

Privacy Commissioner's Submission on the State Sector and Crown Entities Reform Bill to the Governance and Administration Committee 296-1

Introduction

1. The State Sector and Crown Entities Reform Bill (the Bill) seeks to provide for greater integrity and accountability in the management of the State services as well as a more consistent approach to the State Services Commissioner's (SSC) investigatory and inquiry powers by aligning the SSC's powers with the Inquiries Act 2013. The Commissions of Inquiry Act 1908 will no longer apply to the SSC as a result of these amendments.
2. My submission is limited to those parts of the Bill that provide for increased information gathering by the SSC. In particular, I do not support the amendments (clause 8) to provide the SSC with additional powers to examine privileged or confidential documents. I also do not support the proposed amendment (clause 9) to extend the full investigatory powers of the SSC to any investigation/inquiry undertaken in respect of the entire state sector at the request of the head of any part of the State services or any Minister.
3. Extending these intrusive information gathering powers appears unnecessary and disproportionate and could have a significant impact on both the privacy of persons in the state sector and citizens who are interacting with the state sector.

Clause 8 – Application of the Inquiries Act 2013

4. SSC's investigatory powers are currently established through a combination of the State Sector Act 1988 and Commissions of Inquiry Act 1908.
5. When using powers under the Commissions of Inquiry Act, section 4C of that Act applies and provides that "every person shall have the same privileges in relation to the giving of information to the Commission, in answering of questions put by the Commission, and the production of papers, documents, records, and things to the Commission as witnesses have in Courts of law".
6. Clause 8 of the Bill extends the investigatory and inquiry powers available to the SSC when dealing with agencies in the State services and outside the Public Service through inserting new section 9A. This section will provide the SSC with some of the powers available under the Inquiries Act, including section 20(c) - the ability to examine any document or thing for which privilege or confidentiality is claimed in order to determine whether the privilege or confidentiality is justified and therefore whether the document or thing should be disclosed to the SSC.

7. Disputes over whether a document or thing can be properly withheld from the SSC because of a claim of privilege or confidentiality are more properly resolved by referral to the High Court for determination (as currently provided for by section 10 of the Commissions of Inquiry Act). It is not appropriate that this decision is made by the SSC as the need to protect a situation of confidence may sometimes be more important than the need to place all relevant information before the SSC.¹ Privilege provides a legitimate constraint on the fact-finding function of an inquiry.
8. I do not consider that extending the SSC power to include section 20(c) of the Inquiries Act is warranted. Such powers should be limited to investigations of a serious nature (such as those carried out by a Royal Commission) and not extended to more administrative investigations such as those carried out under the State Sector Act.
9. Section 20(c) of the Inquiries Act should not be transferred to the SSC, I therefore **recommend** that clause 8, new section 9A(2)(d), be amended to read "*section 19, section 20(a) - (b) and section 21 (which relate to evidential matters).*".

Clause 9 – Exercise of functions and powers in respect of other State services

10. Currently under section 11 of the State Sector Act, the SSC may only use its full inquiry powers to investigate a part of the State services that does not form part of the Public Service (e.g. Accident Compensation Corporation) at the direction of the Prime Minister. If the Prime Minister has not directed an inquiry, the powers are limited to those of sections 6 to 8 of the State Services Act.
11. Clause 9 of the Bill inserts new section 11(3) to extend when the SSC's full inquiry powers are available to them. It is proposed that the full powers are available for any inquiry undertaken in respect of the State services at the direction of any responsible Minister or at the request of any head of a State services department.
12. SSCs full and expanded investigatory powers under the Bill significantly impact the privacy of a wide range of both public servants and citizens who interact with these services. These powers (section 9, new section 9A and section 10 of the State Services Act) include the power to summons witnesses, to require any person to produce *any* document or *any* thing that the SSC considers relevant to the inquiry and the ability to enter the premises of any department.
13. I do not consider it to be appropriate to extend the availability of SSC's full inquiry powers to include when inquiries are directed by a responsible Minister or head of department. The current limitation to inquiries directed by the Prime Minister provides a mechanism to limit the use of the full inquiry powers (that include the most intrusive information gathering powers) to when it is proportionate. No evidence has been provided as to why these full investigatory powers should be more widely available, and it creates the risk of disproportionate use of inquiry powers without proper oversight.

¹ NZ Law Commission - <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20PP23.pdf>
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14. The ability to require the SSC to use its full range of powers should be limited to the Prime Minister, as it currently is, I therefore **recommend** that clause 9, new section 11(3), be amended to read *“The Commissioner may, if requested by the head of any part of the State services, and must if requested by the Minister in charge of, or responsible for, any part of the State services, perform or exercise any of the function and powers that the Commissioner has under sections 6 to 8”*.

Conclusion

15. I trust that the comments included in this submission will assist the Committee.
16. I do not wish to speak to this submission but am happy to make myself available to the Committee if that would be of assistance.

A handwritten signature in blue ink, appearing to be 'John Edwards', written in a cursive style.

John Edwards
Privacy Commissioner

