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Public Service Legislation Bill

Submission, Transparency International New Zealand (TINZ), 31 January 2020

Thank you for the opportunity to submit on this matter.

We would like to appear before the Select Committee to make an oral submission.

Summary of TINZ response:

The following is a summary of the points made in our submission. Our comments are influenced by the detailed analysis of public sector services in Transparency International New Zealand's [Integrity Plus 2013 New Zealand National Integrity System Assessment](#) (NIS) and its 2018 update. The key findings of the 2013 NIS and its 2018 update that we think relevant to the Public Service Legislation Bill are that:

- There are weaknesses in Parliamentary oversight of the executive. These include the use of urgency to pass controversial legislation, and the lack of specialist expertise and committees to hold the executive to account.
- There are concerns about the interface between the political executive and public officials. There is evidence of an erosion of the convention that public servants provide the government of the day with free and frank advice, an apparent weakening over the last decade or so of the quality of policy advice that public servants provide to ministers, and public concern about perceived non-merit-based public appointments.

In preparing our response to the Bill we regard as paramount that the Bill should maintain and protect New Zealand's long tradition of a politically neutral, incorruptible public service that belongs to the public and serves the public interest. The public sector's high standards of integrity are reflected by New Zealand's continued high standing on the Corruption Perceptions Index.

In this submission we comment and make suggestions about four substantive matters. These matters are:

- i. Public Service Arrangements to Strengthen Parliamentary Oversight of the Executive
- ii. Purpose, principles and spirit of service to the community:
 - a. Maintain and protect the public service duty to provide free and frank advice
 - b. Promoting diversity and active citizenship
- iii. Maintaining healthy tension in the balance of powers and duties across public service agents and actors:
 - a. Closer alignment between agencies and common standards and approaches
 - b. Public service agencies and joint operational agreements Part 2)
- iv. Other specific comments

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Public Service Arrangements to Strengthen Parliamentary Oversight of the Executive

1. Overall, we consider that the Bill should consider what public service arrangements are required to ensure a well, supported and served Parliament that would enable it to maintain effective oversight of the executive. In our view, stewardship oversight of the long-term interests of the country cannot be effectively carried out solely by 'the government of the day', with these interests also being rightly the responsibility of Parliament.
2. We noted in our submission in October 2018¹ that the period of consultation and the lack of background papers made it difficult for organisations to comment on detailed considerations including the role of the State Services Commissioner. We also recommended that independent research be commissioned. We agree with the submission of the IGPS on this draft Bill that, considering its sizeable impact, the time period of consultation on the proposed legislation has been highly challenging. TINZ, largely a voluntary organisation, has struggled to engage fully with its expert volunteers at this time of year.
3. We are disappointed that this important Bill is one of a growing number of Bills proceeding through Select Committee with limited opportunity for public involvement and comment and note this continued pattern of weaknesses in Parliamentary oversight of the executive.
4. We make further suggestions aimed at strengthening accountability to Parliament in commenting about the role of the Public Services Commissioner.

Purpose, principles and spirit of service to the community – maintain and protect the public service duty to provide free and frank advice

5. Transparency International NZ (TINZ) supports the clear purpose of the Bill, affirming democratic government based on constitutional foundation. We are pleased to note that many of the Bill's principles are of long-standing and have been reflected in legislation for the operation of our public service for more than 100 years. However, compared to 100 years ago, we have vastly improved knowledge of and access to empirical evidence.
6. Our National Integrity Systems Assessment revealed a range of pressures that are negatively impacting the ability, confidence and capacity of public servants. We therefore appreciate the inclusion of 'free and frank advice' as a principle in clause 10. We suggest this principle include that the public service must provide ministers with free and frank policy advice, based on the best available evidence, whether Minister want it or not. We also propose that the duty of the public sector to advise the Government is included in clause 9 (which sets out the purpose of the public service).
7. We would like to see a stronger emphasis on public sector entities carrying out their duties under this Act and any other relevant act having regard to the best available evidence and with accepted good practice.

¹ Transparency International NZ, State Sector Act Reform consultation response, October 2018

Purpose, principles and spirit of service to the community – promoting diversity and active citizenship

8. TINZ fully supports the clause 9 long-term public interest purpose and we are very pleased to see included the role (of the public service) to facilitate active citizenship. We would like to see the legislation actively support increased civic participation, which we are not confident is given life to the extent it could through inclusion in principles?
9. TINZ is pleased to see the requirement in clause 73 for principles and practices promoting diversity and inclusiveness. We would like to see that expanded to include Crown entities.
 - a. We suggest that references to diversity also reflect on the makeup of the communities that agencies serve, and their purposes. This suggestion is made because we are aware of the importance of expertise, networks and lived experience that workforces of organisations such as Ministry for Women, Ministry for Pacific Peoples and Te Puni Kokiri and health and disability services bring to the communities they serve and/or their specific purpose.

Maintaining healthy tension in the balance of powers and duties across public service agents and actors: closer alignment between agencies and common standards and approaches

10. In our submission on the public sector reform we commented that a risk of greater central stewardship of accountability and oversight is the loss of individual agency accountability. The balance between the two was not well addressed in the consultation document, and we do not see how this balance has been struck in the Bill. The lesson from the past is that success in maintaining a high integrity public sector empowered to deliver free and frank requires a multifaceted systemic approach and that is regularly evaluated and invigorated – rather than single point centralised control.
11. In general, TINZ supports varying levels of independence of a range of government agencies. Reaching solutions to the identified problems will be dependent on the aims and objectives of the government entities that are involved. Our view, as we have previously submitted in the earlier consultation is that improved integrity will be best achieved by being generated within public sector agencies and their leaders, rather than imposed from a central source. In TINZ's opinion agencies should retain accountability for establishing their own integrity programmes (though with guidance from the State Service Commission).
12. As we set out above in our comments on the proposed values and minimum standards of integrity, our view is that each agency should be responsible for and work collaboratively with others to strengthen the whole system - this will make it stronger overall.

*Maintaining healthy tension in the balance of powers and duties across public service agents and actors:
Part 2 Public service agencies and joint operational agreements*

13. Overall, we support flexibility in public sector arrangements to allow greater ability to deal with cross agency complex and/or emerging issues. The opportunities for public sector leaders to coordinate around the delivery of better services and outcomes in an open and transparent manner is a strong lever for developing better service delivery.
14. However, we are concerned:
 - a. that it is important for effective focus and service deliveries that agencies are formed around mutually reinforcing and compatible functions. We are not clear how important design features for creating effective organisations such as the nature of the governance arrangements required

- and the responsibilities, levers and powers available to Ministers and the governors of agencies have been addressed in the Bill;
- b. at the extent of flexibility provided in the legislation. We consider that there are significant risks to public trust and confidence, which is likely to be eroded by uncertainty about agency responsibility for public services and which will reduce citizen participation. We consider that greater limits should be placed over the use of this flexibility, and establishing such arrangements should be subject to meaningful public consultation; and
 - c. about the potential impact of flexibility and centralisation on regions and on local government. Central and local government engagement is already problematic across many areas. It is not clear how the value of local government services; local regulation; regional development and local opportunities has been considered in the big picture view of how public services are arranged and operate.
15. On balance, we suggest that further review and consultation is required on these provisions. We recommend that either they be split out from the Bill for further debate about the impact and operation of the arrangements, or that this such work be commissioned for reporting back to the Committee before the Bill is reported back to the House.
16. In our submission on the public sector reform, TINZ recommended utilising more independent auditing and assurance: to check transparency and probity; to evaluate results and outcomes; and to provide assurance around process. We are therefore pleased to see the inclusion for a requirement of transparency in relation to interdepartmental executive board operating procedures. We also note that the proposed amendments to the Public Finance Act by the Bill to put in place public accountability arrangements for the more flexible public service agencies, operational agreements and interdepartmental ventures.
17. We propose clarification and inclusion that where the functions of a specified agency fall within those of the host agency, the host agency should be responsible for full disclosure of the specified agency including objectives and associated forecast and actual financial and performance information. We further suggest that the requirements for specified agencies that are not hosted be expanded to include the provision of forecast financial and performance measures and targets. We suggest that specified agencies be subject to annual audit by the Auditor-General, adapted as necessary for their specific nature and intention.
18. Finally, we presume that any interdepartmental ventures or additional agencies will be subject to the same scrutiny as agencies covered by relevant public checks, such as the Official Information Act and the Ombudsman's Act.

State Services Commissioner role and functions

19. The provisions around the proposed powers of the Public Services Commissioner give us unease. Our view is that conduct and culture are collective public sector responsibilities. Anything more centralised, where power is vested in a single position or agency bears a strong risk of quality and culture becoming a compliance outcome rather than 'owned' by agencies.
20. We are concerned that that centralising of integrity and performance standard setting powers is likely to reduce the levers and options for connection points for civil society and citizens. We support the continued role of the Public Services Commissioner as a central facilitator of these matters as has been the successful practice over recent years.
21. We note and support the submission of the Institute for Governance and Policy Studies which proposes a five-person commission as the leadership model, not a single Commissioner. A five-

person Commission with a casting vote for the commissioner allows good diversity of backgrounds in terms of skill sets, knowledge and experience.

22. We further suggest that to strengthen Parliamentary accountability and protect the independence and impartiality of the Commissioner in overseeing the integrity of the public service, the Commissioners be appointed by Parliament and be independent from the Government. In our view such as change is a natural consequence of the proposed principle that the public sector must uphold the concept of stewardship to plan for the long-term interest of the country.
23. Finally we note that the Commissioner's oversight of performance has shifted from a role in 'evaluating the performance of Public Service leaders (including the extent to which they carry out the purpose of this Act) to be broader role including "oversight of the performance and integrity of the system". However, a range of agencies, both departmental and the Officers of Parliament have vitally important roles in maintaining and improving public sector integrity, accountability and performance. We think there needs to be clarity in the legislation to ensure this range of agency responsibilities is not undermined.

Other specific comments

Public service defined

24. TINZ is pleased to see a broadening of the definition to include Crown Agents and interdepartmental ventures. We have not seen discussion papers as to why Crown Agents are included in only some parts of the Act, and what that means in terms of public transparency and accountability. These should be commissioned/made public.
25. TINZ strongly supports the inclusion of Subpart 3(12) (Crown's relationships with Māori). We note that Part 3(12)(2) includes interdepartmental executives and interdepartmental ventures but Crown Agents are not included. Unless there is some other means of including Crown agents in this area of responsibility we submit they should also be included in Subpart 3(12)(2). These agents are extensions of the Crown. Many are involved in substantial asset management, resource use and service delivery, for example Accident Compensation Corporation, District Health Boards, the Commerce Commission, School Boards and Education and Crown Research Institutes. We note that the 'spirit of service' to the community applies to boards of Crown agents. What is the difference, then, in relation to Maori-Crown relationships under the Treaty of Waitangi?

Responsibilities

26. Subpart 3, Clause 13: Further to our comment in relation to responsibilities, we advocate that Crown agents should be included in this description, at the very least the section should include a responsibility of Crown Agent Boards.

Public service values, minimum standards of Integrity.

27. Subpart 4, 14 *public service values*. Consistent with our submission on the public sector reform we are not supportive of 'enforceable' values. TINZ' approach is for organisations to develop cultures of integrity that do the right thing, and align their own principles, purpose and values to those of the State Services Commission. In addition:
 - a. We would like assurance that these values have support from Māori.
 - b. Fair treatment is understood. Bias is more problematic, because it refers to disproportionate weight in favour of an idea or thing. Whilst it can have a negative intent it is also a frequent deliberate approach in targeted public service policy and programmes, such as education,

language and learning, taxation, health, service delivery, illness and injury prevention, sports funding, etc. Perhaps unintended bias is more accurate?

28. Subpart 4, 15 & 16. (Minimum standards of integrity and conduct). Our overarching position on this is that individual agencies should be given 'agency' to strengthen their own cultures and minimum standards in relation to integrity and conduct. We have already seen this in action and strongly support leadership coming from within organisation culture. We think that top down regulatory imposition is less conducive to the development of integrity culture.
29. It would be useful to have a problem definition approach applied to Sections 15 & 16.
30. Within the framework provided we are not clear why some Crown entities are excluded from minimum standards of integrity and conduct.

Clause 103. Offence to solicit or attempt to influence public service leaders

31. It is not clear what problem this clause is attempting to solve. It raises a scenario that causes us some unease. Undoubtedly staff of agencies and members of the public are likely to have opinions about potential public service leaders. If they write to a public service leader or post online about a concern they have relating to a potential public service leader appointment, would they be in breach? Whilst due process must be fair to all candidates (and should be if there were improvements to the protected disclosure legislation), we query whether this would have a dampening effect on the public expression of opinion.

45AB. Waiver from requirement to include financial statements in specified agency's annual report

32. We are very concerned at the inclusion of 45AB, giving a responsible Minister the discretion to waive the requirements for an agency to include financial statements in its Annual Report for as long as three years. This undermines the basic premise of public sector accountability, even one year is questionable in terms of an agency's financial statements not being publicly viewable. No reasoning has been provided for this option to sidestep transparency and public accountability.

Schedule 6, part 8: Long-term insights briefings

33. We agree with the IGPS that the long-term insights briefing to appropriate Minister is potentially a powerful vehicle for the delivery of free and frank advice and to support the fundamental characteristic of the public service. The briefing is strengthened by its level of independence from Ministers. We are not clear about reference to subclause 2(a) (i.e. which subclause that relates to, it seems circular). Whatever the case we support strengthening of this part, so that the outcome is that the free and frank advice that is provided is not only relevant to the functions of the entity, BUT ALSO consistent with Section 10 (public service principles) and Clause 11(2) i.e. supporting the spirit of service to the community.

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About Transparency International NZ

Transparency International New Zealand (TINZ) is the recognised New Zealand Chapter of [Transparency International](#), the global civil society organisation against corruption. TINZ is a not-for-profit incorporated society with charitable status. TINZ is non-political and non-partisan.

The vision of Transparency International, provided below, means that TINZ is a caretaker of New Zealand's high trust, high integrity society. Our reports, assessment documents and facilitation of discussions have positively impacted New Zealand's approaches towards corruption and open government.

The respect given to Transparency International New Zealand is driven from documents such as our [Integrity Plus 2013 New Zealand National Integrity System Assessment \(NIS\)](#) and subsequent updates in 2015 and 2018 towards a 2nd edition, as well as the [Corruption Perceptions Index](#) produced by the global body, Transparency International. TINZ has also worked with central government agencies on initiatives to strengthen understanding on a broad range of issues around transparency, open government, and integrity systems. This includes our innovative Public Sector CEO Leadership Integrity Forums, jointly hosted with the Office of the Auditor General.

TINZ actively brings critical and constructive voices to the table wherever anti-corruption expertise, advocacy and action are needed, and has played a key role in efforts to promote integrity and transparency and to resist corruption.

The portfolio of Transparency International is wide and its approaches are focused on detecting and preventing corruption. The large network of committed stakeholders places the international body and the New Zealand chapter in the privileged position of being able to continue fighting against corruption even within a global socio-political context that feels ever more challenging.

A world with trusted integrity systems in which
government, politics, business, civil society and the daily
lives of people are free of corruption

(Transparency International New Zealand Vision)