

12 October 2018

Peter Hughes
State Services Commissioner and Head of State Services
State Services Commission
Wellington
By email: peter.hughes@ssc.govt.nz

Dear Mr. Hughes

State Services Reform- Discussion Document

Thank you for the opportunity to comment on the State Services Reform Discussion Document. We support its aims to enable the government to:

- deliver better outcomes and better services to New Zealanders;
- enhance support for New Zealand's democratic form of government.

We acknowledge that the Discussion Document includes many important questions but believe that our input is best focused on the questions under the "Scope of the Public Service."

Do you agree with the extended scope of the New Zealand Public Service proposed in this paper? Do you see any problems in how this might operate in practice?

The Discussion Document does not include detailed information supporting the case for extending the definition of 'public service' to include all Crown entities. While the public may not discern a difference between a core department and a Crown entity, there are important reasons why some functions are undertaken by a Crown entity rather than a department. In considering whether to include a Crown entity as part of the Public Service, account needs to be taken of the reasons why it was established as a Crown entity in the first place. Extending the Public Service to include Crown entities will be contrary to the aim of delivering better services if it undermines their independence and accountability, and blurs their explicit mandates.

What entities do you think should be covered by the purpose, principles and values in the Act?

For Crown Entities, generally:

As the Discussion Document recognises, Crown entities are not a homogenous group so a one size fits all approach can't be taken to the question of whether they should form part of the Public Service and be covered by a common purpose, principles and values. Even within those organisations that fall within one of the five categories of Crown entities set out in the

Discussion Document there are significant differences in function, authorities and responsibilities.

Some Crown entities may have similarities to departments, but others will have little, if anything, in common. The public policy reasons for the proposed reforms need to be balanced against the public policy reasons for establishing the relevant Crown entity. Reducing fragmentation and the 'silo effect' has been a common theme in state sector reform. However, it is not clear why solving this problem necessitates having many of the categories of Crown Entities in the Public Service. There needs to be an analysis of whether a Crown entity's functions overlap with those of departments such that a cross-agency approach would be beneficial and not divert the Crown entity from its core function. Cross agency cooperation is more relevant where there is a related set of focused activities to be performed and with objectives that do not conflict.

During the consultation with State Sector CEOs, the SSC noted that the key factors used in determining whether an entity should be included in the broader Public Service definition are:

1. Ministerial control of the entity's activities
2. Appointment of board members; and
3. Ministerial ability to direct the entity to have regard to government policy

For the Guardians of New Zealand Superannuation, specifically:

We acknowledge that the Discussion Document has invited consultation on a possible exclusion for the Guardians of New Zealand Superannuation (Guardians).

We submit that the Guardians should be excluded from the definition of Public Service for the reasons set out below.

The Guardians was established to manage the New Zealand Superannuation Fund. The Fund is a Government savings vehicle established to partly pre-fund the future cost of New Zealand superannuation payments and therefore reduce the burden of the cost of superannuation on future generations of New Zealanders.

In 2001 the Government established the Guardians and the Fund with a legislative framework to allow the Fund to fulfil its intergenerational purpose without political interference. This framework has been globally recognised as a world class example of investment governance. The ability to operate on a commercial basis, independent of the Government of the day is key to the ability of the Guardians and Fund to meet the purpose for which they were established.

Applying the SSC's factors (outlined above) to the Guardians clearly demonstrates that the Guardians should fall outside of the broader Public Service definition:

1. Ministerial Control – the Guardians operate on a statutorily independent basis with multiple layers of independence, outlined in greater detail below. The Minister is expressly limited by the Guardians governing legislation from providing direction to the

- Guardians other than a direction to have regard to expectations of risk and return (and only after consulting with the Guardians).
2. Ministerial appointment of Board members – the process for appointing Board members to the Guardians is provided in the Guardians governing legislation. Prospective Board members are identified by an independent nominating committee and their names provided to the Minister. The Minister may only recommend for appointment a person nominated by the nominating committee and must consult other political parties before recommending their appointment to the Governor General.
 3. Ability to direct the entity to have regard to government policy – as noted above, the Minister has very specific rights to provide directions to the Guardians in respect of the government's expectations as to risk and return. There is no broad ability to direct the Guardians to have regard to, or to give effect to, government policy. In fact there is an express prohibition on providing direction which are inconsistent with the Guardians duty to invest as provided in the Act.

Further, the Guardians has a number of features that distinguishes it from core public sector entities and other Crown Entities:

- It has separate legal existence;
- It does not provide services direct to the public and its service outputs are provided for commercial return rather than for free or on a not for profit basis (as is more common for core public sector services);
- It is not involved in policy development or implementation;
- It does not provide advice to Ministers;
- It is exclusively a commercial operation and operates in a highly competitive global market;
- It has a high degree of independence;
- It has a very specific and clear function; and
- It generally recruits staff from the private rather than public sector market.

The Guardians' features make it closer in nature to a State Owned Enterprise (for which the principal objective is to operate as a commercial enterprise) than a core public sector entity. Including the Guardians in the core public service would increase the risk of political intervention in the management of the Fund and undermine the independence of the Guardians' explicitly commercial mandate.

- The Discussion Document lists various public sector roles and states that the Public Service purpose will be drawn from these roles. The roles listed include: -
- Design and operate regulatory systems;
- Provide advice that supports the Executive Government to make decisions;
- Implementing government policies;
- Undertake the administrative functions of Government; and
- Serving government with professionalism and political impartiality

None of these is applicable to the function of the Guardians.

Statutory Framework of the Guardians – Specific Characteristics of Independence

There are a number of key statutory attributes that underpin the unique nature of the Guardians as a Crown entity. These relate to the appointment of Board members, operating independence and the amendment of the governing legislation.

Appointment and Removal of Board Members to Guardians¹ - First limb of independence

The first limb of independence is that the New Zealand Superannuation and Retirement Income Act 2001 (**NZS Act**) sets out the following specific provisions relating to the appointment and removal of board members.

- The Minister of Finance must establish a committee to nominate candidates to the Minister for appointment to the Board of the Guardians. Members of the nominating committee must have proven skills or relevant work experience that will enable them to identify suitably qualified candidates.
- The Minister may only recommend for appointment a person who has been nominated by the nominating committee.
- After receiving the nominations for appointment from the nominating committee, the Minister must consult with the representatives of all other political parties in Parliament.
- After consultation with other political parties, the Minister may recommend that the Governor-General appoints a person to the Guardians Board.
- Board members of the Guardians may only be removed by the Governor-General on advice from the Minister of Finance for a reason that in the Minister's opinion justifies the removal.

Operational Independence – Second Limb of Independence

The second limb of independence is set out under section 49(4) of the NZSRI Act and provides the Guardians a large amount of independence:

There are no restrictions on the Guardians' power to invest the Fund, other than as provided by sections 58, 59, and 64. "Invest" is defined broadly in section 5(1) of the NZSRI Act:

invest means to carry on any activity, do any act, or enter into any transaction that the Guardians consider to be for the purpose, directly or indirectly, of—
 (a) enhancing or protecting the value of the Fund;
 (b) managing, or enabling the management of, the Fund

Only Board fees and related costs and the costs of the audit of the Fund and Guardians by the Auditor-General (or nominee) are paid for out of Parliamentary appropriations. All other costs and expenses are met by the Fund. Fund performance returns are calculated net of all costs.

The NZS Act² provides that there are no restrictions on the Guardians' power to invest the Fund, other than as provided by sections 58, 59 and 64.

Section 58 of the NZS Act establishes the Fund's mandate. It requires the Guardians to manage the Fund in a manner consistent with best-practice portfolio management. Section 59

¹ New Zealand Superannuation and Retirement Income Act 2001, s55, s56 and cl10(1)Sch3.

² NZS Act s49(4)

restricts the Fund from taking controlling interests in operating entities, and section 64 outlines the Minister of Finance's limited ability to give directions to the Guardians. Section 64 limits directions as to the Government's expectations of the Fund's risk and return after consultation with the Guardians and requires the Guardians to have regard to such directions.

The Minister is prevented under section 64(2) from giving directions that are inconsistent with the Guardians' duty to invest the Fund under section 58 of the NZS Act. It would be an unusual outcome if the State Services Commissioner had greater powers to direct the Guardians than the responsible Minister.

Process for Changing Legislation governing the Guardians and Fund

The intergenerational purpose of the Guardians and the Fund is reflected in a unique multi partisan process for amending the NZS Act.

On the introduction of a Bill that proposes to amend the NZS Act, the Minister of Finance must bring to the attention of Parliament the consultation process that was followed in the formulation of the proposed amendment. The statement must include whether consultation has taken place with the political parties that agree with the proposed amendment to the Part of the Act, and the Guardians in relation to changes to Part 2 of the Act³.

More details about the Guardians and the Fund are contained in the Guardians' submission of 11 April 2018 on the State Sector and Crown Entities Reform Bill.

<https://www.nzsuperfund.co.nz/sites/default/files/documents-sys/Guardians%20Submission%20State%20Sector%20and%20Crown%20Entities%20Reform%20Bill.pdf>

We are available to answer any questions you may have and seek an opportunity to discuss our submission with you.

Yours sincerely,



Catherine Savage

Chair

cc Joseph Sant, The Treasury

³ NZS Act, s73