NEW ZEALAND COUNCIL FOR CIVIL LIBERTIES
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Submission: Public Service Legislation Bill

About the New Zealand Council for Civil Liberties

1. The New Zealand Council for Civil Liberties is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.

2. We wish to appear before the Committee to make an oral submission.

Introduction

3. The Council supports the enactment of the Public Service Legislation Bill (the Bill), subject to amendments suggested in this submission.

4. In view of the frequency with which the Council has in this submission recommended that the Bill be amended to explicitly require public consultation on various standards and guidance, the Council draws to the Committee's attention the provisions of clause 9 of Schedule 6 of the Bill. This explicitly requires the chief executive of a department to undertake public consultation on a draft of the *'long-term insights briefing'* they are required to provide to their Minister once every 3 years. If public consultation is mandated by the Bill for these briefings, why not for the other key issues highlighted by the Council in this submission?

Public Services Principles – Open Government

5. Clause 10 of the Bill sets out 'Public service principles', intended to guide chief executives in achieving the purpose of the Bill defined in clause 9.

6. Paragraph (d) says that one of the five principles is *'to foster a culture of open government'*.

7. However, the Bill does not define the term 'open government'. This is unfortunate, as without clarity this principle may well end up being meaningless – or worse – in practice. Instead of enhancing the public service, it may well simply provide critics with a stick to beat it with.

8. There are a wide variety of attempted definitions of this term. A 2014 research paper reported on the website of the international Open Government Partnership shows how widely the term has been interpreted in countries that are members of the multilateral organisation.[1]

9. The paper's abstract begins, *'No longer restricted to access to information laws and accountability measures, "open government" is now associated with a broad range of goals and functions, including public participation, open data, the improvement of public services and government efficiency.'*

10. Concluding their research, the authors state:

> *discussions of contemporary open government will suffer if they do not begin with a clear definition of the concept itself. Without this definitional clarity, we run the risk of open government becoming a shapeshifting buzzword, invoked by governments and academics in varied and potentially misleading ways. Differently, when open government is clearly defined and understood, governments promising reforms in its name can be evaluated accordingly, and academics discussing the term can construct theories and evidence bases that speak meaningfully to each other. Simply put, those discussing open government need to ensure they are speaking the same language, so to say, when referencing this term.*

11. Put plainly, a failure to define the term will leave it open to abuse, both by the public service as an institution, and by governments of differing ideologies. This will lead to degradation of the term and result in a loss of trust in the public service and government, which is clearly the opposite of what is intended by its inclusion in the Bill.

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[1] *What's in a Name? A comparison of 'open government' definitions across seven OGP members*, A. Clarke and M. Francoli, JeDEM 6(1): 248-266, 2014. Accessed from: https://www.opengovpartnership.org/documents/whats-in-a-name-a-comparison-of-open-government-definitions-across-seven-ogp-members/ on 30 January 2020.

12. There are two options that could be taken in relation to improving the Bill on this issue. The first is to statutorily require the issuing of guidance on interpretation and application of the public service principles. The Bill appears to take this approach by empowering the Public Service Commissioner (the Commissioner) in clause 15 to *'set minimum standards of integrity and conduct'* both in relation to the public service principles and to the public service values described in clause 14, and in relation to *'rights and responsibilities.'* Clause 16 requires agencies and officials to comply with such standards, and clause 17 gives the Commissioner discretion to issue guidance on the minimum standards described in clause 15.

13. There are three key problems with this approach. First, the issuing of guidance by the Commissioner is discretionary when it should be mandatory (easily remedied by substituting 'shall' for 'may').

14. Second, and much more seriously, there is no requirement for the Commissioner to publish and consult on draft guidance or the minimum standards before they are finalised. Given one of the core principles of the public service is mean to be 'open government', it is both ironic and worrying that the Bill itself does not give effect to this principle when empowering the Commissioner to set standards and issue guidance.

15. The third key problem, to which the Council strongly objects, is that this approach still leaves the definition of 'open government' in the hands of an unelected official, rather than in the hands of our democratically elected legislature.

16. So, the second option for improving the Bill on this key topic is to insert a definition of 'open government' in clause 5 of the Bill. There are benefits and risks to such an approach. The benefits would flow from a clear and binding definition, as well as having greater legitimacy since it had been defined by MPs and not officials. The risks would flow from attempting to reach agreement on a contentious issue at a very late stage in the development of this policy and legislation.

17. Some may see the task as hopeless, given the wide variation in understanding of the term that was partially described in the paper cited above, and for which

there is continuing evidence of a lack of consensus, both in New Zealand and around the world.

18. However, the Council does not believe this is the case. We believe the Committee may well want to begin by looking at section 4 of the Official Information Act 1982, which sets out the purposes of that seminal piece of open government legislation:

> The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—
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> (a) to increase progressively the availability of official information to the people of New Zealand in order—
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> (i) to enable their more effective participation in the making and administration of laws and policies; and
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> (ii) to promote the accountability of Ministers of the Crown and officials,—
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> and thereby to enhance respect for the law and to promote the good government of New Zealand:
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> (b) to provide for proper access by each person to official information relating to that person:
>
> (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

19. The Council believes the Committee should pay most attention to the purposes set out in section 4(a), since section 4(b) concerns people's rights to access their own information (since transferred to the Privacy Act in 1993), and section 4(c) concerns the reasons for refusing OIA requests, not defining 'open government'.

20. The Committee could also draw on the Open Government Declaration that New Zealand signed up to as part of joining the Open Government Partnership in 2013:[2]

> *We value public participation of all people, equally and without discrimination, in decision making and policy formulation. Public*

[2] *Open Government Declaration*, Open Government Partnership, September 2011. https://www.opengovpartnership.org/process/joining-ogp/open-government-declaration/

> *engagement, including the full participation of women, increases the effectiveness of governments, which benefit from people's knowledge, ideas and ability to provide oversight. We commit to making policy formulation and decision making more transparent, creating and using channels to solicit public feedback, and deepening public participation in developing, monitoring and evaluating government activities. We commit to protecting the ability of not-for-profit and civil society organizations to operate in ways consistent with our commitment to freedom of expression, association, and opinion. We commit to creating mechanisms to enable greater collaboration between governments and civil society organizations and businesses.*

21. The Council would like to see a stronger commitment to open government in the Bill. We **recommend** this is done by inserting an expansive definition of 'open government' into clause 5. The alternative, and far less preferable route, would be to require the Commissioner to consult on both the minimum standards and the guidance before they are issued to Chief Executives and others.

22. What the Committee and Bill should shy away from is reductive and ill-informed attempts to limit 'open government' to transparency, accountability and open data. Transparency is about clear communication to the intended audience about the procedures, rules and standards that apply in the given context and circumstances.[3] Accountability is something that New Zealand already has copious mechanisms for (but relevant authorities often fail to use). And open data is useful, but clearly completely incapable of providing open government on its own.

23. Any definition of open government added to clause 5 of the Bill clearly needs to build on both the public participation and accountability limbs of the purposes of the Official Information Act, and if anything, place more emphasis on public participation in *'the making and administration of laws and policies'*, than on accountability. New Zealand already has fairly robust accountability

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[3] See *Transparency and the Ethics of Communication*, Onora O'Neill in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald, published for The British Academy by Oxford University Press, 2006.

mechanisms and institutions, and arguably its political and administrative culture – encouraged by the 1988 State Sector Act – has distorted the quality of policy making by placing too much emphasis on this. What the country lacks is similarly strong mechanisms and institutions to enable and safeguard the public's right to participate in policy development discussions long before Bills are drafted, and in evaluation of service delivery and policy outcomes. Notably, for example, the Bill does not require the Commissioner to set minimum standards for agencies' consultations with the public or relevant interested parties when developing policy, in spite of weak practices in this area from many departments. Nor does it touch on public involvement in evaluation of the success or otherwise of a policy or programme.

24. The Council would also like to see 'openness' inserted as one of the 'Public service values' set out in clause 14 of the Bill. At present, clause 14(1)(c) appends being 'open and transparent' on to the idea of officials acting with 'integrity'. In spite of their relationship, these are two different things, and by merging the two issues into one topic, there is a strong risk that being open and transparent will be minimised the standards that the Commissioner may set under clause 15 of the Bill. We **recommend** the separate listing of 'open and transparent' from acting with 'integrity'.

25. Finally, on the issue of 'open government', the Council notes that in spite of it being listed in clause 10 as a core principle for the public service, the Commissioner's functions under clause 42 do not include promotion of this principle. If it is not incumbent on the head of the public service to promote this principle, why should they or any of us expect Chief Executives and organisations to do so? The Council **recommends** that 'open government,' is inserted after the word 'accountability' in clause 42(b), in order to increase the likelihood of making progress with the intended culture change.

New Zealand Bill of Rights Act

26. The Council warmly welcomes the explicit affirmation of the rights of public service employees in clause 20 of the Bill. Public servants need to be confident about their rights, not least to be able to speak in public on issues that they have knowledge of, and where they can contribute to a better informed public

debate on matters of public interest. Public service managers and elected politicians need to trust public servants to exercise their rights appropriately, and proceed on the basis that they will not seek to represent either the department or the government's views when they are speaking in a personal capacity. Without this, there is a chilling effect created by a fear of employment consequences that has and will impoverish the quality of public discussion on important issues.

27. However, the Council has two concerns about this provision, especially given the absence of definition of 'open government'. The first is that clause 20 is limited only to 'employees' of the public service, and that the confirmation of these rights does not extend to contractors working for public service organisations. A significant portion of the people working for public sector organisations (in the broadest sense) are not employees. The Council **recommends** that the Bill be amended accordingly to reaffirm that these rights apply also to contractors.

28. The second concern that the Council has about this provision is that if the Commissioner chooses to issue guidance under clause 17, the subsequent clause states that if this guidance covers the rights and responsibilities of public servants then it must address rights and responsibilities in relation to freedom of expression. Clause 19 of the Bill confirms that this guidance does not have to be presented to the House of Representatives, and as pointed out earlier, there is no obligation on the Commissioner to consult with the public (or public servants or trade unions) prior to the issuing of such guidance.

29. The Council believes that this concentrates too much power in the hands of a single unelected official, particularly when such standards and guidance will inevitably have consequences for the rights of public service employees. Given the very substantial proportion of employment disputes that are settled in secret via MBIE's mediation service, it is entirely foreseeable that accusations that an employee has fallen foul of the standards and guidance will be dealt with in closed session there, rather than in court, or an open Employment Relations Authority proceeding. Employment disputes relating to public servants' fundamental rights will be settled by people who are not expert in the

balancing of competing public interests under the NZ Bill of Rights Act 1990, far less the nuances of freedom of expression. Does the Government, and do MPs, really want to hand over to the Commissioner and MBIE mediators, such broad powers affecting the rights to freedom of expression of public servants?

30. Further, the Council notes from various published reports that it has become increasingly difficult for public servants (and for that matter contracted non-governmental organisations) to share their knowledge with the public. Radio New Zealand has reported that between 2013 and 2019 the number of public relations staff in government grew more than 60 percent.[4] It is now the norm for senior managers to direct public servants not to speak to the media either proactively or in response to questions. Journalists are told that they can only obtain information from a department via its media office, and the Ombudsman has reported that many departments run parallel (and potentially discriminatory) processes for OIA requests received from the public and from the media.[5] The problem created by these limits on public servants speaking in public or to the media on the issues on which they are expert is that the increasing specialisation of functions and complexity with which they are performed, or services provided to the public or industry, means that frequently these officials have a near monopoly of knowledge on the topic. Digital delivery of government services, and the use of algorithms to assess, or contribute to decisions on, matters affecting people's lives and welfare will increasing obscure issues that have previously been explainable in plain language. It is already normal for public servants to be one of the few, if not sole, expert in a given field of government activity. For our democracy to function, those experts need to be able to share their expertise confident that the law protects them from unjustified retribution from managers who may have been embarrassed by the information disclosed.

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[4] *Government's public relations teams rapidly expanding*. Radio New Zealand, 25 July 2019. Accessed from: https://www.rnz.co.nz/news/national/395107/government-s-public-relations-teams-rapidly-expanding

[5] *Not a game of hide and seek*, Chief Ombudsman Dame Beverley Wakem, December 2015. Accessed from: https://www.ombudsman.parliament.nz/resources/oia-report-not-game-hide-and-seek

31. It is a reality of human nature, reflected in the theories of accountability that underpin much of our legislation, that people are more likely to pay attention to information which could become broadly known in their community. An important corollary of this is that managers are less likely to act upon, or even listen to, concerns brought to them by public servants when those managers know there are policies preventing the information from reaching anyone else. A clear goal of this Bill is to get rid of the departmental siloes that have bedevilled the public service for decades. One of the most pernicious of the behaviours engendered by these siloes is the hoarding of information. The financial as well human impacts of this internal secrecy are substantial, and recognition of these impacts and costs was clearly set out in the Danks Committee report on access to official information published in 1980 (aptly named *'Towards Open Government'*).[6] It was not an accident that the OIA repealed the Official Secrets Act, because the Danks Committee understood that it did not just stop officials from talking to the public and press, but also to their colleagues in different departments. Unfortunately, the cultural incentives on chief executives created by the State Sector Act 1988 and Public Finance Act 1989 significantly undermined the goals of the OIA. While it is laudable that the present Bill seeks to tackle this issue, the Council is concerned that the absence of strong definition of 'open government' in the Bill, coupled with mechanisms that will continue the restrictions on public servants sharing their knowledge with the public, will sustain this sickness of secrecy and fail to provide the medicine the Government says it wants to administer to the body politic.

32. The Council **recommends** that since any standards and guidance that the Commissioner may issue will touch on the fundamental rights of New Zealanders working to serve the public, that the provisions of clause 19 of the Bill be reversed, and that the Commissioner should be required to present both the standards and guidance to the House of Representatives for its consideration before it can come into force. This will enable public scrutiny of the provisions by MPs, and the Committee will be able to hear submissions

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[6] *Towards Open Government*, Reports of the Committee on Official Information, 1980. Accessed from: https://www.ombudsman.parliament.nz/resources/towards-open-government-danks-report

from public servants, trade unions, legal experts on ethics, integrity, open government and the rights set out in the Bill of Rights Act.

Crown's relationships with Māori

33. The Council welcomes the explicit recognition in clause 12 of the Bill that the public service has an essential role to play in supporting the Crown's relationship with Māori under Te Tiriti o Waitangi (The Treaty of Waitangi). The Council views Te Tiriti o Waitangi as a constitutional foundation of Aotearoa New Zealand relevant to all, and endorses its relevance for our democracy and laws. The Council endorses embedding in the Bill a requirement on agencies to have the capability to engage with Māori and understand Māori perspectives. However, having the capability is not the same as using that capability, and the provisions of clause 13(3) seem only to relate to the relevant person or board reporting to the Commissioner on progress with *'developing and maintaining'* capability and with employing Māori in their organisations. The Council **recommends** amending clause 12(2) to add a paragraph about agencies actively working to build and strengthen Māori participation in the development of laws, policies, procedures and administrative systems and processes, so that the reporting obligation under clause 13(3) requires agencies to demonstrate concrete achievements in strengthening the Crown's relationship with Māori.

Guidance from 'system leaders'

34. The Council notes, and supports, the provisions of clause 55 of the Bill, which empower a 'system leader' – with the appropriate Minister's agreement – to set and issue 'standards and guidance relating to the particular subject matter area that they lead and co-ordinate'. The Council believes that this is likely to facilitate a continuation of positions such as 'Head of the Policy Profession', 'Government Chief Data Steward', and 'Government Chief Talent Officer'. These clearly have the potential to provide useful advice to officials and agencies.

35. However, again, the Bill fails to require public consultation on the draft standards and guidance that these officials are being empowered to set. If

openness is mean to be a principle of the new public service, provisions where standards can be set should be subject to an obligation to engage in meaningful public consultation on the proposals before they come into force. The Council **recommends** that clause 55 be amended by the insertion of a paragraph requiring public consultation on the draft standards and guidance before they are finalised and come into effect.

Promoting diversity and inclusiveness

36. The Council supports the Bill's commitment to promoting diversity and inclusiveness in clauses 73 and 74. However, these terms are frequently used without an understanding of their implications in practice. The Council **recommends** that prior to finalising the guidance and standards on these issues under clause 74, that the Commissioner be required to consult with agencies, non-governmental organisations and the public on the draft standards and guidance. The Council believes this will increase the likelihood of the standards and guidance including practical measures and an explicit commitment to increasing accessibility and universal design principles to enable more disabled people to work in the public service. An amendment to clause 74 to require this would significantly help with public engagement with disabled people in the community, and help ensure we have a public service that is more likely to act with empathy.

37. The Council believes that consistent flow of information leads to a healthier democracy and more informed and therefore better management. The Council finds a contradiction between the principle of open government in clause 10, and the 3 year briefing cycle proposed in clause 15 of Schedule 3. Whilst the Council acknowledges that the briefing requires preparation and contemplation, that barrier merely prevents the minute-by-minute or day-by-day publication of a briefing or the underlying performance data. The Council **recommends** either a six monthly or annual publication cycle for the briefings on state of the public service. It has been nearly 20 years since organisations like Toyota started to demonstrate the value of continuous improvement processes, and this cannot take place in the public service if the flow of information to Parliament about the state of the public service is triennial.

38. In particular, the Council **recommends** that the Commissioner be required to report annually to the House of Representatives on progress being made on diversity and inclusiveness, and to formally consult on the measures of success that are adopted for such reporting. Since the Bill does not specify whether making progress on diversity and inclusiveness will be an issue on which a Chief Executive's performance will be assessed, we further **recommend** that this be made explicit in the Bill.

Performance review of chief executives

39. The Council notes the provisions of clause 10 of Schedule 7 of the Bill, which sets out matters relating to the Commissioner's review of the performance of departmental chief executives. In view the Government and the Bill's stated commitment to 'open government' and transparency, the Council **recommends** that a paragraph be added to clause 10 requiring the Commissioner to publish the specific criteria and success measures for against which each chief executive's performance is assessed.

40. Many organisations and people believe that agencies' performance on issues of concern to them – whether it be responding to OIA requests, ensuring people are housed properly, or receive an adequate standard of healthcare – will be improved if the Commissioner informs the chief executive that their performance on this issue will form part of their annual assessment. Whether this is a realistic expectation is another matter. But while the chief executive's performance appraisal is matter between them and their employer and the appropriate Minister, there is a strong public interest in the criteria against which the chief executives are assessed being open and transparent. Not just to the chief executive and Minister concerned, but to the public whom these officials are ultimately meant to serve. The choice of measures and criteria is inherently political and in this regard the Commissioner needs to be publicly accountable for her or his choices. This can only happen if the measures are proactively made public.

Medical examinations

41. The Council notes with deep concern the provisions of clause 6 of Schedule 8 to the Bill, which gives chief executives the power to request both any applicant for employment, and any existing employee, to undergo a medical examination by a doctor of the chief executive's choice.

42. The Council notes that the Bill does not require the chief executive to have a legitimate purpose for such requests, nor require them to provide a written explanation of their purpose to the person in question (whether in advance or afterwards). The Bill also contains no limitations on the reasons for which a chief executive may make such a request, meaning that it is quite possible that such a request could be made as part of a 'fishing expedition' in search of information that may be subsequently used to the detriment of the person subject to the examination. The Bill also is entirely silent on any threshold for enabling use of this power. The Bill also does not mandate that a copy of the medical practitioner's report be provided either to the subject of the examination nor to their own doctor. The person who is asked to undergo the medical examination appears to have no right to review the practitioner's report prior to it being supplied to the prospective or actual employer, nor to seek amendments to it. While none of these failings is a breach of section 11 of the NZ Bill of Rights Act (the right to refuse to undergo medical treatment), it is clear that such a broad and untrammelled power, being exercised for opaque purposes with no rights for the job applicant or employee is a deeply unhealthy power to place in the hands of a person who already exercises considerable power over the individual in question. We ask the Committee members to reflect on how they would feel if their employer were able to require a report on their medical condition to be provided to them. We have no doubt that (US Presidential customs aside) they would feel deeply uncomfortable about such a situation.

43. Given the lack of thresholds, and the absence of a requirement for stated reasons and purposes, the Council believes that it is inappropriate for the state to nominate the medical practitioner to undertake such an examination. It clearly facilitates the appointment of a practitioner favourable to the state. As such, it may well cause substantial distress and/or lead to the disclosure of

deeply sensitive personal information on matters wholly unrelated to prospective or current employment. If the role for which an individual is being considered, or is currently undertaking, has particular criteria, these should be specified and applicants asked to submit a letter from their own doctor or a nominated doctor of their choice as to their fitness against the specified criteria.

44. It is also clear to the Council that this power, capable of being exercised in a situation where a person is applying for a job, or maybe experiencing tension in their existing employment relationship, and could be used to informally circumvent the protections against discrimination set out in the Human Rights Act 1993. Given that this Bill seeks to improve inclusiveness and diversity in the public service, the Council is disturbed that the lack of information being provided to the people in question may mask differential standards being applied to disabled applicants or people with a chronic but manageable medical condition.

45. The Council **strongly recommends** that the Committee and Government reviews the provisions of the United Kingdom Access to Medical Reports Act 1988, and that it incorporate the safeguards found in that statute into New Zealand law.[7] In the present instance, this could take the form of amendments to clause 6 and Schedule 8 of the current Bill, but it should also bring forward a separate Bill to afford people working outside the public service similar protections. The UK Act requires the person seeking the medical report to obtain the person's consent, and to provide them with information about their rights to see and amend the report before it is provided to the employer (or prospective employer). Where the person who is to undergo examination says they wish to see the report before it is sent to the employer, the doctor must be told the person's preference, and the doctor is prohibited from supplying the report until the person has had access to it, or 21 days have elapsed without the person exercising their right to access the report. The doctor is obliged to either amend the report if the person considers it to be incorrect or misleading,

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[7] Access to Medical Reports Act 1998, Chapter 28. Accessed from https://www.legislation.gov.uk/ukpga/1988/28/contents on 30 January 2020.

unless they are not prepared to do so, in which case the doctor must attach to the report the person's views on it prior to it being supplied to the employer.

46. Finally, the Council **recommends** that the Bill mandate chief executives to keep data on the frequency and circumstances with which they use the power to ask people to undergo medical examination, and to report this data to the Commissioner annually. This will not only provide an incentive on chief executives to only use the power when they have good reason, but it will provide the Commissioner with information to enable evaluation and possible amendment of the provisions.

Summary of recommendations

47. For ease of use, a summary of the recommendations made to the Committee by the NZ Council for Civil Liberties are set out below.

48. The Council recommends (para 21) that democratically elected Members of Parliament should decide the definition of 'open government' listed as one of the principles of the public service in clause 10, rather than an unelected official in the shape of the Public Service Commissioner. This could be done by adding a definition provision to clause 5 of the Bill. The definition should be expansive, and if any aspect of 'open government' is to be stressed, it should be public participation in the making and administration of laws and policies, and their evaluation.

49. The Council recommends (para 24) that 'openness and transparency' be listed as separate 'public service values' in clause 14, and that believes it is a mistake to try and pigeonhole them under 'integrity' in clause 14(1)(c).

50. The Council recommends (para 25) that the words 'open government' are inserted into clause 42(b) after the word 'accountability', thereby placing a duty on the Commissioner to promote this public service principle.

51. The Council recommends (para 27) that clause 20 of the Bill is amended to explicitly reaffirm the application of the NZ Bill of Rights Act to contractors and not just employees.

52. The Council recommends (para 32) that the provisions of clause 19 of the Bill be reversed, and that the Commissioner be obliged to present both the

standards and guidance to Parliament for scrutiny before they come into force. They cover the fundamental rights of New Zealanders working to serve the public, so we do not believe that the standards and guidance should be introduced without public scrutiny.

53. The Council recommends (para 33) that clause 12(2) of the Bill be amended to add a paragraph about agencies actively working to build and strengthen Māori participation in the development of laws, policies, procedures and administrative systems and processes. If this is done, it will mean that chief executives, when reporting under clause 13(3) will have to demonstrate concrete achievements in strengthening the Crown's relationship with Māori.

54. The Council recommends (para 35) that clause 55 be amended to require public consultation on draft guidance to be issued by 'system leaders'. If the principle of 'open government' is meant to mean anything, the Bill needs to ensure the relevant parts of the public service acts on this whenever it is preparing guidance for others.

55. The Council also recommends (para 36) that the Commissioner be required to consult the public before issuing guidance and standards on promoting inclusiveness and diversity.

56. The Council recommends (para 37) that a six-monthly or annual timeframe be substituted for the proposed 3-yearly cycle of producing a briefing on the state of the public service.

57. The Council recommends (para 38) that the Commissioner be required to report annually on the progress being made on diversity and inclusiveness. We also recommend that this factor be explicitly listed in the Bill as something against which chief executive's performance will be assessed.

58. The Council recommends (para 39) that clause 10 of Schedule 7 of the Bill be amended to require the Commissioner to publish the criteria and success measures against which each chief executive's performance will be assessed. This is not the same thing as publishing the results of those assessments – the employment relationship can still be preserved while enabling the public and MPs to scrutinise the Commissioner's choices of what factors against which performance will be assessed.

59. The Council strongly recommends (para 45) that the astoundingly unregulated powers of chief executives to request that employees and job applicants undergo medical examinations be significantly overhauled. The present drafting is wide open to abuse and enables deeply sensitive personal information to be passed to government agencies in circumstances when it is of absolutely no relevance to employment matters. In particular we draw the Committee and Government's attention to the provisions of the UK's Access to Medical Reports Act 1988 and recommend those safeguards be added to others limiting clause 6 of Schedule 8 of the Bill.

60. The Council also recommends (para 46) that the Bill mandate chief executives to keep and report to the Commissioner information on the frequency and circumstances with which they use the power to ask people to undergo medical examination.