Office of the Deputy Prime Minister
Office of the Minister of State Services

Chair
Cabinet State Sector Reform and Expenditure Control Committee

BETTER PUBLIC SERVICES PAPER 7: AMENDMENTS TO THE CROWN ENTITIES ACT 2004

Purpose

1. This is the last paper in a suite of seven Cabinet papers setting out the policy and legislative changes needed to implement recommendations in the report of the Better Public Services Advisory Group (BPSAG). This paper seeks agreement to a suite of amendments to the governance and reporting provisions in the Crown Entities Act 2004 (CEA), including: strengthening the collective duties of boards; enlarging the scope for the use of the whole of government direction; clarifying the role of monitoring departments, and streamlining the planning and reporting provisions. These amendments in totality represent an important rebalancing between arm's-length entity autonomy and State sector wide interests, which will enable the government to deliver on its commitment to Better Public Services (BPS).

Executive Summary

2. This paper proposes a number of amendments to the CEA which cumulatively will rebalance the CEA to ensure greater alignment between the entities and Government priorities. In response to the Government's goals for BPS, the CEA needs to be amended to:

- ensure sectoral leadership by expanding the existing collective duty (s.50) so that board members ensure that the entity collaborates with other public entities where practicable;

- ensure functional leadership by enlarging the scope for the use of the whole of government direction;

- improve performance by formalising information gathering powers of the Minister of State Services and clarifying the role of monitoring departments; and

- streamline reporting by making the default for the Statement of Intent (SOI) every three years and simplifying the reporting requirements.

3. The legislation already gives the Government significant ability to influence and direct Crown entities, while respecting their arm's-length status – including through the SOI, power of direction of individual entities and whole of government directions. The use of these instruments to date has been sparing and sporadic rather than active. Achieving the required changes will require far more sophisticated application of the existing and proposed tools and levers and building better engagement between Ministers, boards and their staff and monitoring departments. Central agencies also need to act to as a 'sail not an anchor' in enabling the changes required.

4. These changes are important as much for the signal that is sent as for the legal powers that they would provide. However legislative change, while enabling, does not ensure changes in the practice of what people do. Changing what people do requires changes in practices of all the players in the system – entity boards and their staff, monitoring departments, Ministers and their offices, and central agencies. Achieving better dialogue and shared commitment is the key to making the system work better. Accordingly, the *BPS Paper 1: Overview of legislative policy proposals* discusses how the BPS programme challenges Ministers, as well as agencies, to work more collaboratively to achieve results.

Background

5. Crown entities provide a majority of the public services that New Zealanders use. To do that Crown entities collectively employ 68% of central Government employees, hold 45% of fixed assets on the Crown's balance sheet and spend around one half of output appropriations. Therefore achieving better public services will inevitably require Crown entities that are better aligned with the Government's overall goals and are agile and responsive to what individual New Zealanders need.

6. Each Crown entity is *a separate legal entity at arm's-length from the Crown* that, unlike departments, is not directly controlled by the Crown. The CEA introduced a legislative framework that provides a delicate balance between entities being an integral part of the broader state while recognising their varying degrees of autonomy and arm's-length relationship. As a result of the Government's goals for BPS, officials have examined the detailed provisions in the CEA and the overall mix of those provisions to bring them within the influence of the new leadership arrangements set out in *BPS Paper 2: Better system leadership*.

Achieving more focus on sector or system wide interests

7. This paper proposes a number of important amendments to certain sections of the CEA that deal with Crown entity governance and reporting, and one non-legislative proposal on transparency of performance information. It is important to strike an appropriate balance between acknowledging Crown entity autonomy under a governance board while ensuring Crown entities are aligned with wider government priorities. The changes proposed include:

- making more proactive use of a responsible Minister's engagement with their Crown entities on strategic and sector wide issues;
- elaborating of the collective duty on the board; and
- expanding the grounds for issuing a 'whole of government direction'.

Annual engagement with the responsible Minister

8. An annual engagement between the responsible Minister and their Crown entity is part of the annual Statement of Intent (SOI) process. We are recommending in this paper that the default for SOIs be every three years. However, an annual engagement will still be needed to discuss the direction of the entity and alignment with sector wide and functional leadership issues and to decide if an SOI will be produced for that year. We therefore propose to amend s27 to directly provide for an annual engagement between the board of a statutory Crown entity and its responsible Minister, with similar provision in s88 for Crown entity companies.

New collective board duty for statutory entities

9. Another instrument to ensure sector or system-wide interests are within an entity's 'line of sight' is to refine the collective duties of the board. Options for such a duty include:

- expand the existing duty in s50: *The board of a statutory entity must ensure that the statutory entity performs its functions efficiently and effectively and in a manner consistent with the spirit of service to the public and with the broader interests of the sector;*

or

- expand the existing duty in s50 to include *collaboration with other public entities where practicable.*

10. Expanding the existing duty along the lines of the first bullet point above is problematic as it could undermine statutory independence and because entities such as ACC are in multiple overlapping sectors. Accordingly, we propose to expand the existing s50 collective duty to include *collaboration with other public entities where practicable*. Public entities are those under the Public Audit Act 2001 and would include local government.

Expanding the grounds for issuing a 'whole of government direction'

11. The structure of the Minister-board relationship specifically provides for Ministers to have powers of direction over the board, but not for officials to have this power. Whole of government directions under s107 can allow for "functional leadership" without undermining the relationship and accountability of the board to the Minister. To date s107 has only been used once to provide for the wider application of an e-Government standard.

12. We propose to expand the grounds in s107 of the CEA, which provides for the Ministers of Finance and State Services acting jointly to issue 'whole of government directions' to types and categories of entities. At present, a whole of government direction (s107) must be for "*the purpose of both –*

a. *supporting a whole of government approach; and*

b. *either directly or indirectly, improving public services."*

13. The twin purposes in s107(1)(a) and (b) are potentially too restrictive to enable s107 to be used to effect functional leadership. There are two options:

- leave the legislative provision unchanged but use the power more actively; or

- expand the reasons for issuing a whole of government direction to include securing economies or efficiencies, developing expertise and capability, or ensuring business continuity.

14. Changes to s107 provide a strong signal to Crown entity boards as well as clarifying the legal powers available to Ministers. Section 107 would then be along the lines of

> "*A whole of government direction that will support a whole of government approach in order to:*
>
> a. *directly or indirectly improve public services;* or (new text)
>
> b. *secure economies or efficiencies, develop expertise and capability, or ensure business continuity."*

15. We propose to increase the flexibility of the whole of government direction to enable functional leadership by enabling these directions to be applied to coherent groupings of Crown entities. At present these directions can only be applied to all entities within specified legally defined Crown entity 'categories' such as all School Boards of Trustees and 'types' (e.g. all Crown agents). We propose to amend the CEA to include that a whole of government direction could be applied to a grouping or cluster of entities; with the grouping or cluster needing to include at least 5 entities that have two significant attributes in common. These attributes could include size and asset holdings. For example a cluster could be large entities that are significant providers of direct services to the public through regional offices (HNZC, ACC, NZTA, Public Trust, New Zealand Fire Service etc).

16. At the same time the Cabinet office circular (CO (06) 6) would be updated to include criteria that should be used to assess whether the whole of government direction is appropriate including that:

- there is horizontal interest that is wider than individual entities or sectors;

- it is capable of application by being clear and consistent in what is directed;

- it is limited in scope so as not to interfere with statutory independent functions or cut across rights of review and appeal;

- there is some demonstrated advantage that co-ordinated more collective action is preferred to individual agency decision-making; and

- there is a demonstrable link to directly or indirectly improving public services and/or it relates to "economies or efficiencies, developing expertise and capability, or ensuring business continuity".

Expanding the grounds for issuing policy directions to Crown agents and autonomous Crown entities

17. The CEA, as amended, will have three main levers to ensure Crown entities sectoral alignment. We proposed above that Board members collective duties be amended to explicitly require collaboration with other public entities. Responsible Ministers also have the ability to direct Crown agents (s103) to give effect and autonomous Crown entities (s104) to have regard to Government policy. In addition for all Crown entities, the responsible Minister has the ability to shape the direction of the entity through the business planning process and that is backed by the ultimate power to direct any Crown entity to amend the contents of its SOI (CEA s147). We explored an additional option to bring Crown agents and autonomous Crown entities within the influence of sectoral leadership. The proposal was to expand the scope of a direction in s103 and s104 to require Crown agents and autonomous Crown entities, in performing their functions, to play their part under any strategy or strategies developed for the sector or sectors to which the entity belongs. Based on the difficulty of designing a workable proposal, and the feedback from entities, officials' advice is not to proceed with this option.

Strengthening the role of the Minister of State Services and clarifying the role of the monitoring agent

18. We propose to provide for:

- cross references to the existing provision's in other legislation that provides for the role of monitoring departments in administering appropriations and legislation, and providing policy advice as well as in assisting the Minister;

- clarification of the role of monitoring departments and limiting Ministers' powers to delegate under the CEA; and

- the Minister of State Services to have a statutory power to require the provision of information relating to the Minister's portfolio interests in system-wide capability and performance.

Clarifying the role of the monitoring department

19. Ministers generally have a monitoring department to advise and help them to exercise their responsibilities over the Crown entities in their portfolio(s) but the CEA is currently silent on the role of monitoring departments[1]. Even though the monitoring department acts as the Minister's agent, monitors can be seen as 'lacking teeth' when requesting an entity to provide information about its operations and performance.

20. In the consultation process an earlier set of proposals recommended that a legislative regime be put in place that would recognise the role of a monitoring agent and that the Minister could delegate to the monitoring agent the Minister's information gathering power. This proposal attracted negative responses from both departments and Crown entities. Upon reflection, a monitoring department's role is not simply

[1] In the case of the Tertiary Education Institutions, the "monitoring department" is a Crown agent; the Tertiary Education Commission.

limited to monitoring the performance of an entity. Departments already have legal responsibilities to administer appropriations, discussed in *BPS Paper 5: Amendments to the Public Finance Act 1989 (PFA)*, to administer legislation and to able to give policy advice to the government on the Crown entity.

21. We therefore propose to amend the CEA to provide cross references to the existing provisions in other legislation that provides for the role of monitoring department including:

- administering appropriations under the PFA (where applicable);
- administering relevant legislation (where applicable);
- providing advice to the Government (s32(b) of the State Sector Act);

as well as providing for the monitoring department role in:

- assisting the responsible Minister to undertake their roles under s27 (for statutory Crown entities) and s88 (for companies) of the CEA.

Delegations by responsible Ministers to monitoring departments

22. The consultation feedback also noted that under s28 of the State Sector Act 1998, Ministers already had broad powers to delegate to departmental chief executives any powers conferred on Ministers in the State Sector Act and by any other Acts. It was never envisaged that all of the various Ministers' powers under the CEA could be delegated to a departmental chief executive ie the power to appoint or remove board members and the power to issue a direction should always remain with Ministers.

23. Therefore we propose to amend the CEA to:

- make it clear that s28 of the State Sector Act does not apply to Ministers' powers under the CEA; and
- to amend the CEA to clarify which Ministers' powers in the CEA can be delegated. This would be limited to responsible Ministers' requesting information powers.

Minister of State Services

24. Several Ministers have interests in relation to Crown entities:

- the "responsible Minister" has a clearly defined role in s27 for statutory entities (and s88 for Crown entity companies) and related functions and powers specified throughout the Act;
- the Minister of Finance has a range of functions and powers as specified in Part 4 (Crown entity reporting and financial obligations);
- the Minister of Finance and the Minister of State Services may jointly issue whole of government directions in accordance with s107;

- the Minister of State Services has an interest in system-wide capability and the companion *BPS Paper 6: Amendments to the State Sector Act 1988* discusses the Commissioner's role in the human resource management system;

- the Minister of State Services has oversight of the governance regime applying to Crown entities as during the policy development leading to the introduction of the CEA, Cabinet "*noted that on 14 July 1999 the previous Government gave the Minister of State Services ongoing responsibility for general oversight of the governance and accountability regime to apply to Crown entities [STR (99) M 17/4a]".*

25. While the responsible Minister and the Minister of Finance have the power to require a Crown entity board to supply information, currently there is no equivalent statutory power for the Minister of State Services. While the scope of the State Services portfolio is not a statutory matter, there are aspects of the role that could benefit from an associated power to request information for purposes relating to the Portfolio. The Minister of State Services' interests in the Crown entity sector include information on system wide capability (including workforce and employment relations) and sector wide performance.

26. We propose that the Minister of State Services have a power similar to that of the Minister of Finance, i.e. the power to require the supply of any information in connection with the exercise of the Minister's portfolio interests in system-wide capability and performance. The same grounds in s134 for withholding the information would apply. This power would enable the Minister of State Services to collect system-wide or sector information but the power would not be unfettered. While information would need to be collected from individual entities, the power would be designed to enable the Minister to collect information that focuses on system or sector-wide information requirements and not information that relates solely to the performance of any single entity. For example, the Minister of State Services may wish for information to be collected on human resources strategies across all Crown entities.

Strengthening and streamlining planning and reporting

27. The SOI was designed as the key mechanism for the Crown to engage with Crown Entities while respecting the arm's-length relationship. The experience with the SOI and related documents since the legislation was introduced in 2005 is that there is an increasing tendency for these processes to degenerate into a mechanical compliance exercise. Over time this will put the foundations of the CEA at risk. This section of the report proposes changes to the planning and reporting provisions in Part 4 of the CEA. The proposals are based on the findings of the 2010 Crown Entity Chairs' Compliance Cost Review Group. Legislative changes are proposed, which will lead to the following annual process involving Ministers, boards, Parliament and the public:

Table One: Annual Process

When	Activity
October – February	Engagement on an entity's strategy to occur each year between the responsible Minister and the board to start the annual business planning process (including a decision on whether an SOI will be produced for Parliament for that year, with the SOI covering a four year period as the minimum).
Budget (usually May)	The Executive will continue to require forecast financials before the commencement of the financial year. Entities that are funded via appropriations will be required to provide information to support the Budget documents such as the information on forecast service performance.
May - October	The SOI can be tabled in the House anytime after Budget Day, with the latest possible time for the tabling being the same time as the Annual Report. An SOI must be tabled in the House at least once every three years. The responsible Minister can require an SOI more frequently.
September-October	Tabling of the Annual Report.
On-going	Selected performance information regularly updated throughout the year on the entity's website.

28. This timetable involves three major changes: making the SOI triennial as a default position; more consolidated reporting to Parliament, and more timely and relevant performance information.

29. Under the change discussed below, sectoral planning can still occur. The changes will provide the option of ex post reporting across sectors to be in one place. These changes will not provide for one SOI being produced by a group of entities, as this will blur the lines of individual board accountabilities and responsibilities.

Make the SOI triennial, as the default

30. The Crown Entity Chairs' Compliance Cost Review Group proposed moving away from an annual SOI and making the default position the provision to Parliament of strategic information every three years. The CEA currently requires that a SOI be prepared and presented to Parliament annually regardless of whether or not the operating environment and strategic direction of the entity has changed. We propose that the responsible Minister and the board will need to agree the appropriate frequency of the SOI for the particular entity. Where the triennial approach is adopted, the SOI would cover a four year period, enabling a new SOI to be tabled part of the way through the last year of the old SOI. The Minister can require that a SOI be produced more frequently than triennially.

31. Making the SOI an enduring document is expected to improve the quality of SOIs as it will enable the development of a truly strategic document, reduce rework and compliance costs and provide a more solid baseline for reporting and internal and external monitoring as the strategy and performance measures will not be changing each year. Section 147, which gives the responsible Minister a direction power on the SOI, would be retained.

32. This proposal attracted wide support from Crown entities and departments. However, the Department of Labour's view is that the proposal should be reversed i.e., that the default for an SOI be annual, and a triennial SOI be permitted.

Consolidating reporting to Parliament

33. The CEA currently prescribes that Crown entities separately provide an SOI as well as an Annual Report for tabling in the House. We propose allowing greater flexibility in how Crown entities report to Parliament by allowing one document to include the past year's Annual Report as well as the current year's performance forecasts and forecast financial statements. Listed company's annual reports already follow the practice of providing in one document forward-looking and backward-looking information. It is expected to assist in telling a more integrated performance story and allow more coherent Parliamentary review. In the years that a new SOI is completed, this document could be tabled at the same time as the Annual Report relating to the previous year.

34. In addition there will need to be changes to the year-end reporting requirements (s150- 153 of the CEA) to mirror the proposed changes in the Public Finance Act 1989 (PFA), discussed in BPS Paper 5*,* to provide for greater flexibility in how the information is organised. These changes will ensure that reporting is provided once in a single place with a clear line of sight between forward looking and backward looking information.

More relevant and timely information to be provided

35. We propose to move to less onerous requirements for specifying performance in advance. The current planning requirements are very ambitious for smaller Crown entities without significant planning capability. All entities are currently required to specify and then report against measures of longer term outcomes, and immediate impacts, rather than reporting at the most meaningful level for the individual entity. Accordingly we propose to remove the requirement in s141 *Content of the Statement of Intent* for all entities to provide the "specific impacts, outcomes, or objectives that the entity seeks to achieve" and to allow more flexibility on how performance standards are best specified and measured with the requirements framed in terms of 'what the entity is seeking to achieve/goals the entity is seeking to achieve'. This proposal mirrors the proposed changes to the PFA for departmental information discussed in *BPS Paper 5*. Other requirements such as s141(1)(g), which requires disclosure of how the responsible Minister and the board agree they will conduct their relationship, will no longer be required in the SOI. This can be dealt with in a relationship letter or other document. Guidance for Crown entities and monitors will be prepared by the Treasury to operationalise this.

Transparency of performance

36. This proposal does not require legislation. The Government is keen for performance information to be more relevant and useful and specifically for Crown entities to be required by responsible Ministers to provide timelier, publicly available information on their performance against strategy throughout the year. The NZX-type disclosure requirement that has been adopted by seven of the largest State-owned enterprises (SOEs) provides a useful model on the effect of transparency. Those seven SOEs now disclose significant events that may have a material impact on the achievement of their financial performance and provide operational statistics on a quarterly basis on their websites and via the Crown Ownership Monitoring Unit (COMU) website. COMU considers these two initiatives have undoubtedly led to increased transparency of performance information.

37. Accordingly, we propose that from 1 July 2012, statutory Crown entity boards identify in their regular interim performance reports to their responsible Ministers the non-sensitive entity performance information that could be disclosed via individual Crown entity websites or that Ministers and entities have a standing agreement on what performance information is released. We do not intend to implement a one size fits all approach to what is released. The information needs to be useful and meaningful to an external reader. We also note that for some entities this will not involve any change. For example District Health Boards' (DHB) results are reported regularly (monthly or six-weekly) through public meetings of their board. This information (operational and financial results) is publicly available through this forum, and via the DHBs' websites.

38. The Treasury will undertake work to assess the value of having the accountability documents and performance reporting of Crown entities mirrored on the Treasury website, as happens with the SOEs.

39. We also propose to rescind the requirement in CAB Min (10) 29/1A for a selection of statutory Crown entities to provide to the Ministers of Finance and State Services the entity's interim reporting as this reporting is adding no value to central agencies' or Ministers' understanding of performance issues and risks.[2]

Output agreements

40. We propose to repeal the provision for output agreements and instead amend s27(1)(f) on the responsible Minister's role for statutory entities and adding the Minister's legitimate role and involvement in determining the mix and level of outputs not funded from trading revenue. The CEA (s170) includes the provision of an Output Agreement if required by the responsible Minister. As a result of the Crown Entity Chairs' Compliance Cost Review, the Minister of Finance decided to "eliminate the need for output plans by allowing for the required information to be included in the Statement of Intent, if agreed by the Minister."[3] There were two reasons for the output agreement provision being included in the original legislation:

[2] CAB Min (10) 29/1A refers.
[3] Email to Crown entity Chairs of 7 July 2010 refers.

- to ensure Crown entities faced similar requirements to Departments for Output Plans; and

- for the avoidance of doubt about a Minister's ability to influence the outputs of any Crown entity.

41. Output agreements, where they exist, are generally used like a memorandum of understanding to cover reporting requirements and relationship issues (no surprises) rather than as purchaser specifying the quantity and quality of the outputs expected over the year, which are often in the SOI. Any relationship issues including funding, areas of concern, further detail on the mix and level of outputs and reporting requirements can be agreed in a relationship letter. Ideally these relationship agreements should reflect the triangular relationship between the Minister, the Crown entity and the monitoring department along the lines discussed above. This agreement should include as a schedule any purchasers expectation for outputs funded from non- trading revenues.

Subsidiaries

42. The experience with the operation of subsidiaries has revealed a number of minor pressure points in the regime. These include boundary issues associated with multi-parent subsidiaries where one parent is subject to the Crown entity subsidiaries regime and the other parent is subject to a different regime (with conflicting requirements), and issues associated with the requirements to prepare annual audited financial statements for 'inactive' subsidiaries.

43. Problems are experienced with so-called inactive subsidiary companies such as shelf companies, or companies that have ceased to trade but are still required to prepare audited financial statements annually. We propose to introduce similar provisions to those under s10A of the Financial Reporting Act 1993 (FRA) whereby the requirement to prepare financial statements and have them audited can be waived if the directors have made a declaration under the Oaths and Declarations Act 1957 that the subsidiary is inactive.

44. Problems are also experienced with the onerous nature of the reporting requirements required for small subsidiaries. We also propose to amend s154 of the CEA so that separate parent and group statements are only required if the subsidiaries are material. The waiver of the requirement for separate parent accounts could occur based on a similar procedure to s10A of the FRA, whereby the directors make a declaration that the subsidiary is not material.

45. The reporting obligations of multi-parent subsidiaries are more onerous than those imposed on their single-parent cousins. The goal of the regime was to ensure that major multi-parent subsidiaries are visible and do not avoid their accountability requirements due to their subsidiary status, but to let smaller ones avoid unduly onerous requirements. While the Minister of Finance can exempt multi-parent subsidiaries from reporting obligations, in practice this process is regarded as cumbersome and has not been widely used. There are two options to solve this – amend legislation or change administrative practice.

46. The legislative option would involve using the model provided by s17(4) of the Crown Research Institutes Act 1992. In essence this involves "picking a parent" and

including the subsidiary as part of that group. This could be achieved through amending s157 of the CEA by replacing the current reporting obligations and exemption option with a requirement that the multiple parents must nominate a single public entity parent who will report on the subsidiary as if it were controlled by that entity. However, this risks defeating the purpose of the multi-parent regime by reducing the visibility of major multi-parent subsidiaries. Accordingly, for multi-parent subsidiaries, we propose to streamline the procedures and that the Treasury provide clearer guidance on the criteria that would be applied in advising the Minister of Finance and the process that should be followed in order to obtain an exemption under s157.

47. Conflicting subsidiary regimes can apply when one parent is covered by the CEA and the other parent by a different regime such as that applying to Tertiary Education Institutions (TEIs). To avoid these conflicts we propose that:

- the CEA multi-parent subsidiaries provisions could apply by default where both parents are a statutory Crown entity or Crown-owned company; and

- subsidiaries could 'opt out' of the CEA subsidiaries regime and 'opt into' the regime applying to the other parent by way of provision in the subsidiaries constitution. However, as there is no robust regime currently in place for TEIs this 'opt out' option would not be available for TEIs.

Public Finance Act 1989 companies

48. There is a technical loophole in the public sector management system applying to entities listed on Schedule 4 of the PFA that needs to be closed. When the CEA was developed, Schedule 4 was created as a 'parking lot' for a range of very small public bodies (such as Reserve Boards) for whom the CEA was judged inapplicable. Six new companies have been added to Schedule 4 of the PFA since the CEA was passed in 2004[4]. The schedule was never intended to be used as a separate, specific organisational form, so there is little specification of the governance regime that applies. For example, the whole of government direction provisions of the CEA do not apply to Schedule 4 entities. As discussed earlier the changes to the whole of government provision will enable Better Public Services goals to be achieved.

49. We propose to amend the PFA to provide for:

- a schedule which lists the names of the PFA companies and whether any exemptions from the CEA provisions apply; and

- a schedule which lists the reporting and governance provisions of the CEA that would apply to the PFA companies.

50. Schedule 4 would be amended to separate non-company entities from Schedule 4 companies. The later could be placed either on a new Schedule 6 or a Schedule 4A. Legislation would be required to add any further non–company statutory entities to Schedule 4 in future, including Trusts. This restriction is justified because as a general matter the Crown should not set up a Trust that it controls. Where, for example, as

[4] Crown Fibre Holdings, Health Benefits, Learning State, Research and Education Advanced Network New Zealand, the Dispute Resolution Services Limited, and Crown Asset Management Limited

part of a Treaty Settlement process the Crown sets up a Trust to pass control, this Trust can be added to Schedule 4 by the legislation providing for the settlement.

51. Listing on the PFA requires that the Crown has at least a 51% controlling interest. In order to provide for flexibility for the future, where a PFA company on the proposed new Schedule 6 (or a Schedule 4A) may be less than 100% owned, we will provide that certain CEA company provisions such as s87 (the board's duty to the Minister) would not apply. In addition it is necessary to provide for the protection of minority interests in majority-owned PFA companies. If the Crown were to require a PFA company to comply with a lawful policy requirement, and this was contrary to the best interests of the company, the Crown would compensate the entity for the additional or marginal costs involved. This is akin to s7 of the State-Owned Enterprises Act 1986[5].

Proposed next steps

52. The proposals discussed in this paper would be implemented according to the timeline in the table below:

Table Two: Implementation Timetable

Stage	**Implementation date**
Communication of decisions and engagement with Crown entities on any consequential amendments required to individual entity's establishment legislation	May 2012
First possible date for publication of entity interim performance information	1 July 2012
Introduction of amending legislation	August 2012
Changes to the CEA governance regime	Subject to passage of the bill, 1 July 2013
Changes to the CEA reporting regime	Subject to passage of the bill: - annual reports from September 2013 - SOI from 1 July 2014

Consultation

53. The legislative changes proposed in this paper will affect different entities in different ways. These effects are shown in Annex A. The Office of the Controller and Auditor General was involved in the development of the planning and reporting changes proposed in this paper. All departments with Crown entity monitoring responsibilities have been consulted in the preparation of this report. Crown entity chairs were advised of a proposed set of changes. The planning and reporting

[5] Section 7 is too narrow and will need to be broadened to enable coverage of activities such as compliance with e-Government standards that are not goods or services.

changes have the support of the Crown entities Chief Executive Forum, an informal grouping of statutory Crown entity chief executives. A number of useful amendments were made to the governance proposals contained in this paper based on the feedback received from Crown entities and monitoring departments. Proposed next steps for consultation are addressed in the accompanying *BPS Paper 1: Overview of legislative policy proposals*.

Financial, Human Rights, Regulatory Impact Analysis and legislative implications

54. Financial and human rights implications, regulatory impact analysis, and legislative implications are addressed in the accompanying paper *BPS Paper 1: Overview of legislative proposals*.

Publicity

55. Publicity for the Better Public Services suite of papers is addressed in the accompanying paper *BPS Paper 1: Overview of legislative proposals*.

Recommendations

56. We recommend that the Cabinet Committee on State Sector Reform and Expenditure Control:

1 **note** this is the seventh of seven papers provided in response to Cabinet's invitation in January 2012 to the Deputy Prime Minister and Minister of State Services to submit further papers to Cabinet by 30 April on substantive policies or decisions arising from the Better Public Services work programme, including legislative amendments needed to give full effect to these policies [CAB Min (12) 1/1 refers]

Sector or system wide interests

2 **note** that *BPS Paper 2: Better system leadership* has implications for Crown entities in terms of how to bring them within the influence of sectoral and functional leadership

3 **agree** to strengthen sectoral leadership by including a reference to ensuring that the entity collaborates with other public entities where practicable within the existing collective duty of the board in s50 of the CEA

4 **agree** that in order to enable functional leadership the grounds for issuing a whole of government direction (CEA s107) be amended to support a whole of government approach in order to:

4.1 directly or indirectly improve public services; or

4.2 secure economies or efficiencies, develop expertise and capability, or ensure business continuity

5 **agree** that the whole of government direction can be applied to clusters of at least five parent Crown entities that have two significant attributes in common (including inter alia size, significant holdings of financial asset, regional presence)

6 **direct** officials to amend Cabinet office circular (COC 06 6) to include recommendation 4 and 5 above and to extend the criteria that should be used to assess whether the whole of government direction is appropriate to include:

6.1 that there is horizontal interest that is wider than individual entities or sectors;

6.2 that it is capable of application by being clear and consistent in what is directed;

6.3 that it is limited in scope so as not to interfere with statutory independent functions or cut across rights of review and appeal;

6.4 that there is some demonstrated advantage that co-ordinated more collective action is preferred to individual agency decision-making; and

6.5 there is a demonstrable link to directly or indirectly improving public services and / or it relates to "economies or efficiencies, develop expertise and capability, or ensuring business continuity"

7 **agree** that the CEA should be amended to provide cross references to the existing provisions in other legislation that provides for the role of monitoring department including:

7.1 administering appropriations under the PFA (where applicable);

7.2 administering relevant legislation (where applicable);

7.3 providing advice to the Government (s32(b) of the State Sector Act);

as well as:

7.4 assisting the responsible Minister to undertake their roles under s27 (for statutory Crown entities) and s88 (for Crown entity companies) of the CEA

8 **agree** to amend the CEA to limit the Ministers' role under s27 of the CEA that can be delegated to a departmental chief executive to requesting information and to make it clear that s28 of the State Sector Act does not apply to Ministers powers under the CEA

9. **agree** that the Minister of State Services have the power to require a Crown entity to supply information that relates to the Minister's portfolio responsibilities and interests in system-wide capability and performance of the Crown entity sector subject to the existing restrictions in s134 (an entity

may refuse a request for certain information) and a new restriction that this cannot be applied to a single Crown entity

Planning and reporting

10 **agree** to directly provide for an annual engagement between the board of a statutory Crown entity and its responsible Minister by an additional provision to s27(1)(f)) with similar provision in s88 for Crown entity companies

11 **agree** to establish, as the default arrangement, that Crown entities' Statements of Intent (SOI) be tabled in Parliament once every three years but covering at least a four year period

12 **agree** to retain s148 (Amendment to SOI) which establishes a requirement for the Board to amend the SOI if the intentions and undertakings in it are significantly altered or affected

13 **agree** to allow for an entity's SOI to be published any time from the day after Budget day through to the same time as its Annual Report

14 **agree** that the annual report accompanying the SOI would also give an account of progress against the previous SOI

15 **agree** to amend the reporting requirements by removing references to outcomes, impacts, objectives as well as requiring contextual information (with consequential amendments to s27 reference to targets)

16 **agree** to introduce requirements framed in terms of 'what the entity is seeking to achieve/goals the entity is seeking to achieve'

17 **agree** to amend the year-end reporting requirement in ss150-153 to mirror the proposed changes in the Public Finance Act 1989 to provide for greater flexibility in how the information is organised so reporting is provided once in a single place with a clear line of sight between ex ante and ex post information

18 **agree** to repeal the power to require an output agreement (s170)

19 **agree** to replace output agreement with a new provision in s27 (the role of the Minister) that explicitly provides for the Minister's ability to influence the outputs funded from non-trading revenue

20 **note** the Minister's ability to influence the outputs will be linked to the ability through the Budget process for entities funded from appropriations and through the annual engagement (in recommendation 10 above) for outputs funded from other non-trading revenues (eg fees, fines, levies)

21 **agree** that statutory Crown entities be required to disclose non-sensitive entity performance information throughout the year via their websites so transparency can be used to support performance improvement and public monitoring

22 **agree** to rescind the requirements in CAB Min (10) 29/1A for a selection of statutory Crown entities to provide their interim reporting to the Ministers of Finance and State Services effective from May 2012

Governance regime applying to Schedule 4 Public Finance Act 1989 companies

23 **agree** to limit Schedule 4 of the PFA to the non-company entities currently on the schedule and any new non- company entities added to the schedule by legislation

24 **agree** to amend the PFA to provide for :

24.1 A list of the PFA companies, including the companies currently listed on the Schedule 4, and whether any exemptions from the CEA provisions apply; and

24.2 A schedule which lists the reporting and governance provisions of the CEA that would apply to the PFA companies

25 **agree** that certain CEA company provisions such as s87 would not apply and provide for the protection of minority interests where PFA companies are less than 100% Crown-owned

Subsidiaries

26 **agree** that for inactive Crown entity subsidiaries provisions similar to those under s10A of the Financial Reporting Act 1994 apply whereby the requirement to prepare financial statements and have them audited can be waived if the board members have made a declaration under the Oaths and Declarations Act 1957 that the subsidiary is inactive

27 **agree** to amend s154 of the CEA so that parent financial statements are not required if the board members have made a declaration under the Oaths and Declarations Act 1957 that the subsidiaries are not material

28 **agree** that, in the event of conflicting subsidiaries requirements, the CEA multi-parent subsidiaries governance (Part 2) and planning and reporting (Part 4) provisions apply by default to multi-parent subsidiaries where one parent is a Crown entity and the other parent or parents are public entities within the Crown financial reporting entity

29 **agree** that multi-parent subsidiaries should be able to 'opt out' of the CEA subsidiaries regime and 'opt into' the regime applying to the other parent, other than the regime applying to Tertiary Education Institutions, by way of provision in the constitution of the individual subsidiary.

Hon Bill English
Deputy Prime Minister

____/____/____

Hon Dr Jonathan Coleman
Minister of State Services

____/____/____

ANNEX A – APPLICATION OF PROPOSED CHANGES TO CROWN ENTITIES

The table below identifies how the changes discussed in this paper would affect the different categories of Crown entities.

Table three: Application of proposed changed to Crown entities

	Statutory Crown entities			Crown entity companies		Crown entity subsidiaries	School Boards of Trustees	TEIs
	Crown Agents (inc. DHBs)	Autonomous Crown entities	Independent Crown entities	CRIs	Other (TVNZ, RNZ, NZVIF)			
Annual engagement with responsible Minister (s27 & s88)	Y	Y	Y	Y	Y	N	N	N
Expand collective board duty (s50)	Y	Y	Y	N	N	N	N	N
Expanding the whole of government directions (s107)	Y	Y	Y	N - must have regard	Y	N	Y	N
Clarifying the role of monitoring departments (new)	Y	Y	Y	Y	Y	N	N	N
Power for the Minister of State Services (s133)	Y	Y	Y	Y	Y	N	Y	N
Option for triennial SOI (new)	Y	Y	Y	N	Y	Not if prepared by parent	N	N
Consolidated reporting to Parliament (new)	Y	Y	Y	N	Y	Not if prepared by parent	N	N
Relevant performance information (new)	Y	Y	Y	N	Y	N	N	N
Transparency of information (new, not for inclusion in CEA)	Y	Y	Y	N	Y	N	N	N
Output Agreements (removal)	Y	Y	Y	Y	Y	N	N	N
Subsidiary regime changes	Y	Y	Y	Y	Y	Y	Y	Y

Crown Entities Act 2004 and the Education Act 1989 interface

The Education Act 1989 is currently under review. A number of the CEA provisions are replicated in the Education Act 1989. Examples for TEIs include the collective duties of council members, the individual duties of council members, and the financial reporting requirements. Once decisions have been taken on amendments to the CEA, the

Ministry of Education will review whether similar amendments should be proposed for the Education Act 1989.

Crown Entities Act 2004 and the Public Finance Act 1989
Agencies currently listed on Schedule 4 of the PFA would also be affected by the CEA planning and reporting changes and the companies would be affected by the additional CEA governance provisions.