. The article concluded that a broadly similar number had been appointed by the previous government. It should be noted, however, that the current and the former government appointed some of their former political opponents to such boards. In the case of the current Labour-led government this included appointing a former National Party Prime Minister as chairman of New Zealand Post.

The current procedures for appointment to statutory bodies are set out in a Cabinet Office Circular, and contain provisions designed to ensure appointment on merit. However, the procedures have no statutory backing, and there is no independent institution with an oversight and audit role to ensure the required processes are followed. Treasury (2001) commented that, in view of the size of the assets and funding under the control of statutory bodies in New Zealand, and the importance of having technically competent as well as representative boards, the Government should strengthen the procedures requiring appointment on merit and buttress them in legislation. Serious consideration should also be given to establishing an independent Public Appointments Commissioner, such as in the United Kingdom, with oversight and audit responsibilities.

A case can be made for public servants to play a more active and transparent role in recommending people for board appointments, particularly board chairpersons. There

should be a record of the occasions where Ministers appoint Board chairpersons and directors who have not been recommended by public officials. It should be a matter of public record why such people were regarded as more suitable candidates. These requirements should be encapsulated in legislation.

Other long-standing concerns about a lack of clarity in the governance framework for crown entities, and the lack of a clear mandate for the State Services Commissioner with respect to issues of integrity and conduct in the crown entity sector, are covered in a Bill introduced into Parliament in December 2002. This had not yet been passed at the time this report was written. It is important that these deficiencies be put right.

## **Merit Recruitment**

Rules also govern recruitment and career development. Part V of The State Sector Act 1988 contains a requirement for Chief Executives to operate as good employers, including a requirement for the impartial selection of suitably qualified candidates. In addition, S. 60 specifically requires that all appointments under the Act be on merit, while S. 65 requires every department to have a procedure to review appointments that are the subject of any complaint by any employee. S. 58 requires each Chief Executive to ensure that the department has an equal employment opportunities (EEO) programme aimed at eliminating any inequalities in respect of persons or groups, and to report performance in this area in its annual report.

It seems likely that the rules on merit appointment are widely observed. This is because of the ready availability of complaint mechanisms (and ultimately of judicial review), the ability to draw on the services of employee unions, and more broadly prevailing norms on the unacceptability of nepotism.

However, in the devolved public sector management system no aggregate data is currently compiled on the number of complaints or appeals against appointments across the public service. It is hard to say, therefore, whether there may be a problem, or an emerging problem in this area. One piece of hard evidence that is a cause of concern is the finding that less than half of respondents to a large State Services Commission career development survey in 2001 rated their organisations as "good" at treating them fairly, and more public servants rated their department as "poor" (35%) than as "good" (22%) in providing equitable access to rewards.<sup>19</sup> Further investigation would be required to assess the extent to which this reflected concerns over merit appointment or favouritism.

## **Gifts**

Increased public sector links with the private sector, and the adoption of some of that sector's ethos, have created some uncertainty about receiving gifts and hospitality. The Public Service Code of Conduct contains guidance on the acceptance of gifts, and imposes an obligation to disclose them. Chief Executives are obliged by contract to disclose private interests. In 2002, the SSC issued a circular on gifts to all departments expanding on the policy in the Code of Conduct, and is developing guidance for departments on managing conflicts of interest (including acceptance of gifts).

There is no requirement, however, for departments to maintain a register of gifts. Some departments do so, but there is no centralised information on this. Of greater importance than the existence of a register is an appreciation by senior public servants of why the acceptance of gifts raises ethical issues. There is no register/requirement relating to the disclosure of private financial interests.

## **Post-Public Sector Employment**

There are restrictions on post-public service employment for Chief Executives. Their employment contracts currently specify requirements concerning the use and retention of official information (6.4), and a 'cooling-off' period of 12 months (6.6) following disengagement. In some departments, specific conditions apply to some specialist positions. The 2002 resignation of the Reserve Bank Governor, and his immediate declaration of candidacy for Parliament, however, was a matter of concern given the

particular importance of the perception of political independence of that office under the Reserve Bank of New Zealand Act 1989. With regard to the judiciary, Judges appointed to the High Court are required to sign an undertaking that they will not resume practice before the courts on retirement or earlier termination of their appointment, although this has been waived in some circumstances.

## **Whistle-Blowing**

The Protected Disclosures Act 2000 is concerned primarily with the responsibility of officials (and private contractors working for government) to report serious wrongdoing, and the protection of those officials who do so in the proper manner. An active media also provides a safety valve for complaints. However, deliberate leaking as a means of opposing government policy, which occurs periodically, risks compromising the political independence of the public service.

Furthermore, members of the public themselves can make complaints, and request the Ombudsmen to investigate an administrative decision. There are also more specialised avenues for complaints, such as the Privacy Commissioner, and the Health and Disability Services Commissioner. These mechanisms are buttressed by the ability of the public to obtain relevant information under the Official Information Act. (See the separate sections on the watchdog agencies below.)

Finally, there are administrative checks and balances on the decisions of individual public officials. Nearly every decision affecting any individual, or groups of citizens, may be reviewed or challenged. Executive action is subject to external and independent review by the courts (judicial review – see previous section), by the Officers of Parliament (the Ombudsmen, the Parliamentary Commissioner for the Environment, and the Auditor-General), by the Privacy Commissioner, the Human Rights Commissioner, and the Race Relations Conciliator. Parliamentary Select Committees also play an increasingly important part in the process, and there are very active news media and civil society organisations.

## **Police and Prosecutors**

### **Independence**

The convention regarding the independence of the Commissioner of Police is adhered to, and the Minister of Police does not interfere in operational decisions. The Commissioner of Police is independent by convention but has no statutory independence, although this would be clarified by passage of the Police Amendment Bill (No. 2) currently before Parliament. The Commissioner is formally appointed by, and serves at the pleasure of, the Governor-General. In practice, and dating from the appointment of the current Commissioner, the appointment is made in the same way as all senior departmental Chief Executives, through a process administered by the State Services Commissioner. Prior to that the process was administered by the retiring Commissioner of Police. Passage of the Police Amendment Bill (No. 2) currently before Parliament would set this appointment process in statute. The Bill also sets out the matters on which the Commissioner of Police must take direction from the Minister of Police and where the Commissioner is independent of the Minister.

The Serious Fraud Office (SFO) is a separate government department with its own staff which handles all fraud that is either substantial (usually over NZ\$500,000) of a complex nature or of public interest. This applies to the public and private sector alike. The SFO has investigated core public service staff and Members of Parliament as well as private individuals and companies. Smaller-scale fraud is handled by the police fraud squad.

The Director of the SFO is also appointed by the State Services Commissioner, following the same procedures as apply to the appointment of all other Chief Executives of government departments.

## Complaints

Complaints against the police are handled by the Police Complaints Authority (PCA). This is an independent statutory body, headed by a retired Judge. Its independence has been questioned because of the employment of seconded police officers to investigate accusations against other officers. However, the PCA endeavours to get police officers who are not known to those making the complaints, and who come from different parts of the country to that of the accused police officer. In a country the size of New Zealand, this may not always be possible. The Independent Police Complaints Authority Amendment Bill, currently before Parliament, is intended to make the Authority more independent of the police.

## Prosecutions

Prosecutions are kept free from political interference. Police prosecutors, who handle the lower-level cases, are no longer answerable to local police commanders. More complex and high-profile cases are presented by the Crown Prosecutors who are appointed by the Solicitor-General.

As indicated above, the Serious Fraud Office (SFO) handles complex and high-profile fraud cases. The Serious Fraud Act prevents political interference in the operations of the SFO. The Director of the SFO has full discretion in the selection of cases.

## Public Procurement

There are no centralised rules in central government that set out fixed requirements for procurement, such as competitive bidding. While there are no strict formal requirements that limit the extent of sole sourcing, the Office of the Auditor-General has issued "Good Practice" Guidelines (see below) that do cover selective tendering (S. 3.2), and indicate that it should be the exception rather than the rule. With the passage of the State Sector Act 1988 and the Public Finance Act 1989, the detailed regulations covering issues such as procurement previously contained in Treasury Instructions were removed. Unlike similar legislation in many other countries, the Public Finance Act in New Zealand does not address detailed management issues. Legally, with very few exceptions, departments may purchase whatever inputs they choose, using whatever means they choose, provided that appropriation levels are not exceeded, and subject to the general accountabilities of Chief Executives under the State Sector Act.

Chief Executives of departments are responsible under the State Sector Act to the appropriate Minister for the efficient, effective and economical management of the activities of the department (S.32). The State Sector Act empowers the Chief Executive to delegate any powers, but provides that no such delegation affects the responsibilities of the Chief Executive (S. 41(7)). Chief Executives, then, are required to conduct procurement in an efficient, effective and economical manner, but there are no more detailed formal legal requirements.

In addition, the government expects its departments, and encourages other public sector agencies, to be guided in their procurement by a set of principles adopted in 2001. These include open and effective competition, and New Zealand's trade policy interests in open and transparent government procurement markets. With respect to the latter, the government has endorsed the 1999 APEC (Asia Pacific Economic Cooperation) Non-Binding Principles on Government Procurement. These provide for transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination.

There are three sources of detailed guidelines for procurement: Procurement: A Statement of Good Practice, issued by the Auditor-General in July 2001 (the OAG Guidelines); Government Procurement in New Zealand: Policy Guide for Purchasers, issued by the Ministry of Economic Development in July 2002; and Guidelines for Contracting with Non-

Government Organisations for Services Sought by the Crown, issued by the Treasury in 2001.

The Auditor-General Guidelines were first issued in 1995 following audit findings that departments often did not have proper procurement guidelines in place. The latest Guidelines apply to all public entities except local government (although it is understood that a number of local authorities are using the guidelines to inform their procurement practices). The Auditor-General Guidelines indicate that each public entity should have its own procurement manual, and that the Auditor-General will expect to find that an entity's procurement policies and practices compare favourably with the Auditor-General Guidelines.

In practice, the Auditor-General audits the procurement practices of public entities in the course of its routine financial audits. These indicate a generally high integrity environment of government procurement. There are general areas of concern, however, surrounding the quality of the business case that departments put together to justify the procurement decision and the quality of documentation departments keep on their procurement decisions, and the reasons for the selection of particular suppliers. The audit of the Ministry of Defence acquisition of Light Armoured Vehicles illustrated both of these concerns.<sup>20</sup>

It is difficult to make well-informed judgments about the degree of compliance of public entities with the various procurement guidelines. While individual entities may be audited for compliance with the guidelines, there does not appear to be a systematic approach to assessing practice in this area. Nor has there been an exercise pulling together information on procurement in individual audits into a consolidated report to provide an overall picture across government agencies.

Despite this difficulty, information on procurements is accessible and procurement decisions are made public. The guidelines referred to above are all publicly available, including being on the web sites of the respective organisations. Following a 2001 policy review, and in order to ensure full opportunity for New Zealand suppliers to compete, the government also requires departments to notify the New Zealand Industrial Supplies Office (NZISO) of their intention to contract for purchases over NZ\$50,000, and of any intended purchases which are to be the subject of a public call for tender or registration of interest. The latter are posted on the NZISO's website. Following a review in 2001, all government departments are also required to publish on the internet notices of purchase contracts awarded over NZ\$50,000 (excluding GST- Goods and Services Tax ) at least every quarter. The NZISO website provides a centralised point for publication of award notices.

In addition to the accessibility of information, procurement decisions can be reviewed. As with most actions of a public entity, procurement decisions are subject to judicial review (see the earlier section on the Judiciary). Procurement actions and decisions may also be the subject of complaint to the Ombudsmen. Furthermore, the Auditor-General receives complaints with respect to individual procurement decisions and will on occasion investigate (although the Office does not always issue a formal report on any such investigations).

There are no provisions for the blacklisting of any company proven to have bribed in a procurement process, or for specific monitoring of civil servants involved in procurement. There have been no suggestions that such measures are necessary given the very limited instances of overt corruption in New Zealand.

Finally, nepotism and conflicts of interest are covered by regulations. The general rules on conflicts of interest and disclosure of gifts applying to public servants – and described in the previous section on the public service – apply to procurement activities as well as to all activities of public servants. In addition, the Auditor-General Guidelines contain guidance on ethical considerations in procurement, such as declarations of interest of employees involved in procurement, confidentiality and disclosure, and contact with potential suppliers during the evaluation process.

## Ombudsman

The Office of the Ombudsmen was established with the passage of the Parliamentary Commissioner (Ombudsman) Act 1962. The Office investigates citizens' complaints of unfair treatment by agencies of central or local government, and complaints about the withholding of information sought under the Official Information Act 1982. The Office of the Ombudsmen also provides advice to any person considering making a disclosure of improper activity. Such actions, often referred to as whistle-blowing, are provided for under the Protected Disclosures Act 2000. There are three Ombudsmen, one of whom must oversee each complaint investigated by their staff. The Office received 5,358 complaints in 2002 and investigated 5,489 during that year. More complaints were investigated than received because of the number of complaints on hand at the end of the previous year. The appointment of a third Ombudsman during 2002 saw the small complaints backlog reduced. The Ombudsmen's 2002 report noted an increase in the number of complaints relating to the Inland Revenue Department and the Accident Compensation Corporation (ACC). The ACC is the statutory body that handles all claims for compensation for accidental injury. Other areas of on-going concern to the Ombudsmen were the continued delays found in Ministers and Government Departments responding to requests for official information.

The Ombudsmen are independent of the Executive and, as an Officer of Parliament, reports to Parliament through the Speaker of the House, not to a Minister of the government of the day. To ensure independence, the Ombudsmen Act 1975 (S. 3) states that an Ombudsman may not hold any elected position in central or local government. The Act also states that an Ombudsman may "hold no other position of trust or profit, other than his office as an Ombudsman, or engage in any occupation for reward outside the duties of his office without approval from the Prime Minister".

An Ombudsman is appointed by the same process as the Auditor-General. The position is advertised and interviews are conducted by a panel of Parliamentarians drawn from both the Government and Opposition parties. The process ensures that the appointee has the support of Parliament as a whole. While this appointment process is not spelt out in legislation, it has become accepted practice.

The appointee is protected from removal without relevant justification. The Ombudsmen Act 1975 (s. 6) states that an Ombudsman may only be dismissed by Parliament for "disability, bankruptcy, neglect of duty, or misconduct". The Governor-General may suspend an Ombudsman on these grounds if Parliament is not sitting, but may do so only for 2 months, when Parliament must dismiss the Ombudsman or the suspension lapses. While there is strict adherence in New Zealand to the convention that the Governor-General always accepts the advice of the Prime Minister, there are "reserve powers" which provide discretion and arguably would allow the Governor-General to reject advice to suspend an Ombudsman if such a request for suspension were not based on the grounds stipulated in the Act. No New Zealand Ombudsman has ever been dismissed. Controversy arose in 1992 when the first female Ombudsman was not re-appointed and the event led to a critical statement by the Chief Ombudsman. However, there was no suggestion that political pressure had been applied.

Petitioners can complain anonymously to the Ombudsmen if they fear possible reprisals. As the Official Information Act does not apply to the Ombudsmen, the Ombudsmen cannot be forced to reveal the source of information provided. The Ombudsmen have the discretion to reveal or withhold information if they consider this appropriate. This is a matter of judgment on the part of the Ombudsmen which is exercised to protect complainants unless there is a strong reason to identify the complainant.

Where the complaint to the Ombudsmen relates to denial of access to information sought under the Official Information Act, the Ombudsmen are obliged to reveal the name of the applicant. In all other cases, the Office of the Ombudsmen asks if the complaint has been made to the organisation concerned and encourages organisations to develop and use their own complaints procedures before the Ombudsmen are approached. However, citizens retain the right to make the Ombudsmen's Office their first point of complaint.



The work of the Ombudsmen is published. A summary of case notes is published annually, along with a report to Parliament and a Quarterly Review.

The Government is not bound to act on reports of the Ombudsmen. However, the practice of the Ombudsmen is to negotiate with Chief Executives of government departments over specific cases where some redress is required. In cases where no satisfactory agreement is reached, the Ombudsmen can approach the Minister responsible for the government agency involved (and, if need be, the Prime Minister). Where the organisation involved is a local authority, the Ombudsmen can approach the relevant Chief Executive or the Mayor. The Ombudsmen can also alert Parliament to cases where they are frustrated over their negotiations with the organisation under question. Over recent decades this has occurred, particularly following frustration over delays in government responses to applications for official information. Finally, the Ombudsmen can initiate their own investigations where they consider it necessary.

## **Investigative/Watchdog Agencies**

New Zealand has a number of investigative and watchdog agencies. This section deals with the following six agencies: the Treasury, the State Services Commission, the State Sector Standards Board, the Department of Prime Minister and Cabinet, the Health and Disability Commissioner, and the Privacy Commissioner.

The Police and the SFO are investigative agencies but for the purposes of this survey their role is covered in the section on Police and Prosecutors. The Human Rights Commission is dealt with under the Civil Society section of this survey.

### **The Treasury**

The Treasury is the principal economic and financial adviser to the Government. It is also the government's accountant. It reviews expenditure, public debt, tax policy, and the use of official resources. It is headed by the Secretary to the Treasury who is a public servant.

Under the Public Finance Act (PFA) 1989 the Treasury must comply with generally accepted accounting practices. These are clarified in section 2 of the PFA. Section 35 of the PFA requires that each department covered by the PFA must spell out its accounting practices. Section 37 states that annual statements for each department must be accompanied by a statement of responsibility signed by the Chief Executive Officer and Chief Financial Officer.

PFA sections 80 and 81 give the Treasury the power to instruct any department on matters relating to accounting procedures or disclosure of expenditure. Section 79 gives the Treasury the right to request information, but it does not have the power to enter premises to obtain information.

In practice, because of the Treasury's power in formulating the annual budget, Departments generally comply with its requests and instructions. These requests and instructions to Departments are examples of the exercise of the Treasury's preventative, educative and awareness-raising responsibilities.

The Treasury also includes the Crown Company Monitoring and Advisory Unit (CCMAU), an autonomous agency administered by the Treasury to monitor the performance and governance of other Crown companies such as Crown research institutes. CCMAU also administers the process used to appoint directors to these institutions, although Ministers make the actual appointments. CCMAU is administratively linked to the Treasury but it is operationally independent.

### **The State Services Commission (SSC)**

The powers of the SSC are spelt out in the State Sector Act 1988 (SSA). The SSC is headed by the State Services Commissioner who is a public servant and is responsible for appointing most of the Chief Executives (CEs) of government departments and is the

employer of these departmental CEs (SSA sections 6, 35, 36, 38, and 39). The Commissioner also negotiates the terms and conditions of the departmental CEs, although these are also approved by the Cabinet.

The SSC has wide-ranging powers to investigate matters involving the departments for which the SSC is responsible. These powers include the right to obtain information and enter the premises of departments (SSA sections 8, 9, 10, 11).

The Commissioner is responsible for the promotion of ethical standards within the public service and the production of guidelines to ensure that public servants know what is acceptable and unacceptable practice. The Commissioner makes the promotion of standards within departments a part of the contract between the Commissioner and departmental Chief Executives (CE). The SSC has published a Code of Conduct for public servants, which also forms part of the contract between CEs and the staff they employ. The code acts as a guideline for ethical standards of behaviour but does not prescribe or proscribe behaviour.

However, the SSC's view of the Code of Conduct and guidelines for standards of conduct are less important than the culture that has evolved within the public service. The written rules and guidelines are designed to allow the control and dismissal of "outriders" who may want to wilfully behave in a manner that is unacceptable to the standards expected by the SSC. Day-to-day standards of behaviour and development of acceptable practice are not determined by the written guidelines produced by the SSC, but rather are a reflection of the values of the individuals who staff the institution.

The SSC is concerned that since 1988, when the responsibility for the promotion of state sector standards became the responsibility of each departmental CE, public service values have become very "patchy" as different CEs have addressed the issue with different styles and placed differing degrees of importance on the issue. The Commissioner is not comfortable that an understanding of public sector values has "trickled" down from the CEs. The State Services Commission is now actively working with CEs and with public servants to restore the focus on public sector values. These concerns are strongly echoed by the State Sector Standards Board (see below), which has pointed to a loss of the former public service ethos and a fall in morale as public servants feel undervalued and often criticised by politicians. The Commissioner has already written an annual report (2000) focusing on incidents of corruption in the public service. These involved the Immigration Service, the Inland Revenue Department and the Department of Work and Income (which administers benefit payments). The Commissioner said that while the cases were isolated and small in scale, they were still alarming. "In a country that relies largely on voluntary compliance with tax laws, benefit administration and a range of licensing and registration arrangements, citizens' compliance is related directly to their trust in the way in which their personal information will be held, the honesty of the officials administering the law, and citizens' perception that all are treated equitably. This public confidence is fundamental to a successful civil society."

The 2000 report warned that these incidents of corruption show that New Zealand cannot be complacent about the standards of integrity in the public service, especially with the greater presence in the Pacific region of organised crime based in Asia and an increase in political instability in the region.

Section 5 of the State Sector Act requires the State Services Commissioner to act independently of the Minister, although Section 4 also states that the Commissioner is responsible to the Minister responsible for the Commission. In practice there is no conflict between the two provisions, as the Commissioner is supposed to act independently of the Minister on employment matters but take direction from the Minister on policy matters. It is also a strong and long-standing convention in New Zealand politics that the public service be independent and offer free and frank advice to the Minister (See Public Service section above).

In practice, this means that in appointing a CE the Commissioner will have to consult with the relevant Minister or Ministers, in order to get a clear idea of the kind of person who would be acceptable to the Government. This can be problematic when the Minister changes and there is a conflict between the CE and the new Minister, or where there are

several Ministers to whom the CE has to report. The Commissioner takes the view that if a Prime Minister were to reject the person proposed by the Commissioner to head a department this would call the competence of the Commissioner into question and could trigger the Commissioner's resignation. This attitude means that the Commissioner must acquire a clear understanding of the views of the Government over the suitability of nominees to head government departments. These realities limit the independence of the Commissioner from politicians in the exercise of one of his/her key roles, the appointment of other departmental CEs, but recognise the reality of the need to appoint CEs who can work with Ministers. Where there was an irreconcilable conflict between a Minister and a CE, the employment contract between the Commissioner and the CE used to allow for the negotiation of an exit agreement - the presumption being that, so long as the Minister did not breach the State Sector Act or general employment law, it was the appointed public servant's obligation to work with the elected Minister. Those provisions in CE's contracts have recently been removed and have not been replaced.

Section 16 of the State Sector Act sets out the two grounds on which the State Services Commissioner can be dismissed. These are misbehaviour and incompetence. Removal can be carried out only by the Governor-General who must, within seven days of the suspension, set out the grounds for the suspension before the House of Representatives. The House then has 21 days to decide whether to suspend the Commissioner; otherwise the suspension lapses. No State Services Commissioner (or Treasury Secretary) has ever been dismissed.

### **The State Sector Standards Board (SSSB)**

Established for a two-year term in November 2000, the SSSB provided advice and comment on the state sector to the Minister of State Services. Its members included senior people with experience from the private sector, the public sector, public sector trade unions, and Maori. It was established to provide outside advice on future direction for the public service. It was intended to give new insights on the current condition of the public service and priorities that needed to be addressed in the future. Because it was not part of the public service, it could comment on the role of control agencies such as the State Services Commission and the Treasury, and set out issues that all departments, including these control agencies, needed to address. It produced two extensive reports (see Appendices 1 & 2), listing problems and areas of future concern, and was then disestablished in December 2002.

The SSSB commented on the ethos of the state sector and recommended a need for greater leadership from the institutions at the centre of the public service. In the view of the SSSB, there is a need for greater unity of purpose in an increasingly fragmented public service which has placed undue emphasis on economic goals. The SSSB has also called for a more accountable public service which places greater emphasis on the development of staff, and the integrity, efficiency and status of the public service. Its two reports to the Minister of State Services have emphasised a loss of the ethos of public service and the need for a greater role for the State Services Commission in the public sector to promote and retain high standards of integrity. It has also called for a clarification of the role of Ministers in the governance of state-owned enterprises and other state-owned agencies outside the core public service.

In particular, the SSSB proposed a "Draft Statement of Commitment by the Government to the State Sector". The government did publish this commitment, but it is unclear whether this will be a continuing practice.

The SSSB also concluded that improvements in state sector performance and ethics could come from better leadership rather than structural reforms. They produced a list of detailed reforms with particular emphasis on leadership from the centre of the public service, implying a stronger role for the State Services Commissioner. (See Appendices 1 & 2.)

## **Department of Prime Minister and Cabinet (DPMC)**

The DPMC does not have a formal role in monitoring the public service, but it does have a powerful co-ordinating function regarding setting and implementing government policy. This status is symbolised by regular meetings of all departmental CEOs chaired by the CEO of the DPMC at which the Secretary of the Treasury and the State Services Commissioner sit either side of the CEO of DPMC. In practice, this powerful central role makes the DPMC influential in crisis management in all matters involving the public service.

The effect of this increased importance of the DPMC is to allow greater political monitoring and direction of departments, especially by the Prime Minister. This creates the possibility of departments feeling that they have two political masters, the responsible Minister and the Prime Minister. This coordinating role of the DPMC has increased with the formation of coalition governments under MMP.

The presence of two or more parties in Cabinet could increase pressure for public servants to take political sides, and highlights the need for senior officials to remain politically neutral.

## **Health and Disability Commissioner**

Although the Health and Disability Commissioner is not directly concerned with issues of corruption, the office plays an important role in providing an avenue for complaints in a vital area of public policy and has produced highly critical and influential reports on, for example, the functioning of particular publicly owned hospitals.

## **The Privacy Commissioner**

This agency has two main functions. First, it ensures that government and private sector agencies/organisations do not publicly release personal information they hold without the approval of the person concerned. Secondly, it also ensures that government departments agree to requests from an individual to disclose what information the department has on that individual.

The Privacy Commissioner has the power to take legal proceedings against individuals or organisations in breach of the Act, and this can include fines. The rulings of the tribunal that adjudicates on these cases are legally binding.

## **Fragmentation**

As can be seen, New Zealand is served by a wide range of 'watchdog' agencies. Indeed, it is a debatable question as to whether this fragmentation detracts from, or enhances, the effectiveness of these agencies. New Zealand's small size allows the various agencies to work together. The combination of specialisation and close cooperation is, in this sense, a strength, not a weakness, although the report of the State Sector Standards Board (see above) suggested that there has been a lack of coordination in the retention and promotion of a public service ethos. This is also recognised in the more active approach now being taken by the State Services Commissioner to the promotion of higher ethical standards in the public service.

## **Media**

### **News Media Ownership**

The spread of news media ownership has been greatly diminished over the past two decades and all the private sector news media are foreign-owned. The only domestically owned news organisations are the publicly owned TVNZ and Radio New Zealand.

## Newspapers

New Zealand has a high number of daily newspapers in relation to its population size. With a total population of approximately 4 million, around 1.7 million New Zealanders over the age of 10 read a newspaper each day. There are 25 daily newspapers, of which 17 are evening papers. Ninety per cent of the newspapers published are owned by either the Wilson and Horton Group, which is part of the Irish-controlled company Independent News and Media, or Independent News Limited, which is part of Rupert Murdoch's News Corporation. At the time of going to print, this latter group had reached an agreement to sell all its New Zealand newspapers to Australia's Fairfax Group. However, the sale required approval from the Commerce Commission which has the power to prevent arrangements that reduce competition. The Commission had not released its ruling at the time of this report going to print.

There are also two national weekly business papers, both owned by New Zealand companies.

There are also a large number of free community newspapers. Some of these are owned by one or other of the two main newspaper publishing companies, although many are privately owned by family companies.

## Television

There are two main free-to-air television companies - TVNZ, which is publicly owned by the state and has two free-to-air channels, and TV 3, which is owned by the Canadian company CanWest.

There is increasing take up of pay-to-view services, such as that provided by Sky and the cable service, Telstra Clear.

## Radio

There are three main networks: the publicly owned Radio New Zealand, The Radio Network, controlled by Independent News and Media (which also own the Wilson and Horton Group in Newspapers above), and CanWest Radio, which is controlled by the same company that owns TV 3. There are also a number of independent stations and a Christian network.

It has been argued that the narrow ownership of New Zealand's news media puts the country in "perilous danger" and that a small group of news companies can exert "disproportionate power and influence".<sup>21</sup> However, without any strong evidence that the ownership structure of New Zealand's news media has undermined the watchdog role of journalists, it seems likely that any forced restructuring of news media ownership by the Government would expose the news media to government interference, and do more harm than good.

## Freedom and Censorship

New Zealand enjoys freedom of speech and a free press. This is guaranteed under section 14 of the Bill of Rights Act. However, this is not supreme legislation and does not override other legislation. It is also limited by a rather general provision in section 5, which states that the Bill of Rights act is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The free speech provision of the Bill of Rights does, however, influence judicial decision-making.

## Censorship

There is no active censorship of the media in the sense of the government having a legal right to censor news reportage. While at times highly critical, the government does not make threats against news organisations concerning the way they report news.

## Broadcasting

The Broadcasting Act 1989 established the Broadcasting Standards Authority (BSA) which has the power to hear complaints about broadcast material (covering taste, decency, law and order, privacy of individuals and the obligation to give all sides of arguments when covering controversial stories). The BSA has the right to conduct hearings into complaints and block the broadcast of a programme, and order apologies and impose fines for material already broadcast which has breached the Act. The Broadcasting Act (section 44), however, specifically excludes the Minister of Broadcasting from interfering in any way in programme content or news gathering and presentation. Radio New Zealand's Charter guarantees its independence from government.

## Print media

Newspaper and magazine publishers have voluntarily formed the New Zealand Press Council, which hears complaints about standards of print journalism. This is a private body which has no enforcement powers. The grounds on which readers have the right to complain are public and the Council publicises all rulings that are in favour of a complainant. It has 11 members, six from the public and three representatives of the newspaper and magazine publishers and two from the journalists' trade union.

## Videos and Films

The Films, Videos, and Publications Classification Act 1993 deals with matters of taste and applies to videos and films. In the 1990s the Authority established by the Act banned two videos it considered to be offensive. The videos were intended to be critical of gays and had political aims, but the Authority was overruled by the Court of Appeal on the grounds that it endangered free speech. This decision has limited the censorship scope of the Authority.

## Reporting of Corruption and Libel Laws

All news media carry stories on corruption whenever there is news on this subject. There is not, however, a strong tradition of investigative journalism in New Zealand, with news organisations often preferring to commit resources to cover immediate news, which takes less time to get and therefore has a lower labour cost. The exceptions are the two weekly business papers (*The National Business Review* and the *Independent*), the *New Zealand Herald*, the *Dominion Post*, and the *Sunday Star Times*.

There is some evidence that libel laws do have some inhibiting effects, more so in smaller publications. Staff of community newspapers have less training and so may be less inhibited because they are less aware of possible legal sanctions. However, local councillors tend to be litigious, and this counters the enthusiasm of community newspaper staff. Journalists generally feel that there is a way of getting the story out, especially with good legal advice.

## Licensing

There are no licences required to print a newspaper in New Zealand. The only statutory limitation on broadcasters comes from the Broadcasting Act referred to above. Frequencies required by broadcasters are auctioned, although the government has intervened to ensure that certain groups, such as Maori, have guaranteed access to radio frequencies. The government also funds Maori radio stations and is establishing a Maori television service to ensure that Maori culture is presented publicly.

## Civil Society

Civil society groups are playing an increasingly important role in the New Zealand political process. A wide range of citizen groups monitor government agencies from a variety of

standpoints. Business and farming groups are represented by lobbying organisations such as the Business Roundtable, Business New Zealand, Federated Farmers and the Forest Owners' Association. Trade unions play an active part in commenting on Government policies and service delivery. Other groups place more emphasis on social values, and include the City Missions, the Salvation Army, and the Anglican, Catholic and Presbyterian churches. There are also numerous narrow interest groups ranging from firearms enthusiasts to sports organisations.

The Select Committees of Parliament hear submissions from citizens' groups on almost all legislation. Such groups make extensive use of this opportunity to influence politicians. Select Committees also conduct enquiries on a wide variety of issues of their own choosing at which a wide range of civil society organisations regularly appear. Since the advent of proportional representation, the Government no longer controls all the Select Committees so cannot dominate these very public forums.

### **Official Information Act (OIA)**

The Official Information Act 1982 gives any citizen the right to obtain all official information with the following restrictions. Information can be withheld if it is likely to prejudice: the security or defence of New Zealand and its relations with foreign Governments; the maintenance of the law, the prevention, investigation, and detection of offences; the right to a fair trial; and the safety of any person.

The Act cannot be used to damage the economy of New Zealand by prematurely disclosing information about: exchange rates or the control of overseas exchange transactions; the regulation of banking or credit; taxation; the stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes; the borrowing of money by the Government of New Zealand; and New Zealand's entry into overseas trade agreements.

Other grounds on which information may be legitimately withheld include a breach of personal privacy and anything jeopardising the provision of free and frank advice from public servants to Ministers.

The Ombudsmen hear complaints about refusal or delays in the release of official information. Over recent years the Ombudsmen have been increasingly critical of refusals or delays from government departments in the release of information which should not be withheld (see the Ombudsman section of this report). This criticism applies to both public servants and Cabinet Ministers.

The Parliamentary Service is exempt from the OIA. This seems to be counter to the spirit of open government, and this study recommends that this exemption be removed.

### **Security Intelligence Service (SIS)**

The Security Intelligence Service (SIS) has no archival policy requiring it to release information publicly after a certain period of time. While legitimate security grounds will warrant withholding of much of the information held by the SIS (especially that sourced from overseas), there can be no justification for a policy of total secrecy with no time limits. Intelligence agencies in similar jurisdictions – such as the Australian Security Intelligence Organization (ASIO) – have a policy of making information available after a certain period of time – in ASIO's case, 30 years - with prescribed limitations. There is a legitimate public interest in how the SIS has utilised its authority and powers in the past, and a need to ensure adequate accountability for the use of those powers.<sup>22</sup> The government should therefore move immediately to introduce a similar requirement for public release of information held by the SIS after 30 years, with clearly prescribed and justifiable limitations.

### **Human Rights Commission**

Participation in politics and society by minority groups is protected by the Human Rights Commission, an independent Crown entity charged with the administration of the Human

Rights Act 1993. The Act makes it unlawful to discriminate on the grounds of sex, marital status, religion, race, disability, age, political opinion, employment status, and sexual orientation.

## Regional and Local Government

New Zealand has 12 Regional Councils and 74 District Councils. The functions of the Regional Councils are essentially regulatory, and include: management of the effects of use of freshwater, coastal waters, air and land; bio-security - control of regional plant and animal pests; river management; regional land transport planning and contracting of passenger services; harbour navigation and safety; marine pollution and oil spills; and regional civil defence preparedness.

The main functions of territorial councils (District and City Councils) are provision of services, including: community well-being and the development of environmental health and safety (including building control, civil defence, and environmental health matters); infrastructure (roads and transport infrastructure, sewerage, water/storm water); and recreation and culture resource management, including land use planning and development control.

District Councils' resource management responsibilities under the Resource Management Act 1991 (RMA) involve the issue of building permits and land use consents to a far greater extent than central government so the questions in the Public Service section of this survey involving these issues are also dealt with in this local government section.

### Conflicts of interest

The nature of much of the work contracted out by local government makes this a high-risk area for conflict of interest and corruption. The Local Authorities (Members' Interests) Act 1968 requires members to disclose any pecuniary interest they may have involving an item they deliberate on in their capacity as elected councillors. It is enforced by the Auditor-General. For example in September 2002 a Wairoa District Councillor was forced to resign when it was revealed that he had not disclosed that he owned a grounds maintenance company that had a lawn-mowing contract with the Council.

Common Law also covers the way elected Councillors vote on Council decisions. The Courts have ruled that Councillors must vote with an open mind. Two Wellington City Councillors (Wellington is the capital city) chose to resign from the local branch of the Labour Party after the party tried to direct how they should vote on an issue facing the council, in this case the sale of shares in the city's airport. They resigned in order to be seen to fulfil the obligation to consider matters with an open mind, and thus not expose the Council to judicial review by any disgruntled party.

### Nepotism

Under the Local Government Act 1974, elected Councillors only get to appoint the Chief Executive who then appoints all staff (LGA, 1974, S113A to 119J). All the staff are responsible to the CEO, not the Councillors (who cannot interfere in the workings of the staff without going through the CEO). The Local Government Act (LGA, 1974, S194) also requires appointments to be made on merit so an appointment that was possibly not based on merit could be challenged in court.

In allocating committee memberships, Councils are required to separate councillors with responsibilities within the Council for regulatory approvals from councillors with responsibilities for service delivery, so that regulatory powers are not used to influence council services.



## **Award of contracts**

Territorial Councils delegate some authority to paid officials to let contracts (for example for vehicle maintenance), but the delegated authority is usually described in dollar terms. Decisions on contracts with a value greater than the delegated figure are taken by the elected Councillors rather than their staff. The terms of the delegation are discoverable under the terms of the Local Government Official Information and Meetings Act 1987.

However, there is growing suspicion among some citizens that this process - which is less transparent than decisions taken in public by the council - fosters favouritism. The alternative, which some councils have chosen, is to dramatically reduce the value of the contracts for which authority is delegated to officials. However, this means that the council itself makes more detailed decisions, which slows down the decision-making process and lays open the council to further complaints from frustrated citizens and businesses.

All local authorities must make all contracts over a financial limit contestable by calling for public tenders (LGA, 247 E). New Zealand's competition and monopoly control regulatory authority, the Commerce Commission, has ruled that all council contracts have to be in a form that allows genuine competition rather than a form that would mean that only one contractor (for example, the council's own Works Department) could conceivably bid for the contract.

Under the LGA, if a council wilfully ignores the advice of the CEO and the result of that involves a loss to the council, individual councillors can face a personal surcharge (LGA, 1974, S2230). This provision has never been exercised, although the Auditor-General has previously exercised powers of surcharge.

## **Hospitality**

No explicit provision obliges local politicians to declare receipt of hospitality relating to their responsibilities, but if their judgment was shown to be influenced they could be liable under the Crimes Act for receiving bribes. Under the Local Government Act any councillor convicted of a crime involving a possible sentence of two years or more loses his or her seat on the council (LGA, 1974, S101X).

In practice, there is little political party involvement in local politics, so there is intense political scrutiny of each other by councillors. Accusations of receipt of hospitality intended to influence decision-making is a potential political weapon to use against rivals. In practical terms, this is an important check against corruption.

## **District Health Boards (DHBs)**

There are 21 DHBs which are responsible for ensuring the provision of publicly funded health and disability support services for the population of a specific geographic area. Up to 11 board members will sit on each board: seven are elected and four are appointed by the Minister of Health in consultation with his/her colleagues. In practice, they have little power.

## **Community Trust Boards**

The Minister of Finance appoints Members of the Community Trusts, which administer the assets of the old Community Trust Bank. There is a view that some appointments by the current and previous governments have been made on the basis of political patronage rather than competence. There is no evidence that this process has led to corrupt decisions, but it is likely to have led to less competent governance, and less competent governance may allow corruption.

## **Transparency**

The Local Government Official Information and Meetings Act requires all meetings to be held in public with two exceptions: where there is commercial sensitivity over the matter under discussion, and where the personal affairs of an individual are being discussed.

According to Local Government New Zealand (the central body which represents all local authorities in New Zealand), there is some concern at the frequency with which councils go into committee, thereby preventing their workings from being publicly scrutinised. Under the LGA, a paid official is required to advise the Council on whether it is permissible to go into committee - which is intended to be a safeguard against excessive secrecy. Some councils go into committee frequently and, while there is no confirmed evidence that this process is abused, the high variation indicates that some councils have very different thresholds relating to the exercise of this discretion. While the minutes of meetings are discoverable under the Local Government Official Information and Meetings Act, they may not reveal all that transpired in the making of the decision.

There is also growing concern over the frequency with which Councillors hold informal workshops with Council officials. As much of the discussion at such meetings is verbal it will not be recorded and so will not be discoverable. The workshops have the effect of making decision-making less transparent because much is agreed informally. The discussion which takes place at the ensuing public Council meeting might not reveal why a particular decision has been made. Such practices raise the possibility of decisions being made without citizens being able to judge the decisions, and increase the possibility of ill-informed or corrupt decisions being made.

Both the Auditor-General and the Ombudsmen have jurisdiction over local authorities, mirroring their powers at a national level. There is a Local Government Official Information and Meetings Act giving citizens rights to demand information from councils and to take their frustrations with Council to the Ombudsmen.

The Local Government Commission which handles local electoral issues decides on matters such as the number of councillors and local electoral boundaries. There is also an Environment Court which resolves disputes over environmental decisions and consents made by local authorities. This Court is part of the national judicial system.

## **Local Government Handling of Building Permits and Resource Use Consents**

Under the Resource Management Act, the right to consent to the construction of buildings, and to particular land uses, resides with local authorities. There is growing tension over the exercise of this responsibility between land users (such as farmers and developers of residential sub-divisions) and Councils.

Councils delegate this responsibility to their staff, usually with thresholds so that minor applications can be handled without the extensive public consultation required for larger consents. Such delegations are discoverable under the Local Government Official Information and Meetings Act. Consent applications processed by Council staff do not involve public notification and are processed more rapidly than those considered in public by the elected councillors. Many observers are concerned that such consents are open to abuse, as they are not publicly notified so no one knows what actually happened in these decisions. Accordingly, some councils have reduced the threshold for public notification or even withdrawn delegated powers to staff altogether.

Land users, however, are often indignant at the length of time taken to process publicly notified consents. The tension between these two views is ongoing and rising, and has seen pressure on Parliament to change the Resource Management Act which sets this process in place.

The delays in processing applications requiring public notifications have, in 2002, raised accusations that it is becoming cheaper for applicants to pay off their opponents rather than go through the legal process. One payment in 2002 by the commercial arm of the South Island Maori Iwi (tribe), Ngai Tahu, to a potential opponent, was highlighted in a newspaper article (*Sunday Star Times* 3/11/02) as an example of such a payment. However, the intention of the government at the time of the passing of the Resource Management Act was to encourage potential litigants to explore such conflicts in terms of property rights and allow for payments to settle disputes, with the Environment Court as a place to finally settle irreconcilable disputes.

There is concern that the complex processes of the Resource Management Act could encourage corruption by providing incentives for those seeking resource consents to buy off opponents. Settling disputes in this manner creates the impression that disputes can be settled with money, which in some cases could be seen as bribery, or increase the propensity to pay bribes in the future. Delays in getting cases to the Environment Court increase the likelihood of disputes being resolved in this manner because recourse to the legal system is excessively delayed.

### **Control Over Distribution of Gambling Profits**

Gambling is licensed in New Zealand with operators required to distribute a proportion of the profits they make. There is a small number of casinos, which are strictly controlled, but a large and rapidly growing number of gambling machines are located in bars and pubs which are not classified as casinos. The distribution of the profits from these machines is administered by local and some national charitable societies. Many of these societies are established just to distribute these gambling proceeds. According to the Department of Internal Affairs, NZ\$200m was disbursed from non-casino gambling sites in 2002, continuing regular increases in the annual sum disbursed over the past decade.

The current system of disbursing the proceeds from non-casino gambling machines gives considerable control over disbursement to the private organisations that own the machines. There are no standard criteria for making applications, nor is there easy public access to the criteria used to allocate gambling proceeds.

There is much anecdotal evidence, and there are some verdicts from the courts, which indicate that gambling proceeds are allocated to organisations which agree to conduct future business with the machine site operators. A recent case in Wanganui saw a pub licensee banned from further involvement with the disbursement of gambling money.

### **The Governance of Crown/Maori Relations<sup>23</sup>**

An important issue is whether, in settling historical Treaty of Waitangi claims, the government has the balance right between a permissive approach - with very general minimum governance requirements of organisations receiving settlement assets - and a somewhat more prescriptive approach.

As argued by Greenland, iwi governance (and Maori collective governance more generally) faces a number of unique challenges, including:

- A lack of certainty over who has rights to draw on collective resources.
- A lack of clarity in who represents whom.
- A lack of clarity in vertical relationships between hapu (sub-tribe) and iwi (tribe).
- Inadequate legal vehicles for collective organisation.
- Diverging and still evolving notions of the appropriate relationship between members and trustees, and a lack of participation by individual iwi, hapu and whanau members in governance – which is important to ensuring the satisfactory functioning of governance structures and the accountability of leaders.

Added to these fundamental challenges is a rapidly changing and complex mix of social, economic and cultural objectives that iwi and other groups are pursuing.<sup>24</sup>

With respect to the adequacy of legal vehicles, at present Maori are able to use a range of legal entities for collective organisation, including Maori Trust Boards, Charitable Trusts, and Incorporated Societies. However, some features of Maori kinship-based organisation do not mesh well with the presumptions of New Zealand law (for instance, Maori organisations have difficulty registering as Charitable Trusts because the public benefit test requires that beneficiaries not be related by blood). Most Treaty claimants currently use

the structure of a common law trust, but there is a view amongst officials that the existence of an alternative standardised legal personality under which claimant groups could incorporate would have facilitated the settlement of historical Treaty claims.

Consideration of the continued appropriateness of the legal vehicles available for Maori collective organisation should therefore be accorded a high priority by government.

One can argue that government's role should be limited to providing such minimum enabling conditions and leaving the evolution of iwi governance to Maori to determine. However, the role of iwi, hapu, and other collective groups as the recipients of public resources from Treaty claims, and the need to protect the durability of Treaty settlements, means that iwi governance is likely to continue to be an area of contested norms in New Zealand. The lack of participation by eligible members could be a risk to the durability of Treaty settlements if they are not seen as being the outcome of fair and inclusive processes. Although large majorities of participating beneficiaries have supported Treaty settlements to date, few settlements have been endorsed by a majority of claimant group members entitled to vote, due to low voter turn-out and internal conflict.

The Office of Treaty Settlements (OTS) requires Treaty claimants to submit information in response to 20 questions on aspects of governance.<sup>25</sup> OTS uses this as a checklist in its assessment of the governance arrangements, although OTS has no explicitly stated minimum standards against which it assesses the governance arrangements. This is in contrast to the specific governance requirements developed by the Treaty of Waitangi Fisheries Commission to ensure that when fishing quota is allocated to iwi it is to entities meeting some minimum specified measures of transparency and accountability.<sup>26</sup>

The government's policy on the appropriate balance between a permissive and a more prescriptive approach to iwi governance is an important issue, and is one worthy of more attention in government, and better informed public debate, than has been the case to date.

A further point of tension is the increasing role of collective Maori organisations as publicly funded providers of social and other services. Contracting out by government agencies to Maori organisations for the provision of public services must be accompanied – and be seen to be accompanied – by the same transparency and accountability requirements that apply to the use of all other public monies.

The Government is already playing a more active role in building the capacity for good governance amongst iwi, for example, through facilitating the availability of emerging best practice models of community governance, and providing governance training for organisations that manage Maori-owned assets.

More attention to these issues could help to reduce the current polarisation of views in the community over "Maori rights" issues and Maori governance. The resolution of historical Treaty claims, and clarifying the role of the Treaty in contemporary society, are areas of central importance to New Zealand's future. The government's recently announced public education initiative on the Treaty is therefore welcome. However, care will need to be taken to avoid politicisation of the issues. The government also needs to deliver at the same time the message that standard transparency and accountability requirements apply to the funding of service delivery by collective Maori organisations.

## Conclusion

A recurring theme of this study is that what matters is not so much anti-corruption laws and rules, as the maintenance and promotion of a general culture in which unethical behaviour is unacceptable throughout society. While this report recommends a range of reform measures, it recognises that writing down guidelines and codes of conduct does not mean that they will necessarily be followed. That will depend on the wider ethical culture.

It is important therefore to establish just what the level of commitment to 'clean' government is in New Zealand. Surveys should be undertaken to reveal the level of understanding of what constitutes acceptable conduct amongst politicians, the public and the private sectors, and their level of commitment to it. The results of these surveys would provide guidance for areas of risk in the NIS, and for follow-up ethics promotion and integrity management.

### How strong is the New Zealand Commitment to democracy?

While norms of democracy enjoy solid support amongst New Zealanders, evidence suggests there is considerable variation in support across different sub-groups, and a possible fragility in the strength of commitment to them over time, especially when they are perceived as conflicting with other strongly held norms or otherwise come under pressure.

For instance, Webster has analysed responses to the New Zealand Survey of Values (1985, 1989 and 1998).<sup>27</sup> On the basis of respondent self-identification, Webster considers there are at least six distinct cultures in New Zealand.<sup>28, 29</sup> Of particular interest in the current context is evidence Webster presents on divergent views towards various aspects of governance and social norms, which he suggests illustrate the potential for future social conflict in New Zealand. For instance, on the basis of Webster's analysis<sup>30</sup>:

- **Strength of support for democracy:** while 73% of "Pakeha" considered a strong leader who does not need Parliament to be very bad, only 34% of "Maori-Maori" thought so; while only 13% of "New Zealanders" thought democracy was ineffective due to poor decision-making, 47% of "Maori-Maori" thought so;
- **Support for the Treaty of Waitangi:** while only 1% of "Maori-Maori" wanted to abolish the Treaty, 49% of "Europeans" did.
- **Civic morality:** while 91% of "New Zealanders" considered accepting bribes in the course of duties to be unjustifiable, only 72% of "Maori-Maori" thought so;
- **Confidence in the police:** 84% amongst "Pakeha", but only 55% amongst "Maori-Maori".

Commenting on these results, Webster suggests that, by themselves, they may be fairly inconsequential. He considers, however, that the way in which the beliefs are clustered illustrates that there is fertile ground in New Zealand for mutual antagonism and manipulative politics, with the potential for democracy to be restricted in the name of individual freedom or historical rights. "Destabilisation will be most conspicuous when the heart of the culture – in our case a belief in democracy – is seriously disregarded. Such is not yet the case in New Zealand, but there are disquieting signals."<sup>31</sup>

Further observations from the 1998 New Zealand Survey of Values relevant to discussion of governance in New Zealand are<sup>32</sup>:

- 70% of respondents agreed that the country is run by a few big interests looking out for themselves (the corresponding number in 1989 was 54%);
- Only 15% had confidence in Parliament;
- While 29% had confidence in the public service, this was down from 49% in 1985.

## Recommendations

### Executive

- The Auditor-General should carry out audits of Ministers' declarations of financial interests and assets.
- A Code of Conduct should be established on post-Ministerial employment. This should provide guidelines on ex-Ministers immediately becoming lobbyists, or entering business in the field of their Ministerial responsibility.

### Legislature

- The Code relating to conflict of interest by Ministers should be extended to all MPs and their families. This should include public disclosure of private interests and assets, and gifts and hospitality received.
- MPs' allowances, and the issue of the taxation of these allowances, should be determined by an independent authority.
- Select Committees should make better use of the resources available to them to retain the services of independent expert advisers.
- The coverage of the Official Information Act should be extended to include the Parliamentary Service.

### Political Parties and Elections

- Significant anonymous donations to political parties should be prohibited.
- The operation of 'front' organisations and trusts to fund political parties should be made more transparent through being subject to the same disclosure requirements as political parties.
- Consideration should be given to the formation of a single election authority.
- The form and level of state funding of political parties should be revisited.
- The basis for allocating election broadcasting time to political parties should be reviewed.
- Incumbent MPs who use their taxpayer-funded travel and other benefits during the election period should be required to include these costs in the disclosure of their election expenditure.

### Judiciary

- The judiciary should draw up a set of guidelines which clearly sets out what is acceptable and unacceptable behaviour by judges, to facilitate the disciplining of judges who breach these standards.
- The Government should proceed with its plans to establish an office of Judicial Conduct Commissioner, and a Judicial Appointment and Liaison Office.
- Measures should be taken to increase public access to Court information, including the operation of the Family Court.

### Public Service

- A survey should be undertaken of politicians and public officials' understanding of the standards of integrity in the Public Service. (Similar surveys should also be undertaken of the private sector and the general public.)

- A code of conduct should be established relating to a period of restraint regarding post-public service employment by senior officials. (This would build on and extend the restrictions currently applying to Chief Executives.)
- Centralised mechanisms should be introduced to monitor government departments' adherence to good practice in specific areas of risk to integrity including merit appointment, procurement and contracting out.
- Excessive political patronage in appointments to public body boards should be ended through introduction of legislative requirements for greater transparency. Consideration should be given to establishing an independent Public Appointments Commissioner with oversight and audit responsibilities.
- The governance framework for Crown entities should be strengthened, and the State Services Commissioner's mandate for ethics management be extended to the Crown entity sector (as provided for in legislation currently before Parliament).
- The State Services Commission should take a more active role in conducting ethics promotion programmes across the wider state sector, as it has begun to do within the public sector.

### **Public Expenditure and Audit**

- The Government should present regular reports to Parliament on tax expenditures (including tax concessions), and of its overall tax policy strategy.
- The executive should be required to respond within a three-month period to Parliament regarding reports or recommendations made by the Auditor-General.

### **Regulations**

- A Regulatory Responsibility Act should be introduced, containing a statement of principles of good regulatory practice, clear assignment of accountabilities, and a disclosure regime to facilitate monitoring of compliance with the principles.
- The concept of an independent Regulatory Task Force should be considered.

### **Police**

- The independence of the Police Commissioner should be reinforced by statute (as provided for in the Police Amendment Bill (No. 2) currently before Parliament).
- The practice of private sector sponsorship of police vehicles (and similar projects) should be reviewed.

### **Regional and Local Government**

- All councils should adopt a code of conduct applying to councillors (as provided for under the recently passed Local Government Act, 2002).
- The Government should review the mechanisms used to govern the disbursement of the proceeds of gambling machines.

### **The Governance of Crown/Maori Relations**

- The Government should review the adequacy of the legal vehicles available for Maori collective organization.
- The Government should review, and initiate public discussion over, the minimum governance requirements for Maori collective organisations in receipt of historical Treaty settlements.

- The Government must ensure that Maori collective organisations that are publicly funded to deliver public services are seen to be required to meet the same transparency and accountability requirements as all other entities in receipt of public monies.
- The Government should initiate public education initiatives – such as the one recently announced – to try to reduce the current polarisation of views over the Treaty and the Treaty settlements process.

### **General**

- There should be a concerted publicity campaign on the amendments to the Crimes Act relating to liabilities arising from the payment of bribes offshore.
- Measures should be taken to enhance the understanding and implementation of the Official Information Act by Ministers, Public Servants and the public.
- The Security Intelligence Service (SIS) files should be made open to the public after 30 years within clearly prescribed and justifiable limitations.
- Appropriate courses at secondary and tertiary education levels should include ethics and civic components.

### **Future Reform**

- A task force should be established to oversee the implementation of enhancements and development of the national integrity system. This should include both Government and non-Government members. An early analysis should be undertaken of the reforms suggested in this report. The Task Force should have the responsibility of reinforcing the ethics of good governance.
- The respective Ministers for the State Services Commission and Department of Prime Minister and Cabinet should request their departments to comment on the recommendations and other issues raised in this report.

### **Further Studies**

- That TINZ should initiate further reports covering private sector business governance.



## References

- <sup>1</sup> The Treaty of Waitangi, signed in 1840 between the Maori tribes of New Zealand and the British Crown, gave governorship of New Zealand to Britain while protecting the rights and assets of Maori.
- <sup>2</sup> New Zealand's OIA contains very limited exceptions to the general presumption that all official information should be publicly available. For instance, unlike most countries, while the OIA allows the withholding of Cabinet papers while an issue is under active consideration by government, Cabinet papers must be released once the government has taken its decisions.
- <sup>3</sup> The Reserve Bank Act 1989 and the Fiscal Responsibility Act 1994 attracted widespread international attention, and have been influential in the subsequent moves in many countries to greater central bank independence and fiscal transparency.
- <sup>4</sup> While some provisions (such as parts of the Electoral Act) are "entrenched" in legislation, in that they require a special majority of parliament to amend them, the entrenching provision itself can be removed on a simple majority vote. Even the Constitution Act 1986 and the Bill of Rights Act 1990 require only a simple majority to amend them. Some of these laws (such as the Electoral Act) are, however, regarded as being effectively entrenched through the strength of public opinion and the effectiveness of public scrutiny in an open society (see "Building the Constitution", edited by Colin James, Institute of Policy Studies, Wellington, 2000).
- <sup>5</sup> Quote from Hon. Justice Baragwanath, President of the New Zealand Law Commission, "Core Values: What constitutional and legal principles does New Zealand need? A personal view." Available at [www.lawcom.govt.nz/content/speeches/corevalue.htm](http://www.lawcom.govt.nz/content/speeches/corevalue.htm)
- <sup>6</sup> For a collation of a range of views for and against a written constitution in New Zealand, see "Building the Constitution", edited by Colin James, Institute of Policy Studies, Wellington, 2000.
- <sup>7</sup> Transparency International Corruption Perceptions Index 2002, see [www.transparency.org/surveys](http://www.transparency.org/surveys)
- <sup>8</sup> See "Constraining Government Regulation", B. Wilkinson, a discussion paper prepared for the NZ Business Roundtable, Federated Farmers of NZ (Inc), the Auckland Regional Chamber of Commerce and Industry, and the Wellington Regional Chamber of Commerce, November 2001.
- <sup>9</sup> There are three Officers of Parliament: the Office of the Ombudsman, the Parliamentary Commissioner for the Environment and the Auditor-General. They are independent of the Executive and report directly to the Parliament through the Speaker.
- <sup>10</sup> See Technical Practice Aid No. 9, 2002, issued by the Institute of Chartered Accountants of New Zealand, for a discussion of the need for renewed attention to output specification in the public sector in NZ, and the risk of dilution of accountability from an inappropriate focus on outcomes.
- <sup>11</sup> See Treasury, Towards an Inclusive Economy, (2001), p. 84. The Treasury also recommended that governments be required to publish statements of their desired tax policy outcomes and progress towards achieving them, and increased involvement of independent tax policy analysts in advising Select Committees on tax policy issues.
- <sup>12</sup> See G. Palmer, "Deficiencies in NZ Delegated Legislation", Victoria University of Wellington Law Review 29, 1999.
- <sup>13</sup> See B. Wilkinson, Constraining Government Regulation, November 2001, p. 180. See also D. Dugdale, Law Commissioner, "Preserving the Supremacy of Parliament", address to a seminar "Has NZ Come of Age", held in the former Legislative Council Chamber on 3 August 2000.
- <sup>14</sup> See "Enhancing Judicial Independence", Press Statement by the Hon. Margaret Wilson, 7 March 2003.
- <sup>15</sup> Press Statement by Hon. Margaret Wilson, 7 March 2003.
- <sup>16</sup> See Henderson, J and Bellamy P. (2002), p.78. Democracy in New Zealand. Christchurch: MacMillan Brown Centre, University of Canterbury.
- <sup>17</sup> See Palmer, M., (2001), "Ministerial Responsibility and Chief Executive Accountability: Conflict or Complement?" Paper presented at the Institute for International Research Conference on "Analysis and Understanding Crucial Developments in PUBLIC LAW", at the Duxton Hotel, Wellington, 4 April 2001.

<sup>18</sup> See for instance Morris (2000), Upton (2001), *Sunday Star Times*, 3 February 2002, "More jobs for the boys – and girls", and Treasury (2001).

<sup>19</sup> See SSC 2002, p. 15.

<sup>20</sup> See Report of the Controller and Auditor-General on Ministry of Defence: Acquisition of Light Armoured Vehicles and Light Operational Vehicles, August 2001.

<sup>21</sup> From Norris' chapter in: "What's News" Reclaiming Journalism in New Zealand", 2002, Dunmore Press, Palmerston North Eds Judy McGregor and Margie Comrie, p.52.

<sup>22</sup> See for instance, "They're Keeping Our Secrets", by Diana McCurdy, *The Dominion Post*, 23 May 2003, p. B5.

<sup>23</sup> This section draws on H. Greenland, "Building the Inclusive Economy: Maori Governance" (undated), and on M. Petrie, 2002, "Institutions, Social Norms and Well-being", Treasury Working Paper 02/12. See also Te Puni Kokiri (The Ministry of Maori Development) Statement of Intent 1 July 2003 (pp.26-27) on the governance of Maori institutions; and Treasury 2001, "Towards an Inclusive Economy", NZ Treasury, Wellington, May 2001, especially the section on Institutions and Values.

<sup>24</sup> For instance, one of the issues that Maori face is that the group negotiating the settlement of historical claims does not necessarily have the commercial acumen and experience to govern and manage commercial assets following resolution of the claims.

<sup>25</sup> See Hampton and Falloon, R. (2001). "Inter and Intra Claimant Group Disputes in Treaty Settlement Negotiations". Public Law Conference, Wellington.

<sup>26</sup> See Treaty of Waitangi Fisheries Commission (2001).

<sup>27</sup> See Webster, Alan, 2001, *Spiral of Values*, Alpha Publications, Hawera, New Zealand.

<sup>28</sup> He labels these, in descending order of size: New Zealander, Pakeha, European, Maori-Maori (Ethnic Maori who identify as "above all a Maori"), Maori-New Zealander (Ethnic Maori who identify as "above all a New Zealander"), and Pacific Peoples.

<sup>29</sup> The two Maori ethnic groups were of approximately equal size in Webster's sample. Webster also identifies a common core of values, defined as those values on which the main cultures do not disagree, which he labels Kiwi culture.

<sup>30</sup> Webster reports the results cited below as being at the 95% confidence level.

<sup>31</sup> Webster (2001), p. 88.

<sup>32</sup> See Perry and Webster (1999), pp. 42, 44 and 47.

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Local Authorities (Members' Interests) Act 1968

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Protected Disclosures Act 2000

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Public Finance Act 1989

Remuneration Authority (Members of Parliament) Amendment Act 2002

Reserve Bank of New Zealand Act 1989

Resource Management Act 1991

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Serious Fraud Office Act 1990

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## Appendix 1 – SSSB First Report

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STATE SECTOR STANDARDS BOARD

19 January 2001

Hon. Trevor Mallard

Minister for State Services

Dear Minister,

LETTER OF TRANSMITTAL – STATE SECTOR STANDARDS BOARD FIRST REPORT:

I am pleased to give to you the Board's first report, on a draft statement of the Government's expectations of the State Sector, for the Government's consideration. This Statement is submitted in accordance with the Board's Terms of Reference.

As a result of the Board's deliberations we have also recommended, for the Government's consideration, a draft statement of commitment by the Government to the State Sector.

The Board's Terms of Reference also include giving advice to you on matters which may affect the effective implementation of the Government's standards. While it was envisaged that this would be an element in our annual report, the Board considered that these issues were of sufficient significance, in terms of the Government achieving its objectives, to warrant comment in this report.

While many of these items are not new, and some are under consideration in various ways, there is a need to deal with these issues in a timely and effective way, to improve the likelihood of the Government achieving its objectives.

We would be pleased to undertake any further work that you request on any aspect of this report, and look forward to discussing it with you.

Kerry McDonald

CHAIRMAN

STATE SECTOR STANDARDS BOARD

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REPORT TO THE MINISTER OF STATE SERVICES ON A DRAFT STATEMENT OF GOVERNMENT EXPECTATIONS OF THE STATE SECTOR January 2001

1 INTRODUCTION

- The State Sector Standards Board was established by the Minister of State Services on 19 November 2000. The members are: Kerry McDonald (Chairman), Angela Foulkes, John Martin, Rangimarie Parata Takurua, Elmar Toime and Jim Turner. The Board has been assisted by Christine Goodman (SSC).
- This first report of the Board proposes a draft Statement of Government Expectations of the State Sector, for consideration by the Government. The Board also identifies some impediments to the effective implementation of these expectations.
- Further reports will address other elements of the Board's Terms of Reference in due course.

## 2 TERMS OF REFERENCE

- The Government wishes to assure an ethical, public serving State Sector and to this end will set out its expectations in a clear and concise statement of values. The State Sector Standards Board is to advise the Minister of State Services on the content of this statement by setting out appropriate expectations of standards for the State Sector.
- The Board will provide an annual report with an "outside" view on the ethos of the State Sector, which will:
  - o contribute to a profile of the State Sector over time;
  - o assess whether the Government's expectations have been effectively implemented and had an impact;
  - o suggest modifications to the expectations statement; and
  - o advise about future trends and issues and how the Minister of State Services can be proactive on State Sector standards.
- The Board will also consider any other matters that the Minister of State Services may refer to it.
- The Board's advice is to be provided within the existing constitutional framework and on the basis of a politically neutral State Sector.

## 3 THE BOARD'S APPROACH

- There is already a large amount of guidance about behaviour in the State Sector including:
  - o statutes (including the State Sector Act 1988, the Public Finance Act 1989, the Ombudsmen Act 1975, the State-Owned Enterprises Act 1986, the Official Information Act 1982 and the Protected Disclosures Act 2000);
  - o the code of conduct issued by the State Services Commissioner pursuant to s57 of the State Sector Act (currently under review);
  - o Public Service Principles, Conventions and Practice (SSC, 1995);
  - o the Cabinet Office Manual;
  - o codes of conduct and value statements for individual departments and agencies.
- The Board considered this material, previous reports on the New Zealand State Sector, and overseas studies and values statements. It requested and considered informal submissions from Ministers, State Sector employees, state agencies and other bodies. It invited presentations from a number of key people in the State Sector and had discussions with a range of others.
- The views given to the Board reflected numerous concerns, some serious, about the organisation and operation of the State Sector. In part these arise from different and changing expectations of the State Sector. They also underline the important part that the State Sector plays in the lives of New Zealanders.
- Ultimately the Board relied on its own experience, observations and judgements.

- In addition to recommending a draft Statement of Expectations, the Board has also identified in this report a number of impediments, which it considers are adversely affecting the performance of the State Sector and the management of standards issues.
- The Board envisages that, when adopted, the Government's Statement of Expectations would stand above and guide the development of codes, mission statements or statements of values of individual organisations within the State Sector.
- Because of the crucial importance of the working relationship between the Government and those who work in the State Sector, the Board proposes for Government consideration a draft Statement of Commitment by the Government to the State Sector. The Board envisages that the two Statements would be dealt with together and jointly implemented.
- The Board considers that, for the Statement of Expectations to lead change, a considered programme of support by Ministers, the State Services Commissioner and others in positions of influence in the State Sector is required.

#### 4 THE CRITICAL ROLE OF THE STATE SECTOR

- Historically, the State has played a critical role in the lives of New Zealanders. While the role of the State Sector has changed over time, it continues to be of vital importance, as the Sector:
  - o manages State Sector assets;
  - o provides a wide range of services;
  - o undertakes significant commercial activities;
  - o administers funding and contracts entered into by the Crown with bodies outside the state Sector;
  - o manages expenditure and transfers of some 34 per cent of GDP;
  - o is responsible for the collection of public revenue including taxes, charges and fees;
  - o employs some 250,000 New Zealanders;
  - o advises Ministers on the development of policy;
  - o implements the policies and decisions of the Government;
  - o administers the large number of statutes and regulations;
  - o exercises powers (including regulatory authority) vested by law or by delegation; and
  - o administers New Zealand's external relations.
- The effectiveness, efficiency and overall quality of the State Sector's performance has a strong influence on living standards and the sense of well being in the New Zealand community. It also impacts on New Zealand's image and reputation overseas.

#### 5 THE STATE SECTOR

- The State Sector has been defined by the Government for the Board's work as:
  - o Public Service departments and non-Public Service departments (Government Communications Security Bureau, NZ Defence Force, Office of the Clerk, Parliamentary Counsel Office, Parliamentary Service, Police and Security Intelligence Service)
  - o Crown entities
  - o Officers of Parliament (the Ombudsmen and the Parliamentary Commissioner for the Environment)
  - o Reserve Bank of New Zealand
  - o State-owned enterprises.



- It does not include local government.
- There are three main types of State Sector organisations. There are significant differences among them, including in the important areas of governance and accountability arrangements.
  - o The Public Service: the 39 departments listed in the First Schedule to the State Sector Act which are largely funded by Parliamentary appropriation (ie Vote Education...), and are directly responsible to a Minister who is, in turn, responsible to the House of Representatives. The chief executives are employed by the State Services Commissioner who reviews their performance annually in the light of their agreements with Ministers.
  - o Crown entities: this diverse group of agencies may be funded by moneys voted by Parliament, levies, revenue from commercial activities, or by a combination of these. They are often headed by a Government-appointed board and governed by their own individual statutes. There are some 2700 Crown entities of which the greatest number is school boards of trustees; they also include such advisory and regulatory bodies as the Law Commission and the Civil Aviation Authority and service providers such as the district health boards.
  - o State-owned enterprises: these government-owned companies (which operate under the Companies Act 1993) are given the statutory objective of being a 'successful business', are headed by ministerially-appointed boards of directors, who appoint the chief executive, operate within statements of corporate intent agreed with the 'shareholding ministers' and are accountable to Parliament through arrangements set out in the State-Owned Enterprises Act 1986.
- There are various interests which reasonably have expectations of standards of behaviour in the State Sector:
  - o citizens who, as individuals or groups, will have a variety of relationships with the State over time e.g. as clients of individual agencies, consumers of their services, taxpayers, etc;
  - o non-citizens, as potential or actual tourists, migrants, refugees, investors, etc;
  - o employees in the State Sector;
  - o the State Services Commissioner, boards and chief executives who have a leadership role in inculcating and maintaining appropriate standards in the State Sector;
  - o Parliament which has the important task of scrutinising the performance of the State Sector; and
  - o the Government of the day.
- Deregulation and increased competition in private sector goods and services markets since the early 1980s have lifted people's expectations of performance standards, including in the State Sector.
- The evolving relationship between Maori and the Crown, underpinned by the Treaty of Waitangi, is reflected in Maori expectations of the State Sector, to which State Sector organisations need to be responsive.
- The State Sector functions, on an apolitical basis, within a complex framework of laws and conventions. Constitutional checks and balances underline the way in which the State Sector differs from the private sector. The agents of the State have coercive powers not available to private organisations. Citizens often have no choice but to deal with State institutions. Public organisations have statutory obligations in terms of access to services. These characteristics of the State Sector clearly differentiate important aspects of it from the private sector.
- Ultimately the State Sector exists by the will of the citizens, expressed through the decisions of the government of the day. That is the essence of responsible government in a democracy.

## 6 DRAFT STATEMENT OF GOVERNMENT EXPECTATIONS OF THE STATE SECTOR

- The draft Statement that we recommend for the Government's consideration is in two parts:
  - A core values for individuals and agencies; and

B principles that guide the application of those values in day-to-day work.

- The draft Statement is preceded by a short introduction.
- Because of the importance of the working relationship between Ministers and the agencies, employees and other individuals in the State Sector, we have also recommended, for the Government's consideration, a brief statement of the Government's commitment to the State Sector.
- The Board recognises that there will, at times, be a need to prioritise among these values and principles, in their application to particular situations in the State Sector. Choices will have to be made and priorities assigned. Advising on and managing these choices and priorities is a key task and accountability of State Sector managers.

## INTRODUCTION

This Government is committed to achieving better results and opportunities for all New Zealanders.

New Zealanders demonstrate excellence and innovation in many fields of public and personal endeavour, yet our performance as a nation over recent decades has been, in a number of key respects, well below its potential.

The State Sector has a vital role in improving New Zealand's performance. It has a proud record of service but now needs to build on this and, through the quality of its performance, make a very real and positive difference.

This Statement clearly sets out, within the framework of existing legislation, our expectations of the State Sector's standards, in terms of values and in terms of performance generally. It is about being more astute and responsive, about better use of systems, about better collaboration – doing it once, well, and sharing the improvement with other agencies. It's about maintaining the highest standards of service and behaviour, that leave a positive impression, not disappointment and resentment.

It is about accountability, based on effective systems and processes, so that good performance is fairly rewarded and poor performance is recognised and managed. It is about the training and development of State Sector employees and building capability and job satisfaction. It's about best practice and improving areas of weakness, to match the high standards that the State Sector can clearly demonstrate.

Importantly, it is also about values in the State Sector and about standards of behaviour that are respected in the community.

In recognition of the close working relationship and mutual dependence between Government and the State Sector, this Government has also made a statement of commitment to the State Sector, which is attached.

Turning these expectations into results is the next step, for the State Sector and the Government.

A. We expect the behaviour of all individuals and agencies of the State Sector to reflect the following values:

Integrity –

- act honestly;
- give free, frank and comprehensive advice;
- be non-partisan and free from bias;
- avoid and manage conflicts of interest;
- serve the public interest.

Responsibility -

- act with personal and professional responsibility;
- have concern for the consequences of public actions.

Respect -

- respect people, as citizens and clients;
- respect the rule of law;
- respect the institutions of democracy;
- respect the Treaty of Waitangi.

B. To give effect to these values in the day to day conduct of the Government's business, we expect the individuals and agencies of the State Sector to be guided by the following principles:

To be Responsive to the Community by

- demonstrating a commitment to service;
- recognising the legitimate interests of individuals and groups;
- respecting the rights of citizens and others and advising them of their entitlements.

To be Performance-Oriented by

- working effectively and efficiently to achieve objectives;
- building the necessary capability in people, systems and processes;
- being committed to ongoing improvement and innovation in organisations, people, systems and processes;
- identifying and managing risk;
- measuring and assessing results.

To be Accountable by

- adhering to the spirit and letter of statutory accountability systems;
- setting clear expectations of individuals and assessing performance against expectations;
- recognising that contributing to team performance is an important accountability;
- fairly rewarding (or sanctioning) individuals according to performance; and
- addressing failures, faults and deficiencies.

To be a Good Employer by

- ensuring a merit-based, professional employment regime;
- having sound systems and processes for employee management, training and development and succession; and
- recognising the employment requirements of particular groups in the community.

To Have a Whole-of-Government Commitment by

- considering the implications of activities for other agencies and the whole of government; and
- encouraging and participating fully in processes of consultation and collaboration within and beyond the Government.

To Serve the Government by

- implementing its decisions effectively and with commitment;
- providing free, frank and comprehensive advice;
- keeping the Government advised of issues likely to impinge on its responsibilities; and
- being aware of and reflecting the Government's priorities.

## 7 DRAFT STATEMENT OF COMMITMENT BY THE GOVERNMENT TO THE STATE SECTOR

- The Government recognises that the performance of the State Sector will be substantially influenced by the actions and processes of Ministers, acting collectively and individually.
- In its working relationship with the State Sector, the Government and its Ministers will :
  - o acknowledge the importance of free, frank and comprehensive advice;
  - o provide clear guidance about policy directions and outcome priorities;
  - o participate effectively in accountability processes; and
  - o treat people in the State Sector in a professional manner.

## 8 IMPEDIMENTS TO MEETING THE GOVERNMENT'S EXPECTATIONS FOR STANDARDS AND PERFORMANCE

- Despite the wide-ranging reforms of the State Sector since the mid-1980s, there is still a broad consensus among politicians, State Sector employees and the community about the role and appropriate behaviour of the State Sector.
- It is this consensus that leads to public outrage when departments and agencies behave, or are perceived to behave, in a manner that falls short of being effective, efficient and ethical.
- The great majority of State Sector employees, who take pride in service to the public and Ministers, are also disappointed.
- Yet failures in performance have been too frequent and are well-documented.
- The Board believes that successful implementation of the Government's Expectations Statement requires that the impediments to effective implementation be effectively addressed.
- Substantial improvement can be achieved through the State Sector leadership and by change within organisations, without major structural change.

The Board has identified six main areas requiring attention.

### (1) The Role of the Centre

The Board considers that value would be gained by the Centre having a stronger role in areas such as:

- minimum standards for some systems, processes and policies;

- ongoing improvement, in organisation and systems generally and transfer of best practice;
- developing and using performance management and improvement systems and measures;
- developing leadership capability and employee development and training, especially at middle and senior levels;
- setting common standards and protocols for IT systems and specific technologies;
- improving procurement; and
- whole-of-government (see 3, below).

A stronger Centre will be more important for departments and less so for SOEs and other companies in the Sector. It should be based on a collegial system, and not materially erode the authority of chief executives.

## (2) Governance

There is wide variance in the quality of State Sector governance arrangements. In some cases this is reducing organisational effectiveness. It could be addressed by:

- enacting the proposed clarification of governance arrangements in Crown entities;
- strengthening guidance, support and performance management arrangements for departmental chief executives;
- identifying other areas of weakness; and
- clarifying the role of Ministers, individually and collectively, in the governance of agencies.

## (3) Whole-of-Government

State Sector activity is remarkably fragmented and needs to be more strongly oriented to whole-of-government issues. This means:

- explicit processes oriented to whole-of-government outcomes;
- collegial team processes to lead and manage a whole-of-government approach to systems, procurement, and employee development and training, performance management, etc; and
- a more proactive Centre on whole-of-government issues.

## (4) Performance Management and Accountability

The public sees a lack of accountability in the State Sector.

An over-emphasis on economic efficiency as an outcome and in performance measure has distorted behaviours and undermined trust and support from the public and employees. It is necessary to:

- emphasise a more balanced range of results;
- refocus purchase agreements from a narrow outputs focus to include the quality and value of outcomes and the future capability and effectiveness of organisations; and
- ensure organisations have, and use effectively, good performance management systems and processes that enable employees to be assessed and held accountable against agreed objectives.

## (5) Employee Development and Morale

The capacity of the State Sector to deliver is questioned by both the public and Parliament. There is a need to consider:

- including employee development in organisation accountabilities;
- publicly affirming examples of positive performance and dealing effectively with the negatives; and
- articulating a quality focus for State Sector organisations.

(6) The Relationship of the Government and Parliament to the State Sector

Effective working relationships require an agreed understanding of the roles of the participants at the centre of the governmental process, and mutual respect.

## 10 CONCLUSIONS AND RECOMMENDATION

- In accordance with its Terms of Reference, the Board has prepared a draft Statement of Government Expectations of the State Sector. It is accompanied by a recommended draft Statement of Commitment by the Government to the State Sector.
- The draft Statement of Expectations is appropriate for application across the whole of the State Sector.
- There is considerable capability in the State Sector, in dedicated people and good systems, and a considerable amount of work is under way on improvement. However the Government's expectations in relation to State Sector standards and performance are unlikely to be achieved without change in the Sector, and a more systematic and integrated approach to improvement.
- The Board has, on the basis of the material available to it and its own experiences and judgement, identified six areas in the performance of the State Sector where it perceives impediments to the achievement of standards.

It is recommended that:

- Cabinet consider and adopt the attached Statement of Government Expectations of the State Sector and the accompanying Statement of Commitment by the Government to the State Sector; and
- the identified impediments to the effective implementation of standards and expectations be the subject of further discussion between the Board and the Minister of State Services.

## Appendix 2 – SSSB Report on the Ethos of the State Sector

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### LETTER OF TRANSMITTAL - STATE SECTOR STANDARDS BOARD'S REPORT ON THE ETHOS OF THE STATE SECTOR

29 June 2001

Hon. Trevor Mallard  
Minister for State Services  
Dear Minister,

I am pleased to present the Board's second report. This is submitted in accordance with the Board's Terms of Reference, which provide for an annual report to give you an "outside" perspective on the ethos of the State Sector. It also includes recommendations on how you can be proactive in the area of standards in the State Sector and identifies a number of adverse influences on ethos, which merit consideration.

The Board welcomed the Government's decision to issue statements of Expectations and Commitment to the State Sector, as recommended in our first report of 19 January 2001. While it is too early to assess the impact of these statements, there are encouraging signs, but we emphasise the importance of ensuring they receive an active and ongoing programme of support.

We would be pleased to undertake any further work that you request on any aspects of the report, and look forward to discussing it with you.

Kerry McDonald  
CHAIRMAN

### STATE SECTOR STANDARDS BOARD A REPORT TO THE MINISTER OF STATE SERVICES ON: THE ETHOS OF THE STATE SECTOR<sup>1</sup>

29 JUNE 2001

#### 1. INTRODUCTION

- The State Sector Standards Board was established by the Minister of State Services in November 2000, as an advisory board to the Minister. Members of the Board are: Kerry McDonald (Chairman), Angela Foulkes, John Martin, Rangimarie Parata Takurua, Elmar Toime and Jim Turner. The Board has been assisted by Christine Goodman (SSC).
- The first report of the Board (January 2001) proposed a draft Statement of Government Expectations of the State Sector and a draft Statement of Commitment from Government to the State Sector. Both statements were adopted and implementation is progressing. The report also identified a number of significant impediments to achieving the expectations.
- This report does not repeat sections of the first report on the critical role and key characteristics of the State Sector, or the impediments referred to

above. The first report is available at [www.executive.govt/minister/mallard/state/index.html](http://www.executive.govt/minister/mallard/state/index.html).

## 2 CONTENTS

Terms of Reference Page:	3
The Board's Approach	4
Trends in the State Sector	5
The Ethos of the State Sector	8
Important Influences on Ethos	11
The Statement of Expectations and its Implementation	15
Recommendations	16

## 3 TERMS OF REFERENCE FOR THIS REPORT

- The Standards Board is to report annually to the Minister of State Services with an "outside" perspective on the ethos of the State Sector. The report will be derived principally from the Board members' own experience and knowledge, networks in the community, and observations.
- Its aim is to:
  - Contribute to a profile of the State Sector over time.
  - Give views on the extent to which the Government's expectations have been effectively implemented and are perceived to have an impact.
  - Suggest any modifications to future expectations statements.
  - Advise about future issues and trends, and how the Minister of State Services can remain proactive in the area of standards in the State Sector.
- The State Sector has been defined by the Government for the Board's work as:
  - *Public Service departments and non-Public Service departments* (Government Communications Security Bureau, NZ Defence Force, Office of the Clerk, Parliamentary Counsel Office, Parliamentary Service, NZ Police and Security Intelligence Service).
  - *Crown entities.*
  - *Officers of Parliament* (the Ombudsmen and the Parliamentary Commissioner for the Environment).
  - *Reserve Bank of New Zealand.*
  - *State-owned enterprises.*

It does not include local government.

## 4 THE BOARD'S APPROACH:



- In establishing the Board, the Government specified that the Statement of Expectations and its other work were to be relevant to the State Sector as a whole, but recognised that the manner of application was likely to differ among the various categories of State organisations.
- To develop its views the Board reviewed recent published material, wrote to all State Sector organisations requesting the results of any recent employee opinion surveys and interviewed a number of State Sector employees, at different levels and across a range of State Sector organisations. The Board is grateful to those organisations and individuals who have made available information and views. Ultimately, the Board relied on its own experience, observation and judgements.
- The Board considered a number of definitions of ethos, and broadly construed it as:

The values and culture demonstrated by organisations and individuals in the State Sector.

## 5 TRENDS IN THE STATE SECTOR<sup>2</sup>

The Board has identified the following trends affecting the ethos of the State Sector in the recent past and currently:

- Balkanisation of the State Sector, causing difficulty in getting a consistent, whole-of-government sentiment or approach, although there are recent signs of a shift to increasing cooperation.
- Increased efficiency and productivity and a heightened willingness and capability to adopt improvements in systems and practices.
- Growing understanding that change, uncertainty and work pressures are an inevitable part of the modern State Sector work environment.
- Increased mobility in the New Zealand work force, with erosion of State Sector career patterns and of the "public service" ethos among staff.
- Loss of institutional knowledge, because of frequent organisational change and employee turnover, not compensated for by improved systems and training.
- The implications for the State Sector of changing behavioural norms in society and an increasing reluctance of staff to constrain behaviour away from work to the standards required in employment.
- Determined reluctance by some professional staff to adopt a cooperative approach to standards, systems and processes.
- Increased awareness of the need to be responsive to the diversity of citizens and clients.
- A widely held view that, despite the effort devoted by the State Sector to servicing Maori more effectively, little progress has been made. There is a sense that non-Maori solutions are being imposed on Maori problems, resulting in policies and programmes missing the mark and making little difference.

- Greater transparency in government processes and more intensive media scrutiny of the State Sector.
- Concern about the confidentiality of private information held by State Sector agencies, especially given the increased use of information technology and the Internet, and the commitment to e-government.
- Preoccupation with performance in the short term at the expense of longer term capability.
- Increasing recognition of the lack of a systematic or strategic approach to important issues across the whole of the State Sector, including remuneration, leadership/management development and succession planning, performance management and the adoption of best practice.
- Greater acknowledgement of the continuing weakness in the systems and processes needed to support devolved accountability.
- Declining influence of the State Services Commission, but with recent signs of this reversing.
- Signs of a more strategic approach emerging to the management and development of the State Sector. The State Services Commissioner is initiating a number of processes designed to improve system performance in a range of important areas, (including improvements to the Commission's own capacity) as evidenced in the SSC Statement of Intent, 2001.
- MMP and coalition and minority governments have introduced greater uncertainty and complexity into policy making. Resolution of policy issues takes longer and changes in direction are more frequent. The relationship between the legislature and executive has also been affected.
- Public perception of erosion of relations between the Government and State Sector employees, heightened by public criticism by ministers of State Sector organisations and employees.
- The increase in capacity and more active role of ministerial private offices, which has required adaptation elsewhere in the State Sector.
- Expectations that the service, employment and other needs of an increasingly diverse society will be met by the State Sector.
- The persistent, long term weakness in the economy, to which the State Sector and public expectations must adapt.

## 6 THE ETHOS OF THE STATE SECTOR

- Overall, the State Sector has the following characteristics, although there are significant variations among and within organisations:
  - Able people, working hard to achieve good results, but with increasing work pressures, some significant constraints on performance and some unnecessary frustrations.

- A strong commitment from State Sector employees to their organisations and to public service work, including policy development and service delivery.
  - Steady improvement in productivity, with rising standards and performance.
  - Good performance, but with occasional failures - as is to be expected with any people-based activity.
  - Political neutrality.
  - A high level of integrity - although there have been disturbing recent cases of corruption.
- There is, however, considerable negativity in some parts of the State Sector. People have been burnt out by frequent policy, structural and staffing changes, pressure to deliver, limited resources and a feeling that they are inadequately appreciated and rewarded. In these areas capability is at risk. A sense of commitment to public service is nonetheless remarkably widespread and resilient.
  - Service-delivery organisations are particularly under pressure to achieve explicit, quantified and challenging efficiency targets set by ministers, and to meet community expectations. Policy advice agencies face different but no less demanding pressures, grappling with complex issues and tight timetables.
  - The health service has been restructured extensively over the past decade, without any real sense in the community of success. There is a legacy of instability and in some organisations difficult relationships between management and health professionals. In the education sector the perception is that morale is especially low at the tertiary level.
  - The pressure of work throughout the State Sector, both the quantity and tight deadlines, can mean a difficult working environment for people living in a family situation or with external interests. This will continue to influence the composition of the work force.
  - The quality of leadership typically has a strong influence on the ethos of an organisation. Chief Executives in the State Sector could not generally be described as 'happy' in their roles, but the attitude of senior management generally is nonetheless positive. Senior managers are strongly motivated by the sense that their role is important and that they can make a difference. Their approach to their work is dedicated and professional, but too often appears more reflective of 'administration' than 'leadership'.
  - Communication and collaborative working among State organisations - the sharing of views, discussion of issues or working together on issues of common interest - is inadequate, and there is insufficient interaction between these organisations and the wider community.
  - Remuneration issues, particularly at lower levels, reflect the lack of a strategic approach. The frequent advice that there are no funds to pay for

increases, together with weaknesses in the design and application of performance systems, has led to a sense that employees are undervalued and falling behind the private sector.

- In many areas this is offset by a sense of satisfaction from their work, despite being aware that their remuneration is less than they could get elsewhere.
- State Sector employees are generally well aware of the high level of public and political scrutiny they must be able to withstand and the corresponding importance of monitoring and reporting systems. In some cases, however, excessive attention to compliance requirements diverts effort into reporting and justifying rather than actually doing.
- Public attacks by politicians on state sector employees are observed to be particularly damaging to morale, given the inappropriateness of state sector employees engaging in the debate.
- Performance is also affected as public or unfair criticism leads to employees becoming risk averse, to the detriment of the government's aspirations for responsive service delivery.
- Morale can equally be influenced in a strong and positive fashion by soundly-based supporting statements from politicians, especially ministers.
- The relative absence of corruption whether pecuniary or in other forms, in the New Zealand State Sector is frequently commented on. Nonetheless, there have been recent reported incidents of corruption that underline the need to be vigilant, in terms of behavioural standards, effective systems, and commitment by leadership. The Protected Disclosures Act 2000 is an important and relevant new development.
- The communication of information within organisations is often inadequate, which affects, performance, morale and the effectiveness of senior management. A particular issue is where people at lower levels see solutions, which is common, but no one listens.
- Weak links and communications between the regions and with "Head Office" can mean a lack of policy consistency, erosion of respect for the organisation and increased risk of corruption.

## 7 IMPORTANT INFLUENCES ON ETHOS

The Board has identified a number of important influences on the ethos of the State Sector that merit attention.

### **Leadership**<sup>3</sup>

- The quality of leadership in the State sector is a critical issue. Too often senior management processes are more reflective of an administrative or managerial approach, rather than of effective leadership.
- A coordinated State Sector strategy is needed for the recruitment and development of leadership and senior level management capability, including the development of high potential employees. Particular attention needs to be given to people who are promoted to management

and leadership roles on the basis of their specialist capability and performance.

- The relative isolation of State Sector chief executives, especially in the Public Service where they lack the support and guidance of a board - or an equivalent arrangement - is a cause for concern, because of its potential impact on ethos and standards.
- Constructive engagement by officials with ministers is a crucial element of good governance. For their part, senior officials should display initiative and be proactive in providing leadership within the scope of declared Government policy. Some need to be more evidently responsive, on a timely basis, to ministerial requests.

### **Performance Management**

- Effective performance management has a critical influence on employee attitudes, performance and ethos. This is an area where a decisive improvement in systems and processes is needed. Currently, good and poor performance are insufficiently differentiated. Consequently, remuneration, training, counselling and promotion are inadequately targeted and, too often performance management is equated with disciplinary processes.
- Without effective performance management it is not possible to deal with poor performance in a way that meets the relevant statutory criteria for an acceptable process, there is a greater risk of patronage, staff morale suffers and employee confidence in the organisation and its management is undermined.
- Performance failures have a negative impact on the image, reputation and morale of individual agencies, and often the wider State Sector. Effective internal systems and processes for dealing with aggrieved employees and clients such as a "fair treatment system"<sup>4</sup> would have a beneficial effect on the ethos of the State Sector.
- Continuing reductions in the resources available to State Sector organisations, without a systematic approach to performance improvement, are counterproductive and risk adversely affecting the outcomes. Conversely, there is likely to be a significant potential for improved productivity in parts of the State Sector with more effective leadership and systems.

### **Remuneration**

- The situation of lower paid employees across the State Sector merits a prompt strategic review and policy guidelines. Data indicates that remuneration at this level has lagged behind the private sector and behind professional and managerial staff in the State Sector. The consequences of systems and other failures tend to accumulate at the lower levels of organisations, yet these employees are typically at the interface between their organisations and the public and are responsible for the delivery of crucial services.

### **Governance**

- The increasing acceptance within the State Sector of the value of a whole-of-government orientation is encouraging. But a whole-of-government

approach does not imply turning back from the devolution of appropriate responsibilities. What is required is a collegial approach, at all levels, backed by effective performance criteria and accountability processes.

- The number of organisations in the State Sector warrants review. There are grounds for concern that the present architecture of the State Sector has diluted the effectiveness and efficiency of resource use and led to unnecessary duplication, particularly in support functions.
- While it is appropriate that SOEs are expected to perform within the broad parameters of State Sector ethos and standards, care needs to be taken to ensure that incremental changes in central monitoring processes do not weaken their commercial ethos.

### ***The Role of the State Services Commission***

- The SSC has a vital role in providing leadership in the Public Service, and in the State Sector generally, on matters affecting standards and ethos. It needs to be proactive on these matters, ensuring that ministerial intentions are clearly conveyed and effectively monitored. A similar responsibility should be imposed upon other agencies responsible for entities outside the SSC's ambit.
- Work has been under way for some time within the SSC to upgrade the Public Service chief executive performance management system. The success of this initiative, which is commended, is critical. If successful it will provide a pattern that could be extended, appropriately modified, not only to other levels in the Public Service but elsewhere in the State sector.

### ***Relations with Politicians***

- The public statements of politicians, and the way they are reflected in the media, have an important impact on morale in the State Sector. Statements that are considered to be unfair can inhibit the willingness of State sector employees and boards to display initiative and take reasonable risks. The attitudes of politicians also have a strong influence on the perceptions of the community about the State Sector.
- The fostering of effective partnerships between ministers and senior officials merits continuing, close attention from both parties to the relationship. The expectations and aspirations of ministers must be well understood by State Sector employees. Ministers must also be open to the views of officials which need to be conveyed in a timely and appropriate manner. Implementation of the Statements of Expectations and Commitment is clearly relevant and should contribute to the achievement of effective partnerships.
- Changing constitutional arrangements over recent years have, in overt and subtle ways, altered the style and role of ministers, Members of Parliament and the State Sector. There is a need for further investment at all levels in understanding the respective roles of the various parties and in improving processes.

## **8 THE STATEMENT OF EXPECTATIONS AND ITS IMPLEMENTATION**

- The process of implementation has begun, but has some way to go, particularly in the wider State Sector.<sup>5</sup>
- It is too early to suggest any modifications to the Statement.

## 9 RECOMMENDATIONS TO THE MINISTER OF STATE SERVICES

The Board notes the steps taken to implement the statements of Expectations and Commitment issued on 11 March 2001, and:

- a. emphasises** the importance for the effective implementation of the Government's Expectations, of 'a considered programme of support by ministers, the State Services Commissioner and others in positions of influence in the State Sector' (First Report, Section 3)
- b. recommends**, as a high priority for enhancing the ethos and standards in the State Sector, that urgent attention be given to addressing the *impediments* identified in our first report and the *important influences* listed in this second report
- c. recommends** that urgent attention be given to improving communications, both ways, between ministers and the State Sector
- d. recommends** that as management or organisational directions are established by Government, the State Services Commission and/or the appropriate agencies, ensure that State Sector organisations are clearly advised, and supported on implementation
- e. urges** that early consideration be given to the implications of the Statement of Expectations for the health and education sectors, and in particular, the identification of any particular impediments to implementation and attainment of the required standards
- f. notes** that the Board intends to include in its future work programme the implications for the ethos of the State Sector of (a) the evolving role of Parliament in its relations with the Executive since the introduction of MMP, and (b) experience with the Official Information Act 1982 and the Protected Disclosures Act 2001. It will also be considering further the position of the health and education services.

### Notes

**1** The Terms of Reference include several other matters which are covered in this Report.

**2** The Terms of Reference refer to future issues and trends in the State Sector. The issues are included in the comments in sections 5,6,7 and 9.

**3** Leadership, in this context, includes establishing direction and ethics, ensuring that staff have the encouragement, support, systems and processes to work effectively, improving capability and performance over time and recognising the opportunities, responsibilities and restrictions of working in the State Sector. Schick (1996) noted the magnitude of the role of a Public Service Chief Executive, but the key issue is probably the change from being an administrator or manager to being a chief executive in a demanding State Sector environment.

**4** These systems, which are increasingly in use, provide a clearly defined internal process of review, on a simple and efficient basis, at successively higher levels in the organisation and, if necessary, externally. Experience indicates that such systems can be very effective.

**5** Given the Commission's leadership role, it is surprising that the recently agreed SSC Statement of Intent 2001 makes no reference to the Government's Statements of Expectation and Commitment.