



Integrity and Conduct Setting Standards for Crown Entities

A document for discussion with Crown entities

April 2005

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga



The State Services Commissioner has a leadership role on integrity and conduct in the State Services. Recent changes to the State Sector Act enable the Commissioner to set minimum standards of integrity and conduct for Crown entities. Before considering minimum standards, the State Services Commission wants to engage with Crown entities to find out how they manage integrity and conduct issues.

The purpose of this discussion document is to outline the issues that the State Services Commission would like to explore with Crown entities.

Key Questions

During the discussions with Crown entities, the Commission will seek their answers to the following type of questions.

- **If your entity already has written standards of integrity and conduct:**
 - do they cover all the issues discussed in Part 4 of this document?
 - if they cover just some of the issues in Part 4, what issues are not yet covered by your entity's standards?
 - where your entity's standards do cover the same issues as in Part 4, is there any substantial difference between your existing standards and what is said in Part 4 of this document? If yes, do you disagree with the treatment of the issue in this document?
 - are your entity's existing standards written in a code of conduct or different instrument(s) e.g. the entity's personnel policies and/or the employees' employment agreements?
- Are there any circumstances affecting your entity that would justify variations to the preliminary conclusions in Part 4 of this document?
- Were you expecting, or wanting, more detailed guidance on any of the issues in part 4 of this document?
- Were you expecting to see any other issues in the Commissioner's sphere of interest, or do you think the Commissioner should have in interest in other issues?
- Do you have any questions you want to put to the Commissioner?

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State Services Commissioner's Foreword

Introduction

Amendments to the State Sector Act have changed the scope of the State Services Commissioner's mandate. An important change is the power to set minimum standards of conduct for many of the agencies which make up the State Services, and to apply those standards by way of a code or codes of conduct. The legislation does not specify either the character or the content of a code of conduct. My intention is to engage with Crown entities to identify integrity provisions which may already be in place, and explore whether setting additional standards may contribute to increased trust in government and confidence in the State Services. This discussion document is intended to give focus to that engagement and to elicit an understanding of the approaches entities take to integrity and conduct.

What is this about?

Although behavioural obligations may differ according to a Crown entity's function, I believe that there are underpinning ethical requirements which apply throughout the State Services. These are:

- to fulfill lawful obligations to the Government with professionalism and integrity
- to perform official duties honestly, faithfully and efficiently, respecting the rights of the public and colleagues
- not to bring the State Services into disrepute through private activities.

However, I have not developed a view on how these requirements should be recognised or whether behavioural obligations should be implemented in a uniform way.

In some Crown entities a compliance approach may have evolved which emphasises the importance of external controls on behaviour. This, typically, may involve a code of conduct comprising formal, detailed rules and procedures. In other entities, an integrity approach may be followed with an emphasis on learning values, and developing decision making skills which apply those values in daily practice. This is likely to involve value codes, integrity training and an ethics network. The likelihood is that many Crown entities have a mixture of these processes specified for staff, but have less formal requirements for Board members.

I am keen to understand how Crown entities manage conduct and integrity matters before giving consideration to setting minimum standards as provided for in the State Sector Act.

How will this be done?

Ethical considerations impact on a number of aspects of a Crown entity's business. This discussion document identifies "14 issues" which would appear to have particular relevance. These reflect consideration of a range of questions including:

- What obligation does a Crown entity have to maintain a sound working relationship with Ministers and prospective Ministers?
- Should there be limits on the ability of particular Crown entities to make public comment about Government policy?
- What are the requirements for fairness and responsiveness in providing services to the public?

- Are there activities in which Crown entity board members and staff should not become involved, if public confidence in the State Services is to be maintained?
- Should there be limits on offering and accepting hospitality which may strengthen business relationships?
- Should the expectations held of staff differ from what is expected of board members, and how is awareness of these expectations developed?

The approaches Crown entities take to these issues will help me decide what I should do next.

What will happen next?

Over the next 9 months the State Services Commission and departments with entity monitoring responsibilities will engage with Crown entities (possibly aggregated into groups reflecting responsibilities or types of entities) to gather information which will help me understand what is in place. From this I hope to be able to determine how a code or codes might contribute to maintaining or strengthening integrity in the State Services.

I look forward to exploring with Crown entities how best we can give effect to the Government's expectations that everyone working in the State Services, regardless of the agency they work for, demonstrates high standards of integrity and conduct.



Mark Prebble
State Services Commissioner

Purpose of this document

- 1 The State Services Commission (SSC) has prepared this document as the basis for initial discussions with Crown entities about the standards of integrity and conduct that their board members, statutory officers and employees should adhere to. The purpose of the discussions is to:
 - enable the State Services Commissioner (the Commissioner) to ascertain what policies and standards on integrity and conduct already apply in the entity, and how they are implemented
 - enable the Commissioner to explain his interests in integrity and conduct, and the related principles and preliminary conclusions for the behaviour of Crown entity board members and employees
 - discuss those preliminary conclusions with a view to determining what actual standards should apply to the individual entity, taking account of any special circumstances applying to the entity
 - work through any differences between existing entity policies and standards, and the standards that emerge through the discussions. It may be sufficient, for example, for an entity to add some detail to its existing standards and to become more proactive in promoting and implementing the standards at all levels in the entity. Issues such as this will be open to discussion.
- 2 This document:
 - provides some background to the Commissioner's role with regard to Crown entity integrity and conduct (part 1)
 - describes the scope of the Commissioner's interests in Crown entity integrity and conduct (part 2)
 - highlights some considerations for legitimately varying how a particular standard might apply (part 3)
 - provides some preliminary thoughts on the type of standards of integrity and conduct that might apply to Crown entities, including variations where appropriate (part 4). This part of the document is unapologetically lengthy: it is necessary to include the information so that entities can properly consider the SSC's questions, and help achieve the objectives of the forthcoming discussions as described in paragraph 1
 - asks some key questions that SSC would like to talk through with individual entities during the planned engagement process (part 5).
- 3 This document does not represent a draft Code of Conduct; it does not contain a draft Code of Conduct. As stated in paragraph 1, it is designed to initiate discussions with individual Crown entities, and their monitoring departments, with a view to establishing what standards of integrity and conduct should apply to the particular entity. Whether the Commissioner eventually issues a Code of Conduct for Crown entities, or several or many Codes, is a second order matter that will become clearer as the discussions progress.

Part 1: State Services Commissioner's role

State Sector Act 1988

- 4 Under section 57 of the State Sector Act 1988, as amended by section 11 of the State Sector Amendment Act (No 2) 2004, the State Services Commissioner “may set minimum standards of integrity and conduct that are to apply in –
- “(a) the Public Service:
 - “(b) all or any Crown entities:
 - “(c) the Parliamentary Counsel Office:
 - “(d) the Parliamentary Service”.
- 5 Previously, the Commissioner's role on matters of integrity and conduct was limited to the Public Service. This document concerns integrity and conduct with regard to Crown entities (for the purposes of the State Sector Act, the definition of “Crown entities” excludes tertiary education institutions, Crown Research Institutes, and their subsidiaries). The SSC will also hold separate discussions with the Parliamentary Counsel Office and the Parliamentary Service, which are a different type of organisation in the wider State sector.
- 6 The key policy decisions of the Government about the setting and implementation of minimum standards of integrity and conduct for Crown entities are reflected in sections 57A-57C of the amended State Sector Act. In particular:
- the Commissioner may set minimum standards by issuing a code of conduct, including any variations the Commissioner thinks appropriate taking into account an entity's legal or commercial context
 - an entity (and its employees) must comply with any standards that apply to it, by written notice to the entity
 - any entity is free to apply additional or more detailed standards to suit its circumstances, as long as they are consistent with the standards set by the Commissioner
 - an entity may derogate from a particular standard if it has obtained the prior written approval of its responsible Minister and sent a copy of the approval to the Commissioner
 - the Commissioner's role and powers also include:
 - providing advice and guidance on matters like the interpretation of the standards and their application in specific cases
 - obtaining information from entities and carrying out inspections and investigations
 - advising the responsible Minister if the Commissioner thinks any serious breach of a standard either has occurred, or is likely to occur.

Rationale for Commissioner's role

- 7 The statutory extensions to the Commissioner's role reflect that, although Crown entities now exercise significant public powers and functions that were formerly the domain of departments, the basis in the State Sector Act for setting standards of integrity and

conduct remained limited to Public Service departments. The recent amendments to the State Sector Act recognise:

- that Crown entities are instruments of the Crown in respect of the Government of New Zealand
- the role and composition of the modern State Services, in particular that Crown entities collectively –
 - carry out a broad range of executive government functions, including regulatory, advisory, service delivery and purchase functions
 - exercise extensive coercive powers, including powers to inspect, investigate, approve or revoke licenses to operate, approve or revoke standards, hear and decide applications, collect premiums or impose charges, make investment decisions, require the supply of information, or issue compliance notices
- the risk that performance failure or abuse of powers by Crown entities could seriously impact on the quality of peoples’ lives and the conduct of business, and therefore could seriously damage not only citizens’ confidence in individual institutions but also their trust in the institutions of government itself
- there is a need for a strong and unifying sense of values across the State Services
- there is a need for leadership on integrity and conduct across the State Services.

Crown Entities Act 2004

8 The Crown Entities Act 2004, which came into effect at the same time as the amendments to the State Sector Act 1988, creates five categories of Crown entity, namely statutory entities, Crown entity companies, Crown entity subsidiaries, school boards of trustees and tertiary education institutions. The Government has decided that the Commissioner may set minimum standards of integrity and conduct for the different categories of entity as follows:

Crown entity category	Commissioner’s minimum standards ...
Statutory entity	Apply, namely, to all: <ul style="list-style-type: none"> • Crown agents • autonomous Crown entities (ACEs) • independent Crown entities (ICEs)
Crown entity company	Apply (excluding Crown Research Institutes)
Crown entity subsidiary	Apply (excluding subsidiaries of Crown Research Institutes and tertiary education institutions)
School board of trustees	Apply
Tertiary education institution	Do not apply

9 The SSC is very conscious of the differences between the categories and types of Crown entities, and their different governance and accountability regimes. These will be critical factors when discussing legitimate variations to particular standards, as expressed in more detail below.

Part 2: Scope of State Services Commissioner's interest

- 10 The State Sector Act 1988 gives the Commissioner the power to set minimum standards of “integrity and conduct”, but does not define what is meant by “integrity” or “conduct”. Clearly, the Commissioner’s mandate would be very broad if “conduct” were to be interpreted to mean actions or behaviours of any kind.
- 11 The Commissioner’s interest in the conduct of Crown entities in fact extends only to how well Crown entities act as instruments of executive government, and in how their actions (or inactions) affect the public’s trust not only in each entity but also in government as a whole. The minimum standards of integrity and conduct in the Commissioner’s domain relate only to the behaviour or actions of Crown entity board members, statutory officers and other employees that impinge directly on these interests.
- 12 To avoid any doubt, the minimum standards that the Commissioner may set following the discussions with entities would not address:
 - the standards that people in general should follow (whether laid down by law or developed through social norms)
 - general employer obligations (e.g. EEO requirements) or general employee obligations that should be covered in the entity’s own policies (e.g. concerning workplace relations and the workplace environment)
 - professional standards governing particular professional groups
 - organisational culture in a generic sense - this is an internal matter for each entity, to which all staff, managers and board members can contribute in different ways.
- 13 Further, any standards that may be set by the Commissioner would be premised on the recognition of three fundamental principles and enduring realities of New Zealand’s system of public administration:
 - the **separation of powers**. Crown entities have been set up to operate at arms length from the Crown even though they are part of the executive branch of government. The Cabinet Manual writes as follows:

“In establishing such bodies, over a very long period, Parliament has recognised and reaffirmed that much public power should not be concentrated. It should be allocated to distinct bodies with varying degrees of independence from the executive. This separation and independence may help ensure, for instance, a judicial independence of decision, equitable distribution of funds, the pursuit of commercial profit and business efficiency, or effective and credible processes of scrutiny and supervision”.
 - the **rule of law**. The Government and agencies of the State must act within the rule of law. Procedural justice and consistency will often be important aspects of the activity of government agencies, particularly regulatory activities. People should be able to go about their business expecting that their legal rights will be upheld.
 - the principle of **democracy**. The public administration system should reflect the democratic nature of our government. Legislation, appropriation and scrutiny over the use of powers and resources granted by the House should be made by democratically elected leaders – Ministers and MPs. In turn, they are politically accountable for the way powers and resources are used.

Part 3: Variations between Crown entities

- 14 As acknowledged above, and as specifically provided for in the amended State Sector Act 1988, there may be legitimate reasons for varying the application of particular standards of integrity and conduct. For example:
- Crown entities are legally separate from the Crown (therefore, not all the conventions and standards that apply in the Public Service would apply automatically or uniformly to Crown entities)
 - there is great diversity in terms of the relationship between Crown entities and the government of the day e.g.:
 - the responsible Minister may direct a **Crown agent** to *give effect* to a government policy; the board members may be removed by the responsible Minister *entirely at his or her discretion*
 - the responsible Minister may direct an **autonomous Crown entity** to *have regard* to a government policy; the board members may be removed by the responsible Minister *for any reason that in the Minister's opinion justifies the removal*
 - the responsible Minister of an **independent Crown entity** may *not direct* the entity to give effect or have regard to a government policy unless specifically provided in a different statute to the Crown Entities Act; the board members may be removed by the *Governor-General for just cause*, on the advice of the responsible Minister after consultation with the Attorney-General
 - there is a need to acknowledge the special nature of some entities (e.g. corporations sole)
 - the directors of Crown entity companies have duties under the Companies Act 1993 that are separate from, and in addition to, their duties under the Crown Entities Act 2004. The duty to act in what the director believes to be the best interests of the company is pertinent
 - standards are to apply to board members and employees but their roles, responsibilities and relationship with the responsible Minister differ significantly
 - some board members of statutory entities are elected rather than appointed (which creates an accountability to parties other than the responsible Minister), and
 - there is also a need to acknowledge the special status of those Crown entity employees who are appointed to statutory officer positions and, as a result, are required to act independently (usually of both the Minister and the board).
- 15 The distinction between Crown entity board members and employees merits particular comment. Many parties can have a legitimate interest in the conduct of Crown entity board members (e.g. the chairperson, other members on the board, a select committee undertaking a review, the Minister of Finance, the Auditor-General, the Ombudsmen, the State Services Commissioner, the public). However, the board's most important relationship in terms of accountability is with the responsible Minister. What constitutes appropriate conduct in certain cases for board members (particularly in relation to political participation) may come down to:
- the fundamental requirement (expressed in the Crown Entities Act 2004 as an individual duty of members of statutory Crown entities) that a member must, when

acting as a member, act in good faith and not pursue his or her own interests at the expense of the entity's interests

- the nature of the Minister-board relationship in terms of Ministerial powers to direct and dismiss, as summarized in the preceding paragraph in respect of the three types of statutory Crown entities.

16 Accordingly, the boundary on acceptable conduct for a Crown entity board member could be relatively broad or flexible in cases where the Minister has broad discretion to remove the member. A board member of a Crown agent entity, for example, could have political affiliations and carry out a certain level of personal political activity as long as it:

- does not amount to acting as a member and pursuing his or her own interests at the expense of the entity's interests. The entity's ability to maintain the confidence of the government of the day as well as any future government is central to the entity's interests
- does not exceed what the Minister considers appropriate for a Crown agent board member. If that were to happen, the Minister has broad discretion to remove the member. It would be prudent for a board member who wishes, for example, to carry out a certain level of personal political activity, to bear in mind that one Minister's view may differ from the next Minister's view on what constitutes pursuing the member's own interests at the expense of the entity's interests. Ultimately, the Minister will decide what is acceptable.

17 Conversely, there could be stricter boundaries on acceptable conduct in cases where the legislation gives a high degree of protection to members in terms of being removed by the Minister. Stricter rules about political affiliation and participation are likely to apply to board members of independent Crown entities, because it is more difficult to remove them if they exceed what is appropriate for members who must be, and must be seen to carry out their role, free from political or Ministerial influence.

18 As a result of the considerations in the preceding paragraphs, it is much more complex to set minimum standards of integrity and conduct for Crown entities than for the Public Service. It is not possible for the SSC alone to anticipate all the special circumstances that might arise across the Crown entity sector: the discussions with entities will be critical.

Part 4: Preliminary thoughts on the minimum standards of integrity and conduct

19 This section outlines the range of issues that come within the Commissioner’s sphere of interest, sets out the SSC’s preliminary thinking about the principles or other considerations that apply to each issue, and presents some preliminary conclusions for the behaviour of Crown entity board members, statutory office holders and other employees. The actual standards that are appropriate for each entity, or group of entities (e.g. district health boards), will be worked through in the discussions with entities.

Methodology

20 Recognising that behaviour reflects values, and that values underpin relationships, the SSC has rationalised the Commissioner’s interests in terms of four relationships¹:

- integrity and conduct in relation to Ministers, the Government and Parliament
- integrity and conduct in relation to the public
- integrity and conduct in relation to the entity
- personal integrity and conduct.

21 Within the framework of these four relationships, the SSC considers there are fourteen issues within the Commissioner’s sphere of interest, as shown below.

Integrity and conduct in relation to Ministers, the Government and Parliament	Issue 1: Should Crown entity board members and employees be politically neutral, and be perceived to be so?
	Issue 2: Comment by Crown entities on Government policy
	Issue 3: Personal comment by board members and employees on Government policy
	Issue 4: Private communications by board members and employees with Ministers and MPs
	Issue 5: Standing for election to Parliament
	Issue 6: Other political participation by board members and employees
Integrity and conduct in relation to the public	Issue 7: Fairness in processes and decision-making
	Issue 8: Service delivery
Integrity and conduct in relation to the entity	Issue 9: Participation by board members and employees in public bodies or voluntary organisations
	Issue 10: Official information
	Issue 11: Use of financial and other resources
	Issue 12: Gifts
Personal integrity and conduct	Issue 13: Conflicts of interest
	Issue 14: Private out-of-work activities by board members and employees

¹ This is similar to the approach in Canada (in the *Values and Ethics Code for the Public Service*) and Australia (in the publication *Australian Public Service Values and Code of Conduct in Practice*)

Integrity and conduct in relation to Ministers, the Government and Parliament

Issue 1: Should Crown entity board members and employees be politically neutral, and be perceived to be so?

22 Since at least 1912, efficient and effective public administration in New Zealand has relied on a politically neutral Public Service as a key contributor. The question that needs to be addressed here is whether the same requirement for political neutrality extends to Crown entities. Answering this question requires that we first consider what is meant by political neutrality and how it is given effect in the Public Service.

Political neutrality in the Public Service

23 For the New Zealand Public Service, political neutrality means serving the government of the day by acting to maintain the confidence of current Ministers while also ensuring the Public Service will be able to establish a professional and impartial relationship with future Ministers. In the modern era of coalition governments, it also means serving each government as a whole, not any one political party that makes up a particular government.

24 Political neutrality is intended to ensure there is continuity in the business of government regardless of which political party or parties are in power. Such continuity is provided by building a bond of trust between successive sets of Ministers and the public servants who advise them on policy and implement whatever decisions are made by each elected government.

25 The convention of political neutrality requires public servants to:

- avoid doing anything in either their personal or professional capacity that could compromise, or that could be seen to compromise, their department's ability to retain the Government's confidence or which could jeopardise a sound working relationship with prospective future Ministers (from whatever political party)
- do their job professionally, without letting their personal interests or views influence their advice or behaviour, and without bias towards one political party or another – to this end they must implement each Government's programme and policies within the law, and be responsive to the Government's needs, priorities and objectives to the best of their ability and regardless of their own personal or political views
- provide honest, impartial and comprehensive advice to Ministers
- not withhold relevant information from Ministers, nor seek to obstruct or delay a decision, nor attempt to improperly influence or circumvent or undermine the Government's policies.

26 In brief, the convention requires public servants to be loyal to the government of the day, first by giving free and frank advice and then by diligently implementing whatever policies and programmes the government of the day decides to pursue, regardless of their own personal or professional opinions.

27 Political neutrality does not mean that public servants do not have rights to free speech and independence in the conduct of their private affairs. In New Zealand, these rights are

firmly established in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. But it does mean that all public servants need to be sensitive about how they manage their rights as well as their obligations not to compromise their department or their Minister.

- 28 There can be a delicate balance between these rights and the convention of Public Service neutrality. Each case must be treated on its merits, and often requires the exercise of difficult judgement. The critical factors that are considered in any one case include:
- the seniority of the employee
 - the sensitivity of their position in the department, especially whether they have a direct working relationship with Ministers or publicly represent the department
 - the employee's responsibilities, e.g. whether they are involved in giving advice to Ministers or have clerical, technical or industrial duties
 - the type of political behaviour the person is engaged in, e.g. whether seeking election as a member of Parliament, acting as a political party spokesperson, or carrying out volunteer work such as telephone surveys or distributing leaflets
 - the nature of their proposed action
 - the nature of the issue about which the public servant wants to act in a personal capacity, e.g. whether it is a policy directly connected with the person's job, a policy or programme outside their line of work, or a nation-wide or international matter
 - the sensitivity and timing of the issue e.g. whether it is likely to be a defining issue between the political parties contesting the general election.
- 29 In each case, these factors are weighed up to form a judgement about whether, for example, the public servant's behaviour:
- creates concern about their ability to be neutral in their job
 - constitutes disloyalty to the Minister or to the Government as a whole
 - allows them to maintain the confidence of current and future Ministers.
- 30 In extreme cases the requirement of political neutrality may lead to a public servant choosing either to refrain from certain types of political expression or activity, or to resign in order to pursue their desired level of political participation. Generally, however, a public servant discusses the situation with their employer with a view to arriving at a resolution that impairs the public servant's rights and freedoms as little as possible.

Political neutrality and Crown entities

- 31 Crown entities are part of the executive branch of government, and collectively they carry out a broad range of central government functions and exercise extensive powers. Most Crown entities have little or no direct role in providing policy advice to Ministers, but because of the importance of their collective functions and powers, they - no less than departments - have an important role to play in ensuring continuity in the business of government (and thence in maintaining the public's confidence in the institution of government).
- 32 This role requires Crown entities, no less than Public Service departments, to maintain the confidence of current and future Ministers by demonstrating their ability to operate

effectively under any Government now and in the future. As discussed above, this requirement lies at the core of the convention of political neutrality.

Loyalty

33 Because of the uniform nature of departments, all public servants give effect to the convention of political neutrality by being loyal to the government of the day. In contrast, Crown entities are a diverse lot and there can be no general presumption of loyalty. The diversity is illustrated by the following:

- Crown entities that are classified as Crown Agents are required by the Crown Entities Act 2004 to give effect to Government policies that relate to their functions and objectives: it seems reasonable to expect such entities to be loyal to the Government at least with regard to those policies
- independent Crown entities (ICEs) have been set up by Parliament to act, and to be seen to act, independently of the Government of the day: they do not owe loyalty to the Government in the exercise of their statutorily independent functions
- similarly, the board of any non-ICE Crown entity that is required to perform some function independently does not owe loyalty to the Government of the day as regards that statutorily independent function
- the directors of Crown entity companies have a legal duty under the Companies Act 1993 to act in the best interests of the company: it is conceivable that they will be confronted with situations where they judge that an action the shareholding Ministers do not wish them to take in fact is in the best interests of the company
- board members of non-company Crown entities may also be confronted by a similar difficulty because, under the Crown Entities Act 2004, they owe their individual duties to both the responsible Minister and the entity, and it is conceivable that their interests will differ
- some employees of Crown entities are obliged to promote the interest of other parties (e.g. patients, in the case of health professionals working for District Health Boards) rather than to act loyally to the Government.

Relationship with the Minister

34 With regard to the relationship between Ministers and Crown entities, the Crown Entities Act 2004 defines the Minister's role as being:

“... to oversee and manage the Crown's interests in, and relationship with, a statutory entity [Crown entity company] and to exercise any statutory responsibilities given to the Minister [shareholding Ministers], including functions, and powers.”

35 The key question is: how is this role to be discharged?

- On the one hand, responsible Ministers of statutory Crown entities have significant influence over their strategic direction as expressed through the Statement of Intent, and they have the power to review the operations and performance of a statutory entity at any time.
- Against this:
 - the relationship is ‘at arms length’ with regard to the legal form of Crown entities and to many of their operations and much of their decision-making

- the Minister's powers to direct Crown entities are more limited than their powers to direct departments
 - the Minister's responsibility for each statutory entity's policies and programmes varies according to the degree to which they can influence them through their power of direction (variable) or their power to set strategic direction through the entity's Statement of Intent (uniformly significant)
 - Ministers should be able to expect free, frank and comprehensive advice from Crown entities that have a policy advice role, but this applies to few entities.
- 36 With regard to Ministerial responsibility, by convention Ministers are responsible to the House of Representatives for the official acts and general conduct not only of their departments but also of other agencies within their portfolios. This is based on political accountability.

Conclusion

- 37 In summary, the important role that Crown entities have in contributing to the continuity of government requires them, no less than Public Service departments, to follow the convention of political neutrality. However, the diversity of Crown entities and the nature of their relationship with the Minister mean that this convention cannot uniformly be given effect among Crown entities by requiring them to act loyally to the government of the day, as though they were just like the Public Service.
- 38 To give effect to the convention of political neutrality, Crown entity board members, statutory office holders and other employees should conduct themselves in such a manner that they:
- are able to maintain the confidence not only of the government of the day but also of any future government
 - do not jeopardise or erode public trust in the entity or in the institutions of government.
- 39 As discussed in paragraphs 15-17, this conclusion can play out differently in practice for board members, depending on the nature of their relationship with the responsible Minister. A board member of a Crown agent entity can have some latitude that is not appropriate for an independent Crown entity member, but also runs the risk of:
- being perceived as acting, or having acted, in pursuit of his or her own interests at the expense of the entity's interests
 - being easily dismissed if he or she exceeds what the Minister considers acceptable.

Issue 2: Comment by Crown entities on Government policy

- 40 By its nature, the business of government, much of which is done through Crown entities, is of interest to both the public and the media and can be controversial. As a result, there will always be calls for policies and decisions to be both explained and justified. How those calls are dealt with can impact either positively or negatively on both the public's trust in government and on the working relationship between Crown entities and the government of the day. A careful balance needs to be struck between, on the one hand, maintaining coherence of policy by presenting a unified front and, on the other hand, not undermining the statutory role of Crown entities or Crown entity boards.

Principles and other considerations

- 41 On this issue, long-established practice in the Public Service provides a robust base for sound practice in Crown entities. Practice in the Public Service is based on the following principles:
- Ministers are responsible for **defending or justifying** the Government's policies and decisions
 - the role of the Public Service is limited to **explaining** government policy (including its rationale, underlying factual or research basis, and implementation)
 - explanations of policies or their implementation by departments may be given only by chief executives or other employees expressly authorised to do so
 - all explanations must be balanced, factual and impartial – generally this is taken to mean that explanations do not include expressions of views about political decisions, party politics or the discussions that culminated in policy decisions
 - Ministers should not be surprised by any explanation of policy given by a Public Servant.
- 42 The boundary between explaining and defending policy can be hard to define and maintain in some cases, particularly where departments are charged by statute with an **advocacy** role (e.g. the Department of Conservation).
- 43 This same tension can arise in extending established Public Service practice to Crown entities because:
- some Crown entities are required by their enabling statutes to carry out advocacy functions and promote wider public debate of issues, e.g. the Families Commission
 - Crown entities charged with providing news services (Television New Zealand and Radio New Zealand) often will be required to comment on political decisions, party politics and policy debates
 - some Crown entities have regulatory functions that may require them to comment on an alleged contravention of applicable statute by the Crown, e.g. the Commerce Commission
 - the directors of Crown entity companies have a statutory duty to act in the best interests of the company and, in the event a Government implements a policy that they judge not to be in the interests of the company, may comment legitimately on that policy.

Preliminary conclusions for behaviour of Crown entity board members and employees

- 44 Ministers remain responsible for any Government policies and decisions implemented or administered by a Crown entity, even if the Crown entity had a major role in developing the policy. It remains part of the Minister's role to justify or defend the Government's decisions. But it seems reasonable generally that a Crown entity should be able to make the same types of comments as Public Service departments, whereby they:
- may explain Government policy including its rationale, underlying factual or research basis, and implementation
 - should ensure that explanations of policy are factual, balanced and impartial

- should avoid expressing a view about the political processes, party politics and decisions that led to a policy
 - should ensure that explanations are given only by personnel authorised to do so
 - should ensure that the responsible Minister is reasonably forewarned of any element of an explanation of a policy that otherwise might constitute a surprise.
- 45 If a Crown entity company director considers that adverse comment on a particular Government policy would be in the best interests of the company, it would be prudent for the director to confer first with the other directors to see if that is a shared view, and then raise the matter with the shareholding Ministers.

Issue 3: Personal comment by board members and employees on Government policy

- 46 Crown entity board members and employees can face some tension between their official role as a board member or employee and the way they conduct themselves in their private lives. A real example can be where a board member or employee wants to express publicly his or her personal views on Government policy. After all, they have the same democratic rights, including the right to free speech, as other New Zealanders.

Principles and other considerations

- 47 Crown entity board members and employees need to exercise judgement as to whether, when and how to exercise their democratic rights by publicly expressing their personal view on Government policy. They still need to ensure that their words and actions in the public domain:
- neither compromise their entity's ability to operate effectively under any Government now or in the future
 - nor erode the trust that people should be able to place in public office holders and in the institutions of government.
- 48 For that reason, Crown entity personnel who wish to express their personal views on Government policy, party-political or elections issues must exercise judgement on whether comment is appropriate. This will depend on the combination of factors cited in paragraph 28 that can affect the credibility of the entity, principally the nature of the issue, the circumstances in which the comment is to be made, and the position held by the person: the more senior the person's role (especially, a board member or chief executive), the more publicly visible, and the closer he or she operates with Ministers, the more difficult it becomes in the mind of the public to separate the person's official and private roles.

Preliminary conclusions for behaviour of Crown entity board members and employees

- 49 With regard to a Government policy or programme to which an entity is a party, it seems reasonable that similar standards should apply as in Public Service departments. In general, Crown entity employees should not:
- give openly partisan support to, or criticism of, a political party
 - express their personal views as a representative of the entity or in a way that could be taken as a comment in their official capacity
 - indulge in personal attacks on individual Ministers or MPs

- criticise a Government policy or programme with which they have been professionally involved or which they are required to implement
 - comment or act in a way that amounts to a criticism sufficiently strong and/or persistent so as to call into question the person's ability to impartially implement, administer or advise upon a Government policy
 - reveal advice or information given to Ministers, other than as permitted or required by law
 - subject to law, use or reveal information gained in the course of official duties that is not already known, or readily available, to the general public.
- 50 The preliminary conclusions in the preceding paragraph do not apply uniformly to the different types of board members. Whereas they seem appropriate for members of an independent Crown entity because of the paramount importance of maintaining independence, the members of a Crown agent entity may have more latitude if the Minister considers it appropriate. This reflects the Minister's powers to dismiss if a member exceeds what is appropriate, especially where personal comment could be considered as acting in the member's own interests at the expense of the entity's interests.
- 51 On face value, there would be fewer sensitivities for employees and board members around public comment on a Government policy or programme with which the entity is not professionally involved through advice, implementation or administration. However, care and judgement are still necessary particularly if:
- the policy or programme is highly sensitive or controversial
 - the board member, chief executive or other senior employee has a high public profile or works closely with Ministers on other issues
 - the comment is to be expressed in a way that is likely to make members of any party in the House question whether they could work effectively with that person. This scenario may emerge especially if a board member expresses such comments in circumstances where it is reasonable to conclude that the person was acting in his or her own interests at the expense of the entity's interests.
- 52 Some boards have deliberately been set up to include persons elected by one or more constituencies. The accountability of elected members to their constituency potentially creates some pressure on them to comment publicly, and perhaps adversely, on Government policy. It seems legitimate for them to do so, but the manner in which they do so is still important. Under the Crown Entities Act 2004, no distinction is made between elected and appointed members for the purpose of compliance with board and board member duties. All board members should ensure that their actions do not jeopardise the effective governance of the entity.

Issue 4: Private communications by board members and employees with Ministers and Members of Parliament

- 53 Crown entity board members and employees generally have the same rights of access to their political representatives as other New Zealanders. How do these rights play out with regard to communicating privately with their local Member of Parliament, other MPs or Ministers? For example, what rules apply to discussing constituency issues with their electorate MP, writing a private letter to a Minister about a particular policy, or privately lobbying an MP or Minister over a particular issue? The key issue is to manage

effectively the risk that personal communications by board members or employees may be interpreted as reflecting an official view of their entity.

Principles and other considerations

54 In the Public Service, given the requirement for public servants to remain politically neutral in their work, the general guide is that:

- with regard to matters outside their official duties, public servants may communicate privately with any MP or Minister, but public servants occupying senior positions or working closely with Ministers should exercise particular care with such communications
- with regard to matters concerning their department, public servants may communicate privately with their Minister, but they should first raise such matters with the chief executive of the department. A public servant is entitled to the same information or level of detail in a response as would be given to any member of the public under the Official Information Act 1982.

Preliminary conclusions for behaviour of Crown entity board members and employees

55 In the SSC's view, it seems reasonable that the same general guides would apply to Crown entity boards and employees:

- they may communicate privately with MPs and Ministers about matters not connected with their official duties. However, especially if they hold a senior position in the entity, they should ensure that the manner of their communication could not be seen to represent the entity, and that their words and actions do not compromise the entity's ability to operate effectively under any Government now or in the future
- with regard to matters connected with the entity's functions and objectives, Crown entity personnel may communicate privately with their Minister. But employees should first raise the matter with the chief executive; if the chief executive or a board member wishes to communicate the Minister, they should first raise the matter with the chair of the board.

56 Two cases warrant individual mention in this regard.

- *ICEs* - Because the appearance of independence is paramount in the case of an independent Crown entity, board members and employees of ICEs should be careful to ensure that any private communications with MPs or Ministers could not be interpreted to compromise the entity's independence or their personal suitability for carrying out their official duties
- *Select committees* – Crown entity board members and employees may wish to make a submission or appear before a select committee in their private capacity e.g. to comment on a Bill that is of personal interest, importance or concern. Whether this is appropriate in a given case will depend on the issue or Bill and the individual's position in the entity. The fundamental requirement is that their submission or appearance does not compromise the entity's ability to operate effectively under any Government now or in the future, nor erode the trust that people should be able to place in public office holders and in the institutions of government.

- It is most unlikely that senior personnel and those who work closely with Ministers could appropriately appear before a select committee in their private capacity.
- Entity personnel who do appear in a private capacity should:
 - make it clear to the committee that they are appearing in their private capacity
 - avoid commenting on policy issues related to their own entity or with which they have been professionally associated
 - advise their chief executive (who in turn should advise the chair of the board) that they will be submitting.

Issue 5: Standing for election to Parliament

57 No activity is more overtly party-political than standing for Parliament. How does the need to preserve the Government's confidence in the entity and the public's trust in the institutions of government balance with the right of all citizens to stand for Parliament (provided they are eligible)?

Principles and other considerations

- 58 Persons who are board members or Crown entity employees have the same right as any other eligible citizen to offer themselves as candidates for Parliament.
- 59 The Electoral Act 1993 requires that any Crown entity employee (the Act uses the term 'State servant') wishing to stand as a candidate in a general election or by-election must disclose their intent to their employer, and must be placed on leave of absence from nomination day until the first working day after polling day (unless the nomination is withdrawn before then). The rationale behind this requirement is that the confidence of both the Government and the public in the political neutrality of the entity could be eroded, say, by a State servant campaigning as a candidate for one political party while being employed by the Government of the day. Confidence could also be eroded by the employee being remunerated out of taxpayers' money whilst campaigning in the period leading up to an election.

Preliminary conclusions for behaviour of Crown entity board members and employees

- 60 On this issue, the provisions in the Electoral Act 1993 apply: Crown entities must ensure that the provisions are complied with if any employee proposes to stand for Parliament.
- 61 Members of Crown entity boards are not covered by the Electoral Act 1993. Nevertheless, successive governments have made decisions designed to protect the integrity of Crown entity governance arrangements.
- First, Cabinet agreed in 1996, 1999 and 2002 that shareholding Ministers must invite any director of a Crown entity company selected as a Parliamentary candidate to stand down from their board position from no later than nomination day. The reason for this decision was that public confidence in Crown entity companies could be damaged if directors were able, or were perceived as being able, to benefit from any situation where there might be a conflict of interest or to use their position as a director as a vehicle for a personal campaign for political office.

- Second, and for the same reason, Cabinet also agreed that Ministers should ensure that the chairpersons of non-company Crown entities and quasi-government bodies were aware of:
 - the law relating to State servants standing for election to Parliament
 - the possible conflicts of interest (either real or perceived) that could arise if a board member did not stand down upon being selected as a Parliamentary candidate
 - in particular, the conflicts that could arise from the possible use of a position for party-political purposes.

62 In 1999, these expectations were communicated directly by Ministers, but in 2002 and 2005 the State Services Commissioner wrote to Crown entities on behalf of Ministers. It is reasonable that the same expectations would continue in the future.

Issue 6: Other political participation by board members and employees

63 Party-political activity can take many forms other than standing for Parliament, including being a paid-up member of a political party, participating in party-political demonstrations or protests, attending party-political events such as fund-raisers, delivering party-political brochures, and helping with telephone surveys. Again the key issue is how to strike a balance between protecting the right of Crown entity board members and employees to engage in such party-political activities while at the same time preserving the integrity and ongoing effectiveness of the entity with which they are associated, as well as maintaining public trust in the institutions of government.

Principles and other considerations

64 Much of the discussion in issue 1, concerning political neutrality, is relevant here:

- with regard to Crown entity board members, the convention of political neutrality can play out differently in practice, depending on the nature of the statutory relationship between the responsible Minister and the board member;
- in the case of Crown entity employees, the convention of political neutrality generally requires them to conduct themselves in such a manner that they:
 - are able to maintain the confidence not only of the government of the day but also of any future government
 - do not jeopardise or erode public trust in the entity or in the institutions of government.

65 Further, in the case of board members of statutory entities, some of their duties under the Crown Entities Act 2004 can have direct relevance to the boundaries of acceptable conduct with regard to political participation, especially:

- the collective duty (owed to the responsible Minister) to ensure the entity acts in a manner consistent with its objectives, functions, current statement of intent, and output agreement (if any)
- the individual duty (owed to the responsible Minister and the entity) when acting as a member, to act in good faith and not pursue one's own interests at the expense of the entity's interests.

66 Board members and senior employees in independent Crown entities are in a special situation. Public confidence in the independence of their decision making is the

paramount factor that determines whether a statutory Crown entity should be constituted as an ICE rather than an autonomous Crown entity or Crown agent. The requirement for an ICE's decisions to be, and to be seen to be, free from political influence would preclude some forms of political activity or participation on the part of the board members and senior employees of an ICE. The same consideration applies to office holders in Crown agent entities and autonomous Crown entities who are charged with 'statutorily independent functions': public confidence in their independent exercise is also important.

Preliminary conclusions for behaviour of Crown entity board members and employees

67 Paragraph 28 acknowledges the difficult judgement calls that are often required in the Public Service with regard to political neutrality and political participation, and indicates the range of factors that need to be considered. Similarly, difficult judgement calls can also be required with regard to political activity or participation by certain Crown entity board members and employees.

Paid-up member of a political party

68 Whereas the fact of political party membership could compromise a senior public servant's ability to be seen by the Government (either current or future) as impartial and professional, this is less likely in the case of Crown entity board members as long as they continue to fulfil their duties to the required standard (as determined by the responsible Minister). Political party membership is not necessarily a critical factor: the effect of their subsequent actions on the performance of their statutory duties is what counts.

69 Similarly, it would seem reasonable that political party membership on the part of most Crown entity employees (especially, less senior employees) is acceptable, as long as their subsequent actions:

- demonstrate the ability to maintain the confidence not only of the government of the day but also of any future government
- do not jeopardise or erode public trust in the entity or in the institutions of government.

70 However, the requirement for an ICE's decisions to be, and to be seen to be, free from political influence would preclude political party membership on the part of the board members and senior employees of an ICE. The same consideration applies to office holders in Crown agent entities and autonomous Crown entities who are charged with 'statutorily independent functions': public confidence in their independent exercise is also important.

Political demonstrations or protests

71 In line with the discussion in paragraph 68, the question is: what effect would participation in a political demonstration or protest have on the performance of a board member's statutory duties? The duty that a board member of a statutory Crown entity has, when acting as a member, to act in good faith and not pursue one's own interests at the expense of the entity's interests is especially pertinent here. A board member's actions in public in the form of a political protest could easily be interpreted as "acting as a member" rather than acting as an individual. For that reason, it could be easy to exceed what is acceptable by being seen to pursue one's own interests at the expense of the entity's interests (which include demonstrating the ability to maintain the confidence of

current and future Ministers, and to operate effectively under any Government, now and in the future). This is the case especially if the Crown entity of which the person is a board member is professionally associated with, or has responsibilities concerning, the matter under protest.

- 72 In some cases, the responsible Minister might consider that a board member's participation did not, or would not, amount to acting as a member (as distinct from acting privately) or to acting at the expense of the entity's interests and therefore did not, or would not, constitute a breach of duty. That is the Minister's call.
- 73 However, board members of an ICE should refrain altogether from political demonstrations or protests, as an *a fortiori* application of the considerations in paragraph 70.
- 74 Crown entity employees who have a close working relationship with Ministers should also be mindful of their need to avoid conduct that would jeopardise their ability to operate under any Government or that could erode the trust that people should be able to place in public office holders.

Participation in party-political events e.g. fundraising gala

- 75 The appropriateness of attendance at events organised on behalf of a Government or Opposition political party is a question of judgement. As a general rule:
- a Crown entity's employees should not attend if their attendance at the event could be seen, in any way, to compromise the entity's ability to maintain the confidence of current and future Ministers, or its ability to operate effectively under any Government, now and in the future
 - as discussed throughout the preceding paragraphs, there can be more latitude for certain board members, consistent with:
 - the individual duty when acting as a member to act in good faith and not pursue one's own interests at the expense of the entity's interests
 - the nature of the board's relationship with the Minister, particularly the Minister's powers to remove individual members
 - however, board members of an ICE should not participate at such events because their attendance could jeopardise the necessary appearance of independence in their decision making.

Other activities e.g. delivering party-political brochures; helping with telephone surveys on behalf of a political party

- 76 The appropriateness of these types of activities on the part of Crown entity board members and employees rests on the same considerations in the paragraph immediately above.

Use of entity resources

- 77 Because of the need to avoid conduct that would jeopardise an entity's ability to operate under any Government or that could erode the trust that people should be able to place in public office holders, Crown entity boards should ensure that the entity's resources are not used for party-political purposes. Therefore, they should ensure that:
- the entity's employees do not use, or agree to requests to use, their work resources or facilities for the production of party-political material or information

- research funded by the entity is not undertaken for party-political purposes
- work premises are not used for party-political events e.g. fundraising events, meetings
- employees do not use their work email to respond to political surveys or communicate generally about political issues.

78 It is critical that board members apply the same standards in the preceding paragraph to themselves. The use of the entity's premises, resources or facilities for party-political purposes would automatically constitute acting as a member, rather than acting privately, and be seen to act in the member's own interests at the expense of the entity's interests.

Integrity and conduct in relation to the public

Issue 7: Fairness in processes and decision-making

79 Trust in any government institution can easily erode if people are treated unfairly or inconsistently. Reflecting this possibility, the Crown Entities Act 2004 imposes a collective duty on the boards of statutory entities to ensure their entities perform their functions not only efficiently and effectively but also in a manner consistent with the spirit of service to the public.

Principles and other considerations

80 The collective duty on statutory entities to act in a manner consistent with the spirit of service to the public means that Crown entities should be able to demonstrate certain values in all their dealings with third parties. The principal values applying in this case are:

- *fairness and impartiality* – all the individuals and organisations with which the Crown has dealings must be treated impartially
- *consistency* - people in similar circumstances or with similar issues must be treated similarly in terms of the processes that the entity follows, the way policy is applied, and the decisions that are made
- *transparency* - entities must be able to provide reasons to explain and justify all decisions, i.e. they must be able to demonstrate that they were ‘fair and reasonable’ in the circumstances
- *legitimacy* - entities must be able to demonstrate that powers were properly authorised and used properly.

Preliminary conclusions for behaviour of Crown entity board members and employees

81 Crown entity boards should ensure that there are policies and procedures in operation to ensure (where applicable) the entity:

- acts according to the law ie decisions are authorised by law and follow procedures required by law or any other applicable directions or guidelines
- avoids predetermination in dealings with clients and the public. In particular, decisions must be made without bias or the appearance of bias; they must be based on the evidence available, and anyone who is adversely affected by the decision must have the opportunity to provide their views. This latter point is particularly important with regard to a person’s right to know the case against them: section 27(1) of the New Zealand Bill of Rights Act 1990 is clear that: “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law”
- uses competitive tendering and contracting with regard to procurement from the private or other sectors. This involves evaluating bidders against criteria to select a preferred supplier on the basis of value for money; it also involves advertising and selection processes that are transparent, and free from bias. Entities must be able to provide sufficient documentation to justify their decision

- ensures that contractors, partners and alliances are aware of the expected standards of conduct and adopt them as appropriate.

Issue 8: Service delivery

82 Many Crown entities serve the community directly by assessing people's eligibility for and administering entitlements or by delivering specified services. Often Crown entities are the only agency empowered to assess eligibility, administer entitlements and provide specified services. Therefore, the quality and effectiveness of their service delivery can have a major impact on people's lives and thus on their trust in government and its institutions. Parliament's role in granting exclusive powers to entities means it has a very keen interest in their service performance.

Principles and other considerations

83 The *principles and other considerations* that apply to the previous issue of *fairness in processes and decision-making* (paragraph 80) are also relevant to the delivery of services by Crown entities.

84 In addition, some of the values and principles in the statement of Government Expectations of the State Sector² are directly applicable to service delivery by Crown entities, especially:

- the values of –
 - *responsibility*: act with personal and professional responsibility; have concern for the consequences of public actions
 - *respect*: respect people, as citizens and clients
- the principle *to be responsive to the community by*:
 - demonstrating a commitment of service
 - recognising the legitimate interests of individuals and groups
 - respecting the rights of citizens and others and advising them of their entitlements.

Preliminary conclusions for behaviour of Crown entity board members and employees

85 Crown entities involved in service delivery to the public should help members of the public to understand their entitlements as well as their obligations under the law. This requires the appropriate entity personnel to fully understand the laws, policies and programmes that the entity administers, the level of service it is expected to provide, and the principle of procedural fairness as a basis for decision-making.

86 Being responsive also means ensuring equality of access for all clients and endeavouring to administer entitlements or provide services without any unnecessary rigidity.

87 However, being responsive does not mean that entity personnel can make exceptions in individual cases where these are not sanctioned by law or policy. Entity personnel must also avoid providing advice on 'how to get around the system' or 'bend the rules'.

² Proposed by the State Sector Standards Board in January 2001 and endorsed by the Government

Integrity and conduct in relation to the entity

Issue 9: Participation by board members and employees in public bodies or voluntary organisations

88 Board members and entity employees who involve themselves closely with organisations other than their entity potentially create situations where it may not be clear whose interests they are seeking to promote, i.e. they face (or at least appear to face) a conflict of interest. The focus here is on the participation by board members and employees with public bodies and voluntary organisations. Issue 13 deals with conflicts of interest more generally.

Principles and other considerations

89 In the Public Service, the Code of Conduct distinguishes between voluntary organisations and public bodies.

Voluntary organisations

90 Public servants are free to stand for, or be appointed to, any office or position on a voluntary organisation. However, they should first inform their manager of their intentions, to ensure that no conflict exists between such participation and their duties and responsibilities as public servants.

Public bodies

91 Strong conflicts of interest are likely if a public servant is appointed to a public body. Arrangements need to be made to avoid or resolve the conflict. In some cases, this may require that the public servant be requested not to stand for office, or to resign a position already held.

92 The care and judgement required with regard to public bodies is based on the imperative for public servants to preserve loyalty to the Minister at all times and the principle of political neutrality. As discussed earlier, the need for Crown entities to be politically neutral does not necessarily give rise to the same need for loyalty, and the Preliminary Conclusion proposed below reflect a less risk-averse approach.

Senior public servants

93 In the case of senior public servants, as a general rule, they should avoid being appointed in a personal capacity to any position of significant responsibility in a public body or voluntary organisation that is likely to become involved in making representations to the Government on policy issues or being openly and publicly partisan about the actions or policies of the Government. Before standing for or being appointed to any such office, they should first inform their manager of their intentions; arrangements must be made to avoid or resolve any significant conflict of interest.

Preliminary conclusions for behaviour of Crown entity board members and employees

94 It seems reasonable that Crown entity board members and employees may be appointed to any office or position on a voluntary organisation or a public body subject only to the need to avoid or resolve any obvious conflict of interest that might arise by so doing. Any such conflict most likely would centre on an incompatibility with the Crown entity's

business, for example, joining a group whose purpose is to campaign against a policy or programme administered by the Crown entity.

- 95 Board members or Crown entity employees who are involved with a public body or a voluntary organisation that is planning to make representations to the Government on policy issues, or to be openly critical or supportive of the actions or policies of the Government, need to exercise judgement and know when to disengage from discussions and/or explicitly to make “no comment”.

Issue 10: Official information

- 96 Because of public and media interest in the business of their Government, and more especially in issues that are politically controversial, there is a never-ending demand for more and more official information to be made publicly available. The premise of current legislation is that official information should be released unless there is good reason not to do so. In this context, how demands for information are dealt with can impact materially on both a government’s relationships with its agencies and on the public’s confidence in its Government.

Principles and other considerations

- 97 The overriding principle underpinning the preliminary conclusions below is that the applicable law in New Zealand must be complied with. The applicable law deals with two issues, namely the proper use of official information and the appropriate public disclosure of official information.

Proper use of official information

- 98 With regard to the proper use of official information, the basic tenets are that:
- official information is to be used only for official purposes and treated as confidential to the agency that holds the information
 - it is unacceptable for public officials to make unauthorised use of information to which they have had access in their official capacity.
- 99 In accordance with these tenets, members of non-company Crown entities are subject to an individual duty set out in the Crown Entities Act 2004 not to publicly disclose information that they have in their capacity as a member except under specified circumstances. One of those circumstances is that the disclosure is required or permitted by law. The directors of Crown entity companies are subject to a similar obligation set out in the Companies Act 1993.

Public disclosure of official information

- 100 As regards the public disclosure of official information the key point is that, with the exception of the Police Complaints Authority, Crown entities are subject to the Official Information Act 1982 (the OIA). The OIA requires the release of official information unless there is a good reason to withhold it; those reasons are spelled out in the OIA. The boards of Crown entities must ensure that the requirements of the OIA are complied with.
- 101 That being said, Crown entities need to have effective working relations with Ministers and, to that end, to command their confidence. The experience of the Public Service is that poorly handled OIA requests can seriously damage a Minister’s confidence in a department. The key lesson learned by the Public Service is that officials must carefully

assess the political sensitivity of OIA requests to ensure that they are processed appropriately to meet the requirements of the law as well as the department's duties towards the Minister.

Preliminary conclusions for behaviour of Crown entity board members and employees

General

102 Crown entity boards should ensure that:

- there are specific procedures for dealing with the release of information that do not conflict with the provisions in the OIA
- requests for information are dealt with by authorised personnel and only in accordance the entity's set procedures.

103 The personnel authorised to respond to requests made under the OIA should:

- exercise proper care and discretion in applying the entity's procedures
- seek guidance from the entity's legal advisers in cases of doubt.

Politically sensitive information

104 Information cannot be withheld just because it has important or sensitive political implications: it may only be withheld on the grounds set out in the OIA. If the release of politically sensitive or potentially controversial material is required (e.g. if the request comes from an MP or Opposition research unit), the following steps should be considered:

- the Minister should be informed in advance of the release
- follow due process –
 - the personnel who are authorised to deal with the OIA should notify their manager
 - the chief executive or the Chair of the board should consult with the Minister to ensure that any separate concerns about disclosure are identified and properly assessed under the OIA
 - it may be appropriate to transfer the request to the Minister if the information can reasonably be said “to be more closely connected with the functions” of the Minister (OIA, s.14). The political nature of certain requests can make the request more closely involved with the functions of the Minister so that it is appropriate to make the transfer.

105 If a member of Parliament approaches a Crown entity in a private capacity:

- the official dealing with the matter and the MP should both ensure that the matter is addressed, and is seen to be addressed, on the basis of strict impartiality
- if the official is in any doubt about how to respond to an enquiry from an MP, he or she should refer the matter immediately to the chief executive
- if there is any doubt about the propriety of the request, the matter should be referred, through the chief executive or Chair of the board, to the responsible Minister.

Personally sensitive information

106 Crown entities holding personal information about individuals (e.g. regarding their schooling or health status) must protect the confidentiality of information gained from professional relationships and avoid disclosing it to any third party unless disclosure is required or permitted by law, e.g. to avoid serious danger to others or to the individual about whom the information is held.

Issue 11: Use of financial and other resources

107 Most Crown entities receive at least some funding by way of a parliamentary appropriation, and arrangements have been put in place to allow Parliament to hold governments to account for the efficient and effective use of that money. Even where Crown entities get their funding outside parliamentary appropriation processes, their use of their financial and other resources is of interest to Parliament, the media and, more selectively, to the voting public.

108 Recent experience makes clear that the public, governments and Parliament expect entities to use their financial and other resources only for the intended purpose(s), effectively and with great care (even frugality).

Principles and other considerations

109 The need to comply with the applicable law of New Zealand is the main consideration.

Non-company Crown entities

110 In the case of the non-company Crown entities, the most directly applicable law relating to the use of financial and other resources is the Crown Entities Act 2004. This Act:

- unequivocally places the responsibility for the performance of each entity on its board: section 66 vests all authorities and powers in entity boards, and requires all decisions to be made by boards or under their authority
- imposes two relevant collective duties on boards, namely a duty to ensure that their entities operate in a “financially responsible manner” and a duty to ensure that they perform their functions efficiently, effectively and consistent with the spirit of service to the public. These collective duties are owed in each case to the responsible Minister who, for that reason alone, may therefore have to field questions in Parliament on these matters.

111 The Act states that “financially responsible manner” includes the prudent management of an entity’s assets and liabilities, ensuring its long-term financial viability, and endeavouring to ensure it remains a going concern. A board must have effective financial and other management systems in place to meet this obligation.

112 The Act does not elaborate on what is meant by “efficiently, effectively and consistent with the spirit of service to the public”. Meeting this obligation would require each board to ensure that all expenditure is properly authorised and represents value for money in terms of the purpose and objectives of the entity, and that non-financial resources such as communications equipment are used only for legal purposes, and only with proper approval. There must be effective financial and other management systems in place for this to be possible.

Crown entity companies

113 The day-to-day functioning of Crown entity companies is governed by the Companies Act 1993. This Act is less prescriptive than the Crown Entities Act 2004, but it too leaves no doubt that it is the directors who are responsible for the performance of each Crown company entity.

Other considerations

114 The financial and other performance of each Crown entity is subject to routine annual review by a parliamentary select committee and may be subject to special review if a select committee so decides. The Auditor-General assists parliamentary select committees with their financial reviews of Crown entities (and other state sector agencies) by undertaking an annual audit of each entity and by advising committees.

Preliminary conclusions for behaviour of Crown entity board members and employees

115 The fundamental requirement is that Crown entity boards ensure that effective financial and other management systems and policies are in place, and actively applied by the chief executive, to ensure that the board members can discharge the collective financial and performance duties owed to the Minister under the Crown Entities Act 2004.

116 Ordinarily, these systems and policies would cover financial resources (e.g. the use of credit cards, including spending limits; and rules about customer loyalty programmes and similar schemes) and other resources (e.g. the use of the entity's premises, facilities and equipment; and the use of the Internet and email systems).

Issue 12: Gifts

117 The acceptance of gifts by Crown entity board members or employees could compromise, or be seen to compromise, the integrity of the individuals receiving the gift, the entity with which they are associated, and the institutions of government in general.

118 "Gift" is interpreted broadly, and can include a present, an award, hospitality, a prize, cash, remuneration of any nature, services, travel, entertainment or accommodation provided by any person **outside the Crown entity**. It can include a corporate sponsorship, personal air points, sponsored travel, and discounted or free products.

Principles and other considerations

119 Crown entity board members and employees (like public servants):

- are remunerated for doing their job and must not use the job to obtain other benefits
- must not abuse their position for personal gain.

120 Gifts may be acceptable if they do not place the recipient under any obligation to the giver and could not reasonably be regarded as doing so.

Preliminary conclusions for behaviour of Crown entity board members and employees

121 As a general rule –

- *solicitation* – board members and Crown entity employees must not solicit any gift in connection with their duties

- *acceptance* - board members and Crown entity employees should not accept a gift whatever its nature or value if it is (or could be seen as being) an inducement or reward which might place the recipient under an obligation to a third party.

122 Crown entities should have policies and procedures in place about the offer and acceptance of gifts, covering at least:

- what constitutes an acceptable gift
- the protocols to be applied by board members and employees when reporting offers of inappropriate gifts
- the protocols to be applied by board members and employees when reporting their acceptance of gifts
- the protocols to be applied when decisions are made on the final disposal of gifts that have been received.

Personal integrity and conduct

Issue 13: Conflicts of interest

123 To maintain the confidence of both the Government and the public, Crown entities must conduct their affairs impartially. Doubts about impartiality can arise very quickly if decision-makers have, or are thought to have, personal interests that affect their decision-making or their advice, i.e. if they have conflicts of interest.

124 Conflicts of interest are not limited to financial interests and relationships. In a report on conflicts of interest in the local authority sector³, the Office of the Controller and Auditor-General writes:

“... a conflict of interest exists where two different interests are at odds. In other words, where your responsibilities ... could be affected by some other separate interest or duty that you may have in relation to a particular matter. That other interest or duty might exist because of: a relationship or role that you have; or something you have said or done”.

125 This broad definition is consistent with the way “interest” is defined in the Crown Entities Act 2004.

Principles and other considerations

126 The Crown Entities Act 2004 contains important provisions relating to the definition of interests, the disclosure of interests by board members, and the restrictions on their actions that generally must apply if an interest is declared.

127 In accordance with the principles underlying the statutory provisions:

- board members and Crown entity employees (like public servants) must ensure that they perform all aspects of their work impartially by:
 - avoiding any situation where actions they take in an official capacity could be seen to influence or be influenced by their private interests (e.g. company directorships, shareholdings, offers of outside employment, financial rewards)
 - avoiding situations that could impair objectivity or create personal bias which would influence judgements (e.g. unfairly regard a case with favour or disfavour)
 - ensuring they are free from any obligation to other parties.
- board members and Crown entity employees (again like public servants) must ensure their actions can bear the closest public scrutiny, including by avoiding even the appearance of a conflict of interest (consistent with the notion that justice should not only be done but should be seen to be done).

128 It is not enough that Crown entities have policies and procedures in place for identifying and managing conflicts of interest; it is just as important that those policies and procedures are implemented at all levels of the entity. Implementation in respect of employees potentially involves any of the following actions:

³ *Conflicts of interest – A guide to the Local Authorities (Members’ Interests) Act 1968 and Non-pecuniary Conflicts of Interest*, Office of the Controller and Auditor-General, 2004

- *disclosure* – Crown entity employees should inform their manager where any actual or potential conflict of interest arises that impairs the full, effective and impartial discharge of their official duties
- *transfer* - many situations of conflict may be resolvable simply by transferring a duty from one employee to someone not affected by the particular circumstances
- *withdrawal* – an employee might be required to restrict or abandon the interest or activity giving rise to the conflict
- *waiver or approval* - in some situations, it may be sufficient for a conflict of interest to be disclosed and for the parties affected to waive any objection, or for appropriate authorisation to be obtained. However, because a perceived conflict may be just as serious as an actual conflict, there may be limits to the extent to which this approach to resolving conflicts can be used
- *resignation* - where the options above are not practical or do not enable the matter to be resolved in a way that the employee is able to accept, then ultimately the option of resignation from the entity may need to be considered.

Preliminary conclusions for behaviour of Crown entity board members and employees

129 Board members must comply with the Crown Entities Act 2004 regarding:

- the disclosure of interests (including, as applicable, additional directorships)
- the restrictions on their involvement in the deliberations, decisions and actions of the board in the event an interest is declared
- the restriction on secondary employment, in the case of the member of a corporation sole.

130 Crown entity boards should also ensure that:

- the entity has in place policies and procedures for identifying and managing conflicts of interest (e.g. including a requirement for an annual declaration of any significant conflict of interest)
- the conflict of interest policies and procedures are reconciled and consistent with the collective and individual employment agreements
- decisions made under the conflict of interest policies and procedures are implemented at all levels in the organisation.

131 The boards of Crown entities that have regulatory functions must be especially vigilant that all regulatory decisions impacting on other parties are made, and clearly can be seen by the other parties to be made, fairly and free from bias.

132 With regard to secondary work or employment by employees, the boards of Crown entities should ensure that:

- employees consult their manager or chief executive before undertaking secondary work or employment, and then only do so if approval is given
- employees do not undertake secondary employment which, in the opinion of the employer, is or is reasonably thought likely to be in conflict with the employee's duties as an employee and/or the interests of the entity

- except with the written consent of the chief executive (or of the chair of the board in the case of the chief executive), employees do not:
 - act as paid consultants to, or contractors or employees of, people or organisations involved in the entity’s line of business
 - act as paid or unpaid office holders of organisations involved in the entity’s line of business
 - carry on business on their own account in a related industry or profession.

Issue 14: Private out-of-work activities by board members and employees

133 The private out-of-work activities of board members and Crown entity employees may reflect poorly on their suitability for their role or jeopardise the standing of the entity with which they are associated. This risk is particularly acute for persons associated with entities that have an advocacy or promotional role, a care or custodial role, or that act judicially. For example, if a person whose job is to promote road safety were to be convicted of drink driving that would signal a lack of commitment to the job and thus discredit their professional message.

134 Private out-of-work activities do not have to be illegal for this risk to be real. There can be instances where the private activities of a board member or a Crown entity employee, while not illegal:

- fail to meet the qualities or values that help to make someone a ‘fit and proper person’ for carrying out a particular role, or
- could be seen to discredit the entity or what it is trying to achieve.

Principles and other considerations

135 It seems reasonable to apply the following principles (which also apply to public servants) to this type of risk:

- a Crown entity has no legitimate interest in the private out-of-work conduct of a board member or an employee if that conduct does not interfere with the performance of their official duties or reflect on the integrity or standing of the entity.
- a Crown entity, however, does have a legitimate interest where the private out-of-work activities of a board member or employee:
 - reflect to the discredit of the entity in its relationships with the Government or the public, and/or
 - possibly call into question the person’s fitness for continuing in their role.
- whether the private out-of-work activities of board members or Crown entity employees are problematic will depend on:
 - the nature and circumstances of the activity
 - the position, duties and responsibilities of the person concerned (generally, the more senior the person and the more central their role to the governance and administration of the entity the more likely it is that their private conduct could be problematic)
 - the effect of the activity on the ability of the person to fulfil their duties and responsibilities

- the effect of the activity on the relationship with the Minister and the public.

Preliminary conclusions for behaviour of Crown entity board members and employees

136 In accordance with the principles above, Crown entity board members and employees should ensure that their private out-of-work activities do not adversely affect:

- their fitness for, or ability to fulfil, their duties and responsibilities, or
- the entity's integrity or standing with Ministers, the public or the entity's clients.

Part 5: Key Questions

137 During the discussions with Crown entities, the Commissioner will seek their answers to the following type of questions. Only then will the Commissioner be better informed on whether to exercise his mandate to set minimum standards of integrity and conduct for a particular entity and, if so, in what format.

- **If your entity already has written standards of integrity and conduct:**
 - **do they cover all the issues discussed in Part 4 of this document?**
 - **if they cover just some of the issues in Part 4, what issues are not yet covered by your entity's standards?**
 - **where your entity's standards do cover the same issues as in Part 4, is there any substantial difference between your existing standards and what is said in Part 4 of this document? If yes, do you disagree with the treatment of the issue in this document?**
 - **are your entity's existing standards written in a code of conduct or different instrument(s) e.g. the entity's personnel policies and/or the employees' employment agreements?**
- **Are there any circumstances affecting your entity that would justify variations to the preliminary conclusions in Part 4 of this document?**
- **Were you expecting, or wanting, more detailed guidance on any of the issues in part 4 of this document?**
- **Were you expecting to see any other issues in the Commissioner's sphere of interest, or do you think the Commissioner should have in interest in other issues?**
- **Do you have any questions you want to put to the Commissioner?**

Further information

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STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

