

Integrity Plus 2013



New Zealand National Integrity System Assessment

Title: Integrity Plus 2013 New Zealand National Integrity System Assessment

Author: Transparency International New Zealand

Publisher: Transparency International New Zealand

Address: 34 Talavera Terrace, Kelburn, Wellington 6012

Format: PDF

ISBN PDF Format: 978-0-473-27092-6

ISBN Word Doc: 978-0-473-27091-9

ISBN Soft Cover: 978-0-473-27089-6

ISBN CD ROM: 978-0-473-27090-2

Publication Date: 12/2013

www.transparency.org.nz

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DEDICATION



Jeremy Pope

This report on the effectiveness of New Zealand's National Integrity System is dedicated to Jeremy Pope, the first managing director of Transparency International. Jeremy's *TI Source Book 2000* pioneered the concept of the National Integrity System, and his untimely death in 2012 robbed New Zealand and the world of one of its leading anti-corruption and human rights champions. We hope that this report and, more particularly, the actions taken to strengthen integrity following its completion, will serve as further testament to Jeremy's life's work.

PREFACE

TAKING INTEGRITY MORE SERIOUSLY IN NEW ZEALAND

This report documents the second assessment by Transparency International New Zealand (TINZ) of the effectiveness of New Zealand's National Integrity System, 10 years on from the initial study (2003). It also coincides with the centenary of the coming into effect of the Public Service Act 1912, which introduced a professional, merit-based public service in New Zealand.

The methodology for the assessment follows a research design developed by the Transparency International Secretariat (TI-S) in Berlin and implemented by TI national chapters in many countries. The core methodology, which focuses on corruption, has been augmented by a wider focus in selected areas on the role of transparency, integrity, and accountability in strengthening governance in New Zealand – what we have named an “integrity-plus approach”. The report was resourced domestically. Many researchers, reviewers, interviewees, the TINZ Board, TI, and seminar organisers volunteered their time and knowledge – of the order of 500 person-days. TINZ records its profound gratitude for the amazing dedication and efforts of so many people (of its virtual team). Project team members are listed in the acknowledgements section of this report. Those many who gave up their time in interviews and consultation are mentioned in footnotes throughout the report. In addition, financial contributions were received from numerous public sector agencies and the Gama foundation. In-kind contributions of meeting rooms and advice were also received from a large number of businesses and non-governmental organisations. The arrangements to manage the project and ensure the independence of the assessment are described in this report. TI-S also provided its intellectual property as well as in-kind support in the form of training for two New Zealand researchers and comments on report drafts. We thank the Secretariat for its support.

Since the 2003 NIS report, there has been a welcome strengthening of transparency and accountability in some areas in New Zealand. It is clear New Zealand remains highly rated against a broad range of international indicators of transparency and the quality of governance. Areas of concern, weakness, and risk highlighted in 2003, however, remain in the face of on-going and new challenges to integrity in this country. In some key areas, passivity and a lack of urgency continue. In others, progress has been very recent and sometimes insufficient.

The core message of this report is that it is beyond time for serious and urgent action to protect and extend integrity in New Zealand.

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EXECUTIVE SUMMARY

This assessment of New Zealand's National Integrity System is dedicated to New Zealander Jeremy Pope who pioneered the approach. It also marks the centenary of the coming into effect of the Public Service Act 1912

Transparency matters ...

“Transparency” is a term so frequently used and used in such diverse contexts that it is worth re-stating why it matters so much. Citizens have a right to information – a principle well established in such codes as the International Covenant on Civil and Political Rights and New Zealand's Official Information Act 1982. Transparency is also a precondition for effective public debate, strengthens accountability, and promotes fairer and more effective and efficient governance. As Professor Jeremy Waldron, an internationally regarded New Zealand legal academic, has observed, “there is such a degree of substantive disagreement among us about the merits of particular proposals ... that any claim that law makes on our respect and our compliance is going to have to be rooted in the fairness and openness of the democratic process by which it was made”.

The National Integrity System

This National Integrity System (NIS) assessment report takes stock of the integrity with which entrusted authority is exercised in New Zealand. The framework on which the report is based was developed by the Transparency International Secretariat and applied by TI national chapters in many countries. A good working definition of an NIS is “the institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power”. Beyond restraining the abuse of power, integrity systems should also be designed to ensure power is exercised in a manner that is true to the values, purposes, and duties for which that power is entrusted to or held by institutions and individual office-holders, whether in the public sector, the private sector, or civil society organisations.

At the heart of this assessment are reports on 12 ‘pillars’ – branches of government, sectors, or agencies that constitute New Zealand's national integrity system. An NIS assessment is an evaluation of the principal governance systems in a country to assess whether they function well and in balance with each other and thus help to guard against the abuse of power. It extends also to the societal foundations that support the pillars. The New Zealand NIS is illustrated in the standard “temple diagram”. This assessment framework incorporates the Treaty of Waitangi (New Zealand's founding document), environmental governance, and local government. Each of the individual pillars of the NIS has been assessed and scored against a set of indicators that measure each pillar's capacity, governance, and role within the system.

The assessment identifies systemic interactions, interdependencies, and common themes and concerns. The wide scope of an NIS assessment facilitates such identification, which is difficult, if not impossible, to achieve in standard sector- or institution-specific analyses of transparency and accountability. It considers the individual pillars and their interactions (positive and negative) as well as the effectiveness of the overall NIS.

New Zealand's National Integrity System



Overall conclusions of the report

New Zealand's national integrity system remains fundamentally strong, and New Zealand is rated highly against a broad range of cross-country transparency and good governance indicators. Since the first NIS assessment of New Zealand in 2003, a welcome strengthening of transparency and accountability has occurred in some areas. The assessment found that the strongest pillars in the NIS are the Office of the Auditor General, the judiciary, the Electoral Commission, and the Ombudsman. The Canterbury earthquakes represented a severe test of governance systems in terms of compliance with building standards and integrity in reconstruction, and (with two tragic exceptions, the collapses of the CTV and Pyne Gould Corporation buildings), systems have generally held up well.

However, New Zealand's national integrity system faces increasing challenges. In key areas, passivity and complacency continue. New Zealand has not ratified the UN Convention against Corruption more than 10 years after signing it, and is not fully compliant with the legal requirements of the OECD Anti-Bribery Convention more than 14 years after signing it. Areas of concern, weakness, and risk do exist; for example, the relative dominance of the political executive, shortfalls in transparency in many pillars, and inadequate efforts to build proactive strategies to enhance and protect integrity in New Zealand. The pillar that raises issues of most concern is the political parties pillar. The core message of this report, therefore, is that it is beyond time to take the protection and promotion of integrity in New Zealand more seriously.

Strengths from the interactions between pillars

The four key strengths from the interactions between pillars are:

- **the effectiveness of the judiciary as a check on executive action**

- **the effectiveness of the Office of the Auditor-General in supporting parliamentary oversight of the public finances**
- **the effectiveness of the Ombudsman as a restraint on the exercise of administrative power** and in enforcing citizens' rights of access to information under the Official Information Act 1982
- when cases of corruption or unethical behaviour by those in power are exposed, **the media, political parties, the Auditor-General, law enforcement agencies, and the judiciary usually pursue these cases vigorously.**

Weaknesses from the interactions between pillars

Four main weaknesses are apparent in the interactions between pillars.

- **Interface between political party finances and public funding:** A combination of continuing concerns includes the transparency of political party financing and of donations to individual politicians, a long-term decline in party membership and increased party reliance on public funding, and a lack of full transparency of public funding of the parliamentary wings of the parties. These concerns interact also with the refusal to extend the coverage of the Official Information Act 1982 to the administration of Parliament.
- **Parliamentary oversight of the executive:** Concerns include the use of urgency to pass controversial legislation and the lack of specialist expertise and committees to hold the executive to account.
- **Interface between the political executive and public officials:** Concerns include evidence of an erosion of the convention that public servants provide the government of the day with free and frank advice, an apparent weakening over the last decade of the quality of policy advice that public servants provide, and perceived non–merit-based appointments to public boards.
- **Interface between central government and local government:** Concerns include intervention by central government in the decision-making authority of local government and weaknesses in the design and implementation of regulations.

Foundation assessment discloses both strengths and weaknesses

Sources of strength and weakness are also found in the foundations of the NIS.

Key strengths include:

- support for a high-trust society, economy, and polity, and a general culture that does not tolerate overt corruption
- overall, wide support for democratic institutions, and elections that are free and fair
- overall, assurance of the political and civil rights of citizens
- the Treaty of Waitangi as a source of legitimacy, citizenship for all, and respect for Maori authority and full participation. In this context, social, ethnic, religious and other conflicts are rare.

Key weaknesses include:

- a degree of economic inequality that strains social cohesion and, international experience suggests, may create some risk of increased corruption
- only 37 per cent of respondents to a recent Serious Fraud Office survey thought the country was “largely free” of serious fraud and corruption

- 44 per cent of respondents in the New Zealand Survey of Values 2005 thought the country was run by a few big interests looking after themselves rather than for the benefit of all people
- only 55 per cent of those surveyed by the Human Rights Commission considered the Treaty of Waitangi to be New Zealand's founding document, and only 25 per cent rated the Crown–Māori relationship as healthy.

Together the last three factors suggest recognition by the public of the need for a more pro-active approach to promoting and protecting integrity in New Zealand.

Six broad themes across the NIS

Analysis of the 12 pillars and societal foundations of the New Zealand NIS identified six broad cross-cutting themes (that is, themes that cut generally across the whole of the NIS). These themes helped to frame the recommendations.

- A strong culture of integrity with most decisions conforming to a high ethical standard, but this culture is coming under increasing pressure.
- The relative structural dominance of the political executive branch of government.
- A lack of transparency in a number of areas.
- The degree of formality in the frameworks that regulate the pillars in New Zealand's national integrity system varies considerably. Informal conventions provide flexibility, but also create a risk of expediency and a need to ensure they are not being quietly eroded.
- Conflicts of interest are not always well managed.
- New Zealand would benefit from greater emphasis on the prevention of fraud, bribery and corruption.

Recommendations

The recommendations are set out in full in Chapter 6 and cover seven areas. They are based on the analysis and findings in the pillar reports and the identification of pillar interactions and system-level cross-cutting themes. Each recommendation addresses an area of concern identified in this assessment and is directed to a particular institution or sector to implement.

- 1 Ministry of Justice to lead the development of a comprehensive national anti-corruption strategy in partnership with civil society and the business community, combined with rapid ratification of the UN Convention against Corruption (UNCAC), as a matter of urgency.
- 2 Ministry of Justice to initiate a cross-government programme of wide public consultation to develop an ambitious New Zealand Action Plan for the international Open Government Partnership.
- 3 Strengthen the transparency, integrity and accountability systems, of Parliament, the political executive (cabinet) and local government.
- 4 Strengthen the role of the permanent public sector with respect to public procurement, integrity and accountability systems, and public policy processes.
- 5 Support, reinforce and improve the roles of the Electoral Commission, the judiciary, and the Ombudsman in maintaining integrity systems.

- 6 The business community, the media, and non-government organisations to take on a much more proactive role in strengthening integrity systems, addressing the risks of corruption as “must-have” features of good governance.
- 7 Public sector agencies to conduct further assessments and research in priority areas to better understand how to further strengthen integrity systems.

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ACRONYMS AND ABBREVIATIONS

AGAS	Auditor-General's Auditing Standards
APN	APN News and Media
CSO	civil society organisation
DPMC	Department of the Prime Minister and Cabinet
EAG	External Advisory Group
FMA	Financial Markets Authority
GCSB	Government Communications Security Bureau
GIFT	Global Initiative on Financial Transparency
IATI	International Aid Transparency Initiative
INTOSAI	International Organisation of Supreme Audit Institutions
IPCA	Independent Police Conduct Authority
IPRAG	Integrity Plus Research Advisory Group
ISSAI	International Standards of Supreme Audit Institutions
MMP	mixed member proportional representation
MP	member of Parliament
NIS	National Integrity System
NZX	New Zealand Stock Exchange
OAG	Office of the Controller and Auditor-General
OECD	Organisation for Economic Co-operation and Development
OGP	Open Government Partnership
OIA	Official Information Act 1982
SFO	Serious Fraud Office
SSC	State Services Commission
TI	Transparency International
TI-S	Transparency International Secretariat (located in Berlin, Germany)
TINZ	Transparency International New Zealand (the New Zealand chapter of Transparency International)
TVNZ	Television New Zealand
UNCAC	United Nations Convention against Corruption

GLOSSARY OF MĀORI WORDS AND PHRASES

Aotearoa	New Zealand
hapū	traditional political entity based on family relationships, land, and beliefs
hui	gathering, meeting, decision-making forum
iwi	political entity based on hapū relationships
kaiwhakarite	person who makes things right; leadership
kaumātua	elder
kaupapa	issue; matter to be deliberated or resolved; framework
mana	dignity; respect; honour; important value
Matangireia	The name of the former Maori Affairs Committee Room in Parliament House, meaning the 13th and uppermost heaven.
Māori	The indigenous people of New Zealand.
marae	traditional gathering place for whānau, hapū, and iwi; socio-cultural centre
mihi	greeting; speech of welcome
Ngāti Toa	An iwi originally of the coastal west Waikato region of New Zealand, then later Taranaki and Wellington regions.
Ngāti Poneke	A pan-tribal iwi of Māori who have migrated to the city of Wellington in New Zealand
Pākehā	non-Māori residents of New Zealand
pōwhiri	formal process for engaging as hosts and visitors
rangatahi	young people
rangatira	hapū leaders
rangatiratanga	self-determination; sovereignty
rohe	area of land
taonga	treasures, things of value
tangata whenua	people of the land; original people
tauīwi	landed or landing people; diverse origins
Te Māngai Pāho	the Māori Broadcast Funding Agency
Te Puni Kōkiri	the Ministry of Māori Development
te reo	the Māori language
Te Ture Whenua Maori Act 1993	the Maori Land Act 1993
tikanga	Māori law, rules, and practice

New Zealand National Integrity System Assessment 2013
Glossary of Māori words and phrases

tino rangatiratanga	Autonomous self-government and self-determination over lands, people, and belief systems, or tribal authority in terms of self government.
Ngāi Tūhoe	An iwi of Te Urewera in the eastern North Island of New Zealand.
tūrangawaewae	authority to belong; place to stand
waiata	song
whānau	extended family
Whānau Ora	An inclusive interagency approach to providing health and social services that empowers whānau as a whole rather than focusing separately on individual family members and their problems.

GENERAL GLOSSARY

The **Aarhus convention** is the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This convention was signed on 25 June 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001, and, as of 31 May 2013, 45 states and the European Union had ratified it. All of the ratifying states are in Europe and Central Asia. The convention grants the public rights regarding access to information, public participation, and access to justice in governmental decision-making process on matters concerning the local, national, and trans-boundary environment.

Bribery is the offering, soliciting, or receiving of a financial or other advantage to or by any person to encourage them to perform their functions or activities improperly, or to reward that person for having already done so. In the business context, this is usually in order to obtain or retain business or to secure an improper advantage

The **Cabinet Manual** defines the procedures of Cabinet and provides a code of conduct that is an authoritative guide to central government decision making for ministers, their offices, and those working within government. It has no legal status but has become a primary source of information on New Zealand's constitutional arrangements and is explicitly endorsed by each Prime Minister at the first Cabinet meeting of a new government.

Corruption is the abuse of entrusted power for private gain.

The **Crown** is a general term that describes the state of New Zealand, including the Queen and her representative, the Governor-General. Particularly in the context of the Treaty of Waitangi, it is not synonymous with the government of the day.

The **Department of the Prime Minister and Cabinet** provides advice and support services to the executive.

Fraud is intentional deception made for personal gain or to damage another individual.

Impunity is exemption from punishment or loss or escape from fines.

Pasifika denotes people, organisations, or issues connected to the Pacific Island communities in New Zealand.

The **Remuneration Authority** is an independent statutory body that sets the remuneration of key office holders such as judges, members of Parliament, local government representatives, and some individual office holders and board members of independent statutory bodies.

Parliamentary **Standing Orders** are the rules of procedure for the House of Representatives and its committees.

The **State Services Commissioner** provides leadership and oversight of the state services. As the holder of a statutory office, the commissioner acts independently in a range of matters to do with the operation of the public service, state services, and the wider state sector.

The **Treaty of Waitangi** (New Zealand's founding document) was signed by over 500 Māori chiefs and by representatives of the British Crown in 1840. It agreed the terms on which New Zealand would become a British colony.

The **Treaty Settlement Process** is the means by which Māori and the Crown agree to settle a Māori claimant group's historic claims against the Crown, mainly related to the illegal appropriation of Māori land and other resources. Iwi and hapū present claims to the Waitangi Tribunal, which makes recommendations to the government for suitable recompense. Iwi and hapū are also able to negotiate settlements directly with the Crown without going through the full Waitangi Tribunal hearing process. The Crown has established the rules for negotiation that include a mandating process for the negotiations and a vote by the hapū or iwi to accept the settlement. Settlements are generally made up of four parts: an agreed on historical account, an apology by the Crown, a package of cash and property compensation, and commercial redress, providing additional resources for iwi 25-year strategies to meet the future needs of their people. As at 25 July 2013, 38 claims have been settled and more are being negotiated.

Vote (in the context of resources for publicly funded agencies) is the part of the annual Budget allocated to a particular agency or for a particular purpose.

CHAPTER 1: INTRODUCTION

What a national integrity system is

The National Integrity System (NIS) on which this report is based was developed by Transparency International (TI) and has been applied by TI national chapters in many countries. It assesses the integrity of a country's institutional arrangements and asks whether they foster transparency, accountability, and ethical behaviour.

Such institutions will also be effective in reducing or preventing corruption, which in this approach is seen as a symptom of wider governance failures.

As originally formulated by Jeremy Pope, the objective of the NIS is a system of horizontal accountability, in which the role of agencies of restraint and watchdogs is to check on abuses of power, including corruption, by other agencies and branches of government.¹

A good working definition of an NIS is: “the institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power.”²

An NIS assessment, then, is an evaluation of the principal governance systems in a country that, if they function well and in balance with each other, constitute an effective protection against the abuse of power.

Beyond restraining the abuse of power, integrity systems should also be designed to “ensure that power is exercised in a manner that is true to the values, purposes and duties for which that power is entrusted to, or held by, institutions and individual office-holders”, whether in the public sector, the private sector, or civil society organisations.³

The NIS is commonly represented by a ‘temple diagram’ that illustrates the institutional pillars comprising the country's principal governance systems.

Figure 1 presents the NIS temple diagram as applied in the 2013 New Zealand NIS assessment. As illustrated in Figure 1, at the heart of this assessment are reports on 12 ‘pillars’ – branches of government, sectors, or agencies – that constitute New Zealand's NIS. Each of these pillars is the subject of detailed analysis in Chapter 5.

As discussed in this chapter, for the Integrity Plus 2013 New Zealand NIS assessment, two of the TI-S pillars (Law Enforcement, pillar 5, and Anti-corruption Agency, pillar 9) are combined into one pillar.

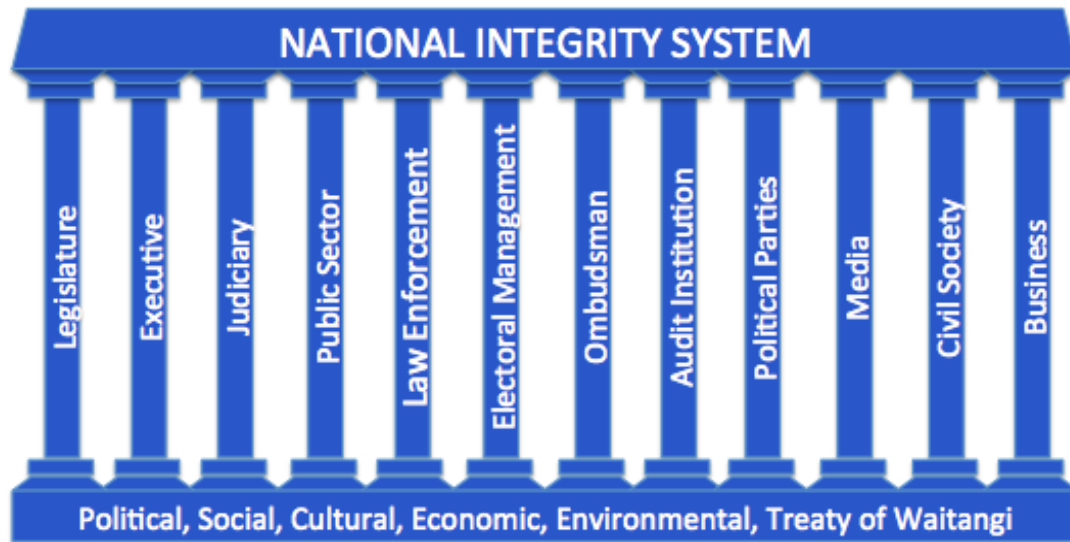
¹ Jeremy Pope, *Confronting Corruption: The elements of a national integrity system*, TI Source Book (Berlin: Transparency International, 2000).

² National Integrity Systems Assessment, *Chaos or Coherence? Strengths, opportunities and challenges for Australia's integrity systems*, final report (Griffith University and Transparency International Australia, 2005), p. i.

³ National Integrity Systems Assessment, 2005: i.

In addition, environmental governance and the Treaty of Waitangi have been added to the foundations, political, social, cultural and economic foundations.

Figure 1: New Zealand's National Integrity System



The 12 pillars rest on foundations: the key norms, ideals, and ethics of the various aspects of society. If the foundations of a society are sound, then they are capable of supporting a sound NIS.

Chapter 2 addresses the societal, cultural, political, and economic aspects that are usually taken to make up the foundations of an NIS.

Two foundations of particular significance for New Zealand have been added to the standard TI-S framework.

The first is the **Treaty of Waitangi**. The Treaty is unique to New Zealand and is generally accepted as a key foundation of the country's society and its constitutional arrangements. It establishes the basis of the relationship between Māori as the indigenous people and the Crown. No assessment of New Zealand's NIS would be complete without a consideration of the Treaty. Accordingly, Chapter 2 includes a brief section on the Treaty and each pillar report in Chapter 5 addresses adherence to Treaty obligations.

The second additional foundation is the **environment**. New Zealanders see the quality and management of the natural environment as another key foundational value. A well-governed society with high integrity needs to be underpinned by sound environmental values and governance practices. Chapter 2 includes a section on these matters, while the public sector pillar report assesses transparency and accountability of environmental governance.⁴

⁴ www.transparency.org.nz/docs/2013/Supplementary-Paper-2-Environmental-Governance.pdf

Unlike the 2003 New Zealand NIS assessment, this assessment covers local government and the business sector.

With respect to the inclusion of local government, in 2010 and 2011 the city of Christchurch in the Canterbury region was devastated by earthquakes. The recovery process has been prolonged (at least in part because of a lengthy period of aftershocks). A disaster of this nature is a test of a country's NIS, and this assessment considers some of the issues that have surfaced and that relate to local government in particular. Accordingly, local government is discussed in the public sector pillar report.

The TI Secretariat (TI-S) core methodology, which focuses on corruption, has also been augmented by a wider and more in-depth analysis of selected issues, as follows.

- The public sector pillar report has been expanded to include detailed assessment of transparency and accountability for the effectiveness of policies, the quality of policy advice, and separate analysis of the Crown entity sector.⁵
- Public procurement was assessed against international examples of good practice and standards including OECD norms, policies of international financing institutions, and disclosure practices from the construction sector transparency initiative (CoST).⁶
- Fiscal transparency, including legislative oversight and direct public engagement, has been assessed against the international Open Budget Index and International Monetary Fund standards.⁷
- Environmental governance has been assessed against the standards set out in the Aarhus Convention.⁸
- The business pillar includes an assessment of the financial sector.⁹

Finally, a standard NIS assessment includes a separate pillar report on anti-corruption agencies, but New Zealand has no specific agency charged with anti-corruption activities. Therefore, such activities are covered in the law enforcement pillar report (renamed law enforcement and anti-corruption), which also discusses how this role is covered in New Zealand.

⁵ See the Supplementary NIS Paper on Crown entities at www.transparency.org.nz/docs/2013/Supplementary-Paper-1-Crown-Entities.pdf

⁶ See the Supplementary NIS Paper on procurement at www.transparency.org.nz/docs/2013/Supplementary-Paper-4-Public-Procurement.pdf

⁷ See the Supplementary NIS Paper on fiscal transparency at www.transparency.org.nz/docs/2013/Supplementary-Paper-3-Fiscal-Transparency.pdf

⁸ See the Supplementary NIS Paper on environmental governance at www.transparency.org.nz/docs/2013/Supplementary-Paper-2-Environmental-Governance.pdf

⁹ See the business pillar report (pillar 13 in Chapter 5).

Basic propositions underpinning the assessment framework

The assessment framework is the same as that used in other national NIS analyses, but the analysis is extended, particularly in respect of governance indicators, to consider a wider variety of standards as mentioned above. The integrity-plus framework used in this assessment is based on five propositions about the importance and value of transparency, public participation, and accountability in the exercise of entrusted authority.

First, transparency means accessibility to the public of information the state and other institutions hold, particularly about their decisions and actions. Transparency is justified both on the basis of its intrinsic merit and because of its instrumental value, that is, its contribution to more effective, efficient, and equitable governance. Citizens have a right to information, as established, for instance, in the International Covenant on Civil and Political Rights and the Official Information Act 1982.

Second, transparency can increase institutional effectiveness and trust in institutions. There is some evidence that citizens' trust in government, in democratic settings, increases voluntary tax compliance, compliance with regulations and legal obligations, and political participation (for example, in terms of voting).¹⁰ Trust in the integrity of large corporations, non-governmental organisations, media organisations, and in political parties is also a valuable asset.

Third, transparency is a promising generic form of "information-age governance". Fung and colleagues describe transparency policies as a third wave of modern regulatory innovation, at a time of optimism about advances in information and communications technology.¹¹ They note, however, that transparency policies need to be well designed, can be captured by special interests, and, if poorly designed, can result in social costs that exceed social benefits.

Fourth, direct public participation in policy development and implementation is a direct complement to transparency, and is widely regarded as contributing to better policies and better implementation by ensuring a wider range of perspectives is brought to bear, new initiatives are fully tested, and policies are seen as legitimate, so are more sustainable and less subject to reversal.

Fifth, accountability means that those in positions of authority have to account for their exercise of power, for the resources entrusted to them, and for their use of those resources. Typically, they are also responsible in the sense that they can face sanctions for the misuse of power or resources. Transparency is a key mechanism for assuring accountability.

¹⁰ See, for instance, "Why trust in government matters", in *Results, Performance Budgeting and Trust in Government*, chapter 2 (Washington D. C.: World Bank, 2010).

¹¹ Archon Fung, Mary Graham, David Weil, and Elena Fagotto, *Transparency Policies: Two possible futures*, Taubman Center Policy Brief 2007-1 (Harvard University, 2007), p. 6.

Assessment methodology

In accordance with the TI-S methodology, each individual pillar has been assessed using a set of indicators developed by TI-S that measure each individual pillar's:

- capacity (resources and independence)
- governance (transparency, accountability, and integrity)
- role within the system.

Similarly, the foundations of the system have been assessed using indicators. In the case of the two additional foundations (the Treaty of Waitangi and environment), TINZ has developed the indicators.

The data collected and analysis developed in response to each indicator question is scored on a five-point scale to provide a quantitative summary assessment. The objective of scoring is **not** to enable a comparison of results across countries. The methodology is such that it is not possible to make valid comparisons between countries of how they scored on a particular pillar or indicator. The specification of the different levels of performance for each indicator is too brief and generic. No attempt is made in any of the NIS studies to cross-check, let alone to validate, scores across countries.

Rather, the objective of scoring is to provide an input to comparisons, for one country at a single point in time, of the relative strengths and weaknesses of the different pillars and the foundation elements of the NIS.

In light of that objective, what is scored are the legal frameworks and the pillars' performance against what New Zealanders expect of their institutions. The assessments are built up from research, public reports and data, interviews with key pillar participants and observers, international conventions and norms of good practice, and community and citizen views as revealed by surveys and public debate.

This methodology also provides a benchmark against which progress in a **single** country can be compared **over time**. The scoring in this report will assist such comparisons when future NIS analyses are done in New Zealand.

Another valid objective of scoring is to assess whether there are **patterns** in the scores across countries, for example, in terms of the relative strengths and weaknesses of different pillars and foundations. Perhaps the most relevant analysis of the pattern of cross-country results of NIS assessments is the study completed by Transparency International in 2012, *Money, Politics, Power: Corruption risks in Europe*.¹² Drawing on NIS reports financed by the EC in 25 European states in 2011, the report identified key cross-country gaps in anti-corruption systems.

The main strengths across these 25 countries are well-developed formal legal frameworks regulating corruption; strong supreme audit Institutions; and electoral processes that are generally robust. Key weaknesses are inadequate regulation of

¹² See www.transparency.org/enis

political party financing; lobbying is veiled in secrecy; legislatures are not living up to ethical standards; there is limited access to official information in practice; public procurement remains an area of high corruption risk; and protection for whistle blowers is severely lacking. These results are compared very briefly to the findings of this New Zealand NIS in the concluding chapter (Chapter 6).

The research team has been responsible for data collection and field interviews, the drafting of the qualitative work, reaching findings and framing recommendations, and the assigning of initial indicator scores. The final score and descriptive label for each pillar are the responsibility of TINZ.

In view of the large amount of existing data and research in New Zealand and to keep the exercise more manageable, it was decided early on not to commission original field tests of how institutions or organisations are performing in practice. The researchers extensively used interviews, desk research, and existing survey and other data, which are cited in Chapters 2–5, and the recommendations in Chapter 6 include some specific new initiatives in the field of research.

There were many policy announcements and other developments while this report was being written. There is limited coverage of events that occurred after 30 June 2013 and for most purposes, events that occurred after 30 September 2013 have not been taken into account, although a few important developments since that date are noted.

A systems approach

The essence of a systems approach is that the functioning of the collection of parts, taken as a whole, cannot be adequately described or evaluated solely from an analysis of the functioning of each individual component in isolation. Individual components of a system interact with each other in a variety of ways.

In general terms, in this NIS assessment we were interested both in the individual pillars and their interactions (positive and negative), dependencies, and in the combined effectiveness of different pillars, subsystems, and the overall NIS. The “role” indicator questions focus on these elements of interaction between pillars. The underlying analysis answered the following questions.

- For each pillar, what are the key areas of interaction with other pillars?
- How dependent is each pillar on the performance of one or more other pillars or key institutions?
- Are there any positive or negative feedback loops in play? Can this dynamic be changed?
- Are there any external factors or ‘shocks’ – such as, in New Zealand’s case, the Canterbury earthquakes – that are challenging one or more pillars or the foundations of the NIS?
- Are there any core rules and procedures that emerge as areas of concern across two or more pillars?
- Are there any other interactions between pillars and foundations that influence their performance positively or negatively?

What is not covered by this assessment

The scope of the NIS is limited in four key respects.

First, this assessment **is not an audit or an investigative exercise**. Neither TINZ nor TI is an investigative body. As per TI-S's policy, in this report individual cases or issues are referred to only where they have entered the public domain and can be referenced and substantiated by sufficient reputable sources.

Second, **policy settings are generally outside the scope** of this assessment – except for policies on governance. In relation to governance, the NIS is concerned with the transparency, integrity, and accountability for decisions taken by those with entrusted authority, not the content or quality of the decisions. In the public sphere, for instance, the NIS does not assess whether particular public policy decisions are sound – except for decisions on the regulation of the integrity pillars; that is, policies on the governance, independence, and resourcing of the integrity pillars are squarely within scope. However, decisions on the appropriate size of government or specific policies about regulation, tax, or public expenditure or individual projects or investment decisions in the public or private sectors are outside the scope.

Third, **detailed analysis of alternative approaches to reform is, in general, outside the scope** of the assessment. The assessment of a country's entire NIS is already a very large exercise. Therefore, in some areas it has been feasible only to recommend general directions or principles for reform, rather than to conduct a detailed analysis of the costs and benefits of alternatives or to specify precise recommended approaches or 'answers'. Based on Jeremy Pope's advice and the approach TI now recommends, however, this integrity-plus approach does envisage an implementation phase for its recommendations.

Fourth, **constitutional issues are considered only to the extent that they are relevant**. The assessment does not attempt a fundamental review of New Zealand's constitutional arrangements. Such an undertaking is well beyond the capacity of this exercise, and it would not be realistic to combine it with such a broad and detailed review of integrity systems. Issues such as the design of the electoral system, the appropriate division of powers between central and local government, the precise nature of the obligations created by the Treaty of Waitangi, or the length of the parliamentary term are outside the scope of the NIS. However, the analysis does raise questions that should be at the core of a more fundamental analysis of New Zealand's constitutional arrangements – such as the effectiveness of parliamentary oversight of the executive, and procedures and criteria for changing the role of a local authority. In this regard, the report raises significant concerns and makes recommendations in these key areas that TINZ hopes are taken up, including in the current exercise reviewing elements of the constitution.

Target audiences for this report

There is more than one audience for an NIS report. The key audience is all New Zealanders, to whom belong the rights protected and advanced by the NIS and who are most directly affected by the performance of the system. A second key audience is the subset of New Zealanders in positions of authority or influence in the various branches and institutions of government, in the business community, and in the different elements of civil society such as the media and non-governmental and civil society organisations. A third important audience is the international community, both in terms of its wider interest in the specifics of how governance operates in New Zealand, and in terms of how this study contributes to knowledge generated by the growing number of individual country NIS reports.

In view of these multiple audiences, the writing style adopted, as the TI-S suggests, is that of ‘scientific journalism’, which presents valid analysis and arguments about technical matters in a language accessible to non-experts and experts alike.

Project governance and management

The TINZ board retained overall oversight and responsibility for the NIS. The board approved a structure in which the chair and deputy-chair of the board were designated as co-directors of the NIS. The co-directors were responsible for all decisions on project design, management, resourcing, and implementation, including the content of reports, within the structure the board set.

Reporting directly to the co-directors was a research team manager (Liz Brown) who was recruited at the outset and attended a training course on the NIS methodology conducted by TI-S in Berlin in September 2012. The research team manager assumed overall responsibility for directing and supervising the large research team, and ensuring all research outputs and the final report were delivered on time and to an acceptable standard.

Between June 2012 and May 2013, TINZ recruited a highly qualified research team that eventually numbered more than 30 (researchers are listed by pillar in the acknowledgements section of this report). The objective of assembling such a large team was to ensure in-depth specialist expertise for each pillar and additional desk research and consultation time for each pillar and foundation topic.

The large number of researchers also provided a diverse background. The researchers included current academics from three different New Zealand universities across a range of disciplines (law, political science, public management, and environmental policy). Many researchers had worked at senior levels in government and watchdog institutions, and included a former Speaker of Parliament and former minister of the Crown, a former Police Commissioner, and two former chief executives of government departments. Others included an investigative journalist, a business commentator, a regular political commentator, a kaumātua (Māori elder), and several New Zealand-based international consultants in diverse fields. Short biographies of the research team members appear in Appendix 6.

A key additional quality control mechanism for the NIS was the Integrity Plus Research Advisory Group (IPRAG), which the co-directors established to provide further quality assurance and advice on technical matters. IPRAG comprised independent experts from diverse backgrounds who advised the co-directors on methodology, reviewed all drafts, advised on consistency of approach across pillars, assisted in identifying cross-cutting issues, and checked the NIS indicator scores for consistency with the text. IPRAG's role, however, was advisory. It is not responsible for the text nor the final scores.

In view of the substantial financial contributions from domestic public sector entities and to increase the likelihood that the recommendations in the final report would be implemented, TINZ also established the External Advisory Group (EAG), comprising representatives of the New Zealand entities that provided financing for the project, most of which have also committed to the implementation phase to follow the 2013 assessment. The EAG was chaired by TINZ patron Sir Anand Satyanand, and was supported by a secretariat provided by the Office of the Auditor-General. EAG members had significant relevant knowledge, access to factual material, and experience, which resulted in helpful comments on draft pillar reports and more accurate and complete final reports.

To preserve the actual and perceived independence of the NIS assessment, the EAG had no decision-making or formal review function. In all cases, the judgement and decision on the pillar reports remained with the individual researchers, NIS project team, and co-directors and, ultimately, the TINZ Board. Further details of project governance, management, and finances are in Appendix 2.

Developments since the 2003 New Zealand NIS

The first New Zealand NIS report made recommendations to strengthen transparency, accountability, and the quality of governance in New Zealand. The individual pillar analyses in Chapter 5 of this report refer in a number of instances to specific recommendations from the 2003 study. To provide an overview of developments since 2003 and a context for the 2013 assessment, Figure 2 shows whether each recommendation has been implemented in full, implemented in part, or not implemented.

In approximately one-third of the areas where specific recommendations were made in the 2003 report, the authorities have subsequently taken action and the recommendations are no longer relevant. With respect to a further one-fifth of the 2003 recommendations, action by the authorities has only partially addressed the recommendation and more remains to be done. Somewhat less than one half of the recommendations have not been implemented at all.

Note that TINZ does not claim there is a causal link between the 2003 report and the subsequent actions. The 2003 assessment was completed with only limited engagement with official agencies, and generated limited attention. Some of the recommendations were in areas where action was already underway or where government had announced an intention to act. In other cases the 2003 report may

have anticipated pressures that subsequently led to reforms, without necessarily influencing events, although it is always difficult to judge the impact of these exercises.

In terms of the individual pillars:

- The judiciary has the best implementation record, with the introduction of a code of conduct for judges, the establishment of the Judicial Conduct Commissioner, and some opening up of public access to court information.
- Other notable recommendations that have been implemented are the formation of a single electoral authority; some tightening of rules about anonymous donations to political parties (concerns remain in this area); and a general allowance for members of Parliament determined by an independent authority (although the jurisdiction of the independent authority will be restricted if a bill currently before Parliament is passed).
- In the public sector, over half of the recommendations have been implemented, including strengthening governance of Crown entities, instituting surveys of public servants on issues of integrity, and introduction of a requirement for local government authorities to have a code of conduct.

Key recommendations from the 2003 NIS where action has not been taken include:

- extending the OIA to Parliament
- reviewing public funding of political parties and the allocation of election broadcasting time to political parties
- introducing a Regulatory Responsibility Act
- regulating post-ministerial and post-public service employment
- undertaking a concerted campaign to publicise the criminalisation of bribery of foreign public officials
- implementing civics and ethics education in appropriate courses at secondary and tertiary levels.

The 2003 New Zealand NIS was based on the TI-S methodology at the time, which did not entail scoring of the performance of pillars or foundations. It is not, therefore, possible to compare the scores in the 2013 New Zealand NIS against the 2003 study. However, the assignment of detailed ordinal scores for pillars and foundations in the current study provides an improved basis for future New Zealand assessments of the NIS to track changes over time.

Figure 2: Implementation of 2003 National Integrity System recommendations

	Fully implemented	Partially implemented	Not implemented
Executive		Auditor-General to audit ministers' declarations of assets	Code of conduct on post-ministerial employment
Legislature		Conflict of interest code for members of Parliament	Official Information Act 1982 extended to cover Parliamentary Service

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	Fully implemented	Partially implemented	Not implemented
		Allowances and taxation for members of Parliament determined by independent authority	Select committees make better use of expert advisers
Political parties and elections	Formation of single electoral authority	Significant anonymous donations to political parties prohibited	Operation of 'fronts' to fund political parties made more transparent Revisit state funding of political parties Review allocation of broadcasting time to parties
Judiciary	Judicial Complaints Commissioner established Judicial Code of Conduct introduced	Increase public access to court information	
Public service	Governance of Crown entities strengthened State Services Commission mandate for ethics management extended to cover Crown entities State Services Commission more active in conducting ethics promotion across wider state sector	Survey of politicians' (not implemented) and public servants' (implemented) understanding of standards of integrity in public service Centralised mechanisms to monitor departments' adherence to integrity in procurement,	Post-civil service period of restraint on employment for senior officials Review of private sector sponsorship of government departments' projects. ¹ Centralised mechanisms to monitor departments' adherence to integrity in merit appointment to boards, and contracting out
Public expenditure and audit	Tax expenditures reported to Parliament Publication of overall tax policy strategy		Executive to respond to findings and reports of the Auditor-General

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	Fully implemented	Partially implemented	Not implemented
Regulations			<p>A new Regulatory Responsibility Act²</p> <p>Independent Regulatory Task Force considered²</p>
Police	<p>Independence of Police Commissioner reinforced</p> <p>Review of sponsorship of police vehicles</p>		
Regional and local government	<p>Local government code of conduct</p> <p>Review mechanisms for distribution of gambling proceeds</p>		
Governance of Crown – Māori relations	<p>Review of adequacy of legal vehicles for Māori collective organisation</p> <p>Accountability for social service delivery by Māori entities</p>		<p>Review minimum governance requirements for entities receiving Treaty of Waitangi settlements</p> <p>Public education on the Treaty of Waitangi</p>
General			<p>Concerted campaign to publicise Crimes Act Amendment relating to payment of bribes offshore</p> <p>Enhance understanding and implementation of the Official Information Act 1982</p> <p>SIS archives opened earlier</p> <p>Civics education in schools</p>
Future reform			<p>Set up a Task Force on the NIS</p> <p>Ministers request departments to comment on NIS recommendations</p>

	Fully implemented	Partially implemented	Not implemented
Further studies	TINZ to do a separate study of transparency and accountability of business sector – carried out in 2013NIS		

Notes

- 1 Note that this recommendation was under “Police” in the 2003 report, and referred specifically to police vehicles as well as having a general reference to other sponsorship projects.
- 2 Note, however, the new oversight role for Treasury in relation to regulatory regimes.

Developments in 2013

Three major developments occurred when this report was nearing completion, and beyond the point at which their implications could be fully considered. Firstly, the “recent developments” section of Chapter 4 has some material on the government’s announcement of a legislative programme. Secondly, when complete, that should enable the Government to ratify UNCAC and progress the recommendations from the OECD Working Group on Bribery’s phase 3 report on implementing the OECD anti-bribery convention in New Zealand.

The third development was the Prime Minister’s announcement in September 2013 of New Zealand’s intention to join The *Open Government Partnership* (OGP). This is an opportunity both to demonstrate leadership on the international stage, and to commit New Zealand to new initiatives in transparency, public participation, and accountability. The OGP was launched in September 2011 by the USA and Brazil, and aims to ‘secure concrete commitments from government to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen government.’¹³ The Open Government Declaration is reproduced in Appendix 5 to this report.¹⁴

The OGP is a multi-stakeholder initiative involving governments, NGOs and business. Each OGP member is required to prepare a national Action Plan containing new initiatives formulated with the active involvement of civil society. Member governments also commit to regular formal independent monitoring by domestic civil society of progress in implementing the Action Plan.¹⁵ The five OGP ‘Grand Challenges’ – substantive areas of focus - cover public resource management, public services, public integrity, corporate accountability, and safer communities. Membership of the OGP allows states access to the OGP networking mechanism, which facilitates the sharing of transparency and open government best practices, approaches and technology.

¹³ See <http://www.opengovpartnership.org/about>

¹⁴ It is also available, in Addendum D, at http://www.opengovpartnership.org/sites/default/files/page_files/OGP%20ArticlesGov%20Final%20June%2011%202012.pdf

¹⁵ The first five country progress reports produced in terms of the independent monitoring mechanism were posted on the OGP web site in mid-October 2013, at <http://www.opengovpartnership.org/news/read-new-progress-reports-ogp-implementation>

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CHAPTER 2: COUNTRY PROFILE – FOUNDATIONS

Introduction

Māori, a Polynesian people, are generally agreed by historians to have been the first inhabitants of New Zealand, probably arriving in several migrations from the 14th century.¹⁶ The first European to reach the country was Abel Tasman in 1642, followed by Captain James Cook in 1769. By 1800, there was some European settlement by whalers and sealers. Soon afterwards, a wave of colonisation began, firstly by missionaries and subsequently by Europeans intent on settlement. The Treaty of Waitangi was signed between Māori chiefs (rangatira) and representatives of Queen Victoria in 1840. As European settlement expanded into Māori land through a variety of means, many illegitimate, conflicts arose culminating in the land wars of the 1860s.

Although throughout the 19th century and much of the 20th century immigrants came mostly from Europe, there has been a Chinese presence since the gold rush of the later 19th century and more recent immigration from other Asian nations. About 345,000 Pasifika live in New Zealand. The Māori population of New Zealand is about 15.4 per cent of the total population.

A sound national integrity system can flourish only in a society that provides a firm and supportive base for its institutions. The political, cultural, and economic aspects of our society are all important, while the Treaty of Waitangi is part of our constitutional framework and a foundation of our society and citizenship. The Treaty also helps to shape our rights and policies with regard to natural resources and the environment, and the value we place as New Zealanders on their maintenance and on equitable access to its benefits. For these reasons, Transparency International New Zealand includes the Treaty and the environment as part of the foundations that ground New Zealand's institutions.

Political-institutional foundations

To what extent are the political institutions in the country supportive of an effective national integrity system?

Score: 4

In general, democracy is consolidated and stable, most political institutions function effectively, and the political and civil rights of citizens receive adequate protection.

New Zealand is a constitutional monarchy with a parliamentary system. The country's institutions are stable, and they ensure the rule of law and support the maintenance of democracy. The Failed States Index 2013 ranks New Zealand 173 out of 178 countries – that is, the sixth most “politically sustainable” country in the world. In the same index, New Zealand is ranked first equal in the world in terms of the “legitimacy of the state”,

¹⁶ Michael King, in *The Penguin History of New Zealand* (New Zealand, Penguin, 2003), p. 36, dates evidence from artefacts at 1350.

third in terms of lack of “violations of human rights and rule of law”, and second equal for lack of the “rise of factionalised elites”.¹⁷

Similarly, the most recent Democracy Index ranked New Zealand fifth out of the 167 countries surveyed. New Zealand scored 10 out of 10 in the categories of “electoral process and pluralism” and “civil liberties”.¹⁸

According to the latest Freedom House report, New Zealand has a total score of 17.¹⁹ Freedom House classifies New Zealand as a “full democracy” and awards it top ratings for “civil liberties” and “political rights”.²⁰

Elections are free and fair. The system of proportional representation has resulted in coalition governments. There is a high level of confidence in the election administration, although voter turnout has been falling. Overall, New Zealanders widely support democratic institutions.²¹

There is much less confidence in the way political parties and politicians operate. This is reflected in a decreasing participation in politics. For example, in the most recent general election of 2011, just over two-thirds (69 per cent) of the voting-age population voted. This is reflected in the Democracy Index, in which New Zealand’s lowest scores were for “political participation” (8.89 out of 10) and “political culture” (8.13 out of 10).

The reputation of politicians in New Zealand has been tarnished by a lack of confidence that there is full integrity in the exercise of political power. This leads to some dissatisfaction with government more generally. The public’s confidence has also been eroded by political scandals over recent years, including controversies over the misuse of taxpayer resources and allegations of links between party funding and some donors’ influence.

A 2013 survey of trusted professions in New Zealand ranked politicians 46th out of 50 professions – just below real estate agents and insurance salespeople, but above sex workers and car salespeople.²² The 2013 Transparency International Global Corruption Barometer also signalled that New Zealanders have a low opinion of the integrity of the political parties – those surveyed were asked to rate how affected political parties are by corruption on a 1–5 scale (where 1 means not at all corrupt and 5 means extremely corrupt), producing an average score of 3.3.²³

¹⁷ Fund for Peace, *The Failed States Index Rankings* (Washington D.C.: Fund for Peace, 2013). <http://ffp.statesindex.org/rankings>

¹⁸ “Global democracy at a standstill”, *The Economist*, 27 March 2013. <http://country.eiu.com/article.aspx?articleid=1080324092>

¹⁹ On a 0–100 scale where 0 means most free and 100 means least free.

²⁰ Freedom House, *Freedom in the World 2013*, 2013. www.freedomhouse.org/report/freedom-world/freedom-world-2013

²¹ Stephen Levine, “Political values”, *Te Ara: The Encyclopedia of New Zealand*, updated 9 November 2012. www.TeAra.govt.nz/en/political-values/print

²² “New Zealand’s most trusted professions 2013”, *Reader’s Digest*, July 2013. www.readersdigest.co.nz/most-trusted-professions-2013

²³ Transparency International, *Global Corruption Barometer 2013* (Berlin: Transparency International, 2013). issuu.com/transparencyinternational/docs/2013_globalcorruptionbarometer_en

Often it is felt that the political executive dominates the legislative branch of government²⁴ – a concern that has lessened since New Zealand moved to a mixed-member proportional representation electoral system in 1996, which has strengthened the role of Parliament somewhat. The government of the day is held to account through debates with opposition parties, which are usually reported adequately in the media.²⁵ Also, various select committees can scrutinise legislation and the activities of government departments.

The rights and welfare of the Māori population are major issues in New Zealand politics. Successive New Zealand governments have endorsed the concept of a Māori–Pākehā partnership that is founded on the Treaty of Waitangi at both Crown–rangatira level and tangata whenua–tauiwi levels (see the glossary of Maori words and phrases), although politicians occasionally express different views and popular endorsement varies.²⁶ The electoral system also has a unique aspect with specially reserved Māori seats for voters who choose to enrol on the Māori electoral roll (rather than the general electoral roll).

Overall, political and civil rights of citizens are assured. Risks to political and institutional support to the National Integrity System are posed by a declining faith in politicians and institutions such as political parties.

Socio-political foundations

To what extent do the relationships among social groups and between social groups and the political system in the country support an effective national integrity system?

Score: 4

As in any country, social divisions exist in New Zealand, especially along economic and ethnic lines. In particular, there are large degrees of economic inequality with a strong ethnic bias. A recent book claims that the country has one of the fastest growing rates of inequality in the Western world.²⁷ Tensions also manifest themselves in issues of ethnicity and debates and concern about immigration levels, notably increased immigration in recent decades from non-traditional sources.²⁸

However, the various social, ethnic, and religious differences rarely result in significant conflict in New Zealand. Diversity is accepted, and differences are usually resolved or ameliorated. New Zealand is, therefore, a peaceful country, which is reflected in its world ranking of number three in the 2013 Global Peace Index.²⁹ Certainly, by world standards, New Zealand is not characterised by deep social divisions and conflicts.

²⁴ See the legislature pillar report (pillar 1 in Chapter 5).

²⁵ See the media pillar report (pillar 11 in Chapter 5).

²⁶ Levine, 2012.

²⁷ Max Rashbrooke, ed., *Inequality: A New Zealand crisis* (Wellington: Bridget Williams Books, 2013).

²⁸ Jock Phillips, "History of immigration", *Te Ara: The Encyclopedia of New Zealand*, updated 19 August 2013. www.TeAra.govt.nz/en/history-of-immigration

²⁹ Vision of Humanity, "2013 GPI Findings". www.visionofhumanity.org/#/page/our-gpi-findings

The link between New Zealand society and the political system is not strong at present. This is due in part to the weakness of political party organisations, civil society groups, and unions. For example, trade union density – the percentage of trade union members among all employees – is about 17 per cent,³⁰ which is little changed since 2003 and slightly low compared with other similar countries.

In some respects, New Zealand civil society can be seen as large, but much of its activity is focused on non-political functions such as sport and outdoor pursuits. As an organised force to mediate between society and the political system, it has less strength. Bruce Jesson has pointed out, however, that the main exception has been the strong Māori social institutions, especially iwi and marae (traditional gathering place).³¹ Consequently, a strong history of Māori political activism has helped to secure greater rights for Māori. In recent years, the emergence of two Māori-based political parties in Parliament has given electoral politics a very different flavour.³²

New Zealand also remains the site of one of the best organised and most deeply rooted environmental movements found anywhere in the world and has been the site of successive waves of organisation by women, of anti-nuclear and peace movement activity, of lesbian and gay rights activists, of a strong anti-apartheid movement, and more widely based movements for economic justice (most recently an emerging coalition for a living wage). Therefore, some important civil society movements impact heavily on politics.

Today, the number of well-resourced civil society organisations is small and, for some of them, their ability to influence policies and decisions through advocacy is limited by their lack of a broad social base.³³ Also, due to the scarcity of private funding, some organisations in the sector rely heavily on state resources.³⁴

A stable, moderate, and partly socially rooted party system articulates and aggregates societal interests. The introduction of the mixed-member proportional representation system has resulted in a Parliament made up of a more representative base of politicians and political parties than was historically the case. However, the level of citizen participation in party activities is low and sporadic.³⁵ The party system also has only a limited ability to articulate and aggregate societal interests and to serve as a link between society and the state. This is especially because the internal democratic governance of parties is underdeveloped.³⁶

³⁰ Ministry of Business, Innovation and Employment, "Union membership return report 2012". www.societies.govt.nz/cms/registered-unions/annual-return-membership-reports/union-membership-return-report-2012

³¹ Bruce Jesson, *Only Their Purpose is Mad: The money men take over New Zealand* (Palmerston North: Dunmore Press, 1999), p. 205.

³² The Māori Party and the Mana Party. There were also the Mana Motuhake and Mana Māori parties, both now dissolved.

³³ CIVICUS: World Alliance for Citizen Participation, *Aotearoa/New Zealand Civil Society: A framework for government–civil society dialogue*, 2001. www.civicus.org/new/media/new%20zealand.pdf

³⁴ See the civil society pillar report (pillar 12 in Chapter 5).

³⁵ See the political parties pillar report (pillar 10 in Chapter 5).

³⁶ See the political parties pillar report (pillar 10 in Chapter 5).

Socio-economic foundations

To what extent is the socio-economic situation of the country supportive of an effective national integrity system?

Score: 4

New Zealand has an international reputation as a country that has a high standard of living,³⁷ low inflation, and low unemployment, is a good place to bring up children, has good access to housing and public services, and allows for easy market entry for new businesses.³⁸ These factors are supportive of an effective national integrity system, which merits a score of 4. There is evidence, however, that these socio-economic foundations are currently at a fragile stage.

To ensure this standard of living and integrity systems are maintained, a significant increase in ethical equity investment is required to support the conversion of research and innovation into quality products, and equity partnerships opening up distribution channels to increase the value and the volume of sales of high-value quality products traded into growing markets..

Currently, the number of New Zealand exporters and the proportion of exports to GDP are low for an open economy. In 2011, there were 14,000 exporters out of 350,000 business entities, with only 260 exporters earning NZ\$25 million or more (and one exporter, Fonterra, accounting for 25 per cent of all export receipts³⁹). Product and supply distribution channels are narrow and short, mainly focused on the domestic economy, with only a few sectors (dairy, meat, forestry, education, wine, imports, and tourism) trading at some scale in overseas markets. Despite a consensus among the business, academia, and technology sectors about the need to be innovative,⁴⁰ New Zealand has had limited commercial success in this area, despite notable quality research and products, and its economic performance lags behind its OECD peers and that of other small nations with low levels of corruption such as Denmark, Finland, and Singapore.⁴¹ While the collapse of New Zealand finance companies both before and during the global financial crisis has prompted the largely Australian-owned banking sector to take a stronger position in providing investment in selected sectors, private investment remains low and continues to favour property investments.⁴²

³⁷ New Zealand is a relatively low-wage economy compared with other developed economies, so this reputation is based on non-financial indicators such as "a good place to bring up children".

³⁸ UMR Research with Transparency International, *Experiences of Corruption in Export Markets*, 2012.

³⁹ Fonterra, "25% of New Zealand's export earnings from Fonterra", press release, *Scoop*, 21 July 2008. www.scoop.co.nz/stories/BU0807/S00346.htm

⁴⁰ Discussion with Gary Hawke, Emeritus Professor Victoria University of Wellington, 9 August 2013.

⁴¹ R. Christie and H. Anderson, "Raising our innovation game: Why business leadership matters", Institute of Directors conference, April 2013.

⁴² World Economic Forum, *Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The case for a multilateral agreement on investment* (Geneva: World Economic Forum, 2013). "The Council reached two main conclusions ... **1) different barriers and distortions are preventing the realization of the full potential from FDI** [foreign direct investment] and **2) the current fragmented governance of FDI contributes to the confusing landscape faced by investors and governments** ... Smaller, outward-looking economies tend to be genuinely more positive towards FDI, realizing the benefits associated with influxes of capital, technologies and skills" " (p. 6, emphasis in original).

International Monetary Fund comparisons show that in 2012 New Zealand sat at 32nd with per capita income of US\$29,730.⁴³ An OECD report published 13 May 2013⁴⁴ reported that New Zealand experienced the 2nd highest decline in market income of any OECD country between 2007 and 2010 with the 2nd lowest average wage rates in the OECD, just above Iceland.⁴⁵ Recent research reviewed by Max Rashbrooke was the basis for his conclusion that New Zealand now has the widest income gap since detailed records began in the early 1980s.⁴⁶ The number of people who are poor has doubled, with 270,000 children living below the poverty line⁴⁷ and many families living in hardship.⁴⁸ “Economic analysis ... has failed to grasp the threat posed by widening disparities within society.”⁴⁹ Accompanying inequality has been growth in wider diversity with a greater range of living circumstances and standards. Fewer people can afford their own homes, and the houses they rent are more likely to be in poorer condition than owner-occupied housing.⁵⁰

The increase in income inequality in New Zealand largely occurred between 1985 and the early 2000s.⁵¹ Since then, inequality has not changed much, but remains much higher than before 1985. There is evidence that a higher level of inequality can lead to increases in corruption. The argument is that “the wealthy have both greater motivation and more opportunity to engage in corruption, whereas the poor are more vulnerable to extortion and less able to monitor and hold the rich and powerful accountable as inequality increases. Inequality also adversely affects social norms about corruption and people’s beliefs about the legitimacy of rules and institutions, thereby making it easier for them to tolerate corruption as acceptable behaviour.”⁵²

Former Minister of Finance and now New Zealand Post Chairman and Treaty Settlements Negotiator Michael Cullen notes: “We used to argue that building a stronger and more equal society was enabled by a stronger economy. Increasingly, we realise that the causative relationship moves in the other direction as well – a stronger and more equal society is important for building a stronger economy.”⁵³

On the positive side, New Zealand has abundant rainfall (though poor potable water quality in some areas), fast grass growth, clean air, and sunshine.

⁴³ International Monetary Fund, *World Outlook Database*, April 2012.

⁴⁴ OECD, *Crisis Squeezes Income and Puts Pressure on Inequality and Poverty*, 13 May 2013.

⁴⁵ Ibid, Table 1.

⁴⁶ Rashbrooke, 2013. Rashbrooke’s conclusion was based on analysis using the Gini coefficient measure, not the 80 : 20 ratio applied information from Bryan Perry, *Household Incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2011* (Wellington: Ministry of Social Development, 2012).

⁴⁷ Interview of Gary Hawke with author, August 2013.

⁴⁸ Perry, 2012. The number of people living on less than 60 per cent of equivalised median household income (contemporary median), after housing costs, rose from 9 per cent in 1984 to 19 per cent in 2011.

⁴⁹ Garnesh Nana, BERL, 2013.

⁵⁰ N. S. Buckett, M. S. Jones, and N. J. Marston, *BRANZ 2010 House Condition Survey: Condition comparison by tenure* (Wellington: Building Research Association of New Zealand, 2011).

⁵¹ OECD, 2011, *Divided We Stand: Why Inequality Keeps Rising* (Country Note: New Zealand)

⁵² You Jong-Sung and Sanjeev Khagram (2005) A Comparative Study of Inequality and Corruption, *American Sociological Review*, 70: 136-157.

⁵³ Interview of Michael Cullen with author, 24 October 2013.

Getting to see a doctor is easy, primary health care is free for all children from birth to five years old and (basic) dental care is free until age 18. The social safety net to compensate for the risks of old age remains generous by international standards and there is a focus on addressing the requirements of people with disabilities. Gary Hawke noted the low wage levels and high numbers in poverty in Asia suggesting that in relative terms, New Zealand's levels of poverty and inequality could be overstated.⁵⁴

Treasury's policy advice increasingly enables individual circumstances to be addressed -as well as its traditional focus on macroeconomic and fiscal conditions, it's analysis is increasingly based on its living standards research.⁵⁵

Through Callaghan Innovation⁵⁶ and other initiatives, the country is targeting innovation that leads to product development, and New Zealand Trade and Enterprise aims for an increase in firms exporting high value in sectors where New Zealand has a comparative and competitive advantage. supporting the development of quality jobs.

Infrastructure development has been progressed in Christchurch as part of the recovery from the 2010 and 2011 earthquakes and in Auckland through the new "super city" structure, although less progress is observable elsewhere in New Zealand. There are increasing examples of New Zealand businesses demonstrating how opportunities in new markets, including the fast-growing economies of Asia,⁵⁷ can be converted to sustainable business profitability and better jobs at home. This has refocused some businesses on the role of good governance and the importance of diversity in directorships, where integrity systems are at the core of institutional life. While there is a long way to go, businesses are waking up to the realisation that transparency, anti-corruption policy and ethical values lead to greater sustainability. This is what could make it possible for the New Zealand economy to move significantly back up the OECD table and to demonstrate the gains that can be realised from strong integrity systems.⁵⁸

⁵⁴ Interview with Gary Hawke, August 2013 where he wondered if relative poverty in New Zealand is linked to absolute poverty elsewhere only because it is a rhetorical device for gaining attention. Simple arithmetic means that the poverty line of 60% of the median income is above the average level of income when he was growing up in New Zealand after World War II.

⁵⁵ Discussion with Girol Karacaoglu, Chief Economist of Treasury, 9 August 2013 about the five key aspects when developing policy advice (economic growth, sustainability for the future, increasing equity, social infrastructure, and managing risks of New Zealand's ability to withstand unexpected shocks that impact on its macro-economic position).

⁵⁶ A new Crown entity established in 2013 to accelerate commercialisation of innovation by firms in New Zealand.

⁵⁷ Merchandise trade figures from Statistics New Zealand.

⁵⁸ Secretary-General, *Keeping the Promise: A forward-looking review to promote an agreed action agenda to achieve the Millennium Development Goals by 2015* (United Nations, 2010). "[8] A number of countries have achieved major successes in combating extreme poverty and hunger, improving school enrolment and child health ... demonstrating that the Millennium Development Goals are indeed achievable with the right policies, adequate levels of investment ... [14] Over 300 million new jobs will need to be created over the next five years to return to pre-crisis levels of unemployment."

Socio-cultural foundations

To what extent are the prevailing ethics, norms, and values in society supportive of an effective national integrity system?

Score: 4

New Zealand's cultural identity is predominately a bicultural one, although recent immigration particularly from the Pacific Islands and from Asia has been influential in developing multicultural characteristics.

Among the reasons for New Zealand's corruption-free reputation is the importance New Zealanders have placed on egalitarianism. Adherence to egalitarianism infers that individuals are not accorded any particular social status or rewards or allowed any influence if their behaviour demonstrates overtly materialistic values or they flaunt their wealth.

While egalitarianism in New Zealand is much less strong than it was three decades ago, values surveys continue to suggest it remains one of the core hallmarks of New Zealand's culture.

A comparison of 1998 and 2005 values surveys suggests that the ethics, norms, and values of New Zealanders continue to broadly support an effective NIS.⁵⁹

- In 1998, 29 per cent of respondents had confidence in the public service. In 2005 that percentage had increased to 56 per cent.
- In 1998, 70 per cent of respondents agreed that the country was run by a few big interests. In 2005 that view was supported by 44 per cent.
- In 1998, 15 per cent of respondents had confidence in Parliament, but in 2005 69 per cent stated they were satisfied or rather satisfied with the way democracy developed in New Zealand. Notably in 2005, nearly 70 per cent of respondents also stated that they were very proud to be New Zealanders and 25 per cent stated they were quite proud.

However, in 2005 just over half the respondents (52 per cent) considered that most people could be trusted.⁶⁰ When asked whether most people would try to take advantage of you if they got a chance, or whether they would try to be fair, only 22 per cent of respondents considered that most people would try to take advantage.

⁵⁹ For discussion of the 1998 New Zealand Survey of Values, see Transparency International, *National Integrity Systems: Transparency International Country Study Report: New Zealand 2003* (Berlin: Transparency International, 2003) and for the 2005 survey, see Massey University, "New Zealand Values Survey 2005". www.whariki.ac.nz/massey/learning/departments/centres-research/shore/projects/new-zealand-values-survey-2005.cfm

⁶⁰ There was no equivalent question in the 1998 survey.

As a further indicator of public mindedness, New Zealand and Australia were ranked as the most generous countries in the world for personal charitable giving out of 153 countries.⁶¹

Quarterly generosity data from October 2009 to December 2010⁶² show that nearly 30 per cent of New Zealanders volunteer about 10 hours a month, about 40 per cent donate about NZ\$40 a month, and about 18 per cent of New Zealanders had donated goods. It is generally acknowledged that the level of giving in a society is a mark of social cohesiveness.⁶³

Socio-environmental foundations

To what extent do the relationship and attitudes of New Zealanders to the environment and their governance and management of it contribute to an effective national integrity system?

Score: 3

Exploitation of natural resources and pollution are potential sources of corruption and of private interests gaining priority over the public interest and the interests of future generations. Also, questions can, and have, been raised about the integrity of New Zealand's claim to be "clean and green".

New Zealanders' basic values and attitudes do not support corruption, and there appear to have been no publicly reported cases of corruption regarding the allocation of access to natural resources or the control of pollution. Compliance with, and enforcement of, the terms and conditions of access to natural resources and of the discharge of wastes to the environment is variable, particularly in some sectors,⁶⁴ but the New Zealand public expects compliance.⁶⁵

To ensure integrity in New Zealand's claim to be "clean and green", environmental governance and practice (and governance and practice in areas that can, by

⁶¹ Charities Aid Foundation, *The World Giving Index 2010*, 2010, p. 8.
www.cafonline.org/pdf/WorldGivingIndex28092010Print.pdf

⁶² *How Do New Zealanders Give? Quarterly generosity indicators – December quarter 2009 to December quarter 2010* (Generosity Hub and Office of the Community and Voluntary Sector, 2011).
www.ocvs.govt.nz/documents/work-programme/building-knowledge/giving-research/qgi-2011.doc

⁶³ Charities Aid Foundation, 2010: 1.

⁶⁴ For example, regarding compliance with dairy effluent disposal consents (Ministry for Primary Industries, *The Dairying and Clean Streams Accord: Snapshot of progress 2010/2011*, 2011. www.mpi.govt.nz/news-resources/publications.aspx?title=Dairying%20and%20Clean%20Streams%20Accord:%20Snapshot%20of%20Progress), forest products (Ministry for Primary Industries and New Zealand Forestry Industry, *The Legality of New Zealand's Forest Products*, 2013. www.mpi.govt.nz/Portals/0/Documents/forestry/forestry-nz/illegal-log/the-legality-of-new-zealands-forestry-products.pdf), and prosecutions under the Resource Management Act 1991 (Ministry for the Environment, *A Study into the Use of Prosecutions under the Resource Management Act 1991* (Wellington: Ministry for the Environment, 2009). www.mfe.govt.nz/publications/rma/rma-prosecutions-2008/html/page1.html).

⁶⁵ E. Rose, J. Huakau, and S. Casswell, *Economic Values: A report from the New Zealand Values Study*, 2005 (Massey University, 2005).
www.massey.ac.nz/massey/fms/Colleges/College%20of%20Humanities%20and%20Social%20Sciences/Shore/reports/Economic_report.pdf

association, impact on environmental integrity) need to be effective so that all important issues are addressed with effective and durable policies and are widely accepted.

While some environmental issues generally are being addressed with effective and durable policies, some important issues are not.

While some aspects of environmental governance are widely accepted, though often subject to resource constraints, other aspects of environmental governance are subject to question and challenge.

In some cases, the eventual outcome may be improved effectiveness and acceptance, in other cases it may be the opposite.

Governance and practice in some areas that affect environmental integrity by association (for example, food safety and labour conditions on vessels fishing in New Zealand waters) are also under question.

Until environmental governance and practice, and governance and practice in other areas that impact on environmental integrity, are demonstrated to be effective and widely accepted, there is a risk that they will undermine an effective national integrity system.

New Zealanders recognise the need for, and the importance of, environmental governance. However, as noted above, there is ongoing debate about the objectives of that governance and about how best to balance the various interests, world views, and values involved. The place of Māori values in resource management and the tension between (shorter-term) economic gain and the maintenance, or enhancement, of environmental quality, natural capital, and ecosystem services are two key areas of tension.

Huge strides have been made in recent years in terms of the acknowledgement of the particular relationship between tangata whenua and the environment. Andrew Henderson notes policy makers have greater awareness that Māori values have a legitimate role in resource management,⁶⁶ but some commentators consider that, while Māori values have entered the system, the system may not yet have the tools or a sufficiently informed approach for dealing appropriately with these values.⁶⁷ The number of successful Māori submissions in opposition to development proposals that affect the environment is few.

Current environmental governance arrangements in relation to the tensions between environmental improvement and (shorter-term) increased economic activity are not widely accepted, one example being the impact of agriculture on water quality.⁶⁸ The

⁶⁶ Andrew Henderson, "Nursing a colonial hangover" – 15 years on 2011", paper for the New Zealand Planning Institute Winds of Change conference, Wellington, 29–31 March 2011.
www.planning.org.nz/Folder?Action=View%20File&Folder_id=217&File=HENDERSON_2011.pdf

⁶⁷ Robert Joseph quoted in Henderson, 2011: 12.

⁶⁸ Jon Morgan, "Water priorities come up trumps", *Stuff*, 1 November 2012.
www.stuff.co.nz/business/farming/7892170/Water-priorities-come-up-trump

Peter Watson, "New dairy waterways accord draws mixed reaction", *Stuff*, 16 July 2013.
www.stuff.co.nz/business/farming/dairy/8924991/New-dairy-waterways-accord-draws-mixed-reaction; Marty

same tensions sometimes apply in respect of conserving natural capital for the future, reflecting the increasing numerical dominance of urban dwellers and, associated with that, the increasing mental distance of many people from the primary production sector. It also reflects generational differences, with younger people apparently giving the need to protect the environment a higher priority.⁶⁹

Recently, the government indicated it intends to change the Resource Management Act 1991 in ways that appear to significantly undermine the original purpose of the Act and shift the balance in favour of economic development.⁷⁰ The government's rationale appears to be that the provisions of the Act are unduly restricting economic growth, employment growth, and the growth of Auckland. In terms of stocks of natural resources and environmental quality, this is likely to favour the current generation over future generations. The Parliamentary Commissioner for the Environment is a respected, independent commentator on such changes to the system of environmental governance.

New Zealand's system of environmental governance, environmental management, and environmental practice is generally appropriate for local issues, but is often inadequate for addressing national, systemic, and cumulative issues. The management of fresh water is an area in which environmental practice has been unsatisfactory and new governance arrangements are being explored. A potentially positive development has been the Land and Water Forum,⁷¹ which has brought together various industry groups, environmental and recreational non-governmental organisations, iwi, scientists, and other organisations with a stake in fresh water and land management to develop a shared vision and a common way forward using a stakeholder-led collaborative process. The success or otherwise of this inclusive approach will depend on the extent to which the government is prepared to accept and implement the recommendations. But at the same time there have been recent instances of the government removing opportunities for public participation and local accountability.⁷²

An active set of civil society organisations with environmental concerns, including iwi organisations, plays (and has played) a very important role in the development of contemporary environmental governance and practice, and continues to work to achieve sustainability, to protect and enhance the environment, and to ensure there is integrity in the "clean and green" claim.

Sharpe, "Dairy industry yet to clean up its act", *Dominion Post*, 17 August 2013. www.stuff.co.nz/dominion-post/news/9054351/Dairy-industry-yet-to-clean-up-its-act. Other examples include, hydro dams (Forest & Bird, "Save the Mokihinui: Keep it in a park". www.forestandbird.org.nz/campaigns/save-the-mokihinui-keep-it-in-park [accessed 19 August 2013]), irrigation schemes (Forest & Bird, "Save our Mackenzie country". www.forestandbird.org.nz/savethemackenzie [accessed 19 August 2013]), and lignite mining (Parliamentary Commissioner for the Environment, *Lignite and Climate Change: The high cost of low grade coal*, 2010. www.pce.parliament.nz/assets/Uploads/PCE-Lignite.pdf).

⁶⁹ Rose et al. 2005.

⁷⁰ Patrick Smellie, *Dominion Post*, 16 August 2013.

⁷¹ www.landandwater.org.nz

⁷² For example, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 and the issue of land for new housing in Auckland.

Treaty of Waitangi

The Treaty of Waitangi is a key foundation of New Zealand society. Does it support or contribute to an effective national Integrity system?

The Treaty of Waitangi forms part of the fabric of New Zealand's society and Constitution. It is widely acknowledged as New Zealand's founding document by the public at large and by government. In this way, it provides a general framework for New Zealand's approach to relations between the government and Māori as well as laws and policies that impact on Māori.

The Treaty of Waitangi was drafted in English and poorly translated into te reo (the Māori language). It is unclear whether, at the time, sovereignty was ceded to the British Crown under the Treaty in the text in te reo, which was the text most signatories signed. Precedents now define New Zealand's constitutional arrangements with the Treaty articles, providing a basis for defining the relationship between the Crown and Māori. The Treaty also guarantees citizenship to both Māori and settlers.

The English and Māori texts align better, though not perfectly, in setting out guarantees for Māori rights, expressed in the English version as "exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties". As a result, the Treaty is considered the basis for the protection of Māori rights in New Zealand.

The Treaty of Waitangi is not enforceable as a matter of domestic law unless it is incorporated into legislation.⁷³ Despite that, it provides some constraint on law making. For example, the New Zealand *Cabinet Manual* requires ministers to draw attention to any aspects of a bill that may have implications for the Treaty.⁷⁴ Moreover, successive Parliaments have, on occasion, included the principles of the Treaty in important legislation, such as the Resource Management Act 1991. When New Zealand courts have been asked to interpret the principles of the Treaty in legislation they have done so in ways that have supported Māori rights.⁷⁵

However, the Treaty's lack of formal legal status or enforceability, in a context where there is also no entrenched bill of rights and Māori are in the minority, leaves Māori rights vulnerable to majoritarian will. This was seen vividly when Parliament legislated to avoid the potential consequences of a Court of Appeal decision⁷⁶ that opened the door to recognition of Māori rights in areas of New Zealand's foreshore and seabed.⁷⁷

New Zealand continues to grapple with its notorious history of breaches of the Treaty of Waitangi, reflected in Māori loss of authority and land and relative socio-economic poverty today.

⁷³ *Hoani te Heu Heu v Aotea District Maori Land Board* [1941] AC 308

⁷⁴ Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008), para. 7.60. <http://cabinetmanual.cabinetoffice.govt.nz>

⁷⁵ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA).

⁷⁶ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

⁷⁷ Foreshore and Seabed Act 2004.

Since the 1970s, steps have been taken to address Māori grievances such as the establishment of the Waitangi Tribunal in 1975, which hears Māori claims in relation to Treaty breaches and makes associated recommendations. The Waitangi Tribunal is, in international terms, a progressive institution and constitutes a positive tool to achieve reconciliation between the state and the indigenous people. On the other hand, the Waitangi Tribunal's powers are limited and, in more recent years, several of its recommendations have been rejected by governments.

New Zealand governments since the early 1990s have engaged in a Treaty settlements process to address historical grievances associated with breaches of the Treaty against Māori directly. Sentiment about the settlements is mixed with some claiming it creates preferential treatment for Māori and others claiming it is unfair towards Māori in terms of financial award and design. Perhaps the most problematic element from an integrity perspective is that the government is both the arbiter and a party in the settlement negotiations, and the courts cannot review the process or the outcomes.

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CHAPTER 3: CORRUPTION PROFILE

New Zealand is consistently ranked highly by Transparency International's Corruption Perceptions Index and is currently joint first with a score of 90.⁷⁸ This does not mean New Zealand has no corruption, and there are signs that should at least raise questions about whether New Zealand is as corruption-free as New Zealanders perceive it to be. New Zealand was included in the Global Corruption Barometer for the first time in 2010, and the result was that 3.5 per cent of New Zealanders surveyed reported that they or a member of their household had paid a bribe in the previous 12 months.⁷⁹ There was a similar result in 2013. It is significant that in this barometer, 65 per cent of people thought levels of corruption in New Zealand had increased in the last three years, although it is worth noting that the equivalent figure in 2011 was 73 per cent.

Recently, there have been investigations and prosecutions of bribery and corruption in New Zealand.

- In 2011, a former Accident Compensation Corporation manager was found guilty of accepting a bribe worth NZ\$160,000 and was sentenced to 11 months' home imprisonment (along with having to repay the bribe).⁸⁰
- In 2010, a member of a district health board was sentenced under section 4 of the Secret Commissions Act 1910 to 20 months in prison for accepting bribes worth NZ\$775,000. The sentence was given concurrently with a nine-and-a-half-year sentence for fraud.⁸¹
- In 2009, a former minister of the Crown was convicted on 11 charges of bribery and corruption and 15 charges of attempting to pervert the course of justice, and sentenced to six years' imprisonment.⁸²

The last three years have seen high-profile fraud prosecutions against company directors and public servants. One of the most prominent examples was two former New Zealand Cabinet ministers found guilty of making false statements.⁸³ While there is little evidence of serious corruption and fraud in New Zealand relative to some other countries, the risks remain important for New Zealanders, especially since cases such as these have served as a reminder that the country is not immune to such crime.

⁷⁸ Transparency International, "Global Corruption Barometer, 2013". www.transparency.org.nz/index.php/indices-reports/global-reports/161-global-corruption-barometer-2013

⁷⁹ Transparency International New Zealand, *Global Corruption Barometer 2010: New Zealand results*, 2011. www.transparencynz.org.nz/index.php/resources/doc_download/90-study-of-global-corruption-barometer-2010-new-zealand-results. This was a potentially surprising and worrying result. However, the terms bribery and corruption were not defined, the survey was administered by email, and the response rate was low.

⁸⁰ "Home detention in ACC bribery case", *New Zealand Herald*, 15 June 2012. www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10813251

⁸¹ These cases can be found in Peter&Peters, *Anti-Corruption Legislation in 54 Jurisdictions Worldwide* (London: Encompass Print, 2012).

⁸² David Gadd, "Taito Phillip Field jailed for six years", *Stuff*, 6 October 2009. www.stuff.co.nz/national/crime/2934748/Taito-Phillip-Field-jailed-for-six-years

⁸³ PwC, *Public Sector Fraud Awareness Survey: Findings*, 2011. www.pwc.co.nz/forensic-services/publications/public-sector-fraud-awareness-survey-findings

- New Zealand's culture positively contributes to a lack of tolerance for unfairness and misuse of official positions and public funds. Negatively, it contributes to a mentality of pragmatism, where (especially petty) corruption is seen as wrong, but not as causing sufficiently significant levels of harm to be worth addressing.

Internationally, some New Zealanders easily adopt an ethical relativist mentality, justifying a laissez-faire attitude where "everyone is doing it, and everyone has to do it". This can be true even for those who know they are in breach of the Foreign Corrupt Practices Act 1977 (US).⁸⁴ As a consequence of the low domestic incidence of bribery and related corrupt activities, New Zealanders newly engaging in international trade may be relatively unprepared to respond to the corrupt practices they encounter. Many larger enterprises have been operating for long enough to be well aware of local conditions (though not immune to the temptation to adopt local practices), but smaller and possibly less scrupulous enterprises are now increasingly turning to overseas markets.

The significantly increased trade with countries that have lower rankings on the Corruptions Perceptions Index than traditional trading partners has meant more New Zealand businesses are further exposed to bribery. Recent examples include those featuring wool and meat exports from New Zealand. The "Grey Channel" is a well-known method of expediting goods into mainland China, via Hong Kong, with facilitation payments made to Hong Kong officials. In June 2012, Chinese authorities stopped an inbound Grey Channel ship carrying more than 1,800 metric tons of frozen meat from the United States, Brazil, Australia, and New Zealand and detained crew members.⁸⁵ Awareness of corruption has gradually increased since the implementation of the UK Bribery Act 2010, which extends extraterritorial jurisdiction to New Zealand businesses that have operations in the United Kingdom.⁸⁶

Corruption risks for New Zealanders engaged in international trade occur in three main circumstances.

- New Zealanders face corruption risks when engaging in overseas trade (procurement, importing, exporting, tourism, financial transactions) where facilitation fees are demanded..
- New Zealanders face corruption risks when exporting to countries where the corruption risk is high.

⁸⁴ UMR Research, *A Qualitative Research Study* (Transparency International New Zealand, 2012), p. 6.

⁸⁵ Rob O'Neill, "Threats to NZ's meat exports", *Stuff*, 8 July 2012.
www.stuff.co.nz/business/world/7240221/Threats-to-NZs-meat-exports

⁸⁶ The chair of Global Company Network United Kingdom noted the heightened awareness of anti-corruption issues and initiatives among member companies: *Anti Corruption and the UK Bribery Act: Fourth quarterly meeting report 2010* (Global Company Network United Kingdom, 2010). www.unglobalcompact.org.uk/wp-content/uploads/2012/10/Anti-Corruption-and-the-UK-Bribery-Act_UNGC-UK-Report-2010.pdf

Domestically in New Zealand, political will is an issue because of the perception that corruption is not a national problem. However, one area of concern is inappropriate relationships between contractors and subcontractors, including forms of cronyism and nepotism. Subcontracting also introduces greater opacity, attenuated transparency, and loosens the control of the principal over the operational process of completing project work.

The 2012 Deloitte corruption survey collated responses from around 200 New Zealand entities.⁸⁷ The study found:

- one in five companies reported encountering corruption, most in the last 12 months
- of the one in five, joint ventures, local offices, and subsidiaries were the most common type of relationships featuring in the corruption experienced
- only 41 per cent of companies interviewed had actively considered the risk (formally or informally)
- 80 per cent with offshore operations either did not regard bribery and corruption as a top five risk to the business in the next five years or considered the issue to be inapplicable.

More generally, corruption is perceived to be a greater threat in the future because of three main issues.

- Recession-induced financial pressure, which is unlikely to ease in the short term and may increase motivation for corrupt activity.
- Globalisation and immigration. There is increasing influence from countries where corruption is the norm for business practice. Less-corrupt countries will find it harder to defend against corruption.
- Risks in post-earthquake Christchurch. There is growing concern with the commencement of the Christchurch post-earthquake rebuild.⁸⁸
 - With NZ\$40 billion projected for rebuilding Christchurch and typical insurance fraud rates of 5–10 per cent of claim value,⁸⁹ the potential for loss to fraud and corruption is significant.
 - A large proportion of the expenditure will involve public sector employees making or influencing decisions. The Serious Fraud Office has been working closely with New Zealand Police, the Canterbury Earthquake Recovery Authority, and other agencies with key roles in Christchurch to address various risks of fraud during the rebuild. In March 2013, the Serious Fraud Office began investigating two high-level cases of alleged fraud and corruption in the

⁸⁷ Deloitte, *Deloitte Bribery and Corruption Survey 2012 Australia and New Zealand: A storm on the horizon?* (Sydney: Deloitte, 2012).

⁸⁸ Serious Fraud Office, "Serious Fraud Office focus on Christchurch", press release, 21 March 2013. www.sfo.govt.nz/n345,24.html

⁸⁹ New Zealand Insurance Council's most recent survey of the level of insurance fraud: icnz.org.nz/for-consumers/insurance-fraud

Christchurch rebuild after claims in Parliament of up to NZ\$240 million worth of suspicious invoicing.⁹⁰

- Local government officials may be put at risk because they are part of the supply chain of high-value projects. Overseas experience suggests corrupt public officials have the leverage to speed up or slow down processes, and bid rigging is a threat.⁹¹

Corruption is not only a risk in the business and public sectors. In civil society, non-government organisations and large trusts seem at higher risk of money laundering than are other enterprises, a fact counter to public perception.⁹²

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⁹⁰ "SFO probes two Chch rebuild fraud cases", *3 News*, 21 March 2013. www.3news.co.nz/SFO-probes-two-Chch-rebuild-fraud-cases/tabid/423/articleID/291270/Default.aspx

⁹¹ Commerce Commission, "Spotlight on the Christchurch rebuild", press release, 2013. www.comcom.govt.nz/spotlight-on-the-christchurch-rebuild

⁹² Department of Internal Affairs – Charities, "Terrorism and money laundering". www.charities.govt.nz/strengthening-your-charity/governance-and-policies/terrorism-and-money-laundering

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Transparency International New Zealand, *Global Corruption Barometer 2010: New Zealand results*, 2011. www.transparencynz.org.nz/index.php/resources/doc_download/90-study-of-global-corruption-barometer-2010-new-zealand-results

UMR Research, *A Qualitative Research Study* (Transparency International New Zealand, 2012).

CHAPTER 4: ANTI-CORRUPTION ACTIVITIES

New Zealand has no over-arching anti-corruption strategy, although the government has directed work be undertaken on developing a national anti-corruption policy covering prevention, detection, investigation, and remedy of corruption and bribery across the public sector (including local government and Crown entities) and the private sector.⁹³ This policy will provide a framework for existing government activity such as the collection and monitoring of corruption statistics, increasing business awareness of corruption risks and liabilities, and monitoring the work of the International Organization for Standardization with a view to using the international standard it is developing as a tool for New Zealand businesses and organisations.

The government has put in place an anti-money laundering policy built on compliance with the recommendations of the Financial Action Task Force, a non-government body that assesses member countries' implementation of anti-money laundering and related provisions. Non-compliance has commercial consequences; it becomes more difficult to trade with European and North American countries. New Zealand has been slow to enact anti-money laundering law, being at least three years behind Australia. However, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 came into effect on 30 June 2013.

New Zealand was assessed by the Financial Action Task Force in 2009 with a follow-up assessment in October 2013.⁹⁴ Among the task force's recommendations were that New Zealand companies and trust law required reviewing, as New Zealand allowed anonymity of asset ownership and financial dealings.

Across the sectors in New Zealand, there appears to be a mentality that New Zealand should expend as little effort as is possible in fighting corruption, perhaps because it is not seen generally as a real risk. This lack of urgency is evidenced by New Zealand's delay in ratifying the UN Convention against Corruption, with one explanation being that the convention requirement for independence in the bodies charged with corruption prevention and the enforcement of anti-corruption legislation is not a priority in New Zealand. However, strong safeguards in New Zealand policy and practice are in evidence.

- The public sector, which strives for the highest standards of integrity, is backed by the Office of the Auditor-General, which is mandated to ensure the public sector is honest.
- In the commercial sector, professional services firms regularly conduct fraud susceptibility reviews. These reviews cover fraud, corruption, and theft, particularly in companies with offshore activities.⁹⁵ They report that most clients (even non-listed companies) are generally proactive about countering fraud and maintaining

⁹³ Ministry of Justice, "A national anti-corruption strategy".

⁹⁴ Financial Action Task Force, "New Zealand". www.fatf-gafi.org/countries/n-r/newzealand

⁹⁵ PwC, *The 2011 Global Economic Crime Survey results for New Zealand: Fraud, fraudsters and cybercrime*, 2011. www.pwc.co.nz/forensic-services/publications/global-economic-crime-survey-2011

transparent governance with audit committees. However, a gap exists in the action taken to address corruption risk, as evidenced in the Deloitte corruption survey.⁹⁶

- Whistle-blower telephone lines – in-house and outsourced – have become common in New Zealand to allow people to report fraud, corruption, and other inappropriate behaviour. International Organization for Standardization fraud risk standards cover prevention, detection, and remediation for New Zealand and Australia.
- Attempts to introduce fraud awareness training are under way. For example, the Serious Fraud Office has commissioned Transparency International New Zealand to adapt the UK chapter's online anti-bribery training model for use in New Zealand.

With respect to trade, New Zealand Trade and Enterprise is often seen as a primary source of information on operating in overseas markets, including the best ways to access markets and how to deal with corrupt practices in those markets.⁹⁷

Legislation (prevention and enforcement)

There is a set of laws that, taken together, represent an attempt to address corruption.

The two principal statutes against bribery and corruption in New Zealand are the Crimes Act 1961 (which, broadly speaking, deals with corruption in the public sector) and the Secret Commissions Act 1910 (which deals mainly with corruption in the private sector). Of particular relevance to corruption:

The Crimes Act makes it an offence to accept or obtain a bribe for acts committed or omitted in an official capacity.⁹⁸ Bribes may involve money, valuable consideration, employment, or any other personal benefit; and the offence covers politicians and public officials, including foreign public officials.

The Secret Commissions Act has some relevance in the public sector but also covers private sector actions such as giving or offering a gift, an inducement, or a reward to gain business advantage; not disclosing a financial interest in a contract while an agent; giving false receipts; or receiving secret rewards for giving advice to enter a contract.

Together these two pieces of legislation have an extensive range. There have been recent prosecutions under the Crimes Act,⁹⁹ but the definitions in the Secret Commissions Act are imprecise and the language is outdated because the Act is over 100 years old. For this reason, it is difficult to prosecute successfully. In addition, the maximum penalties under this Act are low.¹⁰⁰

⁹⁶ See above (Chapter 3)

⁹⁷ For advice on corruption risks when trading with China, see, for example, New Zealand Trade and Enterprise, *Navigating China: For New Zealand businesses*, 2012. www.nzte.govt.nz/media/894196/navigating-china-2012.pdf

⁹⁸ Crimes Act 1961, sections 99–106.

⁹⁹ See the examples in Chapter 3.

¹⁰⁰ Maximum penalties are NZ\$2,000 for a corporate entity and NZ\$1,000 or two years' imprisonment for an individual: section 13 of the Secret Commissions Act 1910.

Neither Act covers offences involving foreign officials, unless the relevant conduct is an offence in the country where it takes place.

Cabinet has approved (among other things) a review of the penalties under the Secret Commissions Act with any changes to be progressed through an omnibus Organised Crime and Anti-Corruption Bill to be introduced in 2013.¹⁰¹

Other relevant legislation is as follows.

- The Serious Fraud Office Act 1990 sets up the SFO but has no specific provisions as regards corruption
- The Criminal Proceeds (Recovery) Act 2009 provides for the civil forfeiture from individuals of property that was derived directly or indirectly from “significant criminal activity”. A special branch of New Zealand Police enforces this Act.
- The Search and Surveillance Act 2012 provides for wide-ranging powers to obtain evidence.
- The Ombudsmen Act 1975 provides for the Ombudsmen to investigate complaints of improper behaviour in the public sector.
- The Protected Disclosures Act 2000 affords some protection to whistle-blowers in the public and private sectors.
- The Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which Act came into force in 2013, aims “to detect and deter money laundering and the financing of terrorism; and ... to maintain and enhance New Zealand’s international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Task Force”.¹⁰² The Act is designed to make the movement of illicit cash more difficult and requires reporting entities¹⁰³ to conduct a programme of customer due diligence against money laundering.
- The Commerce Act 1986 counters bid rigging.
- The Local Authorities (Members’ Interests) Act 1968 regulates for conflicts of interest in local authorities.
- The Mutual Assistance in Criminal Matters Act 1992 allows cross-border requests for investigation assistance
- The Extradition Act 1999 provides the process for extradition both from and to New Zealand.

International conventions

The development of New Zealand bribery and corruption legislation was pushed along in the last decade as New Zealand become a signatory to international conventions.

¹⁰¹ Judith Collins, “Govt moves to stamp out organised crime”, 18 June 2013. www.beehive.govt.nz/release/govt-moves-stamp-out-organised-crime. Bill not yet introduced as at 13 November 2013.

¹⁰² Anti-Money Laundering and Countering Financing of Terrorism Act 2009, section 3(1)(a) and (b).

¹⁰³ Primarily financial institutions, including entities that carry out relevant financial business.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in December 1997 and ratified in 2001. It establishes legally binding standards to criminalise bribery of foreign officials in international business transactions and provides for related measures to make this effective.

The government has recently released a list of planned legislative amendments to bring New Zealand into full compliance with the convention.¹⁰⁴

An OECD Working Group on Bribery review team was in New Zealand in April 2013 to discuss the country's progress and commented that New Zealand seemed to be making little progress in complying with some Convention requirements.¹⁰⁵

New Zealand signed the UN Convention against Corruption (UNCAC) in 2003 after adoption by the UN General Assembly but has yet to ratify the Convention. UNCAC covers five main areas: preventive measures, which include the involvement of civil society in fighting corruption; criminalisation and law enforcement; international cooperation; cross-border asset recovery; and technical assistance and information exchange. It covers a wide range of offences that taken together extend the concept of corruption well beyond the traditional narrower focus on bribery.

New Zealand is one of only three OECD countries that have not yet ratified UNCAC, but is working on the necessary legislation (see below under "recent developments").¹⁰⁶ Once the legislative changes are made, the country may be in a position to ratify UNCAC.

Moving rapidly to comply with both conventions is important for New Zealand. In the absence of compliance, concern is likely to grow (both internationally and in New Zealand) that insufficient emphasis is given to anti-corruption action, that the extent of corruption in New Zealand or by New Zealanders is not known, and that New Zealand is not pulling its weight in international anti-corruption efforts. Meanwhile, for the past 10 years, inaction has impeded New Zealand's ability to use UNCAC initiatives to prevent, investigate, and prosecute corruption.

Other multilateral influences are the Financial Action Task Force and the 1997 Asia-Pacific Group on Money Laundering.¹⁰⁷

Recent developments

On 18 June 2013, the government announced the adoption of recommendations in respect of detecting and preventing organised crime.¹⁰⁸ These include items to be included in the proposed Organised Crime and Anti-Corruption Bill such as:

¹⁰⁴ www.justice.govt.nz/publications/global-publications/o/organised-crime-all-of-government-response/a-national-anti-corruption-strategy?searchterm=OECD

¹⁰⁵ OECD, "Bribery in international business". www.oecd.org/daf/nocorruption

¹⁰⁶ Judith Collins, "Govt moves to stamp out organised crime", 18 June 2013. www.beehive.govt.nz/release/govt-moves-stamp-out-organised-crime

¹⁰⁷ Ministry of Justice, "Global anti-money laundering and countering financing of terrorism initiatives". www.justice.govt.nz/policy/criminal-justice/aml-cft/global-anti-money-laundering-and-countering-financing-of-terrorism-initiatives

- creating new bribery offences relating to the provision of international aid, the solicitation and acceptance of bribes by foreign public officials, and the trading in influence over public officials
- increasing penalties for private sector corruption to bring them into line with those in the public sector
- preventing the tax deductibility of bribes
- ensuring the bribery of a foreign public official can be prosecuted in New Zealand regardless of whether it was an offence in the foreign country
- clarifying the provision allowing for small facilitation payments
- extending record-keeping requirements to require businesses to keep records of facilitation payments
- extending the company director disqualification provisions to corruption and bribery offences.

The announcement also refers to the national anti-corruption policy mentioned above.

On 10 October 2013, the OECD Working Group on Bribery adopted its phase 3 report on implementing the OECD anti-bribery convention in New Zealand.¹⁰⁹ This was too late for its findings to be incorporated into the main body of this report, but it is noted that they are largely consistent with it.

The working group highlighted positive aspects of New Zealand's efforts to fight foreign bribery such as whistle-blower legislation and the range of confiscation tools under its legislation. However, it expressed concern that since joining the convention over 12 years ago, New Zealand had not prosecuted any cases of foreign bribery and only four allegations had surfaced. The report states that outdated perceptions that New Zealand individuals and companies do not bribe may have also undermined detection efforts.

Recommendations of the working group included:

- broadening the possibilities for holding companies liable for foreign bribery and ensuring they face significant sanctions for this crime
- addressing gaps in the Crimes Act 1961 regarding the foreign bribery offence
- strengthening New Zealand's capacity to detect, investigate, and prosecute foreign bribery through law enforcement training
- raising awareness of the risks of foreign bribery and of channels for reporting allegations to law enforcement
- ensuring the non-tax deductibility of all bribe payments, including those paid through intermediaries.

¹⁰⁸ Collins, 2013.

¹⁰⁹ OECD, "Bribery in international business". www.oecd.org/daf/nocorruption

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CHAPTER 5: NATIONAL INTEGRITY SYSTEM – PILLAR REPORTS

Introduction

In this chapter each individual pillar has been assessed using a set of indicators that measure the pillar's:

- capacity (resources and independence)
- governance (transparency, accountability, and integrity)
- role within the system.

The indicator questions are taken directly from the standard template supplied by Transparency International.¹¹⁰

An additional section in each pillar report assesses matters related to the Treaty of Waitangi, using a question drafted for the purposes of this assessment.

For most pillars, two indicator questions are asked in relation to each of the capacity and governance dimensions. For example, in relation to the legislature, the first indicator question about resources asks whether legal provisions ensure the legislature has adequate resources, and the second question asks whether the legislature has adequate resources in practice. This pattern of two questions relating to law and practice is repeated through the other analytical dimensions. Other pillar reports usually follow the same pattern, but in some cases there is only one indicator question for a dimension. For any given indicator question, there may be some variation in the focus of the question asked for different pillars, depending on the nature of the pillar and the issues it faces.

For each pillar, further questions relate to its specific role, and again there may be some variation in the number and focus of questions. The final question on the Treaty of Waitangi is in essence the same for all pillars, although the wording varies slightly.

The indicator questions are scored using a five-point scale where:

5 = very strong

4 = strong

3 = moderate

2 = weak

1 = very weak

The scores are then aggregated (on a scale of 1-100) to provide a score for each pillar dimension and a simple average provides the overall pillar score.

¹¹⁰ www.transparency.org/files/content/nis/NIS_Toolkit_EN.pdf

For more information on scoring, see Chapter 1. The Treaty of Waitangi question is not scored as it is additional to the standard assessment template.

Each pillar report is followed by its own reference section. All major sources have been listed. The research for the civil society pillar report followed a rather different pattern from that for the rest of the report. The report summarises themes from desk research and from a large number of informant interviews, often conducted on a confidential basis. Effort focused on drawing together the diversity of the community and voluntary organisations that were consulted into a meaningful assessment. Given this diversity, the usual referencing of views was not always possible, though all evidence is based on the consultations conducted as part of the research.

Supporting information, mainly for the public sector pillar report, can be found in the four supplementary papers published in conjunction with this report and available from the Transparency International New Zealand website.¹¹¹

¹¹¹ www.transparency.org.nz/docs/2013/Supplementary-Paper-1-Crown-Entities.pdf
www.transparency.org.nz/docs/2013/Supplementary-Paper-2-Environmental-Governance.pdf
www.transparency.org.nz/docs/2013/Supplementary-Paper-3-Fiscal-Transparency.pdf
www.transparency.org.nz/docs/2013/Supplementary-Paper-4-Public-Procurement.pdf

Legislature (pillar 1)

Summary

Parliament is central to New Zealand's constitutional arrangements. Historically, the accessibility of members of Parliament (MPs) to their constituents contributed to public confidence in the legislative process. Politicians were generally held in high regard. However, during the 1980s and early 1990s, there was a rapid erosion of public trust and confidence in politicians and in the first-past-the-post electoral system that had been in place since the previous century. Politicians of both main parties were widely perceived to have broken important election promises when in governmental office. Moreover, in the general elections of 1978 and 1981 first-past-the-post had failed to deliver an allocation of parliamentary seats that reflected voters' preferences.¹¹²

Responding to the growing public discontent with first-past-the-post, the fourth Labour government, which came into office in 1984, established a royal commission to examine electoral options. This body recommended the adoption of the German system known as mixed member proportional representation (MMP). A non-binding referendum in 1992 revealed an overwhelming majority in favour of electoral change, and in a binding referendum in 1993, 54 per cent of voters supported a change to MMP. This report is, in part, an assessment of how Parliament has evolved under this electoral system.

The introduction of MMP has changed the balance so that the parliamentary branch is a more effective check on executive power. But the extent of this checking capacity can depend on the nature of the government make-up and the state of the opposition parties.¹¹³ Because Parliament's legislative work slowed down and a backlog of draft legislation built up under the new voting system, Standing Orders have been amended to extend parliamentary sitting time. Efforts have been made through the Legislation Act 2012 to streamline the consideration of "revision" bills that are not politically contentious. This legislation will take effect in the next parliamentary term.

Parliament has robust integrity systems. While formal regulation is spare by international standards, in practice the House of Representatives has clear rules for the conduct of MPs, which are fairly applied and generally successful in ensuring ethical behaviour. On the other hand, the Parliament seems reluctant to support changes in the law to address new integrity risks and rising integrity expectations in society at large. Parliamentarians have not adopted a formal code of conduct, and Parliament has recently declined proposals for legislation to regulate lobbying or for independent oversight of MPs travel expenses.

¹¹² In 1978, the Social Credit Party won about 21 per cent of the popular vote but gained only two seats; three years later, the New Zealand Party won 12 per cent of the vote but failed to gain a single seat.

¹¹³ Ryan Malone, *Rebalancing the Constitution: The challenge of government law-making under MMP* (Wellington: Institute of Policy Studies, 2008).

Transparency is high but could be enhanced through the extension of the Official Information Act 1982 (OIA) to the officers of Parliament, Parliamentary Counsel Office, Office of the Clerk and Parliamentary Service, and the Speaker. The House has adequate powers for holding the executive to account through the requirement that all draft legislation be examined by select committees (except for bills accorded urgency or Imprest Supply Bills) as well as by the House itself, cross-examination of ministers through oral and written questions, close engagement in the budget process, and the scrutiny of public sector spending and regulation. Against current international good practice, Parliament's oversight of fiscal management is judged as only moderately good, and there is a low level of direct public engagement in the budget process.

Parliament has become a more effective check on the executive in the two decades since MMP began. It is now more representative of the community with multi-party governments (either coalition governments or minority governments that rely on support parties to govern), ensuring the interests of smaller parties are better considered. However, inter-party contestation dominates the parliamentary culture to the detriment of other important parliamentary roles. Many interviewees feel the strengthening of Parliament, therefore, remains a work in progress. Areas of priority for the strengthening of Parliament are:

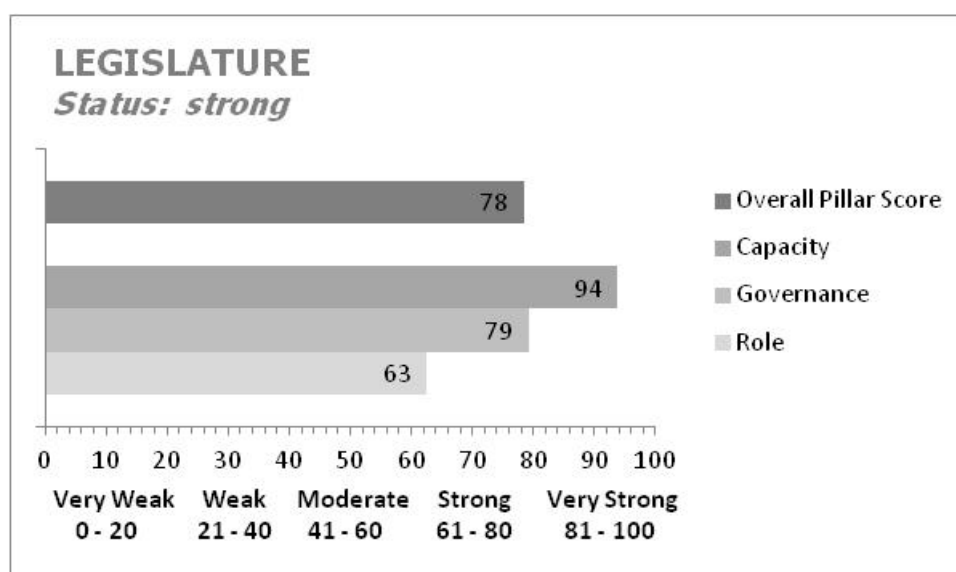
- enhancing scrutiny of the executive by creating a cross-cutting specialist committee for all public accounts and providing it with independent analytical support
- strengthening the quality of Parliament's law making by creating a specialist select committee for treaties
- reviewing existing procedures to ensure Parliament is better aware of the human rights implications of legislation
- enhancing the quality of legislation with more pre-legislative public disclosure of draft bills and the adoption by select committees of tests for legislative quality to complement the executive's recent adoption of *Disclosure Statements for Government Legislation*.¹¹⁴

The New Zealand Parliament is representative and generally transparent in its legislative processes, and the public has excellent opportunities to participate in the work of select committees. Some further strengthening of Parliament's role as a check on the dominance of the executive is necessary. The relative dominance of the executive is a significant theme in this report (discussed further in Chapter 6). A lack of transparency in the administration of Parliament (as distinct from its legislative work) is also a concern.

These elements lead to the recommendations in Chapter 6 calling for a stronger structure of select committees and better committee support, measures to improve the quality of legislation, extending OIA coverage to the administration of Parliament and its officers, more transparency about lobbying of MPs, and the introduction of a code of conduct for MPs.

¹¹⁴ Treasury, *Disclosure Statements for Government Legislation: Technical guide for departments* (Wellington: Treasury, 2013).

Figure 3: Legislature scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

New Zealand has a constitutional monarchy in which Parliament is the supreme legislative power.¹¹⁵ Parliament comprises the Sovereign (represented by the Governor-General) and the House of Representatives.¹¹⁶ Members of the House are elected in accordance with the Electoral Act 1993, and each Parliament has a term of three years, unless it is earlier dissolved. The Governor-General has the power to summon, prorogue, and dissolve Parliament. The Constitution Act 1986 provides for Parliament to have full power to make laws; a bill passed by the House becomes law when the Sovereign or Governor-General assents to it. The Crown may not levy taxes, raise loans, or spend public money except by or under an Act of Parliament.¹¹⁷

The Sovereign's functions are to give the royal assent to bills, call Parliament to meet and dissolve Parliament, deliver the Speech from the Throne, call elections, consent (by means of a "message") to bills affecting the powers and prerogatives of the Crown, and (by means of "address") authorise the House's approval of proposed estimates for the offices of Parliament. These functions are carried out on the advice of ministers of the Crown (the government). The Sovereign plays no other active role in parliamentary

¹¹⁵ New Zealand Parliament, "How our Parliament works: Fact sheets". www.parliament.nz/en-nz/about-parliament/how-parliament-works/fact-sheets

¹¹⁶ Sir Kenneth Keith, "On the constitution of New Zealand: An introduction to the foundations of the current form of government", Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008). <http://cabinetmanual.cabinetoffice.govt.nz/node/68>.

¹¹⁷ No single document is the constitution and parts of the constitution are unwritten. Constitutional arrangements are contained in a variety of documents, including several Acts of Parliament such as the Legislature Act 1908, Constitution Act 1986, New Zealand Bill of Rights Act 1990, and Electoral Act 1993. These Acts include provisions on elections, the term and powers of Parliament, the formation of the government, and individual rights, and have their roots in the English Parliament's struggle to constrain the actions of the sovereign and place political power in the hands of representatives elected by, and accountable to, the people.

work. The supremacy of Parliament over the Sovereign was established in England by the Bill of Rights 1688. This remains part of New Zealand's law today.¹¹⁸

Since 1950, New Zealand's Parliament has had only one chamber, the House of Representatives.¹¹⁹ Its main functions are to provide representation for the people, pass the legislation by which the country is governed, scrutinise the activities of the government, and approve the supply of public funds to the government.¹²⁰

Following the Westminster form, the government is led by the Prime Minister and the Cabinet, who are chosen from the House of Representatives. Parliament has 121 members, elected from 7 Māori and 62 general constituencies, with additional list members for proportionality. Members of Parliament vote to elect the Speaker, nominated by government at the start of each new Parliament (after every general election).

1.1.1 Resources (law)

To what extent are there provisions in place that provide the legislature with adequate financial, human, and infrastructure resources to effectively carry out its duties?

Score: 5

The laws and processes for resourcing Parliament are adequate to enable it to carry out its duties effectively.

Parliament is resourced under the terms of the Public Finance Act 1989. For the purposes of the Act, the Speaker of Parliament is the "responsible minister" of the Parliamentary Service and the Office of the Clerk and in practical terms negotiates Parliament's resource bid with the Minister of Finance and Treasury, in the same way as ministers do. Expenditure is also made under permanent legislative authority, covering, for example, the salaries and allowances of ministers and other members of Parliament, and the salaries of the Ombudsmen and the Controller and Auditor-General.

In determining the resource bid, the Speaker can draw on the advice of the Parliamentary Service Commission, which the Speaker chairs and which comprises representatives of the political parties represented in Parliament. The Speaker is also free to engage other advisers for this purpose. In practice the Speaker's main source of budgetary advice tends to be the Clerk of the House and the General Manager of Parliamentary Services.

The Parliamentary Service Act 2000 obliges the Speaker to establish an appropriations review committee every three years and once during the life of each government to review the funds appropriated by Parliament for administrative and support services for

¹¹⁸ Office of the Clerk of the House of Representatives, "Parliamentary privilege", *Parliament Brief*, February 2007. www.parliament.nz/resource/0000021626 and the Imperial Laws Application Act 1988.

¹¹⁹ Until 1950 the Parliament was bicameral with an upper house known as the Legislative Assembly.

¹²⁰ Geoffrey Palmer and Matthew Palmer, *Bridled Power*, 4th ed. (Melbourne: OUP, 2004), p. 158.

the House of Representatives and MPs and for entitlements for parliamentary purposes.¹²¹ The scope of such triennial reviews is at the Speaker's discretion.

Crucial to resourcing is the number of MPs available to carry out the parliamentary functions. By the standards of comparable developed countries, New Zealand has few parliamentarians.¹²² Comparing lower houses alone, New Zealand has fewer parliamentarians and fewer MPs per 100,000 citizens than Ireland, Sweden, Finland, Norway, and Denmark¹²³ without counting their upper house parliamentarians. This difference is further highlighted if one takes into account the demand on MPs because New Zealand's population is dispersed over a large land area, and that out of the 121 MPs, a comparatively high number, about 30, are taken out to form the political executive.

1.1.2 Resources (practice)

To what extent does the legislature have adequate resources to carry out its duties in practice?

Score: 4

Parliament is adequately funded for its current activities. However, if it is to address weaknesses in the review of bills and the oversight of the executive, reprioritisation and new resources will be required.

The funds appropriated to the Parliamentary Service, the Office of the Clerk, and the permanent legislative authorities totalled NZ\$138,329,000 for 2012/13,¹²⁴ covering:

- Parliamentary Service departmental appropriations for running and maintaining the parliamentary precincts and employing MPs' support staff
- non-departmental appropriations to cover the funding entitlements for Parliament including MPs' salaries, allowances, and entitlements (permanent legislative authority)
- provision for funding MPs' out-of-Parliament offices
- funding for the Office of the Clerk of the House of Representatives for secretariat services to the House and services related to inter-parliamentary relations (permanent legislative authorities).

The salaries and allowances for MPs come to a total of about NZ\$20 million per year. Basic salaries, as at 1 July 2012, range from NZ\$419,300 for the Prime Minister, NZ\$262,700 for ministers, and NZ\$182,800 for MPs. Annual non-reimbursable allowances range from NZ\$21,400 (for the Prime Minister) to NZ\$16,100 (for MPs).

¹²¹ For example, New Zealand Parliament, *Report of the Fourth Triennial Parliamentary Appropriation Review*, June 2010.

¹²² Interview of Jonathan Boston with author, 30 June 2013.

¹²³ Feargal McGuiness, "Number of parliamentarians: International comparisons – Commons Library standard note", 2010. www.parliament.uk/briefing-papers/SN05690.

¹²⁴ *Estimates of Appropriations 2012/13: Vote Parliamentary Service* (Wellington: Treasury, 2013).

The funding for the Office of the Clerk, which includes, among other things, staffing and specialist consultancy support for select committees, is NZ\$20.38 million for 2012/13.

The Parliamentary Counsel Office, which drafts most legislation and publishes the final versions and is resourced under Appropriation or Imprest Supply Acts, had a budget of NZ\$21.304 million for 2012/13. The Responsible Minister is the Attorney-General.¹²⁵

The Remuneration Authority determines the remuneration of parliamentarians – resourcing under these arrangements is regarded as adequate. MPs are well paid by local standards. The level of resources provided for select committees through the Office of the Clerk and the officers of Parliament is also regarded as adequate for current purposes.¹²⁶

The resourcing of Parliament is under the terms of the Public Finance Act 1989. Theoretically this could open Parliament to interference by the executive, but in practice this does not seem to be a problem because of the standing of the office of the Speaker, the role of Parliamentary Services (which in allocating resources and services is accountable to the Parliament rather than the executive) and the scrutiny of MPs. The level of resourcing for the legislature is mainly determined by incremental adjustments to the historical status quo. Where a Speaker seeks to lead step improvements in the parliamentary process in such areas as information technology, extending the televising of proceedings, or strengthening the investigatory resources for select committees – it is a challenging process.¹²⁷

An important resource-allocation matter is how long Parliament sits.¹²⁸ The Business Committee recommends a sitting programme to the House each year. Normal sitting hours are Tuesdays and Wednesdays 2–6pm and 7.30–10pm and Thursdays 2–6pm. For 2013, there are 93 scheduled sitting days.

A review by the Standing Orders Committee in 2011¹²⁹ amended Standing Orders to speed up consideration of non-controversial bills and provide more time for the scrutiny of legislative proposals. These measures included the extension of sitting hours, clearer criteria for the use of urgency, and a more active role for the Business Committee (which has cross-party membership) in planning the business of the House. The Legislation Act 2012 makes provision for the streamlining of the consideration of “revision” legislation, the content of which is largely technical rather than political. This Act will begin to impact on draft legislation in the next session of Parliament.

Another potential resourcing issue is the level of analytical and research support for select committees. Some interlocutors said the committees should be better and more independently resourced to improve the review of legislation and scrutiny of government. Former Clerk of the House David McGee agrees that select committees

¹²⁵ *Estimates of Appropriations 2012/13: Vote Parliamentary Counsel* (Wellington: Treasury, 2013).

¹²⁶ Interview of David McGee, former Clerk of the House with author, 5 February 2013.

¹²⁷ Interview of Margaret Wilson, former Speaker with author, 22 January 2013.

¹²⁸ According to the Schedule of Bills at 2 August 2013, 75 government bills, 25 members' bills, 4 local bills, and 1 private bill are under consideration by the House of Representatives or select committees.

¹²⁹ Standing Orders Committee (Dr Rt Hon. Lockwood Smith, Chair), *Review of Standing Orders*, 49th Parliament (New Zealand Parliament, 2011).

should be strengthened, but says current incentives on the committees to do so are weak. His proposal, discussed below, is that some key committees should first be reorganised.¹³⁰

1.1.3 Independence (law)

To what extent is the legislature independent and free from subordination to external actors by law?

Score: 5

Parliament is constitutionally supreme. It is independent in its oversight of the executive. However, its role in reviewing legislation could be enhanced with more use of specialist select committees on issues of constitutional and cross-cutting importance.

Parliament by law is dissolved at the end of a government's electoral term¹³¹ or when prorogued by the Governor-General. The Governor-General has the formal power to dissolve, prorogue (that is, discontinue without dissolving) and summon Parliament under the Constitution Act 1986.¹³² By convention these actions are taken on the advice of the Prime Minister. When the term of Parliament ends, or Parliament has been dissolved, a general election is held to determine the composition of the House from which the new government will be formed.¹³³

The basic principle of the system of responsible government is that the government must have the confidence of the House to stay in office. Where a government loses the confidence of the House, the Prime Minister will, by convention, advise that the administration will resign and in this case a new government may be elected from within the House (if the administration has its confidence) or a new election may be called.¹³⁴

Parliament is free to decide when it can meet. Each year the parliamentary Business Committee recommends the sitting programme for the following year for adoption by the House. The sessions cover almost the whole year and extend for the parliamentary term.

While Parliament is constitutionally supreme, its composition and processes and New Zealand's constitutional tradition ensure a close and largely supportive relationship with the executive. By international standards the executive has fewer checks on its powers than do most comparable countries (because of the partially unwritten constitution, unicameral legislature and absence of constitutional protection of the powers of local government).

¹³⁰ Interview of David McGee, former Clerk of the House with author, 5 February 2013.

¹³¹ Defined as three years from the date fixed for the return of the writs issued for the previous general election: in *Cabinet Manual*, 2008: para. 6.2.

¹³² Constitution Act 1986, section 18.

¹³³ *Cabinet Manual*, 2008: paras. 6.2–6.4.

¹³⁴ *Cabinet Manual*, 2008: paras. 6.53–6.54.

Three important factors contribute to the independence of Parliament. The first factor, is the status and capacity of the office of the Speaker. The Speaker is the highest-ranking officer elected by the House. The Speaker may maintain links with his or her political party but must not show political bias while chairing the House. The Speaker speaks for the House to the Crown, chairs meetings in the House, chairs three select committees, acts as landlord for Parliament's buildings, and represents the House to international and other important visitors.

The second factor is the control of Parliament's business. The Order of Business is decided by the Business Committee chaired by the Speaker with representation from the political parties in Parliament. It operates by consensus ("near unanimity") as determined by the Speaker.¹³⁵ Disagreements are settled between the Leader of the House and party Whips. The Business Committee sits privately and its proceedings are not recorded.

The third factor is the role of select committees. Membership of select committees is decided by Parliament on the recommendation of the Business Committee. Representation of parties is proportional. Some select committees are chaired by opposition MPs (on agreement between parties) but on a less than proportional basis.

Select committees carry out the intensive legislative, financial, scrutiny, or investigatory work of the House. According to the Office of the Clerk, "Whereas debate in the House is confined to MPs, select committees directly involve the public in their work. This interchange between parliamentarians and the public, particularly as part of the legislative process, is a distinctive ¹³⁶ feature of New Zealand's parliamentary system".¹³⁷

There are 13 subject-specific committees and five specialist committees – the Business, Officers of Parliament, Privileges, Regulations Review, and Standing Orders Committees.¹³⁸ The Business Committee decides the size and composition of the other committees with a view to overall proportionality of representation by political parties.¹³⁹ , ¹⁴⁰ Chairs and deputy-chairs are generally selected by committee

¹³⁵ The committee reaches decisions on the basis of unanimity or, if unanimity is not possible, near-unanimity, having regard to the numbers in the House represented by each of the members of the committee.

¹³⁶ The distinctiveness lies in the ready access for those making submissions to appear in person before the committees.

¹³⁷ New Zealand Parliament, "Office of the Clerk: About – Select Committee Services Group", 2013. www.parliament.nz/en-nz/parl-support/agencies/ooc/who/00CLOOCAdminAgenciesOOCWhoRoleSelect1/select-committee-services-group [accessed 10 July 2013].

¹³⁸ Subjects are defined on the basis of sectors and (ministerial) portfolios. Standing Order 186(2): "The subject select committees may receive briefings on, or initiate inquiries into, matters related to their respective subject areas."

¹³⁹ The Business Committee facilitates House business, decides the size and composition of select committees, grants extensions to the report dates for bills before committees, and grants permission for members' votes to be counted when they are absent from the House. The Officers of Parliament Committee makes recommendations to the House on the appropriations and the appointments of the Auditor-General, Ombudsmen, and Parliamentary Commissioner for the Environment. The Regulations Review Committee examines the legal instruments variously known as "regulations", "delegated legislation", and "subordinate legislation" made under delegated powers in an Act of Parliament. The Standing Orders Committee reviews House procedures and practices.

members.¹⁴¹ Select committees have considerable latitude in how they pursue their roles and may pursue inquiries that are unwelcome from the government's perspective. Critical to the government's political management are the numbers on each committee, that is, does the opposition have more votes than the government or support party members have to initiate the inquiries? On some committees there will be a government majority, and on some the government will be in a minority.¹⁴²

The 13 subject-specific committees are organised on a portfolio basis. Unlike the United Kingdom, Canada, and Australia, New Zealand does not have a public accounts committee covering the use of, and accounting for, all public funds and resources (the Finance and Expenditure Committee chooses to fulfil only some of these functions¹⁴³).

With a small number of MPs to cover many committees, any change requires reconfiguring committees rather than adding new ones. The advantage of specialist committees is the capacity for coherent oversight of important and sensitive policy areas. They offer incentives for committee members to build profile and depth of expertise in the area in question.¹⁴⁴ Interviewees suggested that New Zealand would benefit from a UK-style public accounts committee (which deals with all the executive's accounts), a treaties committee¹⁴⁵ to deal with all international treaties, and a human rights committee. Such committees could support the independent role of Parliament by reducing the opportunity for the executive to indulge in "forum shopping", that is, to send legislation to the committee most likely to support the executive's policy.¹⁴⁶

1.1.4 Independence (practice)

Is the legislature free from subordination to external actors in practice?

Score: 5

Parliament is generally free from subordination in practice. However, the quality of its oversight of the executive could be improved if it developed a more "parliamentary" culture by devoting new attention to the role and status of the Speaker, the control of parliamentary business, and the organisation of select committees.

The operation of select committees is important to the independence of Parliament's role. In general, the select committee system is not organised to promote consensus among committee members from different parties.¹⁴⁷ The majority rules with no obligation or practice for committees to reach consensus on their reports to Parliament. Such reports regularly include dissenting views on a party basis. One consequence,

¹⁴⁰ Standing Orders Committee, "First report", *Appendices to the Journals of the House of Representatives*, I.14, July 1985, para. 4.4.3.4.

¹⁴¹ The Speaker chairs the Officers of Parliament Committee.

¹⁴² See Malone, 2008: 148–167.

¹⁴³ The Estimates for all Votes stand referred to the Finance and Expenditure Committee, but the committee generally refers them and the subsequent financial review to relevant subject committees.

¹⁴⁴ Interview of David McGee, former Clerk of the House, with author.

¹⁴⁵ Treaties are dealt with by the relevant sectoral committee.

¹⁴⁶ As the Public Accounts Committee has in the United Kingdom.

¹⁴⁷ Interview of David McGee, former Clerk of the House, with author.

however, of this approach is that on some select committees the government and its coalition and support party allies do not have a majority. For example, in the 2002–2005 and 2005–2008 Parliaments, the Labour-led government was in the minority on 10 of the 13 subject select committees.¹⁴⁸ In this situation, the select committee is effectively independent of the executive in the recommendations it makes on bills and budgets and in any inquiries it undertakes.

In the constitutional arrangements Parliament is supreme, but the former first-past-the-post electoral system, provided the government of the day with a great deal of influence over Parliament for much of the time. This contributed to a situation in which many felt laws were made too quickly and with insufficient consideration. MMP changed the political dynamic because more political parties were represented, and because coalition governments, or minority governments backed by support parties, became the norm. MMP, in making it necessary for the government to win some cross-party support in order for Parliament to pass its legislation, has indeed strengthened the independence of Parliament.¹⁴⁹ But the logic of this reform has not been fully followed through. Political contestation remains the dominant driver of parliamentary outcomes, primarily because this culture is deeply imbedded in the way Parliament operates.¹⁵⁰

Legislative proposals developed by the executive, dominate the parliamentary agenda. The processes of Parliament provide limited opportunity for other matters to be debated in the House, and individual MPs are provided with a narrow window for bringing matters to the attention of the House. A challenge for Parliament is how to maintain sufficient independence to assure the public that its laws are coherent and constitutional, to approve the raising of revenue, and to scrutinise the efficiency and effectiveness of spending and regulation. At present, the parliamentary culture is not strongly supportive of these roles. Improvement would require new attention to the role and status of the Speaker, the control of parliamentary business, and the organisation of select committees.

The New Zealand Public Health and Disability Amendment Act 2013, considered in all stages under urgency, enables family carers of people with disabilities to be paid less than other carers and prohibits new claimants from seeking legal redress. It was enacted despite advice from the Attorney-General that it breaches the New Zealand Bill of Rights Act 1990.¹⁵¹ In this case, Parliament failed to protect the quality of legislation that citizens have the right to expect.

¹⁴⁸ Malone, 2008: 152.

¹⁴⁹ Malone, 2008: 232: “[I]t is possible to conclude that MMP has produced a significant rebalancing of the constitution. The obligation on ministers to consult within and between multiple parties and to accommodate the policy preferences of those parties into governmental decision-making has significantly restricted executive power. New Zealand’s executive-dominated constitution is now a creature of the past. In its place is a better-balanced constitution, in which the ideal of limited government promoted by the doctrine of separation of power is more tangible than before. If New Zealand ever was an elective dictatorship under [first-past-the-post] as some critics claimed, it is no longer, and simply cannot be in a multi-party government situation.”

¹⁵⁰ Interviews with Sir Geoffrey Palmer and David McGee, 11 July and 5 February 2013.

¹⁵¹ David Beetham, *Parliament and Democracy in the 21st Century: Creating a guide to good practice* (Geneva: International Parliamentary Union, 2006), p. 4: “For the people to have any influence over the laws and policies to which they are subject requires the guarantee of basic rights ... It is this framework of rights that also secures

1.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant and timely information on the activities and decision-making processes of the legislature?

Score: 4

Law and formal processes provide adequately for the transparency of Parliament except that the Official Information Act 1982, despite its centrality in the constitutional arrangements, does not extend to Parliament's own administration.

There are a wide range of formal transparency provisions for parliamentary proceedings. These measures, which are spelt out in Standing Orders, include the right of the public and the media to attend parliamentary sessions; the television, internet, and radio broadcast of parliamentary debates; and the publication of *Hansard* with a verbatim record of what is said in the House. There are also provisions to publish reports considered by the House and its committees and to make draft and final legislation public.

Parliament is financed under the Public Finance Act 1989, and its budgeting and reporting processes are in accordance with that Act, which, as covered in the public sector pillar report, is rated as highly transparent by international standards.

Since 2006, there have been major improvements¹⁵² in the transparency and credibility of the processes around MPs' pay and terms and conditions. This is a major step forward from the situation recorded in the 2003 National Integrity System. Salaries are set on a transparent and independent basis by the Remuneration Authority. Processes in the Parliamentary Service have been upgraded to ensure more clarity of and compliance with the rules on MPs' allowances and expenses.

The OIA does not extend to the legislature's own administration. The public cannot access information on the proceedings of some select committees, or on general parliamentary administration. The Law Commission recently recommended¹⁵³ extending the OIA to the officers of Parliament, Parliamentary Counsel Office, Office of the Clerk, Parliamentary Service, and Speaker of the House.¹⁵⁴ The government rejected this on the grounds that New Zealand has an open Parliament by international standards and it already makes a great deal of information available. The

for them the further democratic principle of being treated as equals without discrimination ... While respect for these rights is the responsibility of all citizens, it is the particular responsibility of parliament as the legislative power to ensure that their formulation and mode of protection in practice conform to international human rights standards, and that they are not undermined by other legislation."

¹⁵² The 2003 New Zealand NIS recommended improvements in this area.

¹⁵³ Law Commission, *The Public's Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012).

¹⁵⁴ Committee on Official Information (chaired by Sir Allan Danks), *Towards Open Government* (Wellington: Government Printer, 1981).

government¹⁵⁵ considered that Parliament was itself better able to develop appropriate rules for the access and use of information.

The OIA has become, in the words of the Law Commission, “central to New Zealand’s constitutional arrangements”.¹⁵⁶ It is anomalous that the principle of open government is not applied to all aspects of the resourcing and management of the Parliament.

1.2.2 Transparency (practice)

To what extent can the public obtain relevant and timely information on the activities and decision-making processes of the legislature in practice?

Score: 4

The public can and does obtain relevant and timely information on the activities and decision making of Parliament.

The formal transparency provisions all appear to function well. Public and media attendance in the House is well established, the media take an active interest in parliamentary proceedings, the various publications and free public broadcasting of proceedings are timely and well presented, and the Office of the Clerk produces publications and runs an excellent website on the history and organisation of Parliament. All draft legislation is made publicly available online and in hard copy, and final legislation is made available to the public in an accessible and comprehensible form.

In general, Parliament (through the Office of the Clerk) is proactive in making the proceedings of the House available to the public.¹⁵⁷ It is regarded as exhibiting international good practice in the guidance and support it gives to those members of the public who wish to make submissions before select committees.¹⁵⁸

1.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the legislature has to report on and be answerable for its actions?

Score: 5

Overall, there is ample legal provision for Parliament to report on and be answerable for its actions. Parliamentary accountability for legislation could be strengthened by the adoption of a code of legislative standards. All MPs face general elections (or selection as list MPs) every three years or more frequently. This is the most basic accountability mechanism for the legislature. Each parliamentary term, the Standing Orders Committee takes public submissions and reviews the rules and practices of Parliament.

¹⁵⁵ New Zealand Government, *Government Response to Law Commission Report on The Public’s Right to Know: Review of the official information legislation* (Wellington: House of Representatives, 4 February 2013). www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-the-publics-right-to-know-review-of-the-official-information-legislation [accessed 16 July 2013].

¹⁵⁶ Law Commission, NZLC R125, 2012.

¹⁵⁷ Interview of David McGee, former Clerk of the House, with author.

¹⁵⁸ Beetham, 2006.

*There have been occasional ad hoc reviews of Parliament, most recently following the introduction of MMP.*¹⁵⁹

New Zealand's system of parliamentary democracy not only provides for citizens to elect their representatives, but also allows citizens to have a say in shaping the laws that affect them. The system of public input into legislative proposals is an important element in the parliamentary process. Submissions are also received on parliamentary inquiries and other matters before a select committee.

Internal scrutiny and regulation of parliamentary behaviour is provided through the Office of the Speaker, the Privileges Committee, and the Standing Orders Committee. MPs are shielded by absolute parliamentary privilege only when they make speeches to the House. Every New Zealand citizen has the right to petition the House to address a grievance or change a policy. Petitions are considered in the first instance by select committees, which may refer the issue to the House for action. In 1892, a petition with 30,000 signatures initiated the process whereby New Zealand became the first country to extend the vote to women.¹⁶⁰ In the last 10 years, Parliament has received over 500 petitions.

All legislation can be scrutinised and reported on by the New Zealand Law Commission, an independent statutory body¹⁶¹ to promote the systematic review, reform and development of New Zealand law. The commission advises Responsible Ministers on possible changes to the law, and its major reports are placed before the House of Representatives.

Some prominent commentators have seen weaknesses in how Parliament considers legislation. Sir Geoffrey Palmer points out that Parliament spends about two-thirds of its time on legislation despite that no more than 15–20 per cent of such legislation is controversial between the parties.¹⁶² He adds that “[despite] great amounts of urgency taken in the life of the Parliament that expired in 2011, in 2013 the Parliament is in the midst of a massive legislative logjam”.¹⁶³

Other commentators agree that MMP has slowed down the legislative process¹⁶⁴ and that many bills stay on the Order Paper for too long, and can become outdated. Statutory changes needed by departments are consequently delayed or denied to them.¹⁶⁵ There were complaints from opposition parties before the last general election that the back-log enabled the government to avoid dealing with opposition party

¹⁵⁹ Rt Hon Sir Geoffrey Palmer QC “Reform of Parliament”, Address to the New Zealand Chapter of the Australasian Study of Parliament Group Seminar, *A Vision for New Zealand's 60th Parliament*, Wellington 17 February 2013.

¹⁶⁰ Office of the Clerk of the House of Representatives, “Petitioning Parliament”, *How Parliament Works*.

¹⁶¹ Law Commission Act 1985.

¹⁶² Rt Hon Sir Geoffrey Palmer QC “Reform of Parliament”, Address to the New Zealand Chapter of the Australasian Study of Parliament Group Seminar, *A Vision for New Zealand's 60th Parliament*, Wellington 17 February 2013.

¹⁶³ The size of the backlog, according to the Schedule of Bills at 2 August 2013, appears roughly the same as in 2011 and 2012.

¹⁶⁴ Malone, 2008. See also David McGee, “Concerning legislative process”, *Otago Law Review* vol. 11, 2007, p. 417.

¹⁶⁵ Email correspondence with Ryan Malone, 9 July 2013.

members' bills before the election.¹⁶⁶ There are concerns too that the situation means that politically topical legislation gets priority over necessary technical and law reform legislation.¹⁶⁷

These problems are being addressed. The 2011 Standing Orders amendments provided for more time for the consideration of some legislation and limited the capacity to resort to "urgency" when the real problem was lack of parliamentary time. Urgency is now used less frequently, albeit sometimes controversially. The Legislation Act 2012 has addressed the problem of a build-up of technical and law reform legislation by making provision for a fast-tracked process for the consideration of non-controversial "revision" bills. These changes will begin to impact on legislation from the next parliamentary term.¹⁶⁸

Where accountability should lie for improving the quality of legislation is not straightforward. Ministers, the public service, and Parliament each have a role, and there are systemic issues such as the possibility of too low a threshold for proposing new legislation and/or that its generation at departmental level is wastefully fragmented.¹⁶⁹ A recent report of the UK House of Commons concludes that "the majority of poor quality legislation results from either inadequate policy preparation or insufficient time being allowed for the drafting process, or a combination of the two. This is not to point the finger at the Office of the Parliamentary Counsel, which neither produces policy nor determines the speed with which policy is to be transformed into legislative proposals".¹⁷⁰

This committee recommended that the UK parliament should adopt a Code of Legislative Standards, and create a Joint Legislative Standards Committee to oversee the application of the code.¹⁷¹ The committee also recommended that the Parliament and the executive should agree on a test to determine whether legislation has constitutional implications.

There is a good case for New Zealand to have similar measures to improve law making. One important step was recently taken by the executive with the requirement for government departments to complete a disclosure statement for all draft government legislation.¹⁷² This statement, which the chief executive of the department concerned must certify personally, aims to ensure that government policies are translated into legislation that is "robust, principled and effective".¹⁷³

¹⁶⁶ "Backlog of bills causing problems in Parliament", *Stuff*, 24 March 2008. www.stuff.co.nz/national/328624

¹⁶⁷ Sascha Mueller, "Where's the fire? The use and abuse of urgency in the legislative process", *Canterbury Law Review* vol. 17(2), 2011, p. 316.

¹⁶⁸ A particularly controversial use of urgency was the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

¹⁶⁹ Interview with Sir Geoffrey Palmer, 11 July 2013.

¹⁷⁰ House of Commons, *Ensuring Standards in the Quality of Legislation* (UK: Political and Constitutional Reform Committee, House of Commons, 2013), summary p. 3.

¹⁷¹ House of Commons, 2013.

¹⁷² Treasury, 2013.

¹⁷³ These requirements are in addition to existing *Cabinet Manual* and Legislation Advisory Committee provisions on legislative quality.

Parliament would do well to complement these regulations with their own set of standards for good parliamentary law making. In the light of serious regulatory failures (covered in the public sector pillar report) there has been public consideration to a Regulatory Responsibility Act.¹⁷⁴ A new Act has not found political support, but Treasury is developing administrative measures that could strengthen the select committee processes dealing with regulation.

1.2.4 Accountability (practice)

To what extent do the legislature and its members report on and answer for their actions in practice?

Score: 4

Parliament and its members are answerable for their actions in practice because Parliament's transparency creates considerable public engagement and because of the frequency of general elections.

Parliament is accountable to the public because of the frequency of general elections. Historically, citizens have had a close relationship with their constituency MPs,¹⁷⁵ and this is regarded as an essential underpinning of the New Zealand's formal constitutional arrangements.

However, this may be changing. Some consider the introduction of list MPs has diluted the power of constituencies and increased the influence of parties.¹⁷⁶ At the same time, party membership is falling (covered in the political parties pillar report). While voter turnout for general elections has been high by international standards, the 2011 general elections recorded the lowest turnout in 126 years with a decrease of over 10 per cent from a decade earlier (from 85 per cent to 74 per cent of electors).¹⁷⁷ Given the importance of direct popular engagement as the invisible glue of New Zealand's governance, this drop in voter turnout warrants attention.

1.2.5 Integrity (law)

To what extent are there mechanisms in place to ensure the integrity of members of the legislature?

Score: 4

The conduct of parliamentarians is covered by criminal law, the provisions of Standing Orders, and the Speaker's rulings. However, Parliament lacks a single, formal code of conduct. The adoption of such a code could encourage more attention to the development of the ethical framework as risks and community standards change.

¹⁷⁴ For example, Graham Scott, "The Regulatory Responsibility Bill: Some issues in the debate", *Policy Quarterly* vol. 6(2), 2010, p. 58.

¹⁷⁵ Interview with Elizabeth McLeay, 14 February 2013.

¹⁷⁶ Interview with Hon. Templeton, 5 July 2013.

¹⁷⁷ Not counting the 1978 elections where the official turnout is regarded as understated because of technical problems.

Various rules of conduct are contained in Standing Orders and Speakers' Rulings, and are enforced by the Privileges Committee and the Speaker. For example, bribery of MPs, as well as being a crime, is covered by the concept of contempt of Parliament.¹⁷⁸ An MP (or outsider) judged by the Privileges Committee to have committed a contempt can be punished by censure, a fine, or (notionally) up to three years in jail.

MPs are covered specifically by criminal law prohibiting bribery and corruption.¹⁷⁹ In these areas they are not protected by parliamentary privilege, as this can be invoked only where the MP is acting in a parliamentary rather than a personal role.¹⁸⁰ Whether an MP's actions are or are not covered by parliamentary privilege is decided by the Privileges Committee. Actions by Parliament or parliamentarians outside the House must comply with the law.

All MPs must disclose their financial interests in the Parliamentary Register of Pecuniary Interests, which is administered by the Registrar of Pecuniary Interests, who is appointed by the Clerk of the House.¹⁸¹ This information is available to the Office of the Auditor-General and is regularly published in summary form. MPs are also obliged to disclose to the Registrar if they have any pecuniary interest in a matter before the House in which they are involved.¹⁸²

As covered in the political executive pillar report, New Zealand, unlike comparable administrations, does not have laws or regulations covering the lobbying of parliamentarians or provisions covering post-government employment from the perspective of avoiding conflicts of interest; nor does there appear ever to have been a prosecution for misconduct in public office.¹⁸³

In 2007, four minor parties drafted and signed a voluntary code of conduct and urged other parties to do likewise. This code, which was placed in the custody of the Speaker, has not attracted the support of the bigger parties. It is nevertheless an evergreen topic. The then Speaker acknowledged in a speech to an international parliamentary conference that most professional bodies have such codes and there is a general trend for ethical matters to be part of the decision making in the public and private spheres.¹⁸⁴ However, while acknowledging that the issues would not go away, the Speaker noted: "The New Zealand Parliament ... has a long history of resisting regulatory intrusions into matters that govern the working of Parliament and the conduct of members. Short of the matter becoming subject of a coalition agreement, it

¹⁷⁸ *Standing Orders*, 2011, Standing Order 407.

¹⁷⁹ Crimes Act 1961, section 103.

¹⁸⁰ In 2008, a member of Parliament was charged with bribery and corruption. The High Court rejected an appeal for immunity, and the member was subsequently convicted on several charges and sentenced to six years' imprisonment.

¹⁸¹ New Zealand Parliament, "Register of pecuniary and other specified interests of members of Parliament", 2013. www.parliament.nz/resource/0000262069 [accessed 16 July 2013].

¹⁸² New Zealand Parliament, "Parliamentary privilege", House of Representatives, *Standing Orders of the House of Representatives*, Chapter 8, Standing Order 399, 2011. www.parliament.nz/en-nz/pb/rules/standing-orders.

¹⁸³ See annex to Public Sector Pillar 4

¹⁸⁴ Speaker of the House of Representatives, "A code of conduct for members of Parliament: Is the time ever right?", speech to the 38th Presiding Officers and Clerks Conference, Rarotonga, Cook Islands, July 2007. www.parliament.nz/en-nz/about-parliament/how-parliament-works/speaker/speeches/48Speakspeech130720071/a-code-of-conduct-for-members-of-parliament-is-the-time.

is unlikely that the New Zealand Parliament will be subject to a formal code of conduct”.¹⁸⁵

This opinion should not stand as the last word. It is by no means clear that a code of parliamentary conduct for MPs can be accurately described as a “regulatory intrusion”. It would be rather a voluntary action by parliamentarians to show the public they apply the same standards to themselves as do other important institutions. A code bringing together the rules on integrity could also encourage more attention to the development of the ethical framework as risks, and community standards, change.

1.2.6 Integrity (practice)

To what extent is the integrity of legislators ensured in practice?

Score: 4

In a moderate number of cases parliamentarians have broken the law and integrity rules. Sanctions have been applied effectively and without favour.

The parliamentary environment exposes MPs to public scrutiny, and political parties in Parliament face strong incentives to ensure their members meet public expectations of conduct. New Zealand parliamentarians live in a fish-bowl-like environment with high media interest and under close scrutiny. Even relatively minor transgressions can have disproportionate consequences for the miscreant if the action puts the government or the party in a bad light.¹⁸⁶

There have been a moderate number of cases over recent years of MPs’ misbehaviour. The most serious were in 2009 when an MP was convicted for corruption and the perversion of justice and sentenced to six years in prison,¹⁸⁷ and in 2006 when an MP was imprisoned for almost three years for using documents with intent to defraud and intent to pervert the course of justice.¹⁸⁸ Most other cases related to the misuse of the perks of office, conflicts of interest, and personal misbehaviour. The materiality of fraud in these other cases was at the lower end of the scale.¹⁸⁹

There is no evidence that MPs are treated more leniently or are less liable to prosecution than other citizens. To the contrary, precisely because they are the elected representatives of the people, the standards of expected behaviour are arguably much higher than those that would apply to the general public in respect of their personal and professional lives.

¹⁸⁵ Speaker of the House of Representatives, 2007.

¹⁸⁶ See the Aaron Gilmore case: “Gilmore: ‘I’m not surrendering, I’m retreating’”, TVNZ, 14 May 2013. <http://tvnz.co.nz/politics-news/gilmore-i-m-not-surrendering-retreating-5435981>

¹⁸⁷ A former Mangere MP was found guilty of 11 charges of bribery and corruption and 15 charges of attempting to obstruct or pervert the course of justice: “Taito Phillip Field guilty of 26 charges”, TVNZ, 4 August 2009. tvnz.co.nz/national-news/taito-phillip-field-guilty-26-charges-2886924

¹⁸⁸ Donna Awatere Huata, a list MP, was convicted of fraud in relation to a government-funded charity and of attempting to pervert the course of justice. Serious Fraud Office, *Report of the Serious Fraud Office Annual for the Year Ended 30 June 2006*, 2006.

¹⁸⁹ Compared with the revelations about members of Parliament in the House of Commons.

1.3.1 Oversight of the executive

To what extent does the legislature provide effective oversight of the executive?

Score: 4

Parliament provides effective oversight of the executive through the scrutiny of reports and the questioning of ministers in select committees and the House of Representatives and through the reports of the officers of Parliament. However, to date, Parliament has not given systematic attention to the impact of the government's policies and services.

Ministers are responsible to Parliament both collectively and individually. As a consequence, the executive is required to be accountable to the House.¹⁹⁰ Five elements are key to the structure of the government's accountability to the House.

The first element is the appropriation and supply of public funds. Parliament must approve public funds under the Constitution Act 1986 and the Public Finance Act 1989. A government cannot remain in office if it fails to obtain supply. Normally, government expenditure cannot be authorised more than a year ahead.¹⁹¹ This ensures government spending is kept under constant scrutiny.

The formal budget process through Parliament comprises the Appropriation (Estimates) Bill, the Budget Speech by the Minister of Finance, and the Estimates. Standing Orders provide for these "set pieces" to take precedence over other business. Substantial time is allocated for their presentation and debate in the House and for their scrutiny by select committees.

The annual Financial Review Bill provides an important opportunity for the House to examine the spending of ministers and their agencies in the previous financial year. Officials are required to provide detailed financial information to Parliament's select committees and to appear before the relevant committee in person to answer oral questions from committee members.

Parliamentary questions are the second element. An hour is allocated from 2pm every sitting day of a parliamentary session for 12 principal oral questions to be put to, and answered by, ministers. The opportunity to ask such questions is equally shared among MPs, excluding ministers. This is an opportunity for Parliament to hold ministers accountable for policy choices and actions under intense opposition pressure and concentrated media coverage. Any MP may also submit written questions, and ministers have six days in which to respond. Approximately 20,000 written questions are asked of ministers each year. Each question and response is published on the parliamentary website.¹⁹²

¹⁹⁰ New Zealand Parliament, "Government accountability to the House", *How Parliament Works* (Office of the Clerk of the House of Representatives, 2010). www.parliament.nz/resource/0000195068

¹⁹¹ David McGee, "Appropriations and authorisations", *Parliamentary Practice in New Zealand*, Chapter 32, 3rd ed. (Wellington: Dunmore Publishing, 2005). www.parliament.nz/en-nz/about-parliament/how-parliament-works/ppnz/00HOOOCPNZ_321/chapter-32-appropriations-and-authorisations [accessed 16 July 2013].

¹⁹² www.parliament.nz/en-nz

Debates in the House make up the third element. An hour is set aside every Wednesday for general debate in which members are free to raise any matters of concern. If the Speaker agrees that a particular matter needs urgent attention, 90 minutes can be set aside for it to be debated.

The executive can be held to account in the Address in Reply Debate, in which Parliament responds to the Speech from the Throne¹⁹³ by the Governor General at the beginning of each parliamentary session. In years with no Speech from the Throne, the Prime Minister's opening statement to the House provides an opportunity for a wide-ranging policy debate among MPs from all sides of the House.

The fourth element is select committees. Scrutiny of the executive occurs in select committees where ministers and officials attend public hearings and answer questions about their performance and policy intentions. If a select committee makes a recommendation to the government, the government must respond to Parliament within 90 days.

The fifth element is the officers of Parliament. The primary function of an officer of Parliament is to act as a check on the executive as part of Parliament's constitutional role of ensuring the accountability of the executive.¹⁹⁴

Parliament has a comparatively limited role in the appointment of officials. It is required by statute to recommend on the appointment of officers of Parliament. There are only a few statutory officers whose appointment requires Parliament's recommendation or endorsement.¹⁹⁵ The appointment of senior government officials and board members is almost entirely within the exclusive domain of the executive.

As covered in the public sector pillar report, New Zealand has been a world leader in its legislation and performance on fiscal transparency, but international standards in this area are rising. The Open Budgeting Initiative (which recently adopted the High Level Principles on Fiscal Transparency, Participation and Accountability promulgated by the Global Initiative on Fiscal Transparency (GIFT)) asserts both a citizen right to information on fiscal policies and a citizen right to direct participation in public debate on fiscal policy.¹⁹⁶

The Open Budgeting Initiative's Open Budget Survey 2012 found that the strength of legislative oversight of fiscal policy in New Zealand was only moderate, as was the level of public engagement in fiscal policy.¹⁹⁷

¹⁹³ The government's programme for the coming session

¹⁹⁴ Leslie Ferguson, "Parliament's watchdogs: New Zealand's Officers of Parliament", paper for Parliamentary Law, Practice and Procedure, 2008.

¹⁹⁵ Peter Waller and Mark Chalmers, *An Evaluation of Pre-Appointment Scrutiny Hearings* (London: Liaison Committee, House of Commons, 2010).

¹⁹⁶ The UN General Assembly endorsed the GIFT high-level principles in December 2012. GIFT is a multi-stakeholder initiative lead by the International Monetary Fund, the World Bank, the International Budget Partnership, the governments of Brazil and the Philippines, and other official sector and civil society entities. The principles are available from the GIFT website, fiscaltransparency.net

¹⁹⁷ "Public participation in the budget process", *Open Budget Survey 2012*, Chapter 4 (Washington D. C.: International Budget Partnerships, 2012).

From a comparative OECD perspective, the New Zealand legislature's role in the budget process looks "weak" because there is no upper House and Parliament has restricted authority to amend the budget.^{198, 199} There is no parliamentary budget office or other independent source of advice on fiscal policy,²⁰⁰ and no provision for public submissions on the annual budget.

Such comparisons do not take account of the very positive impact of highly transparent and frequent general elections that characterise New Zealand public governance, but it would be risky to dismiss them on the basis of New Zealand's self-perceived constitutional exceptionalism. The public sector pillar report observes that while the executive has accounted to the legislature on the use of funds and powers for outputs, reporting on the impact of policies and services has been sparse and unsystematic. There has been little evaluation of the impact of major public management policies despite their importance to citizens and future governments.

With scarce analytical resources of its own, the result is that Parliament has addressed such matters only if third parties report them. Recent changes to the Public Finance Act 1989²⁰¹ cover impact reporting and the policy and regulatory stewardship responsibilities of the public service,²⁰² which should, when implemented, enable Parliament to strengthen the monitoring of government effectiveness.

1.3.2 Legal reforms

To what extent does the legislature prioritise anti-corruption and governance as a concern in the country?

Score: 3

Parliament has effective processes for addressing instances of corruption, but it does not use its select committees to give appropriate oversight and priority to bribery and corruption and to the promotion of national integrity at home and abroad.

Parliament combats public sector corruption through questions in the House, the scrutiny of the select committees, and the activities of the parliamentary officers: the

¹⁹⁸ Standing Orders 318–322 provide that an individual member of Parliament or a select committee may propose amendments to the Budget, but that the Government may veto any amendments that, in its view, would have more than a minor impact on the fiscal aggregates or on the composition of a Vote. See House of Representatives, *Standing Orders of the House of Representatives*, 2011. www.parliament.nz/en-nz/pb/rules/standing-orders

¹⁹⁹ No amendments to the government's budget proposal have been approved in recent years. This is not to imply that Parliament should be able to significantly amend the budget in a Westminster system. What authority a legislature should have to amend the Executive's budget proposal is a fundamental issue of constitutional choice, and no position is being taken on that here. However, the weakness of amendment authority perhaps reduces the incentives of parliamentarians to engage in in-depth analysis and debate on the Budget.

²⁰⁰ The Finance and Expenditure Committee of Parliament is responsible for oversight of fiscal management and is chaired by a member of the governing party. The committee has not sought independent advice on fiscal policy in recent years, although funding is available for it to do so and it has done so with respect to monetary policy.

²⁰¹ Public Finance (Fiscal Responsibility) Amendment Bill.

²⁰² Described in the public sector pillar report (pillar 4).

Auditor-General and the Ombudsmen with the support of the Official Information Act 1982.

The fight against corruption has not had high priority for Parliament in recent decades. However, the global financial crisis, some relaxation of regulatory oversight, and the diversification of the economy and society have given rise to new risks and problems, including fraud, fiduciary failures, and tax evasion.

New Zealand's business interests are becoming increasingly global. As shown recently in China,²⁰³ illegal actions by foreign subsidiaries of New Zealand firms can have a wider impact on New Zealand's national brand. There is evidence that the relative ease of company registration in New Zealand has been exploited for fraudulent purposes by international actors. The government is addressing this problem through the Companies and Limited Partnerships Amendment Bill, which the Commerce Committee is considering.

In 2002, Cabinet authorised New Zealand to sign the UN Convention against Corruption, subject to Parliament examining the convention and the passage of necessary legislation. The Foreign Affairs and Trade Select Committee completed its examination of the convention in May 2012 and reported it had no issues to raise with the House. Parliament has already completed some convention obligations by passing the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the Criminal Proceeds (Recovery) Act 2009. However, amendments are needed to the Crimes Act 1961, Secret Commissions Act 1910, and Mutual Assistance in Criminal Matters Act 1992, if New Zealand is to meet convention obligations.²⁰⁴

New Zealand is a party to the OECD's Anti-Bribery Convention, and, in response to it, the Crimes Act was amended in 2001 to make bribery of a foreign public official an offence.^{205, 206}

Several domestic commentators have raised concerns about the risks of rising corruption in New Zealand society and observed the lack of a focused official response.²⁰⁷ There is concern that New Zealand's excellent ranking in Transparency International's Corruption Perceptions Index is inducing a misguided sense of complacency. While specific cases of corruption increasingly feature in parliamentary debates, it is not evident that Parliament uses its select committee process to give bribery and corruption and the promotion of national integrity, the oversight and priority it deserves.²⁰⁸

²⁰³ Fonterra's problems of subsidiaries selling contaminated milk "Fonterra's Chinese Milk Scandal" *The New Zealand Herald* website August to November 2013.

²⁰⁴ New Zealand Government, *International Treaties List as at July 2012* (Wellington: Ministry of Foreign Affairs and Trade, 2012). www.mfat.govt.nz/downloads/treaties-and-international-law/ITL-International-treaties-list-july-2012-edition.pdf

²⁰⁵ The Crimes Act 1961 was amended by the Crimes Act Amendment Act 2001.

²⁰⁶ Transparency International New Zealand has done several biennial assessments of New Zealand's enforcement of the convention. This is discussed in the law enforcement pillar report (pillars 5 and 9).

²⁰⁷ For example, Deloitte, "Bribery and corruption: Exposure, enforcement and accountability key risks for New Zealand organisations", press release, 13 September 2012.

²⁰⁸ Transparency International New Zealand, "Still not enough action on foreign corruption by New Zealand", press release, September 2012.

1.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the legislature do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? In particular, where the legislature has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

Parliament is directly and continuously engaged in Treaty of Waitangi matters. It appears to give effect to its spirit and principles.

The Treaty of Waitangi looms large in the business of Parliament. In 1985, Parliament passed legislation to allow the Waitangi Tribunal to investigate claims of breaches of the Treaty that had occurred from as early as the signing of the Treaty in 1840. The last phase of a claim settlement is legislation. The first settlement bill was passed in the 1990s, and as time has passed the flow of finalised settlements has increased. Five settlement bills are before the Parliament at present, and many more are in the pipeline.²⁰⁹ The final process is nicely captured in the following description from the Parliament website.²¹⁰

Sometimes the signing of settlement documents takes place in Matangireia (the former Māori Affairs Committee Room in Parliament House), under the gaze of early Māori members of Parliament whose portraits adorn the walls alongside a large reproduction of the Treaty of Waitangi.

Treaty settlement legislation usually contains a Crown apology for historic Crown actions and omissions that were in breach of the treaty, and a package of cultural and commercial redress. In combination, the redress aims to recognise the claimants' historical grievances, restore the relationship with the Crown, and contribute to their economic development.

The passage of settlement legislation usually enjoys strong support across the House. The conclusion of that passage is a momentous occasion. Members of the claimant communities travel to Wellington to witness and celebrate the historic event.

Te reo, the Māori language, came into Parliament with the first Māori MPs in 1868. Māori language was permitted and interpreters were provided – but not encouraged. The understanding was that statements in Māori should be brief. Parliament made Māori an official language in 1985. *Hansard* is published in both Māori and English, and parliamentary broadcasts include Māori to English translation.

In 1996, under the mixed-member proportional representation voting system, 15 Māori MPs entered Parliament – the highest number in its history. Parliament appoints a kaumātua (elder), who manages the Māori components of all formal and important ceremonies and events for the Speaker and the Speaker's departments, the Office of

²⁰⁹ March 2013.

²¹⁰ New Zealand Parliament, "Treaty of Waitangi Settlements and the House of Representatives", 16 July 2012. www.parliament.nz/en-nz/features/00NZPHomeNews201207161/treaty-of-waitangi-settlements-and-the-house-of-representatives

the Clerk, and the Parliamentary Service.²¹¹ The kaumātua supports the kaiwhakarite (functions coordinator) for the Parliamentary Service, and advises on Māori protocol, procedures, and policies relating to te reo and tikanga (Māori law, rules, and practice).

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²¹¹ New Zealand Parliament, “New kaumātua for Parliament appointed”, 7 May 2009. www.parliament.nz/en-nz/features/00NZPHomeNews070520091/new-kaum%C4%81tua-for-parliament-appointed

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Political executive – Cabinet (pillar 2)

Summary

“In New Zealand’s system of government, Parliament sets the rules and the courts decide disputes. But it is the Ministers of the Crown who make the decisions. Those decisions are often hard ones. But Cabinet is the place where the hardest decisions must be made.”²¹²

The executive is made up of the Prime Minister, Cabinet, and organisations that comprise the public service and the wider state sector. The executive conducts the government, deciding on policy and administering legislation.²¹³ This pillar report covers the Prime Minister and Cabinet in their collective interest role of leading and coordinating government, and the institutional and legal framework that supports this role. Interactions between portfolio ministers and the public sector and between the executive and Parliament are covered in the legislature and public sector pillar reports in Chapter 5.

The Cabinet has great power to make policy decisions, and the Prime Minister is powerful within it, having the ability to decide on, and to change, ministerial portfolios. (Statutory power to give legal effect to policy decisions rests with the Executive Council, which has no policy decision-making power.) The powers of the Prime Minister and ministers are defined in statutes, but how they work collectively is a matter of convention, custom, and the personal preference and management style of the Prime Minister. In practice, Cabinet members demonstrate high compliance with the statutory requirements for their areas of responsibility and with Cabinet conventions. This reflects the overall transparency of the executive’s activities and the exposed political environment of Cabinet. Cabinet ministers are also members of Parliament (MPs) owing allegiance to the House of Representatives, their political party, and their electorate every three years or more frequently.²¹⁴

The Cabinet system and the wider public sector governance system in which it is embedded generally provide high transparency of, and accountability for, decision making and implementation and promote ministerial integrity. This important outcome is attributable to a tradition of effective self-regulation through the *Cabinet Manual*,²¹⁵ comprehensive and coherent laws governing ministerial direction of the public sector and reporting of public sector activity to the legislature, the independent scrutiny of the officers of Parliament, the Official Information Act 1982, and Ombudsmen, and the use of parliamentary questions.

²¹² Marie Shroff, “How government works: Making the hard decisions”, *DecisionMaker* (excerpt from a speech by Shroff in 2002). www.decisionmaker.co.nz/guide2005/hgw%2005/harddecisions.html

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²¹⁴ Cabinet Office, “National-led administration: Consultation and operating arrangements”, Cabinet Office Circular CO (12) 03, 1 May 2012. www.dPMC.govt.nz/cabinet/circulars/co12/3

²¹⁵ Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008). <http://cabinetmanual.cabinetoffice.govt.nz>

A key challenge for Cabinet's governance of the public sector is striking the right balance between the whole-of-government interest and the policies and activities of individual portfolio ministers and their departments. The effectiveness of the self-regulatory nature of the existing public management design²¹⁶ was overestimated.²¹⁷ It has been found to set up political and administrative incentives that direct insufficient attention to less publicly observable interests such as public sector capacity, cross-departmental public service coordination, the quality of regulation, and the monitoring and evaluation of the longer-run impact of policies.²¹⁸ These deficiencies in the design and implementation of the public sector legal framework have undermined the Cabinet's collective policy-making effectiveness and weakened the corporate culture within which individual ministers and chief executives should operate.

Constitutionally, Parliament is sovereign and, as in the original Westminster system, its relationship with the political executive is described as "fused" rather than separate. However, in New Zealand the executive has levers of power at its sole disposal around which many other countries have constitutional or statutory protection. One such area is the power to select board members for most statutory bodies. These decisions are made in Cabinet. The nomination process addresses merit and conflicts of interest, but the final decision is open to other nominees, including nominees from the ruling parties' caucuses. A small but significant number of such decisions give the appearance of political patronage, and this has caused public concern. The problem is not political connections per se, but the need to maintain public confidence that the statutory "arm's length" independence of such bodies from government is being respected.

The government, supported by the three central agencies (State Services Commission, Treasury, and the Department of the Prime Minister and Cabinet), recently launched reforms and associated legislative changes to address the collective interest problem areas. This is an important endeavour. Resolution will be challenging because the reforms to be effective will require changing decision rights between Cabinet as a whole and individual ministers; as well as between central agencies and individual departments. Success will also require strengthening the quality of public service policy advice, which has been judged to be in decline.²¹⁹

Cabinet's power in making policy decisions is balanced by the accountability of ministers and the transparency of decision making, although transparency about lobbying needs improvement. In some other respects, Cabinet or ministerial power is not balanced so effectively, and concern about the relative dominance of the executive again emerges as a theme. As examples, in making appointments, Cabinet sometimes introduces candidates outside the normal assessment process, Cabinet ministers may resist the appropriate independence of the public sector by not encouraging or listening to free and frank advice, Cabinet has on occasion shifted local government roles to central government, and Cabinet may resist the spirit and intent of the Official

²¹⁶ Described in the public sector pillar report (pillar 4).

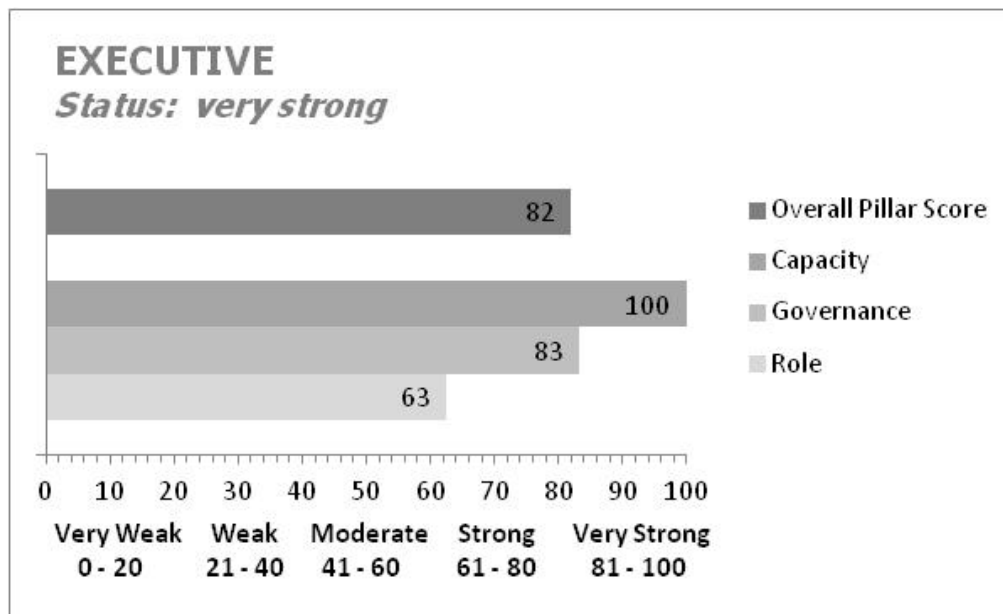
²¹⁷ Particularly in respect of the belief that output accountability would replace the need for process controls.

²¹⁸ Bill Ryan and Derek Gill, eds., *Future State: Directions for public management in New Zealand* (Wellington: Victoria University Press, 2011).

²¹⁹ Review of Expenditure on Policy Advice, *Improving the Quality and Value of Policy Advice: Findings of the committee appointed by the Government to review expenditure on policy advice* (Wellington: Treasury, 2010).

Information Act 1982 in dealing with requests for information. Accountability is relatively weak for the impact and effectiveness of policies. The recommendations in Chapter 6 relating to the executive pick up these areas of concern.

Figure 4: Political executive scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The executive branch of government is charged with executing laws and policies and administering public affairs. It consists of ministers both within and outside Cabinet and the public service. No legislation defines the Cabinet and its powers; these are matters of long-standing convention. This assessment also covers the legislative framework that governs how Cabinet and its ministers directly oversee and report on the public sector and the central agencies that support the Cabinet in these roles.

The Prime Minister and most ministers of the Crown serve as the members of Cabinet.²²⁰ All ministers of the Crown, whether they are inside or outside Cabinet, are members of the Executive Council, the highest formal instrument of government whose principal functions are to advise the Governor-General and make regulations and other orders in council (appointments and such like). The Governor-General presides over, but is not a member of, the Executive Council. When a new Cabinet is sworn in, ministers are first appointed as executive councillors and then receive warrants for their respective ministerial portfolios.

Each minister is responsible for exercising the statutory functions and powers under legislation within their portfolios, “within the collective Cabinet decision-making context”.²²¹ Within Cabinet, the Prime Minister has a dominant role, ultimately

²²⁰ Cabinet Office, “Executive Council and the Governor-General”, in *CabGuide: Guide to Cabinet and Cabinet committee processes* (Wellington: Department of the Prime Minister and Cabinet).
<http://cabguide.cabinetoffice.govt.nz/procedures/executive-council-governor-general>

²²¹ *Cabinet Manual*, 2008: para. 2.2.1d.

constrained only by convention and the need for party and parliamentary support to remain in office.

The most important formal integrity instrument for the Cabinet is the *Cabinet Manual*, which defines the procedures of Cabinet and provides a code of conduct that is an authoritative guide to central government decision making for ministers, their offices, and those working within government.²²² It is periodically updated to reflect changes in cabinet procedures and constitutional developments. Over the years, it has become a primary source of information on New Zealand's constitutional arrangements and is explicitly endorsed by each prime minister at the first Cabinet meeting of a new government.²²³

2.1.1 Resources (practice)

To what extent does the Cabinet have adequate resources to effectively carry out its duties?

Score: 5

The Cabinet and the organisations that support it are adequately resourced.

The remuneration of ministers is covered in the legislature pillar report and is assessed as adequate. This section focuses on the resourcing of the Cabinet system.

The Prime Minister is responsible for Vote Department of the Prime Minister and Cabinet (DPMC), for which NZ\$24.526 million (including a recent increase) is budgeted for 2013/14, covering outputs for:²²⁴

- policy coordination and the provision of policy advice for the Prime Minister, the Cabinet, and ministers
- support for secretarial services to the Cabinet and Cabinet committees and for the New Zealand Royal Honours system²²⁵
- intelligence coordination and national security priorities
- support for the role and facilities of the Governor-General.

The funds are appropriated by Parliament and accounted for by the Prime Minister as the Responsible Minister as required by the Public Finance Act 1989.

DPMC's "overall area of responsibility is in helping to provide, at an administrative level, the 'constitutional and institutional glue' that underlies [New Zealand's] system of

²²² *Cabinet Manual*, 2008.

²²³ It is indicative of the standing of the *Cabinet Manual* that its introduction by Sir Kenneth Keith is regarded as the most definitive account of New Zealand's constitutional arrangements, and that the manual is widely referred to by constitutionalists and public governance experts. (For example, Hon Dame Silvia Cartwright, Governor-General, "Our constitutional journey", speech at Government House, May 2006.)

²²⁴ *Budget 2013 Information Release* (Wellington: Treasury, July 2013).

²²⁵ Department of the Prime Minister and Cabinet, *Statement of Accountability*, 2012.

www.dPMC.govt.nz/dPMC/publications/ar-2012/0400-accountability. See also *Cabinet Manual*, 2008: 1.30–1.34 and 5.77–5.81.

parliamentary democracy”.²²⁶ Within DPMC is the Cabinet Office, which provides secretarial services for the Cabinet system and the Executive Council.²²⁷ The Prime Minister’s Office provides the Prime Minister with political advice. This office operates independently from the DPMC’s policy advisory role.

Funding for intelligence coordination and security priorities covers the Intelligence Coordination Group, which coordinates relations between the Prime Minister and the intelligence community. This group also supports the Officials Committee for Domestic and External Security Coordination, the National Assessments Bureau, and the Commissioner of Security Warrants. The other organisations comprising the intelligence community, the New Zealand Security Intelligence Service and the Government Communications Security Bureau are not funded through Vote DPMC.

A recent Performance Improvement Framework²²⁸ review of DPMC concluded that, while the department performs well and has capable staff, its infrastructure and systems are weak and underdeveloped and require new investment.²²⁹ This recommendation was addressed in the recent Budget Update for DPMC, which increased DPMC’s 2013/14 funding by NZ\$2.5 million.²³⁰ It appears, therefore, that the resources made available for the support of Cabinet and Executive Council systems are now adequate in financial terms.²³¹

2.1.2 Independence (law)

To what extent is the Cabinet independent by law?

Score: 5

The independence of the Prime Minister and Cabinet is embedded in law and constitutional convention. In exercising their powers, the Prime Minister and ministers are bound by the legal framework for the public sector, laws relating to particular portfolios, and the decisions of relevant statutory bodies and officers.

Under the Letters Patent Constituting the Office of Governor-General of New Zealand, the Governor-General appoints the Prime Minister and ministers. By dint of constitutional convention, the Queen and the Governor-General act only on the advice of the Prime Minister or ministers who have the support of the House of Representatives. Thus, as stated in Sir Kenneth Keith’s introduction to the *Cabinet*

²²⁶ www.dPMC.govt.nz

²²⁷ Department of the Prime Minister and Cabinet, “The department’s role”, 2012. www.dPMC.govt.nz/dPMC/publications/ar-2012/0200-role

²²⁸ The Performance Improvement Framework process is described in the public sector pillar report (pillar 4).

²²⁹ State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Review of the Department of the Prime Minister and Cabinet (DPMC)* (Wellington: New Zealand Government, 2013).

²³⁰ Treasury, “Budget 2013 information release, 2013.

www.treasury.govt.nz/publications/informationreleases/budget/2013

²³¹ The New Zealand Security Intelligence Service and Government Communications Security Bureau are usually (law does not require it) in the Prime Minister’s portfolio. They are outside of the scope of this pillar, however, which focuses on the political executive’s collective decision-making role.

Manual, “The Queen reigns ... but the Government rules ... so long as it has the support of the House of Representatives”.²³²

Under the Constitution Act 1986, the Letters Patent constituting the Office of Governor-General, the New Zealand Bill of Rights 1990, and the Public Finance Act 1989, the Crown may not levy taxes, raise loans, or spend public money except by or under an Act of Parliament. The government, particularly through the Minister of Finance, is responsible for exercising the statutory public finance powers. The Queen and Governor-General have powers to appoint and dismiss ministers and other holders of important offices, to summon and dissolve Parliaments, to assent to bills passed through the House, and make regulations and Orders submitted to them by the Executive Council and ministers. By convention the Sovereign or Governor-General does so only on the advice of the Prime Minister or ministers who have the support of the House of Representatives.²³³ In rare cases the Governor-General may exercise a degree of personal discretion, under what are known as the “reserve powers”. According to the *Cabinet Manual*, even then, convention usually dictates what decision should be taken.²³⁴

The Prime Minister is the head of government and he or she alone, by constitutional convention, can advise the Governor-General to dissolve Parliament and call an election and can appoint, dismiss, or accept the resignation of ministers. Ministers constitute the executive arm of government. Their powers rise from legislation and common law, and they are supported in their portfolios by the public service. In exercising their powers the Prime Minister and ministers are bound by the legal framework for the overall governance of the public sector; including fiscal governance, the laws relating to particular portfolios, and the decisions of individuals and bodies under statutes that require them to act independently.^{235, 236, 237}

²³² Sir Kenneth Keith, “On the constitution of New Zealand: An introduction to the foundations of the current form of government”, in *Cabinet Manual* (Wellington: Department of the Prime Minister and Cabinet, 2008). <http://cabinetmanual.cabinetoffice.govt.nz/node/68>

²³³ This is subject to the Governor-General’s rarely used reserve powers. In 1984, the Governor-General did not grant Prime Minister Robert Muldoon’s advice to call a snap election until he had been assured that a majority of the House of Representatives supported the Prime Minister.

²³⁴ *Cabinet Manual*, 2008: para. 1.15.

²³⁵ Especially the Public Finance Act 1989, State Sector Act 1988, and Crown Entities Act 2004.

²³⁶ For example, the laws covering foreign affairs, defence, inland revenue, customs, resource management, and local government.

²³⁷ In addition to statutory bodies such as the Law Commission and Commerce Commission, some departmental chief executives exercise statutory powers for some functions; for example, the Commissioner of Inland Revenue, Secretary to the Treasury, State Services Commissioner, Commissioner for the Environment, Government Statistician, and Secretary for Transport. Also, some staff within departments have statutory powers such as the Director of Public Health, Registrar of Companies, and Surveyor-General: State Services Commission, *State Sector Management Bill: Supplementary Information*, submission to the Education and Science Committee, 6 October 2010.

2.1.3 Independence (practice)

To what extent is the Cabinet independent in practice?

Score: 5

The Cabinet is independent in practice. No other institution, public or private, interferes with its lawful activities and decisions.

While New Zealand does not have constitutionally autonomous branches of the state as exist in the United States and much of Europe, there is a separation of powers in the sense of having an independent judiciary and a set of three branches of the state with separate areas of competence and functionality.

Within DPMC, special organisational and staffing arrangements provide assurance that the Cabinet Office is independent and non-partisan in its support for the Cabinet and the Executive Council, and that the Prime Minister's non-political Policy Advisory Group operates independently. While the Chief Executive of DPMC supports the Prime Minister as head of government, the Cabinet Secretary supports the Prime Minister as the chair of Cabinet.²³⁸ These arrangements have given little cause for public or political concern.

There was public concern about the government's independence when the Prime Minister and his staff got involved in direct negotiations with SkyCity Entertainment Group Ltd concerning its proposal to build a convention centre in exchange for regulatory concessions. No evidence was found that the commercial actor was exerting undue influence on public policy. However, an Office of the Auditor-General inquiry found deficiencies in due procurement process, which contributed to a perception of favouritism.²³⁹ Also, as discussed in the public sector pillar report, the government's decision process did not comply with established principles of fiscal transparency.

2.2.1 Transparency (law)

To what extent are there regulations in place to ensure transparency in relevant activities of the Cabinet?

Score: 4

There is robust legal provision for the transparency of Cabinet and individual ministers including the Standing Orders of Parliament, Official Information Act 1982, Public Finance Act 1989, and Register of Pecuniary Interests. New Zealand, unlike similar countries, does not have legislation to ensure the lobbying of ministers is transparent.

Cabinet minutes: There is no blanket exemption for Cabinet material (or indeed any class of papers) from the obligation to release under the Official Information Act 1982 (OIA). Requests for Cabinet material must be considered on their merits against the criteria in the OIA. Information held by a minister in his or her capacity as a member of

²³⁸ Interview with Diane Morcom, former Secretary of Cabinet, 14 February 2012.

²³⁹ Office of the Auditor-General, *Inquiry into the Government's Decision to Negotiate with Sky City Entertainment Group Ltd for an International Convention Centre*, 2013.

a political party or as an MP (for example, caucus material), however, is not official information for the purposes of the OIA. Furthermore, the Attorney-General, when performing law officer functions, is not subject to the OIA. Where the minister decides that departmental information should not be released, the request may be transferred by the department to the minister (if the department considers the information to be more closely connected with that minister's functions), and the minister is then responsible for fulfilling his or her obligations under the OIA.

Cabinet minutes are distributed within two to three days of a Cabinet meeting. They cover the decisions made, but not the Cabinet discussion. Minutes are sent to portfolio ministers, with a copy for their department if the minister agrees. If not, the department may be sent a summary or excerpts.

Financial information: The provisions of the Public Finance Act 1989 apply to the resources provided for the Prime Minister and his or her department and the Votes for which individual ministers are responsible. The estimates, appropriations, and independently audited financial reports are available to the Parliament and the public and are scrutinised by the House and its committees. A fuller description of fiscal transparency is in the legislature and public sector pillar reports.²⁴⁰

Conflict of interest provisions: All ministers, as MPs, are required to disclose certain assets and interests in the annual Register of Pecuniary Interests of Members of Parliament. This register is designed to promote accountability and transparency by identifying personal financial interests that might influence MPs. Each year the Clerk of the House publishes these interests in summary form. The *Cabinet Manual* provides specifically for ministers further principles and guidance on avoiding the reality and perception of conflicts of interest. The government recently accepted a recommendation of the Chief Ombudsman for regular and proactive disclosure of information about the management of ministerial conflicts of interest.²⁴¹

In August 2013, a select committee rejected a private member's Lobbying Disclosure Bill,²⁴² which proposed a public register for lobbyists of MPs (which would include ministers) and requirements for them to follow a code of ethics drawn up by the Auditor-General and to file quarterly returns. The draft legislation proposed it be a criminal offence for unregistered corporate lobbyists, union members, or workers with non-government organisations to lobby MPs. The Attorney General opposed the draft legislation on the grounds that it would limit freedom of expression and that the bill went beyond what was necessary to limit the activities of lobbyists.

²⁴⁰ See also Murray Petrie, *Integrity Plus 2013: New Zealand National Integrity System Assessment – Fiscal transparency*, supplementary paper 3 (Wellington: Transparency International New Zealand, 2013). www.transparency.org.nz/docs/2013/Supplementary-Paper-3-Fiscal-Transparency.pdf

²⁴¹ Office of the Ombudsman, "Chief Ombudsman recommends regular and proactive disclosure of information about ministerial conflicts of interest", 31 January 2013.

²⁴² "MPs decide law to restrict lobbyists unnecessary in 'village New Zealand' ", *New Zealand Herald*, 24 August 2013.

Some other Commonwealth countries have such laws.²⁴³ The smallness of New Zealand society is not a good argument against making the lobbying of ministers more transparent.²⁴⁴ The select committee in rejecting the bill nevertheless made the important recommendation that Parliament should change its own rules to provide more transparency about lobbying.

2.2.2 Transparency (practice)

To what extent is there transparency in relevant activities of the Cabinet in practice?

Score: 4

Cabinet is transparent in practice, except concerning appointments by ministers to state sector boards.

The provisions for transparency in the activities of the Cabinet are generally effective. Cabinet ministers operate in a publicly exposed environment in which the Prime Minister and political parties are under strong political incentives to deal with ministerial breaches of the rules. Transparency is reinforced by the high fiscal transparency of the public sector, the OIA, parliamentary questions, and the scrutiny of select committees. As covered in the accountability section of this report, several ministers have lost their posts when found in breach of *Cabinet Manual* provisions.

A matter for integrity concern is apparent party political bias in a few appointment decisions taken in the context of the Cabinet Appointments and Honours Committee. Despite improvements in recent years in the supporting bureaucratic process, the final political decision making is opaque²⁴⁵ and provides limited public assurance against the risk of political patronage.

Each year the Crown appoints members to some 400 bodies.²⁴⁶ The administrative process supporting such appointments is managed by the departments concerned and the State Services Commission or Treasury.²⁴⁷ These processes meet good standards,²⁴⁸ but the final ministerial decision is taken in the Cabinet Appointments and Honours Committee, meeting in camera and having also received advice from party

²⁴³ New Zealand Parliament, "Lobbying Disclosure Bill", July 2012. www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL11278_1/lobbying-disclosure-bill

²⁴⁴ Claims have been made that direct lobbying from farmers was a driving force in the legislation passed under urgency to suspend the powers of Environment Canterbury (covered in the public sector pillar report (pillar 4)). Farmers are an important interest group for decisions on water use, but these interests should be a transparent part of the statutory decision-making process.

²⁴⁵ The committee notes the decisions of portfolio ministers; it does not make the decisions: Cabinet Office, "Appointments", *CabGuide*. cabguide.cabinetoffice.govt.nz/procedures/appointments

²⁴⁶ *Cabinet Manual*, 2008.

²⁴⁷ The departments involved, or the State Services Commission, identify candidates for board positions for statutory Crown entities, statutory tribunals and regulatory bodies, and a variety of other bodies and agencies with boards in the state services. The Crown Ownership Monitoring Unit in Treasury advises ministers on candidates suitable for appointment to the boards of entities such as state-owned enterprises, the Crown financial institutions, other Crown entity companies, and statutory entities and for the boards of Crown research institutes. Ministers make 5–60 new Crown company appointments each year.

²⁴⁸ Such guidance is provided by the State Services Commission and *Cabinet Manual*, 2008.

caucuses. There is a perception²⁴⁹ and some research²⁵⁰ evidence that ministers sometimes put their “friends” on these boards. This perception is damaging to citizens’ confidence that the arm’s length principle that underpins the Crown entity system is being respected. This is a case where Cabinet should consider ways to reassure the public that it is using its powers in the public interest.²⁵¹

The appointment process is already replete with guidance and rules. The assurance of public confidence in this area would benefit from the application of a New Zealand equivalent to the “Nolan Rules” in the United Kingdom,²⁵² which reaffirm ministerial responsibility for appointments but have other trust promoting criteria.

In August 2013, a select committee rejected a private member’s Lobbying Disclosure Bill,²⁵³ which proposed a public register for lobbyists of MPs (which would include ministers) and a requirement for them to follow a code of ethics drawn up by the Auditor-General and to file quarterly returns. The draft legislation proposed it be a criminal offence for unregistered corporate lobbyists, union members, or workers with non-governmental organisations to lobby MPs. The Attorney-General opposed the draft legislation on the grounds that it would limit freedom of expression and that the bill went beyond what was necessary to limit the activities of lobbyists.

Some other Commonwealth countries have such laws.²⁵⁴ The smallness of New Zealand society is not a good argument against making the lobbying of ministers more transparent.²⁵⁵ The select committee, in rejecting the bill, nevertheless made the important recommendation that the Parliament should change its own rules to provide more transparency about lobbying.

²⁴⁹ This finding is drawn from media reports (referred to in the public sector pillar report (pillar 4)) and from interviews of former and current state sector board members.

²⁵⁰ Richard Norman, “How should state-owned enterprises be governed?”, *Public Sector* vol. 30(4), 2008.

²⁵¹ The United Kingdom created the position of Commissioner of Public Appointments.

²⁵² See the discussion of these rules in the Australian context in John Halligan, Bryan Horrigan, and Geoffrey Nicoll, “Appointments and boards”, in *Public Sector Governance in Australia*, Chapter 9 (Australian National University, 2012).

²⁵³ “MPs decide law to restrict lobbyists unnecessary in ‘village New Zealand’”, *New Zealand Herald*, 24 August 2013.

²⁵⁴ New Zealand Parliament, “Lobbying Disclosure Bill”, July 2012. www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL11278_1/lobbying-disclosure-bill

²⁵⁵ Claims have been made that direct lobbying from farmers was a driving force in the legislation passed under urgency to suspend the powers of Environment Canterbury (covered in the public sector pillar report (pillar 4)). Farmers are an important interest group for decisions on water use, but these interests should be a transparent part of the statutory decision-making process.

2.2.3 Accountability (law)²⁵⁶

To what extent are there provisions in place to ensure that members of the Cabinet have to report and be answerable for their actions?

Score: 5

The law and processes for ensuring the accountability of Cabinet and of individual ministers are comprehensive.

Ministerial accountability: All Cabinet members must be MPs, so face general elections every three years or more frequently. They are also accountable for their actions if they break the law. Under a constitutional convention, ministers are individually responsible and accountable for:

- their decisions within their portfolio responsibilities
- their own professional and personal conduct
- the decisions and actions of individuals and organisations for which they have ministerial responsibility.

On the advice of the Prime Minister, the Governor-General may dismiss a minister at any time so ministers are largely obliged to work within a Cabinet framework as determined by the Prime Minister. In this forum, ministers jointly discuss the policy that the government as a whole will pursue. Ministers who do not exercise their powers in a manner compatible with Cabinet's decision, risk losing those powers.

The *Cabinet Manual* says, "Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. On occasion, a minister may be required to account for the actions of a department when errors are made, even when the minister had no knowledge of or involvement in, those actions".²⁵⁷ Other forms of accountability include the obligation on a Responsible Minister to explain unappropriated expenditure when it is validated through a Financial Review Bill.²⁵⁸

There is an entrenched expectation that MPs, including ministers, will disclose and explain their actions. The Standing Orders of the House of Representatives list, "deliberately attempting to mislead the House or a committee" as representing contempt of the House, so it is dealt with by the Privileges Committee.²⁵⁹ The Speaker can, and often does, insist on a clear response from ministers in the House.

²⁵⁶ This section draws, in part, on an interview with Elizabeth McLeay, academic and author on New Zealand Cabinet governance.

²⁵⁷ *Cabinet Manual*, 2008: para. 3.5.

²⁵⁸ Public Finance Act 1989, section 26C.

²⁵⁹ *Standing Orders of the House of Representatives*, 2011, Standing Order 407. www.parliament.nz/en-nz/pb/rules/standing-orders

Collective responsibility: According to the *Cabinet Manual*, “The principle of collective responsibility underpins the system of Cabinet government. It reflects the democratic principle that the House expresses its confidence in the collective whole of government, rather than in individual Ministers”.²⁶⁰

Under the mixed-member proportional representation electoral system, however, the principle has been modified to allow for minority parties in coalition governments to “agree to disagree” with the majority party on specific issues. Over time, the *Cabinet Manual* has accepted the legitimacy of the agreement to differ.²⁶¹ The current National-led government has laid out its requirements for its coalition partners in a Cabinet circular that says, among other things, that “Collective responsibility applies differently in the case of support party Ministers. Support party Ministers are only bound by collective responsibility in relation to their own respective portfolios (including any specific delegated responsibilities). When support party Ministers speak about the issues in their portfolios, they speak for the government and as part of the government. When the government takes decisions within their portfolios, they must support those decisions, regardless of their personal views and whether or not they were at the meeting concerned. When support party Ministers speak about matters outside their portfolios, they may speak as political party leaders or members of Parliament rather than as Ministers, and do not necessarily support the government position”.²⁶²

As covered in the legislature pillar report, the Standing Orders require the government to articulate its policies and give account to the House in the State of the Nation address and in the debates during the examination of the Budget. MPs may ask oral and written questions of ministers and question ministers when they appear before select committees. Oral questions are a key part of the daily regime of the House. The Public Finance Act 1989 requires comprehensive information on the intentions and performance of departments and agencies under each ministerial portfolio, as well as for the government as a whole, and this contributes to their accountability both to Parliament and to the public. All government expenditure and regulation comes under the scrutiny of the Office of the Auditor-General and, in some areas, of other officers of Parliament.

Accountability is also enhanced by statutory bodies such as the Law Commission, which reviews the quality of law making, and the External Reporting Board, which sets standards for the financial reporting of government. Standing Orders also make provision for the public to witness Parliament, holding the government accountable through the public gallery, the press gallery, and the publication and broadcasting of House proceedings.

²⁶⁰ *Cabinet Manual*, 2008: para. 5.2.2.

²⁶¹ Vernon Bogador, *The Coalition and the Constitution* (UK: Hart Publishing, 2011).

²⁶² Cabinet Office, “National-led administration”, 2012.

2.2.4 Accountability (practice)

To what extent is there effective oversight of Cabinet in practice?

Score: 5

Cabinet accountability is reinforced by the incentives arising from political contestation within Parliament and by high public exposure. In practice, ministers are held to account at least for publicly visible mistakes or accidents involving organisations in their portfolios.

The decisions and actions of ministers and their departments are, in practice, reviewed by parliamentary select committees, questions in the House, royal commissions, commissions of inquiry, judicial reviews, and the offices of the Auditor-General, Ombudsmen, and Privacy Commissioner. In addition, public scrutiny of the executive is close. Where ministerial or department actions are controversial, ministers ultimately find it difficult to avoid explaining themselves to the media.

The Office of the Auditor-General has undertaken several politically sensitive inquiries. These include inquiries into negotiations with SkyCity Entertainment Group Ltd for an international convention centre, board-level governance of the Accident Compensation Corporation, and the Department of Internal Affairs management of spending that could give personal benefit to ministers. The government took such reports seriously, and there is no evidence of its trying to impede the investigations.

The consequences for ministers of errors or accidents in their department depend in practice on the risk to the government's reputation and perceptions of the minister's culpability compared with that of the chief executive. Any sanctions are determined by the Prime Minister. There is a view that if the matter is serious, the minister should resign forthwith, but in practice ministers sometimes stay on to "put things right".²⁶³ Resignation is more likely with a failure in the minister's personal integrity. Sometimes the minister resigns from Cabinet, and in other cases the minister loses the portfolio in question but retains others.²⁶⁴

The key finding is that ministers are held to account at least for publicly visible mistakes or accidents involving organisations in their portfolios. The main driver of accountability is the incentives created by political contestation within Parliament and by high public exposure. This means penalties also depend on politics.

²⁶³ The Responsible Minister at the time of the Cave Creek tragedy in 1995 stayed on as Minister for Conservation for seven months and remained in Cabinet.

²⁶⁴ A former Minister of Labour resigned from that portfolio following the release of the critical Royal Commission report on the Pike River Coal Mine tragedy, but remained as a minister in Cabinet with her other responsibilities.

2.2.5 Integrity (law)

To what extent are there mechanisms in place to ensure the integrity of Cabinet ministers?

Score: 4

The Cabinet Manual is a comprehensive “code of conduct” for ministers, and it commands high respect. However, Cabinet gives low priority to the further development of its integrity framework. Two unregulated areas of risk for the New Zealand executive are post-ministerial employment and the activities of lobbyists.

The most important formal instrument relating to the integrity of ministers is the *Cabinet Manual*. The manual has no legal status. In form it is descriptive and not prescriptive.²⁶⁵ However, in the context where the Cabinet is itself a creature of convention, the manual’s influence comes from the principles, laws, and conventions it draws together; the focus on the behaviour of ministers; and the fact each new government formally accepts its provisions. The manual has commanded the respect of successive governments and, increasingly, the wider community. As a former minister summed up, “The *Cabinet Manual* is now seen as an essential element of transparent governance”.²⁶⁶ Two decades ago the manual had very restricted distribution. It is now readily available on the internet.

The *Cabinet Manual* provides the code of conduct for ministers. It provides detailed guidance for ministers covering conduct; public duty and personal interests; gifts; fees, endorsements, and outside activities; government advertising guidelines; and ministerial travel. As MPs, ministers are required to make an annual declaration of interests, including employment business interests, shareholdings, real estate, mortgage debts, overseas travel (unless paid for personally), gifts worth over NZ\$500, and payments for outside services.

The Remuneration Authority independently determines the salaries and allowances for all MPs, including ministers.²⁶⁷ The House recently rejected, by a large cross-party majority, a bill proposing that the authority also determine MPs’ travel entitlements.²⁶⁸

The integrity of ministers is also reinforced by the Official Information Act 1982, Protected Disclosures Act 2000, and officers of Parliament.

Compared with the case in other similar developed countries, including Australia, it appears Cabinet is giving low priority to the further development of its own integrity framework. Two unregulated areas of risk for the New Zealand executive are post-ministerial employment and the activities of lobbyists. The possibility of a conflict of interest in the post-government employment of ministers can be high in small countries where business and political elites have close connections. Australia under the earlier

²⁶⁵ Interview with Diane Morcom, former Secretary of Cabinet, 14 February 2012.

²⁶⁶ Interview with Margaret Wilson, 22 January 2013.

²⁶⁷ The Remuneration Authority is a statutory body that sets pay for key office holders across the country.

²⁶⁸ Anthony Hubbard, “MPs unite to keep travel perk in-house”, *Stuff*, 10 August 2013. www.stuff.co.nz/dominion-post/news/9025221/MPs-unite-to-keep-travel-perk-in-house

Rudd government produced standards of ministerial ethics that require an 18-month moratorium before former ministers can “lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as minister in their last eighteen months in office”.²⁶⁹

2.2.6 Integrity (practice)

To what extent is the integrity of Cabinet ministers ensured in practice?

Score: 4

The Cabinet Manual’s integrity-related provisions are mainly effective in practice. There are risks in the opacity that sometimes exists in the relationship between ministers and their departments.

Periodically, breaches of the manual’s provisions attract a good deal of attention from parliamentarians and the public. Since 2000, 10 ministers have been sacked or resigned from Cabinet because of misconduct. The transgressions included conflicts of interest, misuse of public money, misleading statements to Parliament and the media, and personal misconduct.²⁷⁰ It is note-worthy that these sackings and resignations were not because of major instances of corruption. They arose mainly from cronyism, conflicts of interest, and the failure to observe administrative law and regulation in such cases. The transparency of the Cabinet context gives strong incentives to ministers to follow the *Cabinet Manual* and to resign when they fall short on judgement.

As covered in the public sector pillar report, a risk in the public management system is that individual portfolio ministers may override administrative law and convention in their role in directing the public sector. In these areas public scrutiny is not close, the formal protection of the OIA is not necessarily effective, and the Protected Disclosures Act 2000 has so far had little impact.²⁷¹ As discussed in the public sector pillar report, the Protected Disclosures Act does not meet good international standards and is another area where Cabinet integrity could be strengthened. The offence of misconduct in public office appears to be unknown in New Zealand.²⁷²

2.3.1 Legal system

To what extent does the Cabinet prioritise public accountability and the fight against corruption as a concern in the country?

Score: 4

Cabinet does not appear to assign priority to fighting corruption in New Zealand or abroad. This is a matter for concern despite the country’s international reputation for low corruption.

²⁶⁹ *Codes of Conduct in Australian and Selected Overseas Parliaments* (Canberra: Department of Parliamentary Services, 2012).

²⁷⁰ “List: Sacked or resigned ministers, *The Dominion Post*, 21 March 2012.

²⁷¹ See the public sector pillar report (pillar 4).

²⁷² See annex to public sector pillar report (pillar 4).

The legislature pillar report covers New Zealand legislation dealing with bribery, corruption, and related offences.²⁷³ A risk is that New Zealand's very good record on corruption may reduce alertness to emerging risks. The global financial crisis, regulatory failures, and the diversification of the economy and society have given rise to new risks and problems, including public safety, fraud, fiduciary failures, and tax evasion. Furthermore, New Zealand's business interests are increasingly global. The relative ease of company registration in New Zealand has been exploited for fraudulent purposes by international actors and New Zealanders.²⁷⁴

The Cabinet appears to be giving low priority to two important international treaties dealing with bribery and corruption. As covered in the legislature pillar report, despite becoming a party to the UN Convention against Corruption in 2009, the enabling legislation to meet the convention obligations has still not been passed. New Zealand signed and then ratified the OECD Anti-Bribery Convention in 2001, and the effectiveness of its implementation is being assessed by an OECD working group in 2013. One shortcoming has been the failure to substantially increase penalties for private sector bribery offences.

The low priority Cabinet assigns to fighting corruption in New Zealand or abroad is a matter for concern despite the country's high international reputation for low corruption.^{275,276} This National Integrity System assessment looks at the institutional underpinnings of integrity, as an indicator of future national performance. Traditionally, governance in New Zealand has been characterised by a low level of legal formality with the people closely engaged with the governmental process. As these characteristics change, and the globalisation of commerce is an important driver, the risks to national integrity increase.²⁷⁷

2.3.2 Public sector management (law and practice)

To what extent is the Cabinet committed to and engaged in developing a well-governed public sector?

Score: 3

The government is acting to redress a long-standing imbalance between the whole-of-government interest and the policies and activities of individual portfolio ministers and

²⁷³ The Crimes Act 1961 (which makes it an offence to bribe ministers and other high officials (and includes money laundering)), Secret Commissions Act 1910 (which criminalises the bribing of agents in the private sector), Serious Crimes Office Act 1990 and Serious Fraud Office Act 1990 (which cover fraud), and Securities Market Act 1978 (which covers insider trading and market manipulation).

²⁷⁴ The government is proposing to address this problem through the Companies and Limited Partnerships Amendment Bill, which is before the select committee on commerce.

²⁷⁵ "New Zealand tops our list of the best countries for business", *Forbes*, 14 November 2012. www.forbes.com/sites/kurtbadenhausen/2012/11/14/new-zealand-tops-list-of-the-best-countries-for-business. This list was determined by grading 141 nations on property rights, innovation, taxes, technology, corruption, freedom (personal, trade, and monetary), red tape, investor protection, and stock market performance.

²⁷⁶ Transparency International Perceived Corruption Index.

²⁷⁷ Two other small countries (Ireland and Iceland) tumbled down international Transparency International Perceived Corruption Index rankings, after the surfacing of scandals arising from underlying governance problems.

their departments. These reforms will require cross-public service policy advisory changes with new boundaries between ministers and public servants and between the Cabinet as a whole and portfolio ministers.

The laws through which Cabinet governs the public sector from a collective interest perspective are the Public Finance Act 1989, State Sector Act 1988, Crown Entities Act 2004, and State-Owned Enterprises Act 1986. Within that framework, ministers individually exercise powers over departments and agencies under portfolio-related legislation. The main characteristics of the governance of the public sector are covered in the public sector pillar report.

Cabinet is supported in its relations with the public sector by the three central agencies: DPMC, Treasury, and the State Services Commission (SSC). These agencies aim to work together as a “corporate centre” to support Cabinet decision making. DPMC supports policy leadership and coordination. Treasury advises on economic, financial, and regulatory policy for the Crown and administering the public sector in respect of the Public Finance Act and State-Owned Enterprises Act, and the use of financial powers under the Crown Entities Act. SSC appoints and employs public service chief executives, advises on public service management, administers Crown entity governance, promotes integrity across state services generally, and advises on chief executive employment in a variety of state sector agencies.²⁷⁸

The legal architecture and role of the central agencies gives ministers a framework for directing departments and holding them accountable for specified activities and the funds appropriated. Non-public service areas of the state (responsible for the bulk of public expenditure) are coherently structured with clear rules on decision rights and accountability.²⁷⁹ The budgeting, financial management, and accounting arrangements across the public sector have improved transparency and operational accountability.²⁸⁰

The key challenge for Cabinet’s governance of the public sector is striking the right balance between the whole-of-government interest and the policies and activities of individual portfolio ministers and their departments. The effectiveness of the self-regulatory nature of the original public management reform design was overestimated.²⁸¹ Over time it has been found that the political and administrative incentives that had been set up led to insufficient attention to less publicly observable collective interests such as public sector capacity, cross-departmental public service coordination, the quality of regulation, and the monitoring and evaluation of the longer-run impact of policies.²⁸²

Changing the political administrative policy interface is a central challenge if these problems are to be addressed. The Scott Report found that public service policy advice is “generally under-managed” and noted a growing unwillingness by some ministers to

²⁷⁸ Treasury website, www.treasury.govt.nz

²⁷⁹ OECD, *Distributed Governance* (Paris: OECD, 2004).

²⁸⁰ As elaborated in the public sector pillar report (pillar 4).

²⁸¹ Particularly in respect of the belief that output accountability would replace the need for process controls.

²⁸² Ryan and Gill, 2011.

seek public service advice and by some senior officials to provide it.²⁸³ The quality and coherence of policy advice is fundamental to the collective interest of government. Poor policy quality is not a single attribute, but an emergent property arising from the interaction of many factors. This matter is discussed in more detail in the public sector pillar report, but contributing factors are the lack of collective discipline around the policy process, an excessive output focus by departments, and a lack of attention to what it takes to develop and maintain key institutional competencies in policy-intensive departments.

An important step in addressing these problems is the legislation enacted in July 2013²⁸⁴ that strengthens (among other things) the legal obligation on chief executives to report on the strategic direction and capability of departments and the effectiveness of their activities. This provides specificity to the requirement on the public service for professional policy advice and independent reporting. A bill under parliamentary consideration aims to consolidate the structure of the public service, enhance coordination across state services, expand fiscal accountability (especially for the effects of policies), and provide a more focused and evidence-based outcome perspective on some critical national problems.²⁸⁵ The changes in the law will have to be accompanied by attitudinal and behavioural changes in the public service and in Cabinet. The intended emphasis on stewardship, in particular, will, to be successful, require cross-public service policy advisory changes with new boundaries between ministers and public servants and between the Cabinet as a whole and portfolio ministers.

2.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the executive do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in its field of activity? In particular, where the executive has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

Cabinet complies with the Treaty-related legal rights and obligations passed to it by the Crown.

The statement on New Zealand's constitutional arrangements that prefaces the *Cabinet Manual* says those laws and convention that make up the constitution "increasingly reflect the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand".²⁸⁶

Sir Kenneth Keith says the Treaty "may indicate limits in our polity on majority decision making. The law may sometimes accord a special recognition to Māori rights and interests such as those covered by Article 2 of the Treaty. And in many other cases the

²⁸³ Review of Expenditure on Policy Advice, 2010.

²⁸⁴ Public Finance Amendment Act 2013.

²⁸⁵ With amendments to the State Sector Act 1988, Public Finance Act 1989, and Crown Entities Act 2004.

²⁸⁶ Keith, 2008.

law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate. Policy and procedure in this area continues to evolve”.²⁸⁷

The Legal Advisory Committee advises: “The Treaty of Waitangi does not directly create rights or obligations in law except where it is given effect by legislation. It however has been judicially described as ‘part of the fabric of New Zealand society’ ... and has become a constitutional standard. Legislation is expected to comply with the principles of the Treaty ... The Government’s recognition of the need for legislation to comply with Treaty principles if possible is itself a recognition that, whatever the difficulties, the Treaty is constitutionally important and must (at the least) strongly influence the making of relevant legislation”.²⁸⁸

Cabinet Manual guidance on the development and approval of bills states, “Ministers must confirm that bills comply with certain legal principles or obligations when submitting bids for bills to be included in the legislation programme”. The first example given of such a principle or obligation is the Treaty of Waitangi.²⁸⁹

The Cabinet Committee on Treaty of Waitangi Negotiations, chaired by the Prime Minister, considers Treaty settlement negotiations and related policy issues. Cabinet and its ministers appear to accept the constitutional importance of the Treaty. A 1986 Cabinet directive is included in the current *Cabinet Manual*. Successive Cabinets have continued to be committed to the Treaty-claim settlement process.²⁹⁰

Ministers’ responsibilities on Treaty matters are as required under the legislation related to their portfolios. The legal arrangements for the management of state services do not require collective state services action related to the Treaty, although ministers have sometimes asked SSC to take Treaty-related actions.²⁹¹

Cabinet appears to be meeting its legal Treaty-related responsibilities. The public sector pillar report, in reflecting on the current efforts to strengthen the whole-of-government coherence of state services direction, suggests that reporting on public

²⁸⁷ Keith, 2008.

²⁸⁸ Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (Wellington: Ministry of Justice, updated 2012). www2.justice.govt.nz/lac/

²⁸⁹ *Cabinet Manual*, 2008: 7.19–7.76.

²⁹⁰ Cabinet, in a directive of 23 March 1986, agreed that “all future legislation referred to it at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty and Departments should consult with appropriate Māori people on significant matters affecting the application of the Treaty”. The Minister of Māori Affairs is to provide any necessary assistance in identifying those people. It also noted that “the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports”.

²⁹¹ For example, in November 2004, the government directed the State Services Commission to facilitate a series of discussions and produce a report on the place of the Treaty of Waitangi in contemporary New Zealand: State Services Commission, *A Report of the Treaty of Waitangi Community Discussions Initiative* (Wellington: State Services Commission, 2006).

sector progress in realising the goals and spirit of the Treaty might form part of an enhanced public service responsibility for policy stewardship.

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Judiciary (pillar 3)

Summary

The judiciary meets high standards of independence, integrity, and accountability. The judiciary provides a system of justice in accordance with the requirements of a legislative framework. Although the judiciary is an arm of government it operates independently of the executive. It is accountable through a system of appeals and through the Judicial Conduct Commissioner, which is an independent agency.

Several reports have reviewed the operation of the court system and the judiciary, including *Review of the Judicature Act 1908: Towards a new Courts Act*,²⁹² *Review of Public Prosecution Services*,²⁹³ *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office*,²⁹⁴ and *Follow Up Review of the Crown Law Office*,²⁹⁵ and a major restructuring occurred of the public sector, including the Ministry of Justice, which is responsible for the administration and resources of the judiciary and the courts.²⁹⁶

The Law Commission's review of the Judicature Act 1908 identified areas in need of reform, including the need for a more transparent process of appointment of High Court judges and more resources for the judiciary to be able to report independently on their activities. The government announced it will implement the recommendation to make the appointment of judges more transparent.²⁹⁷ There is no commitment, however, to increase resources to the judiciary or for the judiciary to report independently on its activities.

Although the various reviews identify areas for improvement (for example, the Ministry of Justice's engagement with stakeholders such as the judiciary is seen as weak),²⁹⁸ the reviews overall support the conclusion that New Zealand has a judiciary that has independence, integrity, and accountability. It is important to note that most of the reviews do not primarily focus on the judiciary but on the administration of justice from

²⁹² Law Commission, *Review of the Judicature Act 1908: Towards a new Courts Act*, NZLC R126 (Wellington: Law Commission, 2012).

²⁹³ John Spencer, *Review of Public Prosecution Services*, 2011. www.justice.govt.nz/publications/global-publications/p/prosecution-review/review-of-public-prosecution-services

²⁹⁴ Miriam Dean and David Cochrane, *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office* (Wellington: Crown Law Office, 2012). www.crownlaw.govt.nz/uploads/review_2012.pdf

²⁹⁵ State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Follow Up Review of the Crown Law Office* (Wellington: Crown Law Office, 2013). www.crownlaw.govt.nz/uploads/pif-crownlaw-followup.pdf

²⁹⁶ State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Formal Review of the Ministry of Justice* (Wellington: New Zealand Government, 2012). www.ssc.govt.nz/sites/all/files/pif-moj-review-july2012.pdf

²⁹⁷ Judith Collins, "100 year old court legislation in for overhaul", 17 April 2013.

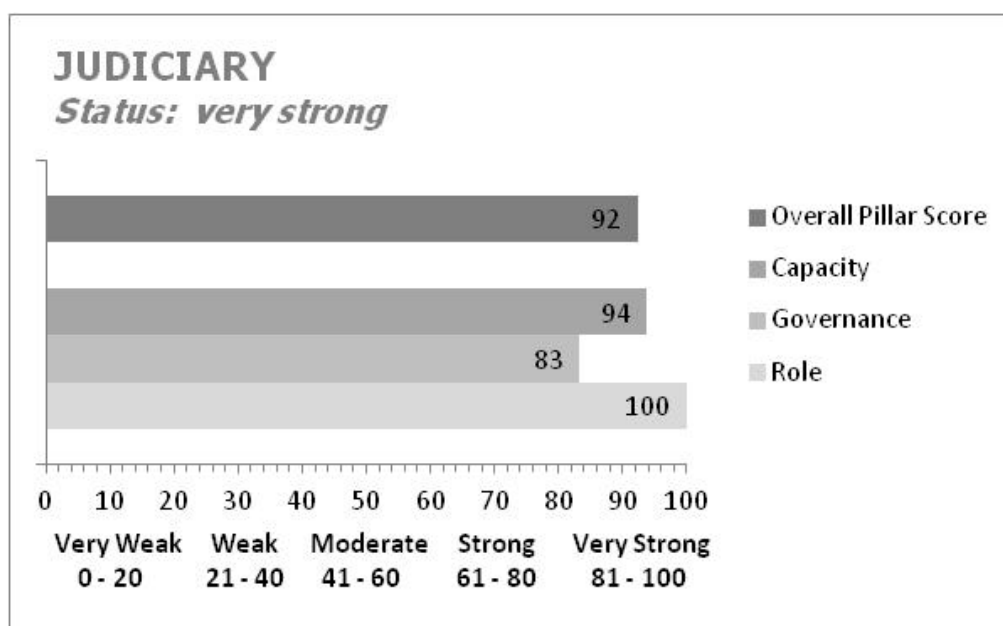
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²⁹⁸ State Services Commission et al., 2012: 19.

the perspective of value for money and customer satisfaction. This perspective is part of the Better Public Services initiative of the present government.²⁹⁹ The effects on the judiciary of the implementation of this new shift in focus will take time to become apparent, so rather than make assumptions about possible outcomes, the focus in this analysis is on the evidence available. The characterisation of the relationship between the Ministry of Justice and the judiciary as one of “partnership” has been criticised because it is seen to undermine the notion of judicial independence.³⁰⁰

The judiciary is an important check on executive decision making. It displays high standards of independence, accountability, and integrity. The court system is seen to be free of corruption and unlawful influence. There are some specific transparency issues – a lack of financial disclosure by members of the judiciary, weaknesses in public access to court information, a lack of regular reporting to the public on the activities of the judiciary (which is linked to the adequacy of administrative resources), and a need for more transparency in judicial appointments. The recommendations in Chapter 6 relating to the judiciary address these transparency requirements.

Figure 5: Judiciary scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The judiciary as a state institution plays an important role in the maintenance of and support for good governance generally and, specifically, is the institution relied on to redress abuse of executive power. The jurisdiction, independence, and accountability of the judiciary are achieved through a combination of legislation, convention, and practice.

²⁹⁹ Better Public Services Advisory Group, *Better Public Services Advisory Group Report* (Wellington: State Services Commission, 2011). www.ssc.govt.nz/sites/all/files/bps-report-nov2011_0.pdf

³⁰⁰ Justice Andrew Tipping, “Final sitting”, retirement speech, 2012. my.lawsociety.org.nz/news/justice-andrew-tippings-final-sitting-speech/Final_Sitting_Address_-_17_August_2012.pdf

There is a hierarchy of courts in New Zealand – Supreme Court, Court of Appeal, High Court, and District Court.³⁰¹ Judges appointed to the High Court are eligible for appointment to the Court of Appeal and Supreme Court. There are also specialist courts – Family Court, Youth Court,³⁰² Employment Court, Environment Court, Māori Land Court, and Courts Martial Court (and Appeal Court). Twenty-eight tribunals, authorities, and committees established by legislation hear and resolve disputes over fact and law.³⁰³ The function, powers, and jurisdiction or authority of these bodies is set out in legislation. This assessment has focused on the independence, integrity, and accountability of the judicial members of the Supreme Court, Court of Appeal, High Court, and District Court.

3.1.1 Resources (law)

To what extent are there laws seeking to ensure appropriate salaries and working conditions of the judiciary?

Score: 5

Judges have appropriate and protected salaries with working conditions in courts administered by the Ministry of Justice.

Although the Remuneration Authority determines judicial salaries, the funding of judges' remuneration and the administration of the courts is the responsibility of the Ministry of Justice. The former process accords independence to the judiciary, while the latter is subject to political priorities.³⁰⁴ The Remuneration Authority is established under the Remuneration Authority Act 1977. Decisions of the authority are published.³⁰⁵ Under the Constitution Act 1986, the salaries of judges cannot be reduced.³⁰⁶ The New Zealand judiciary, unlike the Australian judiciary, has no independent control over expenditure. The level of consultation or influence over judicial resources is dependent on the relationship between the Chief Executive of the Ministry of Justice and the Chief Justice. The nature of this relationship is confidential to the parties as no formal constitutional rules govern the relationship.

3.1.2 Resources (practice)

To what extent does the judiciary have adequate levels of financial resources, staffing and infrastructure to operate effectively in practice?

Score: 4

The members of the judiciary have adequate salaries. There is potential for conflict over resources as the Ministry of Justice pursues cost efficiencies.

³⁰¹ Supreme Court Act 2003, Judicature Act 1908, and District Courts Act 1947.

³⁰² Technically, the Family Court and Youth Court are divisions of the District Court.

³⁰³ Listed at www.justice.govt/tribunals.

³⁰⁴ For an understanding of the resourcing of the judiciary and the courts, see www.justice.govt.nz and Treasury, "Performance information for appropriation: Vote Courts 2012/13", in *Justice Sector: Information supporting the estimates 2012/13*, 2012. www.treasury.govt.nz/budget/2012/ise/v7/ise12-v7-pia-courts.pdf

³⁰⁵ Judicial Salaries and Allowances Determination 2012.

³⁰⁶ Constitution Act 1986, section 24.

The spending and governance of the judiciary is part of Vote Justice, which is part of the budget process. Parliament agrees the expenditure, and the Appropriations Select Committee reviews it.

The question of adequate resources in terms of salaries is linked to the ability to attract suitable candidates to serve on the judiciary, and there is no evidence of the lack of such candidates. The Judicial Salaries and Allowances Determination 2012 sets out the current salaries for the judiciary. The Chief Justice receives an annual salary of NZ\$460,000 plus an allowance of NZ\$7,900, Supreme Court judges NZ\$431,500, Court of Appeal judges \$405,000, High Court judges \$385,500, and District Court judges NZ\$293,000. The Law Society and Momentum Legal Salary Survey 2012 gives some indication of remuneration in the legal profession.³⁰⁷ For example, equity partners or directors of law firms are reported as having salaries of NZ\$40,000–2 million while barristers with over 10 years' experience receive NZ\$20,000–650,000. The income of Queen's Counsel is unavailable but it is assumed to be much higher. Although judges are normally appointed from Queen's Counsel or lawyers with over 10 years' experience, who often have an income higher than judges, there is no evidence of a lack of candidates for the appointment to the judiciary. The Remuneration Authority, which determines the salaries, takes account of the "need to achieve and maintain fair relativity with the level of remuneration received elsewhere".³⁰⁸

Resources are available to the judiciary for training and development. Changes to the system, such as the e-bench project, have had judicial input and justice officials believe the system is working well so far, although more training is required. There is no evidence of a lack of computer resources. As the courts are undergoing restructuring there is some instability of staff as new positions are created and appointments made.³⁰⁹

However, the Chief Executive of the Ministry of Justice notes in a formal review: "We need to work in partnership with the judiciary to deliver improvements in the accessibility, timeliness and predictability of justice delivered by courts and tribunals and to develop agreed, appropriate targets for these areas that are reported on publicly."³¹⁰ The lead reviewers noted: "Justice delivered by courts and tribunals needs to be accessible, timely, predictable and deliver correct outcomes according to the law. The Ministry cannot deliver on its own. Judges are constitutionally independent and decide how a case is dealt with and what is correct outcomes according to law."³¹¹ The reviewers noted the relationships between the Ministry on the one hand and the judiciary and the legal profession on the other are "difficult".³¹² The reviewers argue for

³⁰⁷ New Zealand Law Society and Momentum Consulting Group, *Law Society/Momentum Legal Salary Survey 2012*, 2012. my.lawsociety.org.nz/in-practice/practice-management/human-resources-and-remuneration/new-zealand-law-societymomentum-legal-salary-survey-2012/Law_Society_and_Momentum_Legal_Salary_Survey_2012_Report.pdf.

³⁰⁸ Explanatory memorandum, *Judicial Salaries and Allowances Determination 2012*. www.legislation.govt.nz/regulation/public/2012/0424/latest/DLM4940731.html

³⁰⁹ State Services Commission et al., 2012.

³¹⁰ State Services Commission et al., 2012: 4.

³¹¹ State Services Commission et al., 2012: 9.

³¹² State Services Commission et al., 2012: 12.

a closer “partnership” to achieve key operational targets. The next review will assess what measures have been taken to develop a closer partnership.

The concept of partnership was criticised in a speech by a retiring Supreme Court justice, Justice Tipping, who said the relationship between the Ministry and the judiciary should be one of “mutual cooperation” rather than partnership. This separation was necessary to maintain the separation and balance of powers.³¹³

The recent review of the public prosecutions service recommended the need for cost-efficient service.³¹⁴ The Crown Law Office has also been reviewed.³¹⁵ In March 2013, a follow-up review of Crown Law noted, “There has been substantial progress on organisational development since the original [Performance Improvement Framework], and high standards of legal service have been maintained”.³¹⁶ The reviewers further noted that Crown Law now faces the critical implementation period and there is a need for a better understanding and demonstration of value for money.³¹⁷ Those interviewed indicated that contracting out the Crown prosecution duties does not necessarily ensure a better service in the public interest. Also the fact lawyers working for the Public Defence Service are employees of the Ministry of Justice raises a question of the independence of public defenders in terms of their obligation to the court.

The regular future performance reviews of the Ministry of Justice and Crown Law Office will provide evidence of the impact of these changes on the administration of justice and the work of the judiciary.

A recent annual report of the Judicial Conduct Commissioner also commented on the increasing workload and the need for more resources (that subsequently have been made available) to assist with the workload.³¹⁸

3.1.3 Independence (law)

To what extent is the judiciary independent by law?

Score: 5

Judicial independence is a fundamental tenet of New Zealand law and is well protected.

New Zealand’s constitutional arrangements do not provide for a clear separation of powers. There is no written constitution as such but a collection of laws, conventions, and practices. An understanding of the absence of constitutional legislation in the sense of superior law that overrides other laws is fundamental to an understanding of the role of the judiciary in New Zealand. The sovereignty and supremacy of Parliament is a fundamental tenet of New Zealand’s constitutional arrangements. The judiciary in

³¹³ Tipping, 2012.

³¹⁴ Spencer, 2011.

³¹⁵ Dean and Cochrane, 2012.

³¹⁶ State Services Commission et al., 2013: 7.

³¹⁷ State Services Commission et al., 2013: 9.

³¹⁸ Office of the Judicial Conduct Commissioner, *Annual Report for 2011/2012*, 2012.
www.jcc.govt.nz/pdf/annual-report-11-12.pdf

New Zealand is the third arm of government, but is subject to the entrenched notion of parliamentary sovereignty. This means the judiciary interprets the law but does not make new laws.

The independence of the judiciary is primarily protected through a statutory safeguard against removal from office. First, the tenure of judges is guaranteed by provisions in the Constitution Act 1986. Section 23 of that Act provides that a judge of the High Court cannot be removed from office except by the Governor-General acting on an address of the House of Representatives on the grounds of misbehaviour or incapacity to fulfil the functions of the office. Section 24 provides that the salaries of High Court judges cannot be reduced during their commission. District Court judges may be removed from office by the Governor-General on the grounds of misbehaviour or inability under section 7 of the District Courts Act 1947. Secondly, all judges retain their appointment until the age of 70.³¹⁹ Thirdly, the Remuneration Authority, an independent statutory body, determines all judicial remuneration.³²⁰

Appointments to the High Court and higher judiciary are made by the Governor-General on the recommendation of the Attorney-General, who is a member of the executive, with the administrative process directed by the Solicitor-General. The provisions of the Judicature Act 1908 govern these appointments. The District Courts Act 1947 governs the appointment of District Court judges, who are also appointed by the Governor-General on the recommendation of the Attorney-General, but with the process directed by the Secretary for Justice (who leads the Ministry of Justice). The only statutory qualification for appointment to the judiciary is that the appointee has held a practising certificate as a barrister and solicitor for seven years. Appointment to the Māori Land Court also requires knowledge of te reo (Māori language) and tikanga (Māori law, rules, and practice) and appointments are made after consultation with the Minister of Māori Affairs.

Several conventions are designed to protect the independence of the judiciary. For example, the convention that members of Parliament and ministers of the Crown do not criticise the judiciary is incorporated within the Standing Orders of Parliament.³²¹ Judges are also accorded immunity from civil action when acting within their judicial functions.

3.1.4 Independence (practice)

To what extent does the judiciary operate without interference from the government or other actors?

Score: 5

The judiciary is free from external interference.

³¹⁹ Judicature Amendment Act 1908, section 13.

³²⁰ Remuneration Authority Act 1977.

³²¹ Standing Orders 112–114.

Codes of practice and informal understandings have evolved relating to the judicial appointment process, but concern has been expressed about the lack of transparency in appointments, at the High Court level in particular (see below).

The issue of the independence of the judiciary was raised during the process of disestablishing appeals to the Privy Council and establishing the New Zealand Supreme Court as the final court of appeal. Since the Supreme Court has heard appeals, the issue of independence has not been raised. Issues around judicial conflicts of interest and recusal attracted public attention over allegations of inadequate disclosure by Justice Wilson when sitting on the Court of Appeal in relation to his financial relationship with counsel appearing before him. Those allegations led to a complaint to the Judicial Conduct Commissioner, litigation, and, ultimately, the resignation of the judge.³²²

The relationship between the legislature and the judiciary is formally set out in the Standing Orders of the House of Representatives.³²³ These Standing Orders were recently amended because a few members of Parliament were making disparaging references to the decisions of the courts and referring to matters before the courts but not determined. If a member of Parliament wishes to refer to matters under adjudication or subject to a suppression order, the member must notify the Speaker, and the Speaker may permit reference to the matter after balancing the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes. The Speaker also takes into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government and the risk of prejudicing a matter under adjudication. The Standing Orders also clearly state a member may not use offensive language against a member of the judiciary.

There is no evidence of judges having to be removed before their retirement age of 70.³²⁴ After retirement, judges may be appointed as acting or temporary judges.³²⁵ Before such appointments are made, the New Zealand Law Society is consulted to ensure there are no quality issues. The need for some acting or temporary judges is understood as an administrative necessity, but it is not a practice that should be commonly used. The need for temporary judges arises from the statutory cap on the number of judges that can be appointed. The Judicature Act 1908 sets a limit of 55 High Court judges,³²⁶ and the District Courts Act 1947 sets a limit of 156 District Court judges.³²⁷

Judges also deal frequently with judicial review matters, and there is no evidence that the executive influences the judiciary. A current example of a high-profile case dealt with by the courts is the matter dealing with the legality of the police search warrants in

³²² For details, see *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122; [2010] 1 NZLR 76.

³²³ Standing Orders 112–114.

³²⁴ Office of the Judicial Conduct Commissioner, 2012.

³²⁵ Judicature Act 1908, sections 11 and 11A.

³²⁶ Judicature Act 1908, section 4.

³²⁷ District Courts Act 1947, s5(2).

the “Kim Dotcom case” where the Chief Judge of the High Court held that the arrest warrants were not issued in compliance with the law.³²⁸

A potential indirect threat to the independence of the judiciary may be found in the current justice policy³²⁹ that is aimed at making the whole justice system more cost efficient by changing the rules relating to civil and criminal procedure. For example, setting quotas and time limits may interfere with the rule of law and the rights of litigants if they impede access to the courts. Any serious concerns relating to the above matters should be addressed in the next performance review.

3.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the judiciary?

Score: 4

The public generally has good access to information, and access will improve with the planned extension to the Official Information Act 1982. The judiciary does not produce an annual report.

The Criminal Procedure Act 2011 provides that there is a presumption that every criminal hearing is open to the public,³³⁰ but the court, under sections 200 and 205, may grant a suppression order relating to identity or evidence if specified criteria are complied with. There has been media controversy about name suppression, and the Law Commission recently reported on the issue.³³¹ The Criminal Procedure Act 2011 incorporates the law relating to suppression.³³² For example, the fact a person seeking name suppression is well known is not a reason for the suppression of name.

The public does not have access to transcripts unless there is a good reason but all proceedings are held in public. Access to documentation of court proceedings is governed by the Criminal Proceedings (Access to Court Documents) Rules 2009 and Civil High Court Rules.^{333, 334}

The Official Information Act 1982 also provides a means to access further information not publicly available. The courts are not subject to the Act but a recent review by the Law Commission³³⁵ recommended that it be extended to the courts in respect of statistical and administrative information. In a press statement on 4 February 2013, the Minister of Justice announced that the government would progress this recommendation.

³²⁸ *Dotcom v Attorney-General* [2012] NZHC 1,494.

³²⁹ State Services Commission et al., 2012.

³³⁰ Criminal Procedure Act 2011, section 196.

³³¹ Law Commission, *Suppressing Name and Evidence*, NZLC R109, 2009.

³³² Criminal Procedure Act 2011, sections 200–204.

³³³ Civil High Court Rules, rules 3.5–3.16.

³³⁴ The government recently announced it would take steps to improve and clarify rights to access court records information: Collins, 2013.

³³⁵ Law Commission, NZLC R125, 2012.

Apart from the High Court in 2011, there has been no recent independent reporting from the judiciary on the activities of the judiciary and the court system. The Law Commission in its review of the Judicature Act 1908 sought consultation on this matter and recommended that there should be a statutory requirement on the Chief Justice to publish an annual report on the judiciary covering matters agreed between the Ministry of Justice and the Chief Justice.³³⁶ The judiciary in its submission on this matter noted such a report should not be to Parliament as the judiciary is a separate branch of government. The Law Commission agreed with this position and suggested the report should be made public but not to Parliament. One of the barriers to judicial reports is a lack of resources.

3.2.2 Transparency (practice)

To what extent does the public have access to judicial information and activities in practice?

Score: 4

The public has good access to judicial information, but there is insufficient transparency in the judicial appointment process.

Annual reports, Statements of Intent, and a variety of performance statistics are publicly available.

The public has access to judicial decisions through the Judicial Decisions Online website.³³⁷ The reasoning of the judges is in the judgment. The judiciary is conscious of the need to make their judgments accessible but there is a risk that explanation beyond the written judgment will undermine the legitimacy of the decision itself and the appeal process. Judges do participate in conferences and the Chief Justice in particular through lectures and conference papers undertakes a responsibility to explain the law.³³⁸

The Ministry of Justice website provides statistics on the work undertaken by the courts, such as number of cases, completion rates, and customer satisfaction. The statistics provide a form of transparency but they are related to government policy targets and may be characterised more in terms of compliance than transparency.³³⁹

All legislation is publicly available in hard copy and online. Specialist courts such as the Family Court provide additional information through pamphlets and forms to assist Court users. The Courts of New Zealand website also provides information about both the judiciary and the administration of the courts.³⁴⁰

³³⁶ Law Commission, NZLC R126, 2012.

³³⁷ Ministry of Justice, "Judicial decisions online". <https://forms.justice.govt.nz/jdo/Introduction.jsp>

³³⁸ Recent speeches of the Chief Justice, include Sian Elias, "Fundamentals: A constitutional conversation", Harkness Henry Lecture, University of Waikato, 2011, and Sian Elias, "Justice for one half of the human race?", address to the Canadian Chapter of the International Association of Women Judges, 2011. www.courtsofnz.govt.nz/from/speeches-and-papers

³³⁹ www.justice.govt.nz/justice-sector/statistics

³⁴⁰ www.courtsofnz.govt.nz/

Concerns have been expressed about a lack of transparency in the appointment of High Court judges and promotion of judges to appeal courts. The Law Commission³⁴¹ has recently issued a report recommending a review of the Judicature Act in which, after extensive consultation, it recommended greater statutory transparency in the appointment process.³⁴² The evidence collected by the Law Commission shows a growing consensus that more transparency is needed in the appointment and promotion of judges. A lack of transparency can affect the morale of sitting judges and those qualified for appointment as well as deterring qualified lawyers from accepting appointment. It means applicants do not know if their application was considered fairly and according to accepted criteria.

The government, after consideration of the Law Commission report, has announced an overhaul of the Judicature Act 1908 that will include “steps to improve and clarify rights to access court record information, for example, statistical information about court cases and expenditure” and “making the processes and criteria for appointing judges more transparent by requiring the judicial selection and recommendation process to be published by the Attorney-General. It did not accept the Law Commission’s recommendations as to the qualities required for an appointment or who should be consulted before the appointment is made”.³⁴³

On the other hand, there is a consensus that the two Royal Commissions of Inquiry into the Pike River Coal Mine Tragedy and the Canterbury Earthquake were conducted in an open and transparent way that enables the various responsible agencies and individuals to be held accountable.

3.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the judiciary has to report and be answerable for its actions?

Score: 4

The appeal process provides accountability for judicial decisions and the Judicial Conduct Commissioner for judicial conduct.

Accountability for judicial decisions is through the appeal process. Under the Judicature Act 1908, a judge may give a judgment in writing or orally.³⁴⁴ If it is given orally, the affected parties or their counsel must be given a reasonable opportunity to be present when judgment is given or to hear the judgement via telephone, conference call, or video link. The Supreme Court Act 2003 requires the court to give reasons for the refusal to give leave.³⁴⁵ Immunity for the judiciary does not apply for corruption and criminal offences.

³⁴¹ Law Commission, NZLC R126, 2012.

³⁴² Law Commission, NZLC R126, 2012: 57.

³⁴³ Collins, 2013.

³⁴⁴ Judicature Act 1908 schedule 2, clause 11.3.

³⁴⁵ Supreme Court Act 2003, section 16.

Members of the judiciary are held accountable for their conduct through the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The purpose of the Act is “to enhance public confidence in and to protect the impartiality of, the judiciary” by providing an independent investigation through a fair process that “recognises and protects the requirements of judicial independence and natural justice”. An independent commissioner conducts the investigation and the Office of the Judicial Conduct Commissioner produces an annual report detailing the number of complaints and the action taken.

3.2.4 Accountability (practice)

To what extent do members of the judiciary have to report and be answerable for their actions in practice?

Score: 4

The accountability process appears to be adequate in practice.

The Judicial Conduct Commissioner appears to be active and effective. For example, in 2011/12, there were 328 new complaints and 146 outstanding complaints.³⁴⁶ The most common complaint was that a decision was wrong, which falls outside the commissioner’s jurisdiction. Other complaints specified perceptions of rudeness, unfairness, inappropriate remarks, a failure to listen, a failure to take note of material, prejudice, bias, predetermination, conflicts of interest, and corruption.

The annual Judicial Conduct Commissioner’s report for 2011/12 noted that allegations of corruption are taken “especially seriously”.³⁴⁷ After investigation of the few allegations of corruptions, however, no evidence was found to support any assertion of corruption. The action the commissioner can take is to:

- dismiss the complaint or take no further action because it is outside jurisdiction (this happened to 364 complaints in 2011/12)
- refer it to the Head of Bench (8 complaints were dealt with in this way in 2011/12)
- recommend the Attorney-General appoints a judicial panel (no matters were so referred in 2011/12).

The appeal process is routinely used. There is public access to court proceedings including (with the permission of the court) the televising of court proceedings. The courts in practice endeavour to write decisions that are readily understood by the court users and often also provide press releases summarising the decision and reason for it. The media also asserts an influence on the public perception of the conduct of the judiciary.³⁴⁸

³⁴⁶ www.jcc.govt.nz/pdf/annual-report-11-12.pdf at p 5.

³⁴⁷ Office of the Judicial Conduct Commissioner, 2012: 8.

³⁴⁸ The *New Zealand Herald* ran a week of articles and commentary on the judiciary during 15–19 April 2013.

3.2.5 Integrity mechanisms (law)

To what extent are there mechanisms in place to ensure the integrity of members of the judiciary?

Score: 4

A code of judicial conduct covers judges' financial interests, but asset disclosure is not required. Integrity mechanisms will be improved when new rules and processes are put in place to govern conflicts of interest.

The expected conduct of the judiciary is extensively set out in *Guidelines for Judicial Conduct*.³⁴⁹ The Heads of Bench and the Judicial Conduct Commissioner ensure compliance with these guidelines. These guidelines cover judges' financial interests. Under the Judicature Act 1908, judges are prohibited from having outside employment or holding other offices without the permission of the Chief High Court Judge.³⁵⁰ There is a convention that judges do not appear in court once they have retired from the Bench, but they can undertake opinion work as well as arbitration and mediation work. Judges also do not undertake other paid work while appointed to the Bench.

A member's bill (non-government bill) before Parliament provides for the disclosure of judges' assets.³⁵¹ The Law Commission considered whether there should be such a legal requirement and recommended against legislation.³⁵² However, it also recommended that if there were such a register:

- it should include sufficient detail to disclose the nature of the judges' interests (subject to privacy interests)
- a person in the office of or nominated by the Chief Justice should compile and maintain it
- a fair and accurate summary of the information should be published
- the information should be publicly available on the Courts of New Zealand website.

It has been argued that the provisions of the bill would be a disincentive for experienced practitioners to undertake appointment as it would be an invasion of their privacy.³⁵³

It is a criminal offence to bribe or offer to bribe a judicial officer or for a judicial officer to accept a bribe.³⁵⁴

The Law Commission also reviewed the issue of judicial conflict of interest and when judges should recuse themselves.³⁵⁵ The Law Commission expressed the view that the

³⁴⁹ *Guidelines for Judicial Conduct* (Courts of New Zealand, approved in 2003, reviewed last in March 2013). www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct [accessed 1 June 2011].

³⁵⁰ Judicature Act 1908, section 4(2A).

³⁵¹ Register of Pecuniary Interests of Judges Bill 2010.

³⁵² Law Commission, NZLC R126, 2012.

³⁵³ The government has announced it will not support a register of judges' pecuniary interests: "Appendix 1", *Government Response to the Law Commission's Report*, 2013.

³⁵⁴ Crimes Act 1961, sections 100 and 101.

substantive law relating to recusal as decided in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*³⁵⁶ – a case that arose from an allegation of conflict of interest against a Court of Appeal judge – was consistent with other Commonwealth jurisdictions. It found, however, a lack of clarity in the process whereby a judge should be subject to recusal. It, therefore, recommended that there should be a statutory requirement for the Heads of Bench, in consultation with the Chief Justice, to develop clear rules and processes for recusal in their courts, based on a common set of principles developed by the judges. Any rules and process should be published in the *New Zealand Gazette* and on the internet. The government has accepted this recommendation.³⁵⁷

3.2.6 Integrity mechanisms (practice)

To what extent is the integrity of members of the judiciary ensured in practice?

Score: 4

There has been no serious questioning of the integrity of the judiciary and practice appears to be consistent with the law.

The Institute of Judicial Studies³⁵⁸ was established in 1998 and is administered by the Judiciary in partnership with the Ministry of Justice. The institute's objective is to support the development of judges in best practice. It asserts its independence as the guiding principle for managing and developing the education programmes and resources of the institute.

3.3.1 Executive oversight

To what extent does the judiciary provide effective oversight of the executive?

Score: 5

The judiciary is highly effective in providing oversight of the executive.

The primary oversight by the judiciary of the executive is through judicial review. Actions of ministers and public bodies exercising decision-making power are subject to judicial review by the High Court of the process, but generally not of the decision itself. The rationale for this judicial oversight is that public bodies should act according to the law, and it is a means by which those exercising public power are held accountable. A recent review of judicial review in the New Zealand context demonstrates it is a much-used remedy.³⁵⁹ The courts will not interfere with the right of the executive to make policy decisions, but will ensure any decision made by the executive is made in accordance with the law. In a 1996 Wellington City Council case, the Court of Appeal

³⁵⁵ Law Commission, *Review of the Judicature Act 1908: Towards a new Courts Act*, NZLC R 126 (Wellington: Law Commission, 2012), pp. 58–72.

³⁵⁶ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35.

³⁵⁷ *Government Response to Law Commission Report*, 2013.

³⁵⁹ Jenny Cassle and Dean Knight, *The Scope of Judicial Review: Who and what may be reviewed*, NZLS Intensive – Administrative Law, 2008. www.vuw.ac.nz

said, “[t]here are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene”.³⁶⁰

In that case, the court found that rating requires the exercise of political judgment by the elected representatives of the community and that this was not one of those extreme cases meeting the stringent test for impugning the rating determinations. In the 2012 case *Atkinson v Ministry of Health*,³⁶¹ the Court of Appeal held that the government’s policy not to reimburse parents for the care of their adult children with disabilities was discriminatory on the grounds of family status under the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. These two cases, although involving different issues, demonstrate a shift in the approach of the courts to government policy. There appears to be a greater willingness to review that policy to ensure it is consistent with the law, especially on issues of human rights.

The relationship between the executive and the judiciary is set out in the *Cabinet Manual*.³⁶² The Attorney-General is the link between the judiciary and the executive government. Members of the executive must exercise judgement when commenting on judicial decisions whether generally or in relation to a specific matter. No view should be expressed that adversely comments on the impartiality, personal views, or ability of any judge. If there is such a concern, the minister should contact the Attorney-General. Ministers also must not involve themselves in the decision whether to prosecute a person. The Attorney-General from time to time will remind ministers of the protocol not to criticise the judiciary.

Members of the executive are subject to judicial review and may be called to give evidence or produce documents. Ministers are not immune from civil or criminal proceedings. There is no evidence of the judiciary being intimidated by the executive.³⁶³ A website set up recently, Judge the Judges, cites no cases of executive direction to the judiciary.³⁶⁴

3.3.2 Corruption prosecution

To what extent is the judiciary committed to fighting corruption through prosecution and other activities?

Score: Not scored

The judiciary does not have a role in decisions to prosecute.

³⁶⁰ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537

³⁶¹ *Atkinson v Ministry of Health* [2012] NZCA 184.

³⁶² *Cabinet Manual*, 2008: paras 4.12–4.15.

³⁶³ Office of the Judicial Conduct Commissioner, 2012.

³⁶⁴ www.judgethejudges.co.nz

The New Zealand legal system is a common law system, and judges play no part in decisions to prosecute or not to prosecute for offences. A judge may decide in the course of legal proceedings that there is no case for the defendant to answer, but there has never been any suggestion that this power has been used corruptly.

There is no evidence the members of the judiciary do not conduct the corruption cases that come before them according to the rule of law. Corruption cases have not involved members of the judiciary but members of the public.

Constitutionally, the Attorney-General is responsible through Parliament to the citizens of New Zealand for all public prosecutions and the prosecution system in general. The constitutional convention is that the Solicitor-General, a public official, exercises this responsibility to ensure there is no political interference with prosecutions. The Solicitor-General provides general oversight of the prosecution system through the Prosecution Guidelines³⁶⁵ that are issued by the Attorney-General and Solicitor-General.

3.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the judiciary do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? Where the judiciary have legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

Although the Treaty of Waitangi is not enforceable, the judiciary recognises its constitutional status. The Waitangi Tribunal has been established to consider Treaty matters, but has recommendatory powers only. There is a need for more Māori judges.

The Treaty of Waitangi is not legally enforceable as a standalone Treaty.³⁶⁶ This would require an Act of Parliament specifically giving legal recognition to the Treaty. When this procedure was recommended at the time of the enactment of the New Zealand Bill of Rights Act 1990, it did not receive the support of Māori during the consultation process, so the Treaty was not incorporated into legislation.

Although the Treaty of Waitangi is not legally enforceable, the courts acknowledged its constitutional status in *New Zealand Māori Council v Attorney-General*.³⁶⁷ The provisions of the Treaty have been incorporated in many Acts of Parliament, and those provisions are subject to the normal rules of statutory interpretation. The Supreme Court Act 2003 provides that one purpose of the Act is “to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions”.³⁶⁸

³⁶⁵ Crown Law, *Prosecution Guidelines*, January 2010. www.crownlaw.govt.nz/uploads/prosecution_guidelines

³⁶⁶ Margaret Wilson, “The reconfiguration of New Zealand’s constitutional institutions: The transformation of tino rangatiratanga into political reality?”, *Waikato Law Review* vol. 5, 1997, pp. 17–34.

³⁶⁷ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 513.

³⁶⁸ Supreme Court Act 2003, section 3(a)(ii).

A separate legal regime to deal with Māori land was first enacted in the Native Land Act 1862, and the current legal regime is incorporated in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993). Te Ture Whenua Maori Act 1993 established the Māori Land Court with the primary objective to promote and assist the retention of Māori land and general land owned by Māori, and the effective management, use, and development of that land. The decisions of the court are enforceable.

The Treaty of Waitangi Act 1975 was enacted “to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendation on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty”.³⁶⁹ The decisions of the tribunal are recommendatory only, and this has been criticised because the government may choose not implement the recommendations.

There has also been a move to Rangatahi (Youth) Courts on marae as a means to address offending by Māori youth in a culturally appropriate way. There has been recent publicity critical of the lack of Māori judges to serve on these courts, and the Attorney-General acknowledged more Māori appointments were needed.

The Institute of Judicial Studies is responsible for the professional development of judges and for fostering an awareness of developments in the law and judicial administration. In its 2010–2015 strategic plan, there is included an awareness of the promotion of the Treaty of Waitangi in the context of New Zealand’s conditions, history, and traditions.³⁷⁰ The judiciary has been conscious of the need to ensure Māori are well represented among court officials. Māori is an official language of New Zealand so there is a right to speak and be represented in te reo (Māori language). The need to ensure the judiciary reflects the diversity of New Zealand society, including Māori, is recognised in the recommendations in the Law Commission report on the review of the Judicature Act 1908 that the criteria for appointment to the judiciary should include “social awareness of and sensitivity to tikanga Māori [law, rules, and practice]”.³⁷¹ The government has not accepted this recommendation.

The number of Māori appointed to the District Court has increased, and some Māori District Court judges are leaders in their field, but only three High Court judges have acknowledged Māori heritage. It is difficult to find the number of Māori judges but the New Zealand Law Society notes that Māori are 5.4 per cent of the lawyer population. Since Māori have only relatively recently entered the legal profession in any numbers and given that the qualifying period is a minimum of seven years for appointment, it may take some time for the number of Māori judges to increase.

³⁶⁹ Treaty of Waitangi Act 1975, Long Title.

³⁷⁰ Institute of Judicial Studies, *Strategic Plan 1 July 2010 – 30 June 2015*, 2011. www.ijs.govt.nz/strategic_plan

³⁷¹ Law Commission, NZLC R126, 2012: 57

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Public sector (pillar 4)

Summary

The “public sector” covers the public service, Crown entities, and local government as separate governance subsystems and as components of the national public sector system.³⁷² The National Integrity System is assessed for its effectiveness in containing corruption and promoting ethical behaviour and in safeguarding other governance values.³⁷³

Public sector institutions contribute to New Zealand’s low level of corruption against each integrity dimension. Important integrity underpinnings are:

- a national culture that strongly supports adherence to the rule of law with, in general, a high congruence between what the laws say and actual practice³⁷⁴
- sophisticated and comprehensive approaches to transparency and accountability, including central bank independence and public sector financial management
- operational accountability integrated into the fabric of public management processes rather than treated as an afterthought³⁷⁵
- coherence across public sector governance frameworks covering state-owned enterprises, monetary policy, fiscal policy, and central and local government and their autonomous agencies.

Low corruption is important to, but by no means the only element in, good public sector governance. New Zealand has a powerful executive with comparatively weak formal checks and balances, and this report highlights emerging governance challenges in the making of policy and regulation, the relationship between ministers and officials, and the relationship between central government and local government. The main findings in this assessment relate to resourcing, independence, transparency, accountability, public procurement, integrity systems, integrity promotion, and the public sector reform programme.

Resourcing: The systems for resourcing public sector organisations are adequate. Output-based budgeting and reporting provides reliable information on the cost and volume of services.³⁷⁶ Two systemic factors can contribute to the under-funding of

³⁷² The “public sector” includes the state services (entities that serve as instruments of the executive branch of government, and also local government, sub-national governance entities that exercise their powers under statute. This report does not cover state-owned enterprises or statutory bodies outside the executive such as the Reserve Bank of New Zealand. It is hoped that after this National Integrity System assessment, a separate assessment will be undertaken of state-owned enterprises against international standards such as OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD, 2005).

³⁷³ In keeping with the wider definition of integrity adopted for the New Zealand National Integrity System.

³⁷⁴ For example, after the Christchurch earthquakes public concern focused on the adequacy of building standards. Compliance with existing standards (with one or two tragic exceptions) has not been an issue.

³⁷⁵ Allen Schick, *The Spirit of Reform: Managing the New Zealand state sector in a time of change* (Wellington: State Services Commission, 1996).

³⁷⁶ This judgement on the resourcing system does not preclude that individual entities may be under-resourced.

services: insufficient information on the results of policies and a regulatory interface between central and local government that risks distorting local resource allocation.³⁷⁷

Independence: The public sector is not improperly influenced by other branches of the state or by non-governmental institutions. Public services are delivered without party-political bias. Public servants are seen as non-political actors. Well-institutionalised rules and conventions maintain public sector political neutrality around general elections.

The conventions for relationships between ministers and departments in respect of independent policy advice and major decisions on departmental management lack clarity.³⁷⁸ Some decisions by central government on local governance leave unclear the place of local democracy in the country's governance. Some decisions on Crown entity board appointments have left room for doubt that the principle of Crown Entities' arm's length relationship with government has been respected.³⁷⁹

Transparency: The Official Information Act 1982 (OIA)³⁸⁰ combined with the Public Finance Act 1989, generally accepted accounting principles, the Reserve Bank of New Zealand Act 1989, and good financial management control make the New Zealand public sector one of the world's most transparent.³⁸¹ This institutional assessment generally confirmed this high standing. Transparency shortcomings were, however, found in meeting international good practice standards for national environmental reporting.³⁸² There have also been important systemic shortcomings across government in the reporting on the impact of policies.³⁸³

Accountability: Accountability relationships within the public sector, among agencies, departments, and their ministers, are clear at the operational level. There is a strong legal framework for the executive's accountability to the legislature. A variety of laws and processes all contribute in practice to public sector accountability for management and activities.³⁸⁴ Legislation for local government and for the management of natural resources provides for the direct engagement of and accountability to local communities. School boards are locally elected from among students' parents.

³⁷⁷ Productivity Commission, *Towards Better Local Regulation* (Wellington: New Zealand Productivity Commission, 2013).

³⁷⁸ Review of Expenditure on Policy Advice, *Improving the Quality and Value of Policy Advice: Findings of the committee appointed by the government to review expenditure on policy advice* (Wellington: Treasury, 2010) (often called the "Scott Report"). The review was chaired by former Secretary to the Treasury Dr Graham Scott. The other team members were former Secretary of the Department of Human Services in Victoria, Australia, Patricia Faulkner and Commerce Commission member Pat Duignan.

³⁷⁹ See the independence section of this pillar report.

³⁸⁰ One of the earliest countries to do so and with a scope that covers Cabinet papers.

³⁸¹ Open Budget Index 2011

³⁸² Parliamentary Commissioner for the Environment, *How Clean is New Zealand? Measuring and reporting on the health of our environment*, 2010.

³⁸³ The government released a discussion document in 2013 concerning a proposal for a new bill to improve nation-level state of the environment reporting and improve some of the environment statistics that underpin it: Ministry for the Environment, "Release of discussion document: Proposed Environmental Reporting Bill", Cabinet Economic Growth and Infrastructure Committee, March 2013.

³⁸⁴ The OIA, citizens' surveys, the chief executive management process, the financial management and accounting system, departmental and agency Performance Improvement Framework reports, and reviews of regulatory regimes.

The executive's accountability for the impact of policies is not well institutionalised. Project and programme evaluation occurs in some sectors, but the public management system does not demand that major policies be independently monitored and evaluated. This exposes the government and the public to the risk that policy failures are not recognised and corrected.³⁸⁵ The public has been particularly at risk from the lack of accountability for regulatory policies.

Public procurement principles: Public procurement principles reflect international good practice and the process appears to be working well in general. Faults identified in oversight reports usually relate to relatively marginal issues of process. However, there are shortcomings in information and transparency on what may be the full state of affairs because, in a highly decentralised system by international standards, systematic procurement records are not readily available within departments and agencies. Public procurement has improved since the 2003 National Integrity System assessment, but risks arise from the capability of staff, especially in smaller entities; passive oversight with reliance on targeted discovery through the OIA, select committee mechanisms, and entity-level *ex post* audits; and the potential for conflicts of interest in a small market. The country's exposure to procurement corruption is increasing with the changing geography of its trade and purchasing patterns and increasing off-shore procurement.

Integrity systems: Integrity systems in departments and agencies for the control of corruption and promotion of ethical conduct are sound, and the evidence is that, in general, public sector staff act with integrity. Surveys of integrity and conduct (by the State Services Commission) and of fraud awareness, detection, and prevention (Office of the Auditor-General) show good results overall. Management control in some departments and agencies does not appear to be adequate for assuring internal processes for administrative justice.³⁸⁶

Integrity promotion: The departments and agencies involved are active in fighting corruption and promoting integrity. Those involved in international trade provide information and advice to the business community on New Zealand's international anti-bribery and corruption obligations.^{387, 388} New Zealand signed and ratified the OECD Anti-Bribery Convention (2001).³⁸⁹ Key issues are the need to increase penalties for private sector bribery offences and the ratification and implementation of the UN Convention against Corruption (UNCAC).

Public sector reform programme: The government has launched ambitious reforms to better protect the public interest in the managerial problem areas identified. Many of these problems are institutionally embedded, and earlier attempts to solve them have

³⁸⁵ The Public Finance (Fiscal Responsibility) Amendment Bill may rectify this.

³⁸⁶ Protection of private information, integrity of complaint and dispute settlement procedures, and responsiveness to the OIA and Protected Disclosures Act 2000.

³⁸⁷ The Serious Fraud Office, Ministry of Justice, Office of the Auditor-General, and SSC.

³⁸⁸ The Ministry of Foreign Affairs and Trade and the New Zealand Export Credit Office provide high-level advice on their websites.

³⁸⁹ The effectiveness of its implementation is being assessed by an OECD working group undertaking a phase 3 evaluation.

proven unsustainable. The lesson from the past is that success requires a multi-faceted systemic approach and should be regularly evaluated.

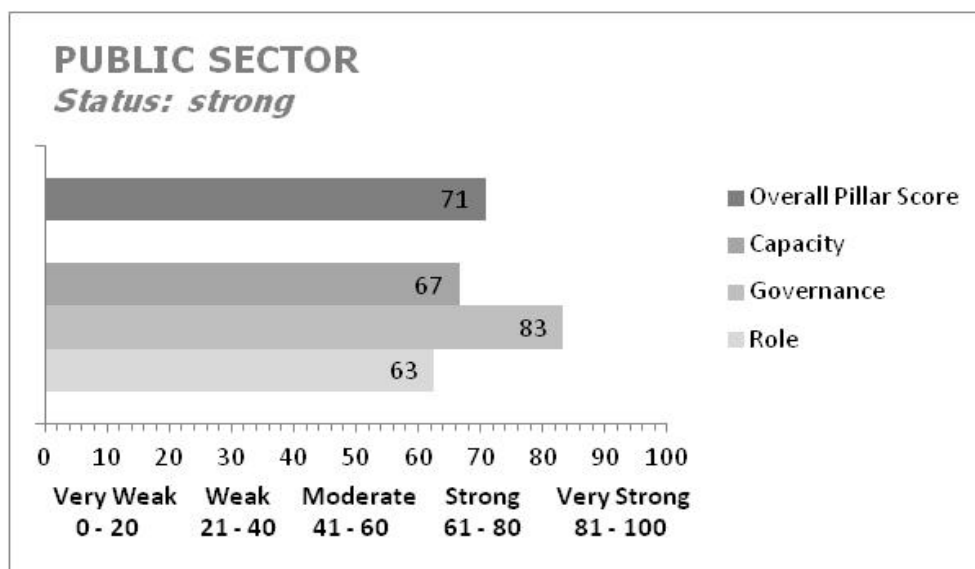
The policy advisory responsibility of the public service is an important underpinning of public sector integrity. The move to enhance the stewardship responsibility of the public service is a positive development. The desired outcome of a more capable and professional public service advisory cadre will also require active support from ministers and Parliament.

The variety of institutions and processes covered in this pillar report is extensive. At a general level, the institutional and governance arrangements strongly support ethical behaviour, suppress corruption, and promote transparency and high levels of accountability. There are, however, pressures (including governance arrangements that have promoted fragmentation) on the capacity of the public service to provide free and frank advice and to assure high-quality regulatory processes. Information on the impact of policies is insufficient, and the role of local government is variable. At a practical level, there has been resistance to the obligations established by the OIA. While procurement processes have improved considerably, specific enhancements are still needed. The public sector has been helpful in promoting integrity among exporters, but could do more to encourage integrity-focused education and training in wider civil society.

Some of the recommendations that would fall to the public sector to implement arise from the analysis in other pillar reports, for example those relating to providing more civics education and establishing registers that record the owners or beneficiaries of companies and trusts. The recommendations in Chapter 6 that flow directly from this pillar report include developing strategies to enhance evidence-based policy making and evaluate the effects of policies and departmental restructuring, initiating or improving reports on social and environmental outcomes and fiscal matters, getting a more firmly embedded role for local government, and improving transparency and capability in procurement processes.

Three broader sets of recommendations draw together many of the threads in this report, and both ministers and the public service will need to drive them. These are recommendations for a national anti-corruption strategy (see the law enforcement pillar report), the development of an Open Government Partnership plan using a consultative process, and further research and evaluation.

Figure 6: Public sector scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

In major reforms in the 1980s, New Zealand’s “machinery of government” was transformed at both national and local levels. Large departments were broken up into smaller more-focused departments, policy functions were separated from delivery functions, some non-commercial public functions were corporatised under government-appointed boards, statutory regulators were created, and the commercial operations of government were sold off or corporatised in state-owned enterprises. An integrated set of laws with the Public Finance Act 1989 as its centrepiece drove fundamental changes in fiscal transparency and management. The reforms aimed to reduce regulatory burdens (or transaction costs) within state services and in society at large. Top-down restrictive regulation was replaced by “self-regulatory” design features. In the public service, the specification and reporting of outputs for each department and the accountability of chief executives were seen as replacing much central process control – so too was the use of statutory boards for many public sector functions.

These reforms, combined with an output-based budgeting and reporting system, enhanced transparency, efficiency, and accountability for departmental activities. However, beginning with a review by Allen Schick, a growing number of internal and external commentators concluded that the deep incentives for chief executives to attend to departmental outputs came at the expense of whole cross-governmental effectiveness and due attention to the impact of policies.^{390, 391, 392} In the subsequent 15 years, central agencies launched several efforts to retrofit a stronger culture of

³⁹⁰ Schick, 1996.

³⁹¹ Particularly government reports on “Managing for Outcomes” and “Review of the Centre”.

³⁹² Ed Campos and Sanjay Pradhan, *Budgetary Institutions and Expenditure Outcomes: Binding Governments to Fiscal Performance* (World Bank, 1999) (an early critique that the New Zealand emphasis on technical efficiency and aggregate control was at the expense of allocative efficiency – the capacity to identify and fund new priorities).

collective endeavour across the public service, but these did not produce sustainable change. Current government initiatives are described below.

Public service

The public service comprises 29 departments.³⁹³ The management of the core public service is decentralised. In the late 1980s traditional permanent secretaries were replaced by chief executives with wide responsibility and authority for department management, including for organisation and personnel. These chief executives have a performance agreement with their minister and a limited-term employment contract with the State Services Commissioner. Ministers are forbidden by law to become involved in departmental staffing matters.

Crown entities

The Crown entities covered in this assessment are as defined in the Crown Entities Act 2004. They are established by Acts of Parliament and are legal entities in their own right that the Crown owns.³⁹⁴ The assigning of functions or activities to a Crown entity indicates that they should be carried out at arm's length from the government. Crown entities spend about two-thirds of current and capital spending and one-third of total Crown expenses.³⁹⁵ District health boards, school boards of trustees, universities and polytechnics, and organisations such as the Privacy Commission, the Accident Compensation Corporation, and Radio New Zealand are Crown entities.³⁹⁶

Crown entity boards are accountable to a Responsible Minister, who is assisted by a monitoring department, and to Parliament. Boards have powers similar to those of boards of private enterprises and appoint chief executives. While ministers appoint most Crown entity boards, some are a mix of elected representatives and ministerial appointees. School boards of trustees are elected by the school communities they serve.

Local government

Local government reforms in 1989 fundamentally changed local government governance, management, and services.³⁹⁷ Further reforms in 2002 required councils to undertake participatory longer-term planning for their communities' desired outcomes, including sustainable development.³⁹⁸ Councils have statutory duties and authority to undertake their functions and to secure revenue through a variety of rating

³⁹³ State Sector Act 1988: Schedule 1.

³⁹⁴ Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008). www.cabinetmanual.cabinetoffice.govt.nz/3.28

³⁹⁵ State Services Commission, "Crown entities: Balancing independence and risk", updated 28 June 2010. www.ssc.govt.nz/node/1314

³⁹⁶ *Cabinet Manual*, 2008: para. 3.28.

³⁹⁷ The 1989 reforms reduced 691 multi-function and special purpose local authorities to 86 new councils encompassing regional and territorial (city and district) councils. In 2010 the number of councils was further reduced to 78 when the new Auckland Council replaced former city councils and the regional council.

³⁹⁸ The Local Government Act 2002, Local Government Electoral Act 2001, and Local Government Rating Act 2002 have the explicit joint purposes of enhancing local government's responsiveness to community needs and its accountability to those communities.

and charging mechanisms. They are legally required to be financially prudent. By international standards, local government in New Zealand has a narrow range of functions and low central government financing (on average, 9 per cent of operating revenue).

Recent developments

In April 2011, the government responded to concerns about public service policy advice with a suite of priority actions aimed at sustained improvement in the quality and management of policy. Actions included producing better financial and management information to drive value for money and efficiency; improving the leadership and management of policy advice within agencies; and driving stronger central agency stewardship of the state sector to support cross-agency collaboration, performance improvement, capability building, and a focus on medium- and longer-term policy challenges.^{399, 400}

These priorities informed existing and new central agency programmes, some of which have culminated in the major public sector reform programme Better Public Services, which recently amended the Public Finance Act 1989 and State Sector Act 1988.^{401, 402} Key goals of Better Public Services are to reallocate decision-rights, so ministers, supported by the central agencies (the State Services Commission, Treasury, and the Department of the Prime Minister and Cabinet) are better able to act strategically across the public sector and to use public sector resources more efficiently from a whole-of-government perspective.^{403, 404}

In a supportive initiative, the three central agencies are driving the Performance Improvement Framework under which external consultants (including former senior public servants) are contracted to work with individual departments and agencies to report against a “mixed scorecard” questionnaire, covering results (responsiveness to government priorities and the efficiency and effectiveness of core business) and organisational management.⁴⁰⁵ The Performance Improvement Framework review is

³⁹⁹ New Zealand Government, *Summary of the Government Response to the Review of Expenditure on Policy Advice*, April 2011. www.treasury.govt.nz/statesector/policyexpenditurereview/summ-repa-apr11.pdf

⁴⁰⁰ Review of Expenditure on Policy Advice, 2010.

⁴⁰¹ Better Public Services Advisory Group, *Better Public Services Advisory Group Report* (New Zealand Government, 2011).

⁴⁰² State Sector Amendment Act 2013 and Public Finance Amendment Act 2013.

⁴⁰³ The programme aims to enhance customer feedback, and make better use of private sector services. It has measurable and time-bound outcome targets in 10 high-priority cross-cutting areas. The legislative proposals include a greater range of organisational options (including operational agencies with their own minister), more meaningful information to Parliament about what state services are spending and achieving, requiring Crown entities to collaborate with other public entities, and expanded scope for government direction for Crown entities. Better Public Services requires the central agencies to work more collaboratively as the public sector’s “corporate centre”: Parliament is considering the Public Finance (Fiscal Responsibility) Amendment Bill to introduce greater transparency in relation to priorities for resource allocation, the interaction between fiscal and monetary policy, inter-generational impacts, and the consistency of past fiscal policy with fiscal strategy.

⁴⁰⁴ Territorial local authorities were not covered in *Better Public Services Advisory Group Report* (Better Public Services Advisory Group, 2011), yet the Productivity Commission found that local governments have responsibility for implementing 30 pieces of primary legislation, which is overwhelming their capacity and interfering with local priority setting: Productivity Commission: 2013.

⁴⁰⁵ State Services Commission, Treasury, and Department of the Prime Minister and Cabinet.

identifying management problems, enhancing cross-government learning, and supporting interdepartmental cooperation. Since the framework was piloted in 2009, most government departments have been reviewed and reviews of Crown entities have started.

The main goal of Better Public Services is to shift the locus of management attention away from individual agencies towards the goals and interests of government as a single enterprise. The proposed combination of legal, structural, and regulatory measures has the potential to change the dynamics of the public management system. Success will require ministers to accept a higher level of cross-portfolio leadership and central agencies and departments to develop the processes and culture necessary for sustained matrix management across the government agenda. These are challenging goals, and, as with any major regulatory reform in a complex area, the consequences are uncertain.⁴⁰⁶

Regulatory governance has become more important as the economy has become more complex. Government interventions rely increasingly on influencing independent actors, rather than on direct government action. Big changes have occurred in the scope of regulation, as markets have become global and in the design of regulation to minimise the perceived “dead weight” costs of compliance imposed on those regulated. The public sector reforms of the 1980s and 1990s can be viewed, in retrospect, as a regulatory revolution. New approaches to regulation, whether for health and safety, building standards, financial institutions, or the machinery of government, relied heavily on self-regulation and allowing those regulated to find the best way to reach regulatory goals.

Until 2010, the main means for ensuring the quality of regulation was a *Cabinet Manual* requirement that Cabinet papers with regulatory implications be accompanied by a regulatory impact statement. In 2009, ministerial approval was obtained for a regulatory impact analysis framework, which has been the basis for an ongoing Treasury programme of risk assessment of the main regulatory regimes across government. As of April 2013, Treasury obtained ministerial approval for “Initial Expectations for Regulatory Stewardship”.⁴⁰⁷

4.1.1 Resources (practice)

To what extent does the public sector have adequate resources to effectively carry out its duties?

Score: 4

The public sector has coherent systems for resourcing the public sector with the exception of central government’s transfer of regulatory responsibilities to local government. The high managerial delegation to chief executives and the scarcity of information on service impact makes it difficult to assess resource adequacy at the individual department or agency level.

⁴⁰⁶ Peter Mumford, “Best practice regulations: Setting targets and detecting vulnerabilities”, *Policy Quarterly* vol. 7(3), 2011, p. 36.

⁴⁰⁷ Treasury, “Regulation information releases”. www.treasury.govt.nz/economy/regulation/inforeleases

Public service

Public service funds are allocated and reported to Parliament on the basis of outputs and are accounted for in a way that reveals the cost of capital and commitments. This provides an information base that helps to ensure activities planned by departments are adequately resourced. Decentralised responsibilities for staff numbers and remuneration levels generally allow departments, within their overall budget, to secure the skills they need.

Resources provided to the public service appear adequate for the services agreed. The SSC commissions a survey of citizens' satisfaction of 42 frequently used public services.⁴⁰⁸ This survey, which covers services from both the public service and Crown entities, has shown a small increase in citizens' satisfaction levels since it began in 2009.⁴⁰⁹ Departmental reporting systems do not show up under-funding in particular organisations.

Whether public service resources are adequate from the perspective of impact on desired outcomes is not clear, because little policy impact evaluation is undertaken. This information gap makes it difficult to know when activities are sub-critical or being funded to no avail.

Crown entities

The Crown entity sector is diverse. A broad indication of the adequacy of Crown entity resourcing is that their financial statements show their operating costs are less than their revenue. Individually, such entities have freedom to set rates of remuneration according to market conditions in accordance with an agreed plan. They are funded in different ways, reflecting their roles and degrees of autonomy *vis-à-vis* ministerial control. Funding options include a dedicated budget appropriation, appropriation as part of a broader Vote, formula-based funding allocated from an appropriation, a mix of government and other funding, third-party fees for services, and income from services provided.

Like other agencies within the state sector, they have operated in an environment of fiscal constraint since 2008, following a sustained period of increased government funding before that. There is a general sense that services are being delivered effectively.⁴¹⁰ Board fees and Crown entity employees' wages and salaries are set within broader requirements and expectations for state sector remuneration which aim to achieve consistency in levels of remuneration and ensure reasonable use of public funds.

⁴⁰⁸ State Services Commission, "Kiwis Count survey: NZers satisfaction with public services," update August 2012.

⁴⁰⁹ The overall service quality score for public services between February and June 2012 was 72, an increase over the 2009 score of 69.

⁴¹⁰ State Services Commission, "Kiwis Count survey". www.ssc.govt.nz/kiwis-count

Local government

Strategic and annual plan provisions for resourcing local government encourage transparency and accountability. Territorial local authorities are mainly resourced from rates and other local charges. The availability of resources is subject to the ability of councils to justify and sustain their requirements. There are central-government imposed constraints on their borrowing. They have the freedom to establish their own rates of remuneration for their staff.

The overall adequacy of territorial local authority resourcing is affected not only by the local council's demands, but by the cost of discharging diverse regulatory responsibilities on behalf of central government. The Productivity Commission recently concluded that "the monitoring of local regulations is under-resourced and that this is undermining the achievement of regulatory objectives. Inquiry participants suggested that statutory timeframes are resulting in councils spending more resources on processing consents than they would otherwise consider efficient. The result is that other regulatory tasks (such as monitoring and enforcement) may receive fewer resources than necessary".⁴¹¹ The commission recommended that central and local government should agree on a protocol to govern their interaction on regulatory matters.

4.1.2 Independence (law)

To what extent is the independence of the public sector safeguarded by law?

Score: 4

Weaknesses in the professional independence of the public sector are now being addressed through new legislation on policy advice and stewardship responsibilities. There is confusion and a lack of clarity about when central government can override decisions taken by democratically elected local politicians.

Public service

The independence of the public service is safeguarded by law and legal convention. The public service is under the direction of the political executive, but it has its own professional obligations in terms of acting lawfully, acting impartially, and providing policy advice.

Public service independence serves the public interest in the continuity of the government system. Important conventions and rules guide the service during the vulnerable periods of election campaigning, a caretaker government (for delays in forming a government), and government formation. For general elections, conventions for ministers and officials protect public confidence in the democratic process by keeping the public sector running but abstaining from making decisions that might compromise the rights of an incoming government and by ensuring the public service is even-handed in its provision of information to political parties involved in forming the government.

⁴¹¹ Productivity Commission, 2013.

A more difficult area is balancing the public sector's professional independence with its obligation to serve the government of the day. Portfolio ministers' legal powers over their departments are extensive. The State Sector Act's restrictions on ministerial power over departments are precise only about the independence of chief executives in staffing decisions, and the responsibility on the State Services Commissioner to appoint chief executives. (The Executive Council has the power to decline the commissioner's recommendation in favour of a named alternative. In such a case, the decision is published in the *New Zealand Gazette*.⁴¹²)

In ministers' relations with departments, the discretion of individual ministers is limited by the law and by Cabinet discipline. The public service must serve the government of the day and in so doing it is expected to operate as a non-partisan, merit-based career service operating within the law and providing ministers with "free and frank" policy advice – alerting ministers to the possible consequences of following particular policies, whether or not such advice accords with ministers' views.⁴¹³ The *Cabinet Manual* says ministers are responsible for the direction and policies of their departments, but should not be involved in their day-to-day operations.⁴¹⁴

These legal and conventional arrangements are intended to promote the collective interest of government and to maintain the confidence of successive governments, and, in so doing, maintain public trust in government institutions over time.⁴¹⁵ In other developed countries' government systems, these values are preserved through detailed administrative law⁴¹⁶ or the oversight of the legislature.⁴¹⁷ New Zealand inherited the Westminster system in which the independence of the public service is mainly maintained by convention and culture.

Crown entities

The Crown Entities Act 2004 provides for Crown entities' independence⁴¹⁸ by focusing on the relationships between ministers, boards, and Crown entities. The framework legislation specifically addresses the interaction of Crown entities with the public, stakeholder groups, or business. It may also be covered in individual Crown entities' enabling legislation. State services Crown entities are subject to the SSC code of conduct, which sets independence requirements for interactions with these groups.⁴¹⁹ Boards of schools and tertiary education institutions have independence provisions included in the Education Act 1989.⁴²⁰

⁴¹² The government's "official newspaper" that the Department for Internal Affairs produces.

⁴¹³ Michael Wintringham, "State Services Commissioner". *Guide to the Parliament and the Government*. www.decisionmaker.co.nz/guide2005/hgw%2005/hgw_sscom_06.html#state

⁴¹⁴ *Cabinet Manual*, 2008: para. 3.5.

⁴¹⁵ The appointment of Heads of Mission and Heads of Post in the Ministry of Foreign Affairs and Trade is exempt from this provision of the Act.

⁴¹⁶ For example, Sweden (and other European countries with detailed administrative law).

⁴¹⁷ In the US system, Congress must approve the Administration's senior appointments, and the Congressional Budget Office and the General Accounting Office have statutory advisory independence.

⁴¹⁸ Crown entities' individual legislative provisions for safeguarding independence have not been examined.

⁴¹⁹ State Services Commission, *Standards of Integrity and Conduct* (Wellington: State Services Commission, 2007). www.ssc.govt.nz/sites/all/files/Code-of-conduct-StateServices.pdf

⁴²⁰ Education Act 1989, sections 75 and 161.

Legislative provisions for board appointments emphasise appointment based on merit as well as providing for diversity. In making appointments, ministers must take account of these factors.⁴²¹ A Crown entity's enabling legislation defines its board's composition.⁴²² Board structures reflect the degree of Crown entity independence – some boards require a mix of ministerial appointees and elected representatives from communities and staff groups, and school boards of trustees consist entirely of elected members. There are normally limits on the length of board members' terms.⁴²³

Local government (territorial and local authorities)

New Zealand local government's scope is not defined in a single, constitutional document.⁴²⁴ Its powers are found in numerous statutes, principally the Local Government Act 2002, Local Government (Rating) Act 2002, and Local Electoral Act 2001. Together, these Acts "provide for those spheres in which forms of local government have authority".⁴²⁵ Within its own sphere, local government has a considerable degree of independence, but no entrenched constitutional provisions protect that independence, and Parliament may alter the governing statutes by a simple majority vote.

The recently amended Local Government Act 2002 extended the minister's powers to intervene in territorial local authority affairs.⁴²⁶ The government explained that it was introducing a graduated mechanism for government assistance and intervention. The powers include requesting information; appointing a Crown review team, a Crown observer, a Crown manager, or a commissioner; and calling a local body election. Local Government New Zealand and Society of Local Government managers argued in vain that the new provisions for government intervention were unnecessary given existing legislation and external scrutiny, and given that the minister already had powers of intervention in a disaster or a failure of a local authority to perform its functions, duties, and responsibilities.

In 2010, the Minister of Local Government and Minister for the Environment promoted a law change, passed under urgency, allowing appointed commissioners to replace the elected members of Environment Canterbury, a regional council, with a view to improving its relationship with the region's 10 territorial local authorities in the context of work on a fresh-water management strategy. A further law change, also under urgency, provided for Environment Canterbury's governance arrangements to be reviewed in 2014 and for commissioner governance to be extended until 2016.⁴²⁷ These legislative actions have been controversial. There have been accusations that central government failed to uphold the rule of law and interfered because of farmer

⁴²¹ Crown Entities Act 2004, section 29.

⁴²² For example, section 94 of the Education Act 1989 (provisions for boards of trustees), section 267 of the Accident Compensation Act 2001, or section 10 of the Museum of New Zealand Te Papa Tongarewa Act 1992.

⁴²³ Crown Entities Act 2004, section 32.

⁴²⁴ Crown Entities Act 2004, section 32.

⁴²⁵ Matthew S. R. Palmer, "What is New Zealand's Constitution and who interprets it? Constitutional realism and the importance of public office-holders", *Public Law Review* vol. 17, 2006, p. 145.

⁴²⁶ The most recent amendments to the Local Government Act 2002 were through the Local Government Act 2002 Amendment Act 2012.

⁴²⁷ Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

lobby concerns about regional water management decision making.⁴²⁸ A leading constitutional lawyer described the process as “constitutionally repugnant”.⁴²⁹ He observed, “This didn’t go through any select committee consideration, no submissions and no consultation. Why should urgency be taken on a matter such as this?”.

The supplementary paper on environmental governance expresses concern about the Environment Canterbury laws in the light of the risk of central government overriding other resource decisions assigned by statute to the local government level. It also expresses concern that amendments to the Resource Management Act 1991, the administration of which has become part of councils’ democratic role, will constrain public participation and access to justice and place elements of environmental decision making beyond public access.^{430, 431, 432}

4.1.3 Independence (practice)

To what extent is the public sector free from external interference in its activities?

Score: 3

The public sector remains politically impartial, but organisational fragmentation over the last two decades has weakened the provision of professional policy advice. There are also concerns about how central government transfers regulatory responsibilities to local government.

Public service

The public service is independent in the sense that it discharges its responsibilities impartially and adheres to the rule of law. It also has a duty to provide ministers with professional policy advice without fear or favour. Some recent studies raise concern about how well this duty is being fulfilled.

The NIS assessment interviews and academic and media coverage indicate that the public service has not come under undue influence from other branches of the state or from other institutions in society. The independence of the public service seems well established. The political neutrality of public servants has rarely been an issue. Public

⁴²⁸ Human Rights Commission, *Submission to the Select Committee on Local Government and the Environment, on the Environment Canterbury Act*, 2012).

⁴²⁹ Philip Joseph, “Environment Canterbury legislation”, *New Zealand Law Journal* June 2010, p. 193.

⁴³⁰ The Resource Management Act 1991 is the centrepiece of environmental governance in New Zealand and the broad statutory framework provides for a degree of public involvement. However, potential systemic issues include ensuring all those interested or affected are aware of plan-making processes and their rights to make submissions, the skills and resources of local authorities to adopt wider participatory approaches, and the timing of planning processes and whether these limit responsiveness to participation. Also there are concerns about how much information is available to the public to allow them to be fully informed to make submissions.

⁴³¹ Ralph Chapman, Amanda Thomas, Sophie Bond, Eddie Goldberg and Chris Livesey, *Transparency International New Zealand Project: A report on New Zealand environmental governance*, supplementary paper 2 (Wellington: Transparency International New Zealand, 2013).
www.transparency.org.nz/docs/2013/Supplementary-Paper-2-Environmental-Governance.pdf

⁴³² The Resource Management Amendment Act 2013 passed into law on 27 August 2013.

service culture tends to discourage political advocacy within the work place.⁴³³ Concerns have sometimes been expressed about the role of political advisers in ministers' offices, but in practice public servants and political advisers appear to have successfully co-existed without serious instances of blurring roles.⁴³⁴

Such difficulties as there have been are in the policy advisory relationship between ministers and chief executives. In one recent case, a department failed in its advice to discharge its responsibilities under the law.⁴³⁵ There is also a solid body of evidence of public service advice falling short of good professional standards. As this report was being finalised, the Prime Minister's Chief Science Advisor, Sir Peter Gluckman, released a report on the role of evidence in public policy formation.⁴³⁶ Gluckman finds that while there is excellent practice in some parts of the public service, "some policy practitioners held the view that their primary role was to fulfil ministerial directives, rather than to provide an evidence-informed range of policy options on which ministers could develop a position".

The Scott Report in 2010 was critical of the state of the policy advisory system, noting:⁴³⁷

- a reluctance by some chief executives to bring big issues to ministerial attention
- weak leadership and management of policy development
- poor cross-government coordination
- a lack of attention to future policy needs and capacity
- a lack of experience among chief executives and senior management teams on policy content and the advisory process
- a failure to understand the particular management challenges of departments with policy intensive role.⁴³⁸

Other issues raised were the low quality of regulatory impact statements associated with draft legislation, poor public access to government-held data, limited public input to policy development, the desirability of more pre-emptive releases of information under the OIA, weak monitoring and evaluation, and the need for more published research.

⁴³³ Public Service Association, "Post-election survey of PSA members: Analysis of the questions on political neutrality", 2007.

⁴³⁴ Chris Eichbaum and David Shaw in "Revisiting political advisers and public servants in Westminster systems", *Governance* vol. 21(3), 2008, conclude "Yet empirical tests of the assumption that political advisers pose a threat to the conventions that underpin the permanent civil service in Whitehall, Canberra, Ottawa, Dublin, Wellington, and elsewhere, and its relationship with its political masters and mistresses, are few and far between".

⁴³⁵ Parliamentary Services illegally released private information on a matter of high political sensitivity.

⁴³⁶ Sir Peter Gluckman (Prime Minister's Chief Science Advisor), *Role of Evidence in Policy Formation* (Auckland: Office of the Prime Minister's Science Advisory Committee, 2011).

⁴³⁷ Review of Expenditure on Policy Advice, 2010.

⁴³⁸ See also the statement in Suzy Frankel and Debora Ryder, eds., *Recalibrating Behaviour: Smarter regulation in a changing world* (Wellington: Lexis Nexus, 2013) that "the strong impression is that over successive administrations over the past 15 years, free and frank advice has been under attack".

These are matters for serious concern. The public service's policy advisory role and capacity are crucial to maintaining public service professional independence.⁴³⁹ Building institutional competencies, knowledge, and reputation in key areas of public policy is the work of decades not years. The Scott Report considered that ministers and the public service share the blame for the poor state of policy advice.⁴⁴⁰ A Better Public Services report talks of new policy demands, but does not address the incentives for the institutional competencies required.⁴⁴¹

Some politicians appear to have an ideological (or managerial) objection to the public service's advisory role, as if that role is at odds with the government's right to govern. This has been expressed in ministers' reluctance to seek public service advice or fund its development.⁴⁴²

In New Zealand and the United Kingdom the responsibility to provide independent policy advice to ministers is described in similar terms, but operates differently. A UK observer recently highlighted the direct, hands-on role that some New Zealand ministers now take on policy matters.⁴⁴³ He characterised this as exhibiting "ministerial entrepreneurship" compared with the United Kingdom's more "deliberative" approach. This difference was highlighted when the Minister of State Services, in a speech in London, presented the New Zealand system as allowing for more direction from ministers, so a model the UK Government might benefit from emulating.⁴⁴⁴

The law and administrative process give individual portfolio ministers a powerful role in the appointment of chief executives.⁴⁴⁵ The Commissioner has a statutory obligation to ask Ministers to advise him of matters which should be taken into account in making a chief executive appointment.

In practice this means that the Commissioner asks Ministers for their views on the position and on the composition of an interview panel. Note however that this consultation with Ministers does not amount to an ability of Ministers to direct the Commissioner in the exercise of his statutory function.

When the government is trying to strengthen the public service from a collective interest perspective, it is timely to consider whether the existing chief executive selection process has been one of the drivers of fragmentation. For instance, the nature of chief executive appointments has also become an important means of effecting macro-managerial change.

⁴³⁹ An article covering covers a trans-Tasman 2013 report on the state of the public service found, "Cohesion between the cabinet and the state sector was slipping": Tracy Watkins, "Best, worst of our public service revealed", *Stuff*, 4 June 2013. www.stuff.co.nz/national/politics/8750749/Best-worst-of-our-public-service-revealed.

⁴⁴⁰ Review of Expenditure on Policy Advice, 2010.

⁴⁴¹ Better Public Services Advisory Group, 2011.

⁴⁴² Interview with Neil Walter, former public service chief executive and former chair of two Crown entity boards, 3 December 2012.

⁴⁴³ Martin Stanley, *New Zealand and UK Compared*, February 2013. www.civilservant.org.uk/nz.pdf

⁴⁴⁴ Jonathan Coleman, "Taking a results approach to delivering Better Public Services," 26 February 2013. www.beehive.govt.nz/speech/taking-results-approach-delivering-better-public-services

⁴⁴⁵ In addition to their effective veto on the commissioner's recommendation.

Under current arrangements, the policy advisory process is unclear when a portfolio minister plays a leading role in specifying that a new chief executive should be committed to fundamentally reorganising a department and its staff.^{446, 447} The structure and capability of any major policy-oriented public service department is a matter of collective interest because it has implications for coordination with other policies and affects the interests of future governments. As discussed under “Accountability”, despite the importance of machinery-of-government policy in New Zealand public sector governance, from the public perspective it lacks quality assurance, transparency, and accountability.

The Scott report, and now the Gluckman report, show that some chief executives have adapted to the implied simple principal–agent relationship with their minister, by reducing their role and capacity for policy advice. These tendencies appear more marked in New Zealand than in the United Kingdom. New Zealand ministerial–chief executive relationships are one on one whereas the UK Permanent Secretaries are more collegial and under active oversight and guidance from the head of the civil service.⁴⁴⁸ Contributing factors are that New Zealand has had many departments, some quite small, and, in contrast to the United Kingdom, has tended not to appoint new chief executives from within the department involved.⁴⁴⁹

This situation, in part, reflects New Zealand’s public service management policy. In a significant number of cases, chief executives have been appointed from outside the public service. Chief executives, especially if new in the policy area, can find themselves in a situation of co-dependency with their minister and with little capacity for independent advice. A recent Performance Improvement Framework overview finds that individual ministers tend to be happier with agencies with a weak strategy and sense of purpose.⁴⁵⁰

Another difference is that the collective interest in the quality and independence of departmental policy advice in the UK system is reinforced by intense scrutiny of senior officials by the Public Accounts Committee of the House of Commons. Any

⁴⁴⁶ In most cases of departmental restructuring, there has been a collective interest requirement for a budget and staff reduction. In principle, this does not require major structural change.

⁴⁴⁷ Restructuring (discussed below) is sometimes necessary. The integrity problem is that while restructuring has been a very heavily used tool in New Zealand’s public management, there has been no credible process of evaluating its effectiveness, so no public assurance on risks of politicisation or poor policy design.

⁴⁴⁸ Interview with Len Cook, former Chief Statistician in New Zealand and the United Kingdom, 8 March 2013: “the collegiality at the top in the [United Kingdom] is greater as a result of structurally different processes. These include the annual Sunningdale conference, an annual Cambridge visit, the Civil Service Management Board, cross government heads of profession, whole of government fast stream recruitment and weekly Permanent Secretaries meetings. The head of the Civil Service is also active in ensuring the system works, for instance in ensuring Permanent Secretaries are prepared for [Public Accounts Committee] hearings if it is their first time. There is also a lot more structured development of top level people – the cabinet office every year asked me about up and comers – that happened once in 8 years in New Zealand.”

⁴⁴⁹ Stanley, 2013, reports that only one New Zealand chief executive in seven was from within the department involved.

⁴⁵⁰ State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Core Guide 3: Getting to great – Lead reviewer insights for the from the Performance Improvement Framework* (Wellington: New Zealand Government, 2013).

shortcomings result in public criticism of the department in question. New Zealand's parliamentary scrutiny is not as well informed or independent in this regard.^{451, 452}

It appears that the fragmentation of government action that the Better Public Service reforms are designed to rectify has also unintentionally impaired the collective public interest in the independence of the policy advisory capacity of the public service.⁴⁵³ This finding suggests that if Better Public Services is to successfully strengthen departmental policy stewardship, not only will new capacities have to be built in the public sector, but portfolio ministers will have to be motivated to act more collectively.

Crown entities

Crown entities have checks and balances (boards, monitoring departments, external watchdog agencies) to protect them from external interference. Operating independently requires a fine balance, as some entities must give effect to or have regard for government policy and are subject, in some circumstances, to whole-of-government direction and to SSC integrity and conduct expectations. SSC provides guidance to monitoring departments on inducting board members and on integrity and conduct issues.⁴⁵⁴

The 2003 NIS assessment report noted public perceptions that ministerial board appointments were, in some instances, politically motivated or seeking to influence a Crown entity's independence.⁴⁵⁵ Independent research on the relations between government and boards (in this case for state-owned enterprises)⁴⁵⁶ found that two-thirds of directors considered that "the process for appointing board members is too politically influenced". Despite amendments to the appointment procedures in the State-Owned Enterprises Act 1986,⁴⁵⁷ perceptions continue that some government appointments to Crown entity boards are unduly influenced by party political factors.⁴⁵⁸

⁴⁵¹ Stanley, 2013; interview with Len Cook, former Chief Statistician in New Zealand and the United Kingdom, 8 March 2013.

⁴⁵² The legislature pillar report (pillar 1) supports recommendations to strengthen select committee scrutiny of the public sector, and recent amendments to the Public Finance Act 1989 (covered later in this report) makes the chief executive more individually accountable.

⁴⁵³ On the risk of unintentional change in constitutional arrangements, Matthew Palmer in "New Zealand constitutional culture", *New Zealand Universities Law Review* vol. 22, p. 565, 2007, says, "While I am comfortable with ... with an unwritten constitution I am very concerned that we pay attention to what it is. It may be harder to change aspects of an unwritten constitution if they exist only in implicit practices which are not articulated as 'constitutionally' important. More importantly having our constitution located in many different elements is that it is easier for those elements to change, and for some groups of people to consciously change them, without serious public discussion, or even awareness, that a change is contemplated.

⁴⁵⁴ State Services Commission, *Board Appointment and Induction Guidelines* (Wellington: State Services Commission, 2012).

⁴⁵⁵ Transparency International, *National Integrity Systems: Transparency International Country Study Report: New Zealand 2003* (Berlin: Transparency International, 2003), p. 27.

⁴⁵⁶ Richard Norman, "How should state-owned enterprises be governed?" *Public Sector* vol. 30(4), 2008, p. 37.

⁴⁵⁷ "Crown Entities and Other Bodies", State Services Commission, 1 October 2013. Crown Entities Act 2004, section 29. For reasons that are not clear, the government did not use the term "merit" in its amendments of this Act, but the terminology used is similar in meaning.

⁴⁵⁸ The following articles include appointments to boards of the Accident Compensation Corporation, New Zealand on Air, and the Health Promotion Agency. One article noted that three of seven appointees to the board of the Health Promotion Agency had close political affiliations with the National party. One appointee was the chief executive of a lobbying group the interests of which appear to conflict with those of the board:

In 2012, concerns were expressed about appointments to the boards of the Accident Compensation Commission, New Zealand on Air, and the Health Promotion Agency.⁴⁵⁹

Such controversy may be associated with only a small proportion of appointments made, but given the importance of Crown entities, and the arm's length principle on which they are founded, something is needed to convince the public that these processes are trustworthy. Many countries have addressed how to maintain public confidence in senior state sector appointments. Processes need to recognise that candidates with overt political associations may also have the skills and experience required for a particular role. The United Kingdom, after public concern about political cronyism, adopted rules devised by Lord Nolan,⁴⁶⁰ which provide for a combination of ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality.

Local government (territorial and local authorities)

The Productivity Commission⁴⁶¹ maintains that central government mistakenly treats local government as its operational arm. It concludes “the lack of effective interaction between central and local government is having a detrimental effect on New Zealand's regulatory system. The uneasy relationship between the two spheres of government is rooted in divergent views and understandings of their respective roles, obligations and accountabilities”.

The integrity issue here is not about whether central government has good reason for overriding local government decision making in these individual cases. As exemplified in the Environment Canterbury case, it is rather the apparent absence of clear and agreed principles to govern relationships between the two spheres of government in terms of the legitimacy and sustainability of local democracy. The principle in action seems to be that local government is free to take decisions – as long as central government does not disagree. This is a shaky foundation for the future, especially since the creation of the Auckland “super-city”⁴⁶² and the possibility of further local government aggregations, which could, because of their size and significance, have a greater need for some constitutional protection.

Kate Shuttleworth, “New ACC board chair gets mixed reception”, *New Zealand Herald*, 4 September 2012.

www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10831727

“Editorial: ACC culture must be more fair and open”, *New Zealand Herald*, 7 September 2012.

www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10832252

Isaac Davision, “Lobbyist appointment no conflict: Key”, *New Zealand Herald*, 25 June 2012.

www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10815422

Isaac Davision, “Nats accused of health agency cronyism”, *New Zealand Herald*, 28 June 2012.

www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10815974

Derek Cheng, “Key bats away talk of cronyism”, *New Zealand Herald*, 4 February 2012.

www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10783229

⁴⁵⁹ Shuttleworth, 2012; “Editorial: ACC culture must be more fair and open”, 2012; Davision, “Lobbyist appointment no conflict: Key”, 2012; Davision, “Nats accused of health agency cronyism”, 2012; Cheng, 2012.

⁴⁶⁰ Meredith Edwards, John Halligan, Bryan Horrigan, and Geoffrey Nicoll, *Public Governance in Australia* (Australian National University, 2012). <http://epress.anu.edu.au/titles/australia-and-new-zealand-school-of-government-anzsog-2/public-sector-governance-in-australia-2>

⁴⁶¹ Productivity Commission, 2013.

⁴⁶² A single large local authority for the Auckland region, formed by the amalgamation of 8 previous regional and local authorities

4.2.1 Transparency (law)

To what extent are there provisions in place to ensure transparency in financial, human resource and information management of the public sector?

Score: 4

The legal provisions for public sector transparency, especially fiscal transparency, have been adequate. Recent changes to the legal requirements for reporting on public sector effectiveness and stewardship should, when implemented, bring the legal framework for public sector transparency up to a high standard.

Official Information Act 1982

The Official Information Act 1982 (OIA) has been in place for 31 years. It is deeply imbedded in the administrative system, is widely complied with, and has contributed to a high public expectation of government transparency. However, the problems with the political-administrative interface appear to be impacting on the willingness of some ministers and some public sector chief executives to comply with the OIA on issues of potential political sensitivity. This is creating tension between some ministers and public servants, and in some cases public service compliance appears to the public as grudging and slow.⁴⁶³ The point has been reached that the Chief Ombudsman has announced an “own motion” investigation of the handling of OIA requests.

In 2012, the Law Commission reviewed the official information legislation and recommended a new and reformed Act (covering local government as well), OIA coverage of the administration of Parliament, the courts, and the officers of Parliament, and a new information agency or an expanded role for the Office of the Ombudsman. In March 2013, the government responded, rejecting all the major recommendations apart from extending the OIA to the administration of the courts.

Fiscal transparency

New Zealand has been a pioneer in fiscal transparency and continues to exhibit international best practice in many respects.⁴⁶⁴ It was the first country to publish a full balance sheet of the government, and the approach to mandating transparency in the Fiscal Responsibility Act 1994 (mirrored in the Local Government Act since 1996) influenced the development of international fiscal transparency standards. The success of these measures is reflected in New Zealand’s top ranking out of 100 countries in the Open Budget Index 2012.

Roles for fiscal management are clearly allocated between the executive and the legislature, central and local governments, and within the public sector. Parliament has imposed a high degree of budget transparency on local government. As noted, New Zealand ranks first in the Open Budget Index. However, global fiscal transparency

⁴⁶³ These matters are described in the Ombudsman pillar report (pillar 7).

⁴⁶⁴ Fiscal policies are government taxation, borrowing, spending, and the investment and management of public resources – sometimes referred to simply as budget transparency. In technical terms, fiscal policies are public policies implemented through the provision of non-market services, and the redistribution of income and wealth, financed primarily by taxes and other compulsory levies on non-government sectors.

standards are evolving and increasingly emphasise the importance of legislative oversight of the executive's management of fiscal policy and the need for direct public engagement to improve the quality and legitimacy of fiscal management.

Public service

The framework for public service operational financial transparency is the Public Finance Act 1989, which requires departmental plans and reports to be organised around outputs and include non-financial as well as financial measures of departmental performance. Departments routinely release corporate documents such as the Statements of Intent, briefings for the incoming minister, and annual reports. In addition, departments publish a variety of managerial and professional papers, including planning documents, statistics, evaluation and monitoring reports, articles in journals and other publications, research, regulatory or impact statements, and operational guidelines. The depth and variety of such publications varies across departments and according to their different areas of business. In general, detailed information about departments' operational decisions is not proactively made available to the public, but is usually subject to disclosure under the OIA.

In the last two or three years, central agencies have produced reports on aspects of the management and performance of government departments: Performance Improvement Framework reports led by SSC and assessments of regulatory regimes produced by Treasury. These provide a new level of transparency about public sector management and are available on departmental websites.

The effectiveness of public management policy has, as discussed below, been less transparent than other policy areas, despite being of high public interest. It is hoped that this situation will change with the recent changes to the Public Finance Act 1989,⁴⁶⁵ making chief executives directly accountable for departmental capacity and effectiveness, and the recently approved expectations for regulatory stewardship,⁴⁶⁶ which should impose a new discipline on the regulation of the public service.

Public Records Act 2005

The Public Records Act 2005 sets out information-management requirements for the public sector.⁴⁶⁷ The Act, and the record-keeping audits it prescribes, is an important part of the legal framework for public sector transparency and accountability. It supports the OIA by requiring records to be created and maintained. Under the Public Records Act, every public office and local authority must have full and accurate records of its affairs until their disposal is authorised, including records of any matter that is contracted out. The Chief Archivist acts independently and is not subject to direction from either the minister or the chief executive. Visibility of the operation of the system is provided through an annual report to Parliament on the state of record keeping in

⁴⁶⁵ Public Finance Amendment Act 2013.

⁴⁶⁶ Treasury, *Regulatory System Report 2013: Guidance for departments*, 2013.
www.treasury.govt.nz/publications/guidance/regulatory/systemreport/04.htm

⁴⁶⁷ The full scope of this Act is "the legislative, executive and judicial branches of the Government of New Zealand": Public Records Act 2005, section 4.

public offices, and a programme of independent audits of record-keeping practices, which is also reported annually to Parliament.

Crown entities

Clear provisions support Crown entities' transparency in financial, human resources, and information management. Legislation outlines how board members' fees are set. Crown entities must publish an annual report on their affairs, including content prescribed by legislation. Legislation also requires Crown entities to disclose board members' and employees' remuneration over NZ\$100,000, subject annual reports to scrutiny by the Office of the Auditor-General, have their annual report tabled in Parliament by the Responsible Minister, and report compliance in the annual report.

Crown entities are subject to information management provisions set out in the OIA, Privacy Act 1993, and Public Records Act 2005. Crown entities' actions are subject to review under the Ombudsmen Act 1975. A Crown entity may have its own independent review and appeal authority, so there are circumstances when the Ombudsmen cannot investigate a complaint.⁴⁶⁸

Local government

The Local Government Official Information and Meetings Act 1987 has, according to the recent Law Commission report on official information,⁴⁶⁹ done much to strengthen the trust of citizens in local government. Territorial local authorities share the positive characteristics of central government in terms of transparency and are, by law, comparatively more open to engagement with citizens through the requirements for local level long-term planning and the Resource Management Act 1991.

4.2.2 Transparency (practice)

To what extent are the provisions on transparency in financial, human resource and information management in the public sector effectively implemented?

Score: 4

In practice, public sector transparency is slipping behind international best practice. The quality of national reporting on the environment has been a significant area of weakness.

Fiscal transparency

A high degree of transparency exists in practice, reflected in New Zealand's top ranking out of 100 countries on the Open Budget Index 2012.⁴⁷⁰ The index measures in

⁴⁶⁸ Ombudsmen Act 1975, section 17(7)(a).

⁴⁶⁹ Law Commission, *The Public's Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012).

⁴⁷⁰ The full Open Budget Survey 2012 of New Zealand, consisting of 125 questions, together with a New Zealand country summary produced by the International Budget Partnership, is available at <http://internationalbudget.org/what-we-do/open-budget-survey/country-info/?country=nz>. The survey contains links to all the New Zealand budget documents cited.

detail the information in eight key Budget documents.⁴⁷¹ In the 2012 index, New Zealand's scores out of 100 were Pre-Budget Statement – 100, Executive's Budget Proposal – 93, Enacted Budget – 100, Citizens Budget – 67, In-Year Reports – 96, Mid-Year Review – 92, Year-End Report – 97, and Audit Report – 95.

Nevertheless, there are areas of concern in terms of disclosure of fiscal information.

- Non-financial data on performance and outcomes: Considerable scope exists to further improve the information and data in Budget and departmental documents and in fiscal reports on the expected and actual impacts and outcomes of government spending.
- Related to the point above is the need for more comprehensive, regular, and technically independent reporting and commentary on “state of the nation” environmental and social indicators.
- Transparency of tax expenditures: The tax expenditure statement needs further deepening.
- The desirability of a single, simplified “citizens’ guide” to the Budget. There is no single, short, non-technical, user-friendly guide to the annual Budget aimed at the average citizen – although much of the information that such a guide might contain is scattered across the different Budget documents.

The Open Budget Survey 2012 had an expanded focus on public participation compared with previous rounds. Also, the recently adopted High Level Principles on Fiscal Transparency, Participation and Accountability promulgated by the Global Initiative on Fiscal Transparency assert a citizen right to direct participation in public debate on fiscal policy.⁴⁷² While New Zealand has not overall been innovative in this area, the public outreach during preparation of the 2013 Long-Term Fiscal Position and of the deliberations of the Tax Working Group in 2009 are important improvements. The Open Budget Survey 2012 concluded that the strength of legislative oversight of fiscal policy in New Zealand and the level of public engagement in fiscal policy were only moderate.⁴⁷³

There is public concern about the transparency of the proposed SkyCity Entertainment Group project,⁴⁷⁴ in which a casino operator will finance the construction of a new public national convention centre in return for a relaxation of gambling regulation to allow the operator to recoup construction costs. The centre will, in effect, be financed by gamblers. Government support for a public facility is most transparently financed through some combination of compulsory taxes, rates, or user charges. The policy

⁴⁷¹ These documents contain details of where New Zealand does not achieve the top mark on specific questions in the survey. The Open Budget Index 2012 is based on data and information released up to 31 December 2011.

⁴⁷² The UN General Assembly endorsed the Global Initiative on Fiscal Transparency high-level principles in December 2012. The Global Initiative on Fiscal Transparency is a multi-stakeholder initiative lead by the International Monetary Fund, the World Bank, the International Budget Partnership, the governments of Brazil and the Philippines, and other official sector and civil society entities. The principles are available at <http://fiscaltransparency.net>

⁴⁷³ Covered in more detail in the legislature pillar report (pillar 1, section 1.3.1).

⁴⁷⁴ Office of the Auditor-General, *Inquiry into the Government's Decision to Negotiate with Sky City Entertainment Group Ltd for an International Convention Centre*, 2013.

trade-off between the social costs and benefits of gambling is best decided on its own merits, rather than by an individual operator being provided with a relaxed regulatory framework in return for providing an unrelated public benefit. This is a disguised fiscal activity that shifts the immediate cost off the government's budget. While concern has focused on the compromised public procurement process in the SkyCity project, the proposal also raises concerns from both fiscal transparency and regulatory perspectives.

No principles, objective criteria, or robust management framework are published for such "hybrid procurements" involving government contracts or arrangements with non-government entities in which regulations or other public policy settings to be applied to an individual entity are negotiated as part of the package of terms and conditions.

Public service

The OIA governs disclosure of publicly held information on request, but proactive disclosure is variable.

A step towards making more public service data and information available is the New Zealand Declaration on Open and Transparent Government that departments adopted in 2011 to monitor departments' promotion of the private sector's re-use of "high-value" public data "to grow the economy, strengthen our social and cultural fabric, and sustain our environment".⁴⁷⁵ Twenty-seven departments have so far released new kinds of information.

Similar energy needs to be applied to making public service information more proactively available in the interests of good governance. Some departments are already proactive in releasing material, but commentators such as the Ombudsmen have recommended that the public sector now be more systematic in moving towards more proactive disclosure. The Scott review recommends that "the government should be more proactive about the release of Cabinet papers, minutes and decisions. The decision to release a Cabinet paper and other material such as briefings, under the OIA, or what should be withheld, should be made at the time of writing, should be routine and, once the decision has been taken, the paper should be made publicly available, not just to the requestor".⁴⁷⁶

International development

New Zealand has signed the International Aid Transparency Initiative (IATI), and in IATI's 2012 Transparency Index, was ranked 16th out of 72 donors. This was a big improvement on its 2011 ranking of 30th. Internationally, the standard of transparency of official development assistance expenditure is not high. New Zealand's current transparency performance, though improved, is classified as "moderate". IATI has advised New Zealand to produce "a revised implementation schedule that sets out an ambitious timetable for publication to the IATI Registry in 2013, aiming for full

⁴⁷⁵ "Declaration on Open and Transparent Government", Government ICT Update, December 2012.

⁴⁷⁶ Review of Expenditure on Policy Advice, 2010.

implementation by 2015. As a first step, it could improve the existing data on its website and make it compatible with the IATI standard.

Environment policy

The Parliamentary Commissioner for the Environment reported that New Zealand lacks reliable and independent state of the environment reporting. The Ministry for the Environment has produced only two national environment reports, in 1997 and 2007.⁴⁷⁷ The commissioner criticised the 2007 report for lack of independence and for fundamental technical errors. Despite its “clean and green” marketing pitch, New Zealand is the only OECD country without a legal requirement for regular independent reporting on the state of the environment or for consistent reporting across local authorities.

In 2011/12, the government consulted on an environmental reporting bill to improve consistent, independent environmental reporting in New Zealand. At that time, the proposal in the discussion document fell short of what would be needed under the Aarhus Convention.^{478, 479} However, on 8 August 2013, the Minister for the Environment announced that legislation would be introduced that would provide for a “comprehensive synthesis [state of the environment] report covering all environmental domains” to be prepared and “released every three years”.⁴⁸⁰

Crown entities

Existing transparency provisions concerning financial, human resources, and information management in Crown entities are implemented effectively. As part of the Better Public Services programme, government expects Crown entities to disclose non-sensitive performance information more frequently on their websites. Chief executives of statutory Crown entities comply with the State Service Commissioner’s disclosure regime for expenses, gifts, and hospitality. This information is freely available on the internet.

Crown entities are subject to public information provisions. Agencies responsible for investigating complaints under these provisions publish opinions and case notes. A small number of these concern Crown entities. Processes for managing board member interests are not subject to routine external review. This places increased emphasis on

⁴⁷⁷ Parliamentary Commissioner for the Environment, 2010.

⁴⁷⁸ See the August 2011 Cabinet paper Release of discussion document www.mfe.govt.nz/publications/ser/measuring-up-environmental-reporting/cabinet-paper-11co1298-environmental-reporting-bill.pdf and Cabinet Economic Growth and Infrastructure Committee, “Proposed Environmental Reporting Bill: Release of discussion document” Cabinet minute EGI Min (11) 17/5, 11 August 2011. www.mfe.govt.nz/publications/ser/measuring-up-environmental-reporting/cabinet-minute-environmental-reporting-bill.pdf

⁴⁷⁹ The UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city of Aarhus at the 4th Ministerial Conference of the Environment for Europe process.

⁴⁸⁰ Amy Adams, “Govt to mandate three-yearly state of the environment reports”, 8 August 2013. www.beehive.govt.nz/release/govt-mandate-three-yearly-state-environment-reports.

integrity provisions and guidance for board members. Some board appointments are publicly advertised, although this is not a legislative requirement.⁴⁸¹

4.2.3 Accountability (law)

To what extent are there provisions in place to ensure that public sector employees have to report and be answerable for their actions, and how do they work in practice?

Score: 5

The legal provisions for public sector accountability are comprehensive.

In this section and the following one, accountability is addressed from two perspectives: the vertical accountability of public officials as agents to political decision makers as principals; and democratic policy accountability whereby governments are accountable to Parliament and indirectly to citizens for the impacts and consequences of the use of the powers with which they are entrusted.

The public service, Crown entities, and territorial local authorities are all subject to scrutiny by the Ombudsmen (under the official information legislation and the Ombudsmen Act 1975) and by the Office of the Auditor-General. In addition, they are subject to the Protected Disclosures Act 2000.

Public service

As covered under “transparency” above, public service officials are held accountable for performance under the Public Finance Act 1989 and State Services Act 1988. These Acts were recently amended to strengthen accountability for departmental policy stewardship, including giving more attention to effectiveness. This has been an area of systemic weakness despite New Zealand being a pioneer in the use of outcomes-focused reporting from the Reserve Bank in its role of targeting inflation⁴⁸² (used as a model for the legislation of many other countries) and in the setting of quotas for fisheries management.⁴⁸³

Crown entities

Crown entity boards are required by law to be answerable to the minister (or ministers) and through the minister to Parliament. Ministers are responsible to Parliament for overseeing and managing the Crown’s interests in and relationships with the entities within their portfolios. Boards are the primary monitor of an entity’s performance and governance. The governance of non-public service entities provides for the participation of ministers (with differing rights and restrictions) in setting strategies, requesting information, and monitoring performance. Entities also operate under

⁴⁸¹ Treasury’s Crown Organisations Management Unit has a dedicated website for board appointments: www.boardappointments.co.nz

⁴⁸² Reserve Bank of New Zealand Act 1989.

⁴⁸³ Fisheries Act 1996.

scrutiny from the Office of the Auditor-General, the Ombudsmen, and regulatory bodies as appropriate (for example, the Commerce Commission).⁴⁸⁴

The Crown Entities Act 2004 describes boards' responsibilities and role and spells out the accountability of members to the Responsible Minister for performing their duties.⁴⁸⁵ The minister can remove board members with just cause (including misconduct, an inability to perform the functions of office, neglect of duty, and breach of collective or individual duties). Dismissal of a board or board member must comply with the principles of natural justice.⁴⁸⁶

Crown entities are legally required to report to the legislature and account for their actions through Statements of Intent and annual reporting mechanisms. This system also provides for scrutiny through select committee financial reviews. Corrupt use of official information and bribery of officials are offences under the Crimes Act 1961. Boards and their members are held to account for their actions through various accountability mechanisms.

Local government

There is comprehensive legal provision for oversight by communities, ministers, and independent statutory bodies of local authorities' activities. These bodies include the Parliamentary Commissioner for the Environment, Local Government Commission, Remuneration Authority, and the Department of Internal Affairs (in a monitoring capacity).

All local authorities are audited on the basis of their performance, stewardship, and compliance. Elected members' pecuniary interests are overseen through the Local Authorities (Members' Interests) Act 1968. The government and independent authorities oversee the performance of territorial local authorities in meeting the requirements of the law on these as well as on anti-corruption standards.

4.2.4 Accountability (practice)

To what extent do public sector employees have to report and be answerable for their actions in practice?

Score: 4

Public service

In practice, hierarchical public sector operational accountability has been applied more effectively than democratic and policy accountability. Until very recently there has been no system-wide accountability for evaluating the impact of policies. Accountability for the effectiveness of public management policies, including regulation and the machinery of government, has been particularly weak.

⁴⁸⁴ Crown Ownership Monitoring Unit, "Our role". www.comu.govt.nz/about-comu/our-role

⁴⁸⁵ Crown Entities Act 2004, sections 25 and 26.

⁴⁸⁶ Crown Entities Act 2004, sections 36–41.

The public service has three vertical accountability arrangements. First, senior public servants are under formal performance agreements to deliver specified outputs with the resources granted. (Over the years, there have been refinements and elaborations in the internal accountability to ministers through agreements, plans, budgets, financial reports, and key indicators.) Second, departmental activities are subject to regulation and guidance by the three central agencies to maintain collective standards of financial and human resource management, regulatory quality, and policy coordination. Third, the executive's vertical accountability to Parliament is based on the presentation of budgets, estimates, plans, and annual reports as required under the Public Finance Act 1989 and the discharge of the range of departments' legislated responsibilities.

These arrangements are subject to scrutiny, investigation and reporting by the Office of the Auditor-General and the Ombudsmen, and are subject to the OIA and the Protected Disclosures Act 2000.

Also, the Better Public Services reforms include specific, measurable, and time-bound outcome targets in 10 high-priority cross-cutting policy areas. While previous governments have set up programmes of strategic goals to drive public sector priorities, the Better Public Services provisions go further in terms of measurable indicators for such goals and in providing for state services resources to be applied more flexibly in pursuit of these goals. These aspects of the Better Public Services reforms, as discussed below, are in their early days and fall short of being an impact feedback system for the full range of government activities.⁴⁸⁷ Their effectiveness also depends on significant investment in evaluation capacity both of the impact of existing interventions and of the appropriateness of the indicators.⁴⁸⁸

Policy impact evaluation

The recent comparative study of New Zealand's fiscal transparency observes "there is considerable scope for further improving the information and data in budget documents and fiscal reports on the anticipated and actual impacts and outcomes of government spending".⁴⁸⁹ This is particularly so for the social and environmental impacts of fiscal policies, which are now more prominent in international fiscal transparency standards.⁴⁹⁰

A growing volume of local academic research (most recently by Bill Ryan and Derek Gill⁴⁹¹) points out that the lack of evaluation inhibits the adaptation of national policies

⁴⁸⁷ Paul McBeth, "Public service falling short on evaluating policy, Treasury boss says" *National Business Review*, 15 April 2013. www.nbr.co.nz/article/public-service-falling-short-evaluating-policy-treasury-makhlouf-says-bd-138685

⁴⁸⁸ Jacqueline Cuming and Sharleen Forbes, "Better public service: The case for monitoring and evaluation", *Policy Quarterly* vol. 8(3), 2012, p. 49.

⁴⁸⁹ See the Supplementary NIS Paper on fiscal transparency at www.transparency.org.nz/docs/2013/Supplementary-Paper-3-Fiscal-Transparency.pdf

⁴⁹⁰ For example, Principle 4 of the High-Level Principles on Fiscal Transparency, Participation and Accountability promulgated by the Global Initiative for Fiscal Transparency, which states, "Governments should communicate the objectives they are pursuing and the outputs they are producing with the resources entrusted to them, and endeavour to assess and disclose the anticipated and actual social, economic and environmental outcomes."

⁴⁹¹ See, for example Bill Ryan and Derek Gill, eds., *Future State: Directions for public management in New Zealand* (Wellington: Victoria University Press, 2011).

as society changes. It also lays government open to the unthinking perpetuation of policies, pushing problems on to future generations.⁴⁹² The problem is highlighted in a report by the Prime Minister's Chief Science Advisor, who concludes "the quality of assessment and evaluation of policy implementation is quite variable. The required scrutiny can be devalued by agencies that assume their primary mandate is to implement political decisions. As a result, funding for evaluation is frequently trimmed or diverted".⁴⁹³ This systemic deficiency has been periodically recognised, but various attempts to improve the situation have come to little.⁴⁹⁴

The resistance to independent evaluation seems entrenched in the incentives of the public management system. Possible explanations are that chief executives' incentives are too strongly focused on output delivery, and that ministers have in general become less tolerant of departments producing reports with the potential for political embarrassment. The Secretary to the Treasury has said that "policy stewardship" should be a goal for the Better Public Services reforms in that the state sector "should understand the impact that policy is having over the medium and long term, and test spending in existing areas to see if it's delivering the results we need".⁴⁹⁵ This approach is now included in the Public Finance Act 1989 and in the recently approved expectations for regulatory stewardship. If successfully institutionalised, these measures will represent real progress towards improved impact monitoring and evaluation across the public sector.

Public service restructuring

An SSC survey of state services employees in 2010⁴⁹⁶ found that 65 per cent of the 8238 staff surveyed had been involved in a restructure or merger in the past two years.⁴⁹⁷ This same group reported significantly less trust in departmental management than those not involved. This compares with 18 per cent affected by structural change for a similar survey of federal government in the United States.⁴⁹⁸ For most organisations, major structural changes that unsettle a large proportion of their staff tend to be under taken in quite extreme circumstances. In the New Zealand public service on the other hand, such restructurings have become what a chief executive recently described as "standard operating procedure". In the United Kingdom, most structural changes are politically driven. In New Zealand more than half are driven by chief executive often within a short time of taking up their job.⁴⁹⁹

⁴⁹² The lack of evaluative activity is also noted by Martin Stanley (Stanley, 2013) and the Scott Report (Review of Expenditure on Policy Advice, 2010).

⁴⁹³ Gluckman, 2013: 3.

⁴⁹⁴ Bill Ryan and Derek Gill, "Past present and the promise: Rekindling the spirit of reform", in Ryan and Gill, 2011.

⁴⁹⁵ Secretary to the Treasury Gabriel Makhoul quoted in McBeth, 2013.

⁴⁹⁶ Research New Zealand, *State Services Commission: Integrity and Conduct Survey 2010* (Wellington: State Services Commission, 2010). www.ssc.govt.nz/2010-survey-report

⁴⁹⁷ Richard Norman and Derek Gill, *Restructuring: An overused lever for change in New Zealand's state sector*, IPS11/06 (Wellington: Institute for Governance and Policy Studies, Victoria University of Wellington, 2011).

⁴⁹⁸ Norman and Gill, 2011.

⁴⁹⁹ Norman and Gill, 2011.

Any public service organisation may be required to reduce spending and staff numbers. This does not require a deep reorganisation unless the organisation is dysfunctional or has to meet quite new demands. The frequency with which public service chief executives restructure departments is difficult to justify in the absence of transparency about why the present organisational structure is unsatisfactory and of accountability for the costs in reduced morale, productivity, and unplanned exits of staff.⁵⁰⁰ There are also risks from interruptions of institutional memory and services. Accountability for the ultimate success or failure of restructuring decisions is obscure. No central agency undertakes an *ex post* review, and by the time the outcome is evident, the chief executive involved may have gone to another job.

The restructuring of the Ministry of Foreign Affairs and Trade initiated in 2012 is a case in point. A new chief executive introduced a fundamental change to the *modus operandi* of the ministry, transforming it from a career diplomatic service to one based on term contracts. The changes have seen a loss of experienced staff and a high degree of concern in the “international relations community” about the reasons for the change and the negative impacts it is having and may continue to have on institutional capacity. There has been a lack of transparency around the public policy justification for this major change, the analysis of the shortcomings of the career service model, the various options for addressing the concerns, and the justification for the particular change strategy that was decided on. In the public debate, it has been unclear who was the architect of the changes – the chief executive, the minister, or central agencies – and who should be accountable for publicly defending the strategy and explaining the changes. In the absence of a detailed *ex ante* analysis of the costs and benefits of different options for reform it will be difficult to evaluate the success or otherwise of the changes.^{501, 502}

The use of structural change to improve departmental performance is such a prominent feature of the New Zealand public management system that the public service must carry the burden of proof that the public interest has been served by this approach.⁵⁰³ In the absence of independent evaluation, it is difficult to escape the conclusion that, over and above necessary restructurings, the phenomenon has been unduly driven by the short-term interests of chief executives, ministerial preconceptions, and, possibly, central agencies lacking better means of influencing public service behaviour. The institutional health of the public service is a matter of collective rather than departmental concern. Departmental reforms should be decided on the basis of robust

⁵⁰⁰ In the Integrity and Conduct Survey 2010, SSC found increasing mistrust of managers among staff involved in restructuring – despite that these would have been the “survivors”: Research New Zealand, 2010.

⁵⁰¹ “Neil Walter notes for address at the launch of ‘New Flags Flying’”, 27 November 2012; Stuart McMillan, “Changed MFAT leaves sorry mess”, *National Business Review*, 5 April 2012; Terence O’Brien, “Culture of MFAT under threat”, *Dominion Post*, 2 April 2012; Winston Peters, address at launch of *Persona Non Grata* written by Michael Green, 27 June 2013. (MFAT stands for the Ministry of Foreign Affairs and Trade.)

⁵⁰² Foreign services require tacit knowledge and devolved tactical decision-making. OECD countries have similar systems for career-based socialisation and development of diplomats. What makes New Zealand different has not been explained.

⁵⁰³ In the recent Performance Improvement Framework report, SSC is criticised for relying only on minister’s feedback as the performance measure for success of machinery of government policy: State Services Commission, Treasury and the Department of the Prime Minister and Cabinet, *Review of the State Services Commission (SSC)* (Wellington: New Zealand Government, 2013).

evidence-informed analysis and, from now on at least, demonstrate that they meet the expectations for regulatory stewardship.

Crown entities

The legal accountability framework for board members appears to be effective in practice. In several examples in the past 10 years the activities of boards and their members have been subject to external scrutiny and investigation.⁵⁰⁴

Local government

In 2012, the Auditor-General, in reporting on local government's ability to meet its future needs, expressed general satisfaction with local authorities' efforts (under the long-term plan provisions) to deliver services in prudent and sustainable ways and to plan prudentially and by not raising rates to unreasonable levels.

Regulatory governance

In modern government, the public sector's regulatory role has become of equal, if not greater, importance than its roles in public services and transfers. In the last two or three decades New Zealand governments have been innovative in regulatory design, but the associated accountability has been lacking.

In recent years, lives were lost in the collapse of the CTV building in the Christchurch earthquake and in a gas explosion in the Pike River mine near Greymouth. The collapse of non-bank financial institutions and inadequate weather-proofing of tens of thousands of private dwellings caused the loss of billions of dollars to citizens. The investigations of these events revealed major deficiencies in accountability for the design, implementation and oversight, of regulation by both central and local government.

The Royal Commission on the Pike River Coal Mine Tragedy concluded that "New Zealand has a poor overall health and safety record compared with other advanced countries ... This time the lessons must be remembered. Legislative, structural and attitudinal change is needed if future tragedies are to be avoided. Government, industry and workers need to work together".⁵⁰⁵ The commission found that the Department of Labour's "main public accountability documents ... did not reveal any concern about [the department's] ability to administer the health and safety legislation" or "provide much insight into the performance of the mining inspectorate, or the health and safety inspectors as a whole".^{506, 507}

⁵⁰⁴ These include OAG inquiries and performance audits, ministers using powers to remove boards or board chairs or members, board member resignations following privacy breaches at the Accident Compensation Corporation, Privacy Commissioner investigations, and New Zealand Police and Serious Fraud Office investigations.

⁵⁰⁵ Royal Commission on the Pike River Coal Mine Tragedy, *Royal Commission on the Pike River Coal Mine Tragedy*, 2012, p. 35

⁵⁰⁶ Royal Commission on the Pike River Coal Mine Tragedy, 2012: 30.

⁵⁰⁷ Commenting on the Health and Safety in Employment Act 1992, the royal commission says, "The move towards more self-management by the employer was appropriate but the necessary support for the legislation, through detailed regulations and codes of practice did not appear ... The special rules and safeguards applicable

The Royal Commission report on the collapse of the CTV building in the Christchurch earthquakes, causing the death of 115 people, attributes most blame to engineering issues, but observes that the building “should never have been issued with a building permit by the Christchurch City Council in 1986 because it was not built to the standards of the time”.⁵⁰⁸

About 40,000 houses and apartment buildings built between 1994 and 2005 were found to suffer from severe weather-tightness problems, contributing to the ill health of occupants and rapid deterioration of structures. The repair and replacement costs were estimated at NZ\$11.3 billion.⁵⁰⁹ Several court decisions held local authorities liable for compensation claims due to inadequate regulation. Other inquiries queried central government policy making as regards the appropriateness of the Building Act standards for New Zealand conditions. Peter Mumford doubts whether government departments understood the risks and uncertainties related to new regulatory regimes.⁵¹⁰ He maintains that regulatory regimes should always be considered experimental and subjected to regular review.

The government has responded to the recommendations arising out of the inquiries relating to the major regulatory failures, including, in the aftermath of the Pike River mine disaster, the creation of a new Crown entity to focus solely on the development, administration, and enforcement of the Health and Safety in Employment Act 1992, and the workplace enforcement of the Hazardous Substances and New Organisms Act 1996. Treasury uses a “best practice regulation model” for biennial assessments of regulatory capacity for the 56 main regulatory regimes in the public sector.⁵¹¹ The capacity of the regulatory bodies for 22 of these regimes is conservatively identified by the Treasury as “possible areas of material concern”.

As covered above, Treasury now has approval for expectations for regulatory stewardship. These stewardship expectations represent an important new step towards the wider goal of strengthening policy advice across government. Stewardship is defined to include monitoring, evaluation, and implementation planning as well as good policy advice in relation to regulation both inside and outside government.

That New Zealand’s regulatory problems have not yet been solved is made evident in the recent Productivity Commission inquiry into local regulation. The commission observed that “30 pieces of primary legislation ... confer regulatory responsibilities on local government, and many regulations in secondary instruments”, and identified several shortcomings in the way that regulations are made at the central level including a lack of implementation analysis, poor consultation, and weak lines of

to mining contained in the old law, based on many years of hard-won experience from past tragedies, were swept away by the new legislation, leaving mining operators and the mining inspectors in limbo”: Royal Commission on the Pike River Coal Mine Tragedy, 2012: 32.

⁵⁰⁸ Canterbury Earthquakes Royal Commission, *Final Report: Volume 6: Canterbury Television Building (CTV)*, 2012, para. 9.3.

⁵⁰⁹ “Leaky homes will cost \$11.3b to fix – report”, *New Zealand Herald*, 22 December 2009.

⁵¹⁰ Mumford, 2011.

⁵¹¹ Treasury, *The Best Practice Regulation Model: Principles and assessments* (Wellington: New Zealand Government, 2012).

accountability.⁵¹² The commission concludes “there is evidence to suggest that implementation analysis is a generic weakness of regulatory policy analysis in New Zealand. This weakness impacts on local government because local government is often the implementer of government policy”.⁵¹³

Over many years, governments, the public sector, and Parliament have been insufficiently accountable to citizens for the quality of the regulations they designed, enacted, and implemented. Many failures arose from deep-seated institutional values and incentives. Although major progress has been made, other regulation-related accidents may be waiting to happen. Regulation must remain high on any integrity watch list for this country.⁵¹⁴

4.2.5 Integrity mechanisms (law)

To what extent are there provisions in place to ensure the integrity of public sector employees?

Score: 5

Formal responsibilities and accountabilities for staff integrity rest primarily on the chief executives and board members of individual entities. Central agency assurance of these arrangements is light-handed with the SSC’s Integrity and Conduct Survey being the main feedback mechanism.

Public service and Crown entities

SSC sets standards of integrity and conduct for most state services agencies and provides advice and guidance to state services employees on matters of integrity and conduct.

Integrity standards are set out in a code of conduct, *Standards of Integrity and Conduct*.⁵¹⁵ The code consists of a one-page document that sets out high-level goals and criteria for state services employees to be fair, impartial, responsible, and trustworthy. It is applied to public service departments and the Crown entities within the State Services Commissioner’s mandate. Staff in these organisations must comply with the code. As part of complying with the code, state services organisations must maintain policies that are consistent with it.

In 2007 and 2010, SSC ran an integrity and conduct survey that measured state servants’ perceptions of trustworthiness and compliance with standards of integrity and conduct within their agencies. The survey is structured around the main elements of the code. SSC also provides advice and guidance to agencies on how to interpret and

⁵¹² Productivity Commission, 2013: 5.

⁵¹³ Productivity Commission, 2013: 90.

⁵¹⁴ Many of New Zealand’s regulatory reforms followed an approach first articulated in 1972 by Lord Robens in the United Kingdom, that prescriptive regulation creates moral hazard for the regulatee. Part of the philosophy of the revised New Zealand Building Act 2004, for example, was that house buyers and owners were themselves responsible for ensuring houses were sound. This perspective was overturned in the subsequent legal judgments on leaky homes (presentation by Luke Cunningham, law firm, March 2013).

⁵¹⁵ Issued by the State Services Commissioner under section 57 of the State Sector Act 1988.

implement the code in their organisations, and advice on specific matters of integrity and conduct such as on safeguarding the political neutrality of the state services or on state servants' interaction with social media.

The State Services Commissioner may conduct investigations and report on matters of integrity and conduct across most of the state services in order to provide assurance that the activities of agencies and individual state servants are being carried out within the law and within the bounds of proper conduct. SSC states, "there is a relatively high threshold for the involvement of the Commissioner in individual matters of misconduct. In the first instance, individual chief executives are responsible for behaviour within their own organisations".⁵¹⁶

In the context where individual chief executives carry the main responsibility for the integrity of their organisations, the ability of staff to speak out about wrongdoing is an important safeguard. But the key legal instrument for this purpose is not working well. The Protected Disclosures Act 2000 seems to have had little impact. SSC Integrity and Conduct Surveys show that awareness about this Act is low (although rising).⁵¹⁷ Few people seek the Act's protection. A significant number of whistle-blowers encounter inaction, and believe they are at risk of retaliation.⁵¹⁸

It is possible that Protected Disclosures Act 2000 requires other changes in the public management system if it is to be effective. But as things stand, this Act falls short of international good practice standards.⁵¹⁹ Important issues seem to be the definitions of reportable wrongdoing, the high threshold for the seriousness of wrongdoing, the effectiveness of the reporting paths established by the legislation; the means of prompting the management of agencies or companies to recognise disclosures once made, central monitoring and oversight systems, incentives prompting agencies or companies to establish internal whistle-blower support and protection strategies, and effective remedies and compensation.

Crown entity employees are subject to the integrity and conduct standards set by the State Services Commissioner. Legislative provisions in this area align with *Cabinet Manual* expectations covering key areas such as the need for impartiality, acting legally and honestly, observing a duty not to disclose information, and acting in good faith without pursuing personal interests. Board members' fees are set through independent mechanisms and within frameworks designed to ensure consistency of remuneration in keeping with reasonable spending of public money. Standards of behaviour expected of Crown entity boards are set out in legislation, which gives boards responsibility "for ensuring the entity acts in a manner consistent with the spirit of public service".⁵²⁰

⁵¹⁶ State Services Commission, "Integrity and conduct". www.ssc.govt.nz/integrityandconduct

⁵¹⁷ The 2010 survey reported that only a third of staff were aware of the Protected Disclosures Act 2000 despite a statutory requirement that agencies have a protected disclosures policy that is published widely in the agency.

⁵¹⁸ Research New Zealand, 2010.

⁵¹⁹ Including presentations from and discussions with Professor A. J. Brown.

⁵²⁰ Crown Entities Act 2004, section 47. Cabinet Office, "Fees framework for members appointed to bodies in which the Crown has an interest", Cabinet Office Circular CO (12) 6, 3 July 2009. www.dpmc.govt.nz/sites/all/files/circulars/coc-09-05.pdf

Legislation requires board members to declare interests before (and during) their appointment and to alert the board to any interests of other board members that may be in conflict. The Responsible Minister must be satisfied that the interest is manageable.⁵²¹

Local government

Comprehensive mechanisms within local government and the Local Government Act ensure integrity. The Act sets out governance principles covering democracy, transparency, accountability, being a good employer, and relations between elected and appointed officers. It also requires each council to produce at each triennial general election a “Governance Statement” that describes in detail their governance arrangements. Local authorities also fall under the ambit of the Office of the Ombudsman, OIA, and Local Government Official Information and Meetings Act 1987. In addition, the:

- Parliamentary Commissioner for the Environment hears and investigates complaints about local authority decisions on environmental issues
- Remuneration Authority sets elected members’ remuneration
- Local Government Act 2002 requires councils to consult and give account to communities concerning planning, revenue raising, and expenditure
- Resource Management Act 1991 covers councils’ preparation and enforcement of regional policy statements, regional plans, and district plans and the integrity of elected members and employees in undertaking their own duties
- Environment Court has roles in mediation and alternative dispute resolution and exists as an appellate authority where there are disputes on council decisions made under the Resource Management Act 1991 and related statutes.

Professional institutions (planning, engineering, architecture) also have codes of conduct or practice and disciplinary sanctions for professional employees of local authorities.

4.2.6 Integrity mechanisms (practice)

To what extent is the integrity of public sector employees ensured in practice?

Score: 4

Overall, the responsibilities for departments and agencies to maintain and promote integrity are actively discharged. However, departmental integrity systems are not centrally monitored and have been found to be weak in areas relating to administrative justice for citizens and staff (such as client appeal systems, privacy, OIA compliance, procurement record keeping, and protected disclosure measures). Surveys show significant differences in integrity between the public service and Crown entities and between the health sector and other sectors.

⁵²¹ The Crown Entities Act 2004 provides guidance on how to manage interests and what must be disclosed. The legislation also provides for the ongoing management of interests.

State services

Results of the Auditor-General's 2012 survey on fraud awareness, prevention, and detection in the state sector show⁵²² a strong commitment to protecting public resources against fraud.⁵²³

There is no requirement for regular department or agency feedback on compliance with the Standards of Integrity and Conduct.⁵²⁴ In the last three years, state services chief executives have agreed, on the suggestion of the State Services Commissioner, to be more transparent about their expenses and receipt of gifts and hospitality by publishing this information on their websites regularly. SSC also publishes the chief executive remuneration tables,⁵²⁵ which were previously included in the SSC annual report. Publishing this information as a stand-alone document puts it in the public domain in a more timely fashion.

There are no centralised rules on the promotion of values and ethical training. The promotional strategy is to strengthen the ethical culture within the public service by publishing standards and policy and leadership documents, sharing responsibilities, declaring real or potential conflicts of interest, reporting on conflicts of interest, producing various annual reports, and fulfilling the obligation to justify administrative decisions. SSC undertakes some integrity-promoting activities across the state services. For example, in 2012, SSC ran a series of events focused on whistle-blowing, led by international expert Professor A. J. Brown.

The departmental or agency emphasis of the public management system has worked well with most chief executives appearing to have been active in ensuring staff receive ethical training and implementing integrity and conduct standards.⁵²⁶ Nevertheless, in recent months several security breaches resulted in the release of private information about citizens (contravening the Privacy Act 1993) and, in the case of the Accident Compensation Corporation, revealing that appeal processes were being adjudicated by agents under incentives to support the corporation.

SSC undertook Integrity and Conduct Surveys in 2007 and 2010 and is reportedly considering a revised survey in 2013 to provide a greater level of information. In 2010, there were fewer cases of observed sexual harassment, more staff reporting of misconduct, more collegial support for ethical behaviour, managerial action against breaches, and attention to integrity matters in performance appraisal processes.

Areas of weakness previously noted in 2007 include low awareness of ethics training; continued low awareness of the Protected Disclosures Act; and high levels of observed

⁵²² OAG, *Fraud Awareness, Prevention, and Detection in the Public Sector*, 2012. www.oag.govt.nz/2012/fraud-awareness

⁵²³ OAG, "Part 1: Overview: Summary of our fraud survey results for government departments." www.oag.govt.nz/2012/fraud-summary-govt-departments/part1.htm; OAG, "Part 2: Detailed results for these entities." www.oag.govt.nz/2012/fraud-summary-crown-entities/part2.htm

⁵²⁴ State Services Commission, *State Services Commission Annual Report for Year Ended 30 June 2011* (Wellington: State Services Commission, 2011).

⁵²⁵ SSC, *Remuneration of Public Service and State Sector Senior Staff as at 30 June 2012* (Wellington: State Services Commission, 2012). www.ssc.govt.nz/sites/all/files/rem-senior-statesector-staff-30june12.pdf

⁵²⁶ Interview with SSC.

ethical misconduct, especially abusive or intimidating behaviour towards other staff, improper use of the internet or email, and lying to other employees. In addition, some aspects of senior managers' behaviour are perceived poorly. More state servants in 2010 than in 2007 disagreed that they trust middle and senior management to keep promises and commitments.⁵²⁷

In 2010, 65 per cent of staff reported their organisation had been through a restructure in the last two years compared with 55 per cent of state servants in 2007. These staff recorded higher levels of dissatisfaction with the information from senior managers about what is going on in their organisation and less trust that senior and middle managers in their organisation will keep their promises and commitments. State servants think managers are less likely to be held accountable for misconduct than are non-managers. Sixteen per cent of state servants who reported a breach or misconduct experienced retaliation as a result.

The Integrity and Trust Surveys also revealed significant attitudinal and behavioural differences between state services governance systems and, in some cases, sectors. These differences reveal that different governance regimes have distinctive integrity risk profiles. For example:

- public servants feel better prepared to handle situations that invite misconduct than do other state servants
- although misconduct is seen at similar levels to among other state servants, Crown entity employees who see misconduct are less inclined to report it
- where Crown entity staff report misconduct but are dissatisfied with the outcome, more than half (53 per cent) say it was because they feel "there was a cover up"
- district health board staff see more misconduct than do other state servants, in particular abusive or intimidating behaviour towards other staff
- where district health board staff report misconduct but are dissatisfied with the result, substantially more in 2010 than in 2007 say it was because corrective action was not severe or complete enough (93 per cent compared with 50 per cent)
- public service employees are more likely than Crown entity employees to agree that their manager disciplines integrity breaches.

Crown entities

The integrity and conduct of boards comes under scrutiny from time to time as evidenced by Auditor-General inquiries into various aspects of board operations. Board chairs have a responsibility to ensure board member conflicts of interest are managed effectively. It is difficult to know how well integrity provisions for board members are ensured in practice.

Overview

While the arrangements for promoting integrity appear comprehensive and actively maintained, the areas of little progress indicated in the surveys are cause for concern.

⁵²⁷ As discussed above, this finding reflects the negative impact of restructuring.

A weakness in the regulatory system seems to be accountability for some processes at the agency level. Central agencies, besides setting standards, may need some process of assuring ministers that the integrity risks of different public sector governance regimes are covered, and that departments and agencies have credible management controls for ensuring integrity including, for example,⁵²⁸ administrative justice for clients and staff. The Performance Improvement Framework has the potential to surface such issues, and SSC informed the NIS researchers that the next round of Performance Improvement Framework reviews would give more attention to integrity systems, including increasing staff understanding of protections under the Protected Disclosures Act 2000.⁵²⁹

Because of the devolved nature of departmental- and agency-level integrity management, the SSC's Integrity and Trust Surveys stand as the key source of independent information on the effectiveness of the public sector's integrity arrangements.

Unlike in Australia or the UK, there have been no prosecutions for the offence of misconduct in public office in New Zealand, so New Zealand law on this offence is not clear. An explanation of the offence and its potential is in the annex to this pillar report.

4.3.1 Public education

To what extent does the public sector inform and educate the public on its role in fighting corruption?

Score: 3

The public sector has an active, targeted, and sector-specific approach to combatting corruption, but the system as a whole lacks a body clearly responsible for identifying and promoting action to combat new corruption risks as they emerge. This lack of overview has been manifested in the tardiness of the country's response to international standard setting in the fight against corruption.

In the New Zealand context, domestic corruption has not been such a problem that there has been a strong domestic constituency for making it a high cross-government policy priority. Where public sector agencies do engage the public on matters relating to corruption, it tends to be in relation to specific policies for which they are responsible. Thus, the Ministry of Business, Innovation and Employment addresses specific matters relating to banking regulation and company governance, the Serious Fraud Office and New Zealand Police investigate and prosecute instances of corruption, and so on.

Those departments and agencies involved in dealing with bribery and corruption (the Serious Fraud Office, Ministry of Justice, Office of the Auditor-General, and SSC) maintain a reasonably high public profile in integrity-promoting activities, and the public sector organisations most involved in international trade (the Ministry of Foreign Affairs

⁵²⁸ For example, client appeal and review processes, and OIA and Protected Disclosures Act 2000 responsiveness.

⁵²⁹ Interview with A. J. Brown July 2013

and Trade, the New Zealand Export Credit Office, and, albeit to a more limited extent, New Zealand Trade and Enterprise) inform and advise the business community involved in international trade on New Zealand's international anti-bribery and corruption obligations.

This generally satisfactory situation has its risks. One is a tendency to be inactive in cooperating on international anti-corruption activities. As covered in the legislature and political executive pillar reports, New Zealand signed but has yet to ratify the UN Convention against Corruption⁵³⁰ and has been slow in implementing the requirements of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. Secondly, while the public sector's targeted and sector-specific approach to combatting bribery corruption seems appropriate given its relatively low incidence, the public sector system as a whole appears to lack a body clearly responsible for identifying and promoting action to combat new corruption risks as they emerge. As active participants in the global economy, New Zealanders are increasingly exposed to pressures to engage in corruption in other countries.⁵³¹ In recent revelations about fraud involving shell companies and tax havens, it appears that some New Zealand citizens have promoted such activities.⁵³²

4.3.3 Public procurement⁵³³

To what extent is there an effective framework in place to safeguard integrity in public procurement procedures, including meaningful sanctions for improper conduct by both suppliers and public officials, and review and complaint mechanisms?

Score: 4

Adequate formal processes are in place for public procurement, and compliance appears to be high. The processes reflect international good practice, but there are serious shortcomings in transparency because, in a highly decentralised system by international standards, systematic procurement records are not readily available within departments and agencies.

The effectiveness of the institutional arrangements for public procurement is crucial in minimising corruption. The government spends about NZ\$30 billion a year (37 per cent of total appropriations or 90 per cent of output expenses) in procuring works, goods, and services to build and maintain infrastructure and support public programmes.⁵³⁴

⁵³⁰ The UN General Assembly adopted the Convention against Corruption on 31 October 2003 by Resolution 58/4. It was opened for signature from December 2003 and signed by 140 countries. As of June 2013, there are 167 parties to the convention, including the European Union.

⁵³¹ "New Zealand Tops anti-corruption index – but our off-shore dealings more dubious", *National Business Review*, 27 October 2010 www.nbr.co.nz/article/nz-shares-top-spot-anti-corruption-index-132133

⁵³² For example, Nicky Hager, "Money trail leads home to New Zealand" *Stuff*, 7 April 2013. www.stuff.co.nz/business/money/8515361/Money-trail-leads-home-to-New-Zealand

⁵³³ A more detailed assessment of public procurement is in the supplementary papers. See the Supplementary NIS Paper on Procurement at www.transparency.org.nz/docs/2013/Supplementary-Paper-4-Public-Procurement.pdf

⁵³⁴ Ministry of Business, Innovation and Employment, *Government Procurement: Buying goods and services – The five principles*, October 2012. www.business.govt.nz/procurement/pdf-library/a3-principles-of-government-procurement-final.pdf

Public procurement is lightly regulated through a framework comprising guiding principles (updated in 2012) and a set of rules (2007) that are about to be updated with a wider reach.⁵³⁵ The rules are mandatory for the 29 public service departments and the police and defence forces, and are advisory for the nearly 3,000 other public entities.⁵³⁶ The Ministry of Business, Innovation and Employment is responsible for promulgating the policy, rules, and guidance, monitoring implementation of the policy, and investigating complaints.⁵³⁷ No separate entity conducts procurement. Each entity, through its chief executive, is responsible for tailoring procurement policies and procedures to business need and for conducting and administering procurement contracts.

The rules require open tendering as the norm (subject to reasonable exceptions), objective evaluation of tenders against published criteria, and documentation of the process. While guidelines and model documents are available, standardisation has been minimal. However, this is increasing, both for efficiency and for alignment with international trade treaties.⁵³⁸ The existing rules regarding transparency and accountability fall short of international good practice in extent and in ease of access.

Large and high-risk projects have, since May 2008, been subject to special review at key milestones through the Gateway review process that SSC administers as part of Treasury's capital asset management regime.⁵³⁹ The rules require clarifications during tendering to be shared equally with all participants, but recourse on the process or award decision can follow multiple avenues without explicit requirements to be followed. A supplier feedback system in the Ministry of Business, Innovation and Employment handles general concerns about process. General rights and protection for whistle-blowing, provided under the Protected Disclosures Act 2000, apply also to procurement. Formal accountability has been exercised by the Office of the Auditor-General, but procurement is not a standard part of financial or performance audits and its inclusion is, in essence, discretionary.

In practice, compliance with the main processes of open tendering, objective evaluation, and required disclosure appears high, especially for medium to large procurements that must be tendered through an electronic tendering system. Although totalling about 3,000 activities last year, this represents only 10–15 per cent of total

⁵³⁵ Revisions to the *Mandatory Rules for Procurement by Departments* (2006) have resulted in *Government Rules of Sourcing*, which Cabinet approved in April 2013 and come into effect on 1 October 2013. These rules align to the World Trade Organization Agreement on Government Procurement, which is considered to represent best international practice.

⁵³⁶ State Sector Act 1988, Schedule 1.

⁵³⁷ Ministry of Economic Development, *Government Procurement in New Zealand: Policy Guidance for Purchasers*, August 2007, Appendix 1.

⁵³⁸ New Zealand has determined to accede to the World Trade Organization Agreement on Government Procurement. Accession to this agreement will require a much greater degree of reporting on the procurement activities of agencies. Work is under way to meet those requirements. In part, it is intended that this requirement for reporting (transparency) will be met by a replacement Government Electronic Tender Service (GETS), which will be deployed early in 2014.

⁵³⁹ In April 2013, oversight of major information and communications technology service procurement and management became the responsibility of the Government Chief Information Officer (who is also the Chief Executive of the Department for Internal Affairs).

annual public procurement by value.⁵⁴⁰ The extent of procurement not following these procedures and the reasons for this are not readily evident. There are no requirements for disclosure or for informing the market when other forms are being followed. The lack of registers or statistics on all government procurement (particularly for goods) makes it difficult to assess compliance with the rules. While some information is accessible later through select committee reports, integrity would be strengthened by expanding systematic proactive disclosure to include key statistical and implementation information that reflects practice.⁵⁴¹ This would also reveal the variety of procurement practices and performance across the range of large and small entities.

The wide distribution of entities undertaking procurement means that staff capacity and capabilities are areas of discernible risk. Each entity is responsible and accountable for the resourcing, administration, qualification of its staff, and separation of functions for procurement. Large entities such as the New Zealand Transport Agency, which accounts for nearly 10 per cent of total government procurement, have strong systems and capacity, but smaller entities such as certain Crown entities and various boards are particularly exposed to these risks. The Ministry of Business, Innovation and Employment is addressing these issues with a capacity-building programme, including establishing the Procurement Academy to foster world-class procurement training and qualifications (cited by the OECD as good practice) and the Commercial Pool, which provides special expertise. However, further improvements are warranted, including more explicit provisions for the separation of procurement functions between end-users and procurement specialists, guidelines and training on handling the thin market and managing potential conflicts of interest in the small entities, and implementing contract administration systems (especially for handling and disclosing contract variations).⁵⁴²

The performance standards for complaint handling need to be more specific and binding (addressed by the new rules), and complaints and resolutions should be published to improve effectiveness and confidence in the system. The administrative sanctions on staff regarding public procurement are limited. However, a supplier may be excluded for false declarations or previous performance deficiencies, and the new rules would broaden the basis of exclusion.⁵⁴³ In practice, formal audits and inquiries have been effective in encouraging compliance without unduly suppressing efficiency, and findings from the Office of the Auditor-General have served as a leading guide on good practice in procurement. However, there is concern that the extent to which procurement policies and practices are examined in audits depends on both the judgment of the auditor and on funding considerations, because the audited entity is obliged to pay the audit costs. Parliamentary select committee reports also support accountability because they typically include a selective review of procuring entity practice.

⁵⁴⁰ Ministry of Business, Innovation and Employment, *The Noticeboard – March 2013 – Government Procurement Branch*, March 2013. www.business.govt.nz/procurement/procurement-reform/noticeboard

⁵⁴¹ See, for example, the Construction Sector Transparency Initiative at www.constructiontransparency.org

⁵⁴² OAG, *Central Government: Results of the 2007/2008 audits*, 2009, p. 87.

⁵⁴³ Rule 41 *Government Rules of Sourcing*, April 2013

Three large cases illustrate the strengths and some limitations of the procurement framework: the Canterbury earthquake recovery, the international convention centre in Auckland, and Novopay.

For the Canterbury earthquake recovery, the procurement framework at first facilitated a controlled but speedy and innovative approach, using standard rules for core business contracts, deploying probity auditors for large complex projects, and hiring special expertise for procuring land and large-scale facilities in the rebuilding phase. Difficulties emerged, however, in defining pay quantities and financial performance. The next phase may also involve foreign supply chain risks.

For the international convention centre in Auckland, the procurement procedure was changed during procurement. An audit by the Office of the Auditor-General in 2012 highlighted the need for clear and consistent rules to be followed, fairness to all parties, and transparency at all stages.

In the case of Novopay, a large complex payroll system for education, there were high time, cost, and delivery performance difficulties despite an apparently sound procurement process. A ministerial inquiry found that the main problems lay in the departmental and central agency oversight and management of the project.⁵⁴⁴

4.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the public sector do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in its field of activity? In particular, where the public sector has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

The public sector complies with its legal responsibilities under the Treaty of Waitangi, but little priority is given to oversight and policy development in this constitutionally important area. The comparatively low level of employment of Māori by Crown entities warrants attention.

Departments and Crown entities are not required to report regularly on Treaty observance. However, the legislation for the functions of some public service departments and Crown entities have specific Treaty requirements that are covered in their overall performance reporting. In addition, Te Puni Kōkiri (the Ministry of Māori Development) provides general guidance for the public sector⁵⁴⁵ and periodically reports and advises on specific policy areas from the perspective of the welfare of Māori.⁵⁴⁶

⁵⁴⁴ Ministerial Inquiry into the Novopay Project, *Report of the Ministerial Inquiry into the Novopay Project* (Wellington: New Zealand Government, 2013). static.stuff.co.nz/files/NovopayInquiry.pdf

⁵⁴⁵ For example, Good Practice Participate website, "Related resources for working with Māori Good Practice Participate." <http://goodpracticeparticipate.govt.nz/customer.modicagroup.com/working-with-specific-groups/related-resources/maori.html>

⁵⁴⁶ Te Puni Kōkiri, *Treaty of Waitangi and the Ministry for Social Development*, no date.

SSC does not have on-going statutory responsibilities for the Treaty of Waitangi and, where it has undertaken wider activities related to the Treaty, it has been in response to the policies of the government of the day. SSC's personnel management obligations overlap with Treaty interests in the regular monitoring of the employment of Māori.

The good employer provisions of the Crown Entities Act 2004 include the expectation that personnel policies will recognise the aims and aspirations of Māori, their employment requirements, and the need for the involvement of Māori as employees of the entity.⁵⁴⁷ SSC's latest Human Resources Capability Survey of public service departments showed 16.4 per cent of Māori staff of whom 9.2 per cent are tier 1–3 managers.⁵⁴⁸ On the other hand, only 6.36 per cent of Crown entity employees are Māori, a quarter of respondent entities have no Māori staff, and only two chief executives and very few senior managers are Māori.

Local governments by contrast have clearly stated Treaty-related obligations under the Local Government Act 2002 and Resource Management Act 1991. Treaty issues may also arise in the implementation by local government of a wide range of statutes. The Resource Management Act requires the principles of the Treaty to be taken into account in decisions made under it. In practice, this has meant a duty to consult local Māori who might be affected. Practice across councils is variable.⁵⁴⁹ How well Resource Management Act-related consultation results in Treaty principles being taken into account is unclear. The Productivity Commission in its report on local level regulation, observes, "on the available evidence, the current system for involving Māori in resource consent decisions, does not appear to be working well for anyone, largely due to the costs and timeframes involved".⁵⁵⁰

Treaty responsiveness information at the agency level is not consolidated. Also, respect for the Treaty is not just about equal employment opportunities, cultural awareness, and consultation processes. The interests of Māori are deeply engaged in the most difficult policy challenges facing government at national and local levels. The Better Public Services reform programme is attempting an historical recentralisation of some aspects of state services management. Accordingly, SSC is having its management mandate broadened and deepened, and Treasury is seeking to strengthen the quality and public service accountability for policy advice through the expectations for regulatory stewardship.

Given the constitutional standing of the Treaty and the enduring importance of Māori issues across the policy agenda, central agencies could see the monitoring and evaluation of public sector policy advice and services from a Treaty perspective as part of their stewardship responsibilities. How such stewardship information should impact on policies would, of course, remain the prerogative of the government of the day.

⁵⁴⁷ Crown Entities Act 2004, section 118(2)(d).

⁵⁴⁸ Human Rights Commission, "Crown entities monitoring report reveals low numbers of Māori employees", 3 April 2012. www.hrc.co.nz/2012/crown-entities-monitoring-report-reveals-low-numbers-of-maori-employees

⁵⁴⁹ For example, "Memorandum of Understanding and Protocol between Otago Regional Council, Te Rūnanga o Ngāi Tahu and Kāi Tahu ki Otago for Effective Consultation and Liaison", Otago Regional Council, January 2003.

⁵⁵⁰ Productivity Commission, 2013.

Annex to pillar 4

Misconduct in public office: An integrity-plus approach

In line with the integrity-plus approach, the introduction of an offence of misconduct in public office would prove valuable. It would enable prosecution for a broader range of breaches of integrity, such as improper acts involving varying degrees of abuse of authority or conflict of interest, than is possible under standard bribery laws alone. Good examples are found in the UK and Hong Kong where the law provides for an offence of misconduct in public office, and there are similarities with the US approach to malfeasance in public office.

The Hong Kong Court of Final Appeal defined the elements of the offence of misconduct in public office as:

The offence would be committed where –

- (1) a public official;
- (2) in the course of or in relation to his public office;
- (3) wilfully misconducts himself; by act or omission (for example, by wilfully neglecting or failing to perform his duty);
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the office-holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

This definition reinforces provisions of the Hong Kong Civil Service Code under which public officials must show commitment to the rule of law; honesty and integrity; objectivity and impartiality; political neutrality; accountability for decisions and actions; and dedication, professionalism, and diligence.⁵⁵¹

The definition of the elements of the offence in UK law is similar:⁵⁵²

1. A public officer acting as such ...
2. Wilfully neglects to perform his duty and/or wilfully misconducts himself ...
3. To such a degree as to amount to an abuse of the public's trust in the office holder ...
4. Without reasonable excuse or justification ...

However, UK law omits the proviso that the misconduct must be serious, not trivial. Penalties in the UK can also be more severe than in Hong Kong.

Commentary on the UK law explains: “The essential feature of the offence is an abuse by the public official of the powers, discretions or duties exercisable by virtue of his official position conferred on him for the public benefit. It does not require the presence

⁵⁵¹ Civil Service Bureau, *Misconduct in Public Office*, 2012.

http://hksargegu.org.hk/S%20Topic/CS%20BOOKLET/MIPO_Booklet_Eng_2012.pdf

⁵⁵² *UK Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868, para. 61.

of bribery or pecuniary gain, and thus covers a wider range of misbehaviour than corruption narrowly defined.”

The judicial authorities that apply the UK law also recognise that the holder of a public office should not be defined in a narrow or technical sense, and suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment. “A public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.”⁵⁵³

A person may fall within the meaning of a public officer where one or more of the following characteristics apply to a role or function that they exercise with respect to the public at large: judicial or quasi-judicial, regulatory, punitive, coercive, investigative, representative (of the public at large), or responsibility for public funds.

An offence of misconduct in public office in New Zealand would reinforce the requirement for ethical behaviour in the public service and state services, form a legal adjunct to the State Service Commission’s Code of Conduct, support chief executives of public agencies, and lend strength to a national anti-corruption strategy. Along with other laws, codes, and conventions governing integrity in public service, it would need to be supported by a broader educational strategy for public officials in New Zealand.

In addition, the restoration of the annual central record of criminal offences by state servants, such as the State Service Commission used to publish before 1988, could be an integral part of an anti-corruption strategy.

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⁵⁵³ In *R v Whitaker* [1914] KB 1,283.

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Law enforcement and anti-corruption agencies (pillars 5 and 9)

Summary

New Zealand's law enforcement agencies are generally adequately resourced, independent, and accountable. On occasions when they fail to meet good standards, the failures are quickly identified and these failures and controversies provide impetus for improvement. Compared to many countries, they appear to have low levels of internal corruption.

Reporting in 2007, a commission of inquiry addressed integrity issues concerning police conduct,⁵⁵⁴ and New Zealand Police reports regularly on the implementation of the commission's recommendations.⁵⁵⁵

Police, as the largest of New Zealand's enforcement agencies, has a dedicated oversight body created under statute and headed by a retired judge to independently investigate misconduct and neglect of duty – the Independent Police Conduct Authority (IPCA). The other main law enforcement agency, the Serious Fraud Office (SFO) is not covered by the IPCA but is subject to the Ombudsman.

The Official Information Act 1982 (OIA) applies to Police and the SFO, but includes withholding provisions that protect information relevant to the maintenance of the law. While the two agencies generally comply with transparency obligations, two recent cases have led to concerns about a lack of transparency around surveillance activities and the use of information obtained through such activities.

Greater priority needs to be given to the prevention, detection, investigation, and prosecution of bribery and corruption. In particular, there is an absence of reliable information about actual and potential levels of corruption and an absence of monitoring of risk areas and of educational and awareness activities. For example, there should be training programmes and more thorough preparation for the triennial responsibility of thoroughly and rapidly investigating electoral offences.

The development of New Zealand bribery and corruption policy (see Chapters 3 and 4 for more detail) has been driven in the last decade by external pressures that have come through processes relating to the UN Convention against Corruption (UNCAC), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the multilateral Financial Action Task Force. Despite these pressures, the New Zealand response has been slow. Recent impetus, brought about, in part, through a reprioritisation of anti-corruption legislation in line with New Zealand's bid to be an independent member of the UN Security Council, has led to proposals for a series of legislative changes. These changes are now under way to allow ratification of UNCAC and conformity to the OECD convention. New Zealand's bribery and

⁵⁵⁴ Dame Margaret Bazley, *Report of the Commission of Inquiry into Police Conduct* (Wellington: Commission of Inquiry into Police Conduct, 2007); "Commission of Inquiry into Police Conduct". <http://ndhadeliver.natlib.govt.nz/ArcAggregator/frameView/IE1112831>

⁵⁵⁵ New Zealand Police, "Commission of Inquiry Quarterly reports". www.police.govt.nz/about-us/publications/corporate/commission-of-inquiry

corruption legislation provides a basic framework for the criminalisation of such behaviours. There are overseas examples that could be useful to adopt in New Zealand.⁵⁵⁶

Options to address the deficiencies in the present regime are under discussion in the context of the recent announcement that New Zealand is to ratify UNCAC. UNCAC requires, and the government should take a formal decision to establish, an independent anti-corruption unit, with separately specified funding and a mandate that includes prevention as well as investigation and prosecution. Given New Zealand's small size, the unit could be placed inside an existing agency such as the SFO for administrative purposes, but it should operate as a stand-alone unit and the government should seek legislative mandate for its existence and role as soon as possible. This action will help build compliance with UNCAC and assist in meeting the standards required for ratification of that convention, which emphasises the need for education and participation by civil society in fighting corruption.

Another weakness derives from the difficulty of making corrupt activities visible. Making organisations and individuals within them individually responsible for proper risk management practice, along with monitoring processes, is a settled approach in respect of health and safety and has similar applicability in respect of bribery and corruption. Measures used overseas could be adopted here.⁵⁵⁷

Notwithstanding the actions taken by agencies in New Zealand, the belief that corruption is not a significant feature of New Zealand society has militated against stronger policy and action by the government. A principle of effective action is that because of the closed nature of corrupt transactions and the self-interest in non-disclosure by all parties, there is a need to investigate potential areas of corruption instead of waiting until complaints are made.

New Zealand law enforcement agencies maintain high standards of transparency, integrity, accountability, and independence. The New Zealand government has been slow to implement international policies and laws for deterring and combatting bribery and corruption. In several key areas, legislation, resources, and government policy are inadequate for addressing bribery and corruption, and there is little in the way of risk monitoring, preventative, or educational activity. Concern is also on-going about the extent of the over-representation of Māori in the criminal justice system.

The gaps in anti-corruption frameworks, particularly in relation to the implementation of international conventions, comprise an on-going risk in New Zealand; this is taken up as part of a wider theme in Chapter 6. There are government commitments to progress these areas, but they remain a necessary focus.

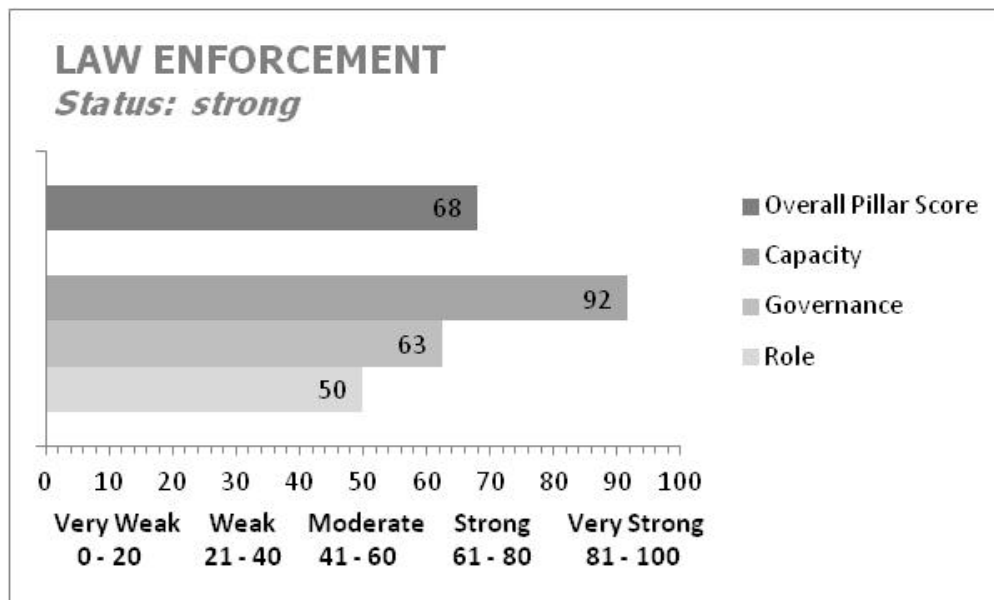
The recommendations in Chapter 6 relating to anti-corruption are wrapped into an overarching proposal for a national anti-corruption strategy. As well as direct enhancement of anti-corruption legislation, the strategy includes measures to improve the disclosure of beneficial interests in companies and trusts and the pecuniary

⁵⁵⁶ Bribery Act 2010 (UK), section 6.

⁵⁵⁷ Bribery Act 2010 (UK), section 7.

interests of office-holders, to get more transparency in political party finances, and to take a broad approach to boost anti-corruption and integrity-focused education, training, and research.

Figure 7: Law enforcement scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The main law enforcement agencies combating bribery and corruption are the SFO⁵⁵⁸ and New Zealand Police.⁵⁵⁹ Other organisations have a law enforcement function, sometimes together with regulatory activities; for example, the New Zealand Customs Service, the Ministry for Primary Industries, the Financial Markets Authority,⁵⁶⁰ Maritime New Zealand, and the Immigration Service in the Ministry of Business, Innovation and Employment. By its nature, the Inland Revenue Department sometimes encounters issues of bribery and corruption and does discharge law enforcement functions. On occasion the New Zealand Defence Force works with Police.

The SFO is a specialist law-enforcement agency the purpose of which is to detect, investigate, and prosecute New Zealand's most serious and complex financial crimes. It operates under the SFO Act 1990. In 2013, its two investigation units were the Financial Markets and Corporate Fraud unit and the Fraud, Bribery and Corruption unit.⁵⁶¹ The SFO has primary responsibility for liaising with foreign anti-corruption agencies and has strong relationships with those agencies, including active corruption investigations or prosecutions with the UK SFO and the Hong Kong Independent Commission against Corruption.⁵⁶² Under a memorandum of understanding with Police, the SFO is the lead agency for bribery and corruption, so complaints on those

⁵⁵⁸ www.sfo.govt.nz

⁵⁵⁹ www.police.govt.nz

⁵⁶⁰ Financial Markets Authority Act 2011.

⁵⁶¹ SFO, "Our purpose and role". www.sfo.govt.nz/about

⁵⁶² Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013.

matters are referred there in the first instance. Currently, SFO prioritises bribery and corruption cases. One of its strategic outcomes is “a just society that is largely free of fraud, corruption and bribery”. However, there is no statutory obligation for SFO to prioritise corruption and bribery, rather the SFO Director has made a discretionary decision to allocate resources to this area.

New Zealand Police is the lead agency for reducing crime and enhancing community safety. It conducts a variety of corruption and bribery investigations, and one of its goals is a “corruption-free public service”.⁵⁶³

The Organised and Financial Crime Agency New Zealand exists to prevent and disrupt organised crime through multi-agency action. It is responsible to the Commissioner of Police for its enforcement actions.⁵⁶⁴ The agency is guided by and reports to a committee of senior officials drawn from other enforcement agencies. It was created to develop a “whole-of-government” approach to organised and financial crime and to be able to scale rapidly to meet the needs of particular investigations.

New Zealand anti-corruption and bribery legislation is listed in Chapter 4. Various international instruments are relevant to the operations of law enforcement agencies in New Zealand, and these are also covered in Chapter 4.

5.1.1 Resources (practice)

To what extent do law enforcement agencies have adequate levels of financial resources, staffing, and infrastructure to operate effectively in practice?

Score: 4

Resourcing is generally adequate, but resource limitations may affect the prioritisation of anti-corruption activities.

The SFO has a staff of 52 (50.5 full-time equivalents) and a budget of NZ\$10.7 million (2012).⁵⁶⁵

The SFO handles serious corruption and bribery cases. However, the limited resources of the agency restricts its activities. Notably, it has neither the legislative authority nor the funding to monitor the economy actively in high-risk areas or to conduct education and raise the profile of bribery and corruption issues. (It does make staff available for public-speaking engagements but not for systematic training and publicity activities.) The SFO has a low level (currently two)⁵⁶⁶ of foreign-based bribery investigations or prosecutions, a reflection of the difficulty of detection but also of the low profile of the problem and limited education and publicity. It also relies on other agencies, particularly Police, for some support capability. The SFO has limited ability to upscale investigations for long periods, but would look to Police to provide further resources as

⁵⁶³ New Zealand Police, *2011/12 Annual Report*, 2012. www.police.govt.nz/about-us/publication/annual-report-2012

⁵⁶⁴ Organised and Financial Crime Agency New Zealand, “About OFCANZ: Background”. www.ofcanz.govt.nz/about-ofcanz/background.

⁵⁶⁵ SFO, *Annual Report 2012*, 2012. www.sfo.govt.nz/f55,18661/SFO_Annual_Report_2012.pdf

⁵⁶⁶ Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013.

appropriate. Where it does require support, it activates this through the memorandum of understanding with Police.⁵⁶⁷ The SFO has a similar memorandum with the Financial Markets Authority.⁵⁶⁸

Police has 12,000 staff (as at 30 June 2012) with a policing ratio of about 280 per 100,000 population. However, it is not clear how this compares with the ratio in other countries, and appears to include, for example, road safety officers. Research in 2011, found a ratio of one constabulary officer to 498 people, which compares with 1 to 388 in England and Wales and 1 to 435 in Queensland, which has a similar total population and urban–rural population split to New Zealand.⁵⁶⁹

New Zealand Police's 2011/12 operating budget was NZ\$1.47 billion (1.5 per cent of total annual government expenditure).⁵⁷⁰ Police does not have any dedicated anti-corruption and bribery staff apart from the dedicated internal investigation staff who deal with complaints about police, including bribery and corruption, that are conducted under the oversight of the IPCA.

Police distributes its resources in accordance with assessed needs. Responsibility for allocating resources within local areas (Police districts) is highly delegated. However, centralised direction, particularly allocation to preventive activity, ensures local districts comply with broad strategies. Police has strong internal operational performance management with regular reporting. This includes a significant focus on the local leadership's understanding of policing needs (crime and problems) and the actions taken in response. Engagement with local communities is expected to inform these decisions. In addition, a case-prioritisation system allocates investigative resources and allows for national oversight to ensure high-priority crime reports (for example, child abuse) are managed similarly nationally.⁵⁷¹

Both SFO and Police have some discretion over the deployment of their funding, so there is no legal barrier to funding activities directed at prevention, education, and information about corruption and bribery. However, neither agency is specifically funded to oversee and assist central and local government or private companies and organisations to put in place processes and mechanisms to detect and deter bribery and corruption or to provide education and publicity about corruption and bribery.

Resource limitations reinforce the need, already discussed, for New Zealand to establish better processes for handling matters to do with bribery and corruption.

⁵⁶⁷ SFO and New Zealand Police, *Memorandum of Understanding between New Zealand Police and Serious Fraud*, 2011. www.sfo.govt.nz/f232,17638/MOU_NZ_Police_and_SFO.pdf

⁵⁶⁸ Financial Markets Authority and SFO, *Memorandum of Understanding between Financial Markets Authority and Serious Fraud Office*, 2011. www.sfo.govt.nz/f249,14746/SFO_and_FMA_MOU.pdf

⁵⁶⁹ New Zealand Police Association, *Towards a Safer New Zealand: Police and law & order policies for the future*, October 2011, p.

⁵⁷⁰ New Zealand Police, 2012. Included in the funding is a substantial amount attributable to road policing.

⁵⁷¹ In accordance with the recommendations of the IPCA in its *Inquiry into Police Conduct, Practices, Policies and Procedures Relating to the Investigation of Child Abuse: Part 1*, 2010; IPCA, *Inquiry into Police Conduct, Practices, Policies and Procedures Relating to the Investigation of Child Abuse: Part 2*, 2011. www.ipca.govt.nz/Site/Child-Abuse-Inquiry/default.aspx

5.1.2 Independence (law)

To what extent are law enforcement agencies independent by law?

Score: 5

Law enforcement agencies have full legal independence.

The SFO operates under the SFO Act 1990, which provides that the Director of the SFO has complete independence in operational decisions: “in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case or any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently”.⁵⁷² The Act provides guidance to the director in decisions on what matters to investigate, which includes consideration of the suspected nature and consequences of the fraud, the scale of the fraud, and any relevant public interest considerations. The investigation of bribery and corruption is not specifically identified in the Act. However, on the Director’s instructions it has been made a priority.

Despite the provisions for independence in the SFO Act 1990, the consent of the Attorney-General is required before the SFO starts a prosecution for bribery or corruption under the Secret Commissions Act 1910⁵⁷³ or under most of the provisions of the Crimes Act 1961.⁵⁷⁴ Provision for such consent is found in some other legislation and is seen as some protection against vexatious prosecutions, given that New Zealand law permits private prosecutions.

The SFO Director is appointed in accordance with processes under the State Sector Act 1988 and is subject to normal performance management processes conducted by the State Services Commissioner in his or her role as employer. This review would not cover matters on which the Director is authorised by statute to act independently (for example, operational decision making).⁵⁷⁵

Police’s organisation and governance arrangements are prescribed by the Policing Act 2008 and, like the SFO’s arrangements, they are covered by standard public management legislation such as the Public Finance Act 1989, State Sector Act 1988, and OIA.

The Governor-General, on the recommendation of the Prime Minister, appoints the Commissioner of Police.⁵⁷⁶ Under the Policing Act 2008, the State Services Commissioner is responsible for the conduct of the selection process through to but not including the final decision to appoint.

The Policing Act 2008 sets out the relationship between the Minister of Police and Commissioner of Police with the commissioner being responsible to the minister for

⁵⁷² Serious Fraud Office Act 1990, section 30(1).

⁵⁷³ Secret Commissions Act 1910, section 12.

⁵⁷⁴ Crimes Act 1961, section 106. Prosecutions of ministers or members of Parliament do not require the Attorney-General’s consent, but do require the consent of a High Court judge.

⁵⁷⁵ See the public sector pillar report (pillar 4).

⁵⁷⁶ Policing Act 2008, section 12.

carrying out the functions and duties of Police, the general conduct and management of Police, and tendering advice to the Crown. However, the commissioner “is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instruction of a Minister of the Crown) regarding enforcement of the law ... and the investigation and prosecution of offences”.⁵⁷⁷

Further, the Crown Law 2010 Prosecution Guidelines state that the “universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process. ... In practice in New Zealand the independence of the prosecutor refers to freedom from political or public pressure. All Government agencies should ensure wherever it is reasonably practicable to do so, that the initial decision to prosecute is made by legal officers independently from other branches of the agency and acting in accordance with these Guidelines”.⁵⁷⁸

5.1.3 Independence (practice)

To what extent are law enforcement agencies independent in practice?

Score: 5

There is no reason to believe law enforcement agencies are other than independent in practice, including in corruption and bribery investigations.

Research for this report has not identified any substantiated allegations of political interference in the activities of law enforcement agencies. Police staff also appear to be properly guided and controlled in relation to the relationship between law enforcement duties and political activities in that the Police Code of Conduct contains sufficiently clear rules about political neutrality for staff, and there have been no cases that would undermine the apparent nature of this position.

An enduring risk is the perception of political bias that arises when investigations that follow allegations of electoral impropriety are not conducted with sufficient vigour. It is known, for example, that political parties in New Zealand have expressed concerns based on perceptions that Police have failed to investigate electoral incidents and allegations in a sufficiently timely and thorough manner.⁵⁷⁹ In a strongly partisan environment such as politics a perception based on a lack of vigour can easily transfer to a perception of bias. Police appears reluctant to investigate electoral cases because of the risk that to do so might be perceived as a willingness to engage politically.⁵⁸⁰ The apparently minor nature of many allegations of electoral offending contributes to this reluctance. The reluctance to engage extends, perhaps unfortunately, to the training that would not only result in improvements to investigation technique (and therefore

⁵⁷⁷ Policing Act 2008, section 16.

⁵⁷⁸ Crown Law, *Prosecution Guidelines* (Wellington: Crown Law, 2010), paras. 4.1 and 4.2. www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf

⁵⁷⁹ Communication with Howard Broad, former Commissioner of Police, 10 October 2013 in relation to the political dispute over the 2005 election and whether the Labour party pledge card was properly and fully accounted for in election spending returns, and further in relation to whether a religious organisation’s advertising was more connected to a political party’s election campaign than was publicly admitted.

⁵⁸⁰ Communication with Howard Broad, former Commissioner of Police, 19 October 2013.

competence to investigate electoral cases without a perception of bias), but also would increase the likelihood that Police would address these allegations with more effort and urgency.⁵⁸¹ The Police and SFO memorandum of understanding now provides for all political funding issues to be referred to the SFO. This may result in an improvement because the SFO has demonstrated it is prepared to investigate and prosecute cases involving politicians.⁵⁸²

5.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can access the relevant information on law enforcement agency activities?

Score: 4

The public generally has good access to information, but some law enforcement information is exempt from the OIA.

The law enforcement agencies are governed by and have to comply with New Zealand legislation on disclosure of information. They must adhere to the OIA, Privacy Act 1993, Criminal Records (Clean Slate) Act 2004, New Zealand Bill of Rights Act 1990, and Criminal Disclosure Act 2008. The OIA and Privacy Act are described and assessed in other pillar reports. There are often exceptions within this legislation for the protection of information held by law enforcement agencies. A key provision of the OIA relates to information where disclosure would prejudice the maintenance of the law, including the prevention, detection, and investigation of offences and the right to a fair trial.⁵⁸³

Victims of crime have rights to information about the prosecution proceedings relevant to their case. This information includes the progress of the investigation, the charges laid or reasons for charges not being laid, and the outcome of proceedings (including decisions to grant bail).⁵⁸⁴

There are no special provisions relevant to anti-corruption activities or the investigation and prosecution of corruption offences, and research has failed to find any person or group advocating for such special provisions. This also applies to the provisions that relate to the collection of evidence and protection of witnesses.

Specific confidentiality provisions in the SFO Act 1990 protect information obtained during an investigation, but the Director may waive this confidentiality in some circumstances, for example, when the person supplying the information consents to disclosure or for the purposes of a prosecution.⁵⁸⁵

⁵⁸¹ Communication with Howard Broad, former Commissioner of Police, 19 October 2013.

⁵⁸² For example, the Taito Philip Field case *R v Field* HC Auckland CRI-2007-092-18132, 6 October 2009.

⁵⁸³ Official Information Act 1982, section 6(c).

⁵⁸⁴ Victims' Rights Act 2002, section 12.

⁵⁸⁵ Victims' Rights Act 2002, section 36.

5.2.2 Transparency (practice)

To what extent is there transparency in the activities and decision-making processes of law enforcement agencies in practice?

Score: 3

Law enforcement agencies generally comply with their legal obligations, but there are concerns about the transparency of processes in relation to surveillance activities.

The primary means by which those accused of a crime establish the case that is made out against them by the state is through “disclosure”. In this process, the evidence and the means by which it has been collected are communicated in writing to the accused according to rules derived from the OIA and Privacy Act 1993. Almost all of the detail of this process has been determined by case law precedent.

All citizens⁵⁸⁶ have rights under the OIA and Privacy Act 1993 to information held by law enforcement agencies, although such information may be withheld if its disclosure would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.⁵⁸⁷

The limitations of the OIA can be seen most when agencies are slow or reluctant to provide information on contentious subjects. In 2011/12, the Ombudsmen noted 130 OIA complaints against Police.⁵⁸⁸ There is no evidence that Police fails to cooperate with an Ombudsman’s investigation, and in the two cases specifically reported, where the Ombudsman recommended the release of information, Police accepted the recommendation.⁵⁸⁹

Select committee reviews of law enforcement agencies (see below) are open to the public.

Problems and weaknesses in the system sometimes come to light only as a result of controversies or revelations raised by the media, politicians, or the courts. For instance, the 2012/13 Kim Dotcom extradition case⁵⁹⁰ revealed undisclosed and illegal (although not deliberately illegal) cooperation between the Police and the Government Communications Security Bureau (GCSB). It subsequently became apparent the GCSB had routinely provided such illegal assistance to law enforcement agencies.⁵⁹¹ The practice has since been legalised.⁵⁹²

GCSB activities, which evolved in a national security rather than policing context, are protected by strict secrecy rules that preclude normal cross-examination and testing of

⁵⁸⁶ And also any person in New Zealand: Official Information Act 1982, section 12.

⁵⁸⁷ Official Information Act 1982, section 6(c); Privacy Act 1993, section 27(1)(c).

⁵⁸⁸ Office of the Ombudsman, *Annual Report 2011/12*, 2012, p. 50.

⁵⁸⁹ Office of the Ombudsman, 2012: 45–47.

⁵⁹⁰ *Dotcom v Attorney-General* [2012] NZHC 1,494.

⁵⁹¹ Prime Minister, press release, 3 October 2012. www.beehive.govt.nz/release/pm-releases-results-gcsb-file-review

⁵⁹² The Government Communications Security Bureau Amendment Act 2013 amended the Government Communications Security Bureau Act 2003.

evidence in the course of a court case. The result is that using the GCSB to assist law enforcement agencies has the potential to undermine transparency, due process, and the checks and balances of good policing. There are grounds for arguing that unless GCSB evidence provided to domestic law enforcement agencies can be treated in court like any other evidence, it should be excluded.

There are also concerns about the case of the Urewera Four⁵⁹³ where police executed a large number of search warrants in the Ruatoki Valley, seeking evidence of offences under the Arms Act 1983 and, more significantly, the Terrorism Suppression Act 2002. Questions arose about the lawfulness of evidence collected under some warrants, the manner in which some search warrants were carried out (in particular the sensitivity to the presence of children), and the manner in which the Ngāi Tūhoe rohe was controlled with roadblocks. Four of those arrested were eventually convicted of Arms Act offences, but there was a series of failures to progress elements of the case through to court and questions were asked about the decision making involved.

In a review of the case, having had full access to police records and personnel, the IPCA found that the operation and its termination were lawful, reasonable, and justified, but it also found that there were serious failures in the execution of the investigation and some police actions were described as “unlawful, unjustified and unreasonable”.⁵⁹⁴

The question about process endures because whether police actions were proportionate to the risk has never been satisfactorily answered; nor has it been possible for citizens to form their own views on the issues because insufficient information has been made public. Police is, however, to some extent limited by legislation designed to protect the rights of those under surveillance.⁵⁹⁵

Broad, continuous police surveillance of groups of citizens who are not involved in serious criminal activities is undesirable and cannot be justified. (In certain exceptional circumstances, specific and lawful surveillance of individual citizens can be justified if it is proportionate and reviewable.) Police intelligence information like this is rarely able to be accessed and checked by the people concerned, either under the OIA or the Privacy Act 1993 or in court. The lack of transparency facilitates operations that lack integrity and undermine accountability.

5.2.3 Accountability (law)

To what extent are there provisions in place to ensure that law enforcement agencies have to report and be answerable for their actions?

Score: 4

In general, provision for the accountability of law enforcement agencies is adequate, but weaknesses exist.

⁵⁹³ Extensive litigation includes *R v Iti* HC Auckland CRI-2008-004-20749, 24 May 2012, and *Hamed v R* [2011] NZSC 101.

⁵⁹⁴ IPCA, *Operation Eight: The Report of the Independent Police Conduct Authority*, May 2013.

⁵⁹⁵ Such as sections 312J, 312K, and 312P of the Crimes Act 1961, now transferred into the recently enacted Search and Surveillance Act 2012.

Law enforcement agencies have reporting responsibilities to their minister, Parliament, and select committees.⁵⁹⁶ Both the SFO and Police are audited by the Office of the Auditor-General.⁵⁹⁷

Police and the SFO are subject to significant levels of oversight along the continuum of a criminal case. While the SFO has a broad statutory discretion covering decisions to investigate a case, Police may be subject to a complaint to the IPCA alleging a neglect of duty for failing to receive or pursue a complaint. A decision to investigate may also be complained about. A police investigation that does not result in a prosecution may similarly be complained about.⁵⁹⁸

A police or SFO investigation that proceeds to prosecution is subject to the oversight of a court. The decisions relevant to the case may be questioned in court, and consequences to the case and the officials involved may follow. For example, the case may be dismissed because of the manner in which evidence was collected.⁵⁹⁹

Procedures that override normal human rights in a police case generally attract additional supervision. For example, a search of a property in most circumstances requires judicial authority.⁶⁰⁰ An arrest without warrant is subject to a court hearing. Where there is no hearing, the IPCA may investigate a complaint. Where specific authority to search without warrant exists, there is generally a requirement to report the circumstances to a higher authority in Police, and the action is always amenable to IPCA oversight.

Officials from Police and the SFO hand their investigations over to another official for the purposes of prosecution. In serious cases (including all SFO cases), the prosecutor is a barrister or solicitor drawn from a list overseen by the Solicitor-General, New Zealand's senior professional law officer (not a member of the judiciary). For minor police cases the prosecutor is drawn from police staff who serve in a semi-autonomous police prosecutions service. In each of these cases, the primary duty of the prosecutor is to the court.

Police actions and decisions can also be reviewed and challenged by the IPCA and, ultimately, when a case is before the courts.

The IPCA's main function is to receive and investigate complaints alleging misconduct or neglect of duty by any member of Police or concerning any Police practice, policy, or procedure affecting a complainant.⁶⁰¹ It has statutory independence,⁶⁰² and emphasises on its website that it is "fully independent – it is not part of the Police".⁶⁰³ It says, " 'Independence' means that the [IPCA] makes its findings based on the facts and the law. It does not answer to the Police or anyone else over those findings. In this

⁵⁹⁶ For example, under section 43 of the Public Finance Act 1989 and section 101 of the Policing Act 2008.

⁵⁹⁷ Public Finance Act 1989, section 45D.

⁵⁹⁸ Independent Police Conduct Authority Act 1988, section 12.

⁵⁹⁹ See the discussion of the Kim Dotcom and Urewera Four cases.

⁶⁰⁰ There is general protection against unreasonable search in the New Zealand Bill of Rights Act 1990.

⁶⁰¹ IPCA Act 1988, section 12(1)(a).

⁶⁰² IPCA Act 1988, section 4AB.

⁶⁰³ IPCA, "Independence". www.ipca.govt.nz/Site/about/Independence.aspx

way, its independence is similar to that of a Court”.⁶⁰⁴ The chair of the IPCA must be a judge or retired judge.⁶⁰⁵

The major weakness of the IPCA under its current legislation is that, unlike the Ombudsman, it cannot initiate “own motion” reviews. The IPCA can receive and take action in relation to complaints⁶⁰⁶ or initiate its own inquiries into incidents involving death or serious bodily harm,⁶⁰⁷ but it is limited in inquiry to that which relates to the complaint or incident.⁶⁰⁸ This precludes it from conducting wide-ranging, thematic, or issues-based inquiries.

Police is subject to other inquiry and accountability authorities. For example, the Privacy Commissioner has powers to inquire into and report on breaches of the Privacy Act 1993 by Police⁶⁰⁹ and could take proceedings through the Human Rights Review Tribunal. The Human Rights Commission may also investigate allegations Police has breached the Human Rights Act 1993 and proceedings may follow.⁶¹⁰

The SFO is not covered by the IPCA, but is subject to the jurisdiction of the Ombudsman.⁶¹¹

Independence and accountability can conflict in practice. This is the case with the SFO. The SFO Director has independence in decisions about investigations and prosecutions, protecting him or her from political or other influences. However, the Director is not required to report his or her decisions on whether to open an investigation or take a prosecution, and these decisions cannot be challenged in court⁶¹² (although there is no apparent reason why they should not be subject to investigation by the Ombudsman). In the view of the SFO, this protects it from a well-resourced criminal or politician attempting to shut down an investigation.⁶¹³

The SFO Act 1990 states, “Any decision by the Director ... to investigate any case which the Director suspects may involve serious or complex fraud; or to take proceedings relating to any such case ... shall not be challenged, reviewed, quashed, or called in question in any court”.⁶¹⁴

Police reports regularly on the implementation of the recommendations of the Commission of Inquiry into Police Conduct.⁶¹⁵

⁶⁰⁴ IPCA, “Independence”. www.ipca.govt.nz/Site/about/Independence.aspx

⁶⁰⁵ IPCA Act 1988, section 5A(2).

⁶⁰⁶ IPCA Act 1988, section 12(1)(a) and (c).

⁶⁰⁷ IPCA Act 1988, section 12(1)(b).

⁶⁰⁸ IPCA Act 1988, section 12(2).

⁶⁰⁹ Privacy Act 1993, Part 8.

⁶¹⁰ Human Rights Act 1993, Part 3.

⁶¹¹ Ombudsmen Act 1975, Schedule 1, Part 1.

⁶¹² Serious Fraud Office Act 1990 section 20.

⁶¹³ Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013.

⁶¹⁴ Serious Fraud Office Act 1990, section 20.

⁶¹⁵ New Zealand Police, “Commission of Inquiry into Police Conduct”. www.police.govt.nz/about-us/nz-police/commission-inquiry. See also the Summary section and section 5.2.6.

5.2.4 Accountability (practice)

To what extent do law enforcement agencies have to report and be answerable for their actions in practice?

Score: 3

In most respects, law enforcement agencies are accountable in practice, but gaps and weaknesses exist.

The Kim Dotcom case (described under question 5.2.2), was a case of multiple failures in lawful processes by Police and the GCSB, demonstrating how a lack of transparency leads to a lack of accountability. These and similar previous failures were not picked up as part of normal Police or GCSB reporting and accountability. The systems did not work. Without the judicial review case brought by Dotcom's lawyers, it is likely the actions in question would not have come to light and no accountability would have been possible.

Parliament's Law and Order Committee regularly reviews each law enforcement agency as part of the mid-year Review of the Estimates and end-of-year Finance Review.⁶¹⁶ Select committee members submit written questions, and senior law enforcement agency officials appear in person to answer questions.⁶¹⁷ The quality of the scrutiny depends on the experience, priorities, and focus of the select committee members. Ministers are also probed and challenged about law enforcement agencies in oral and written parliamentary questions.⁶¹⁸

The IPCA appears to be operating effectively save for the restriction on its mandate described above. In 2011/12, it made 74 recommendations for improvements to Police conduct, 32 of which had been accepted by the end of the reporting year.⁶¹⁹ The Ombudsman did not report a significant number of complaints about the SFO under either the Ombudsmen Act 1975 or OIA.⁶²⁰

5.2.5 Integrity mechanisms (law)

To what extent is the integrity of law enforcement agencies ensured by law?

Score: 4

Integrity mechanisms are generally adequate and have improved in recent years.

⁶¹⁶ For an example, see New Zealand Parliament, *2011/12 Financial Review of the New Zealand Police*. www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_FIN_11763_1/201112-financial-review-of-the-new-zealand-police

⁶¹⁷ *Appendix C: 2012/13 Estimates for Vote Serious Fraud – Law and Order Committee – Additional questions*. www.parliament.nz/resource/0000238943

⁶¹⁸ New Zealand Parliament, "Questions for oral answer". www.parliament.nz/en-nz/pb/business/qa
New Zealand Parliament, "Questions for written answer". www.parliament.nz/en-nz/pb/business/qwa

⁶¹⁹ IPCA, *Annual Report 2011/12*, 2012, p. 2. www.ipca.govt.nz/Site/publications/Accountability/2011-Annual-Report.aspx (a large number of recommendations were made during the last three months of the year and are still under consideration).

⁶²⁰ Office of the Ombudsman, 2012: 39, 50.

The public service must adhere to several codes and standards. The State Services Commission produced the Standards of Integrity and Conduct in 2007 to cover all public sector organisations.⁶²¹ The State Services Act 1988 provides guidance on matters of integrity and conduct of employees within the public service. The Office of the Auditor-General also overviews all state sector organisations in matters relating to conflict of interest, impartiality, and transparency.

The one-page Standards of Integrity and Conduct sets out the core standards to be upheld by all public sector employees and officials, including the need to be fair, impartial, responsible, and trustworthy. Being trustworthy includes “declin[ing] gifts or benefits that place [the organisation] under any obligation or perceived influence”.⁶²² The SFO is covered by this code of conduct. It has detailed internal policies and gift and hospitality records to ensure transparency and regularly publishes details of the Director’s expenses.⁶²³

Police has its own code of conduct.⁶²⁴ While it does not explicitly refer to conduct in relation to gifts and hospitality, it covers this form of misbehaviour through broad principles of “honesty and integrity”, stating that employees must avoid any activities, either work-related or non-work-related, that may bring Police into disrepute, or damage the confidence in Police and government. Misconduct includes failing to declare a reasonably foreseeable conflict of interest, which indirectly includes receiving gifts.

Neither Police nor the SFO has post-employment restrictions, and these are not common in New Zealand’s public sector.

One result of the Commission of Inquiry into New Zealand Police Conduct was the Policing Act 2008, which replaced the Police Act 1958. The 2008 Act is based on the following principles.

- Principled, effective, and efficient policing services are a cornerstone of a free and democratic society under rule of law.
- Effective policing relies on a wide measure of public support and confidence.
- Policing services are provided under a national framework but also have a local community focus.
- Policing services are provided in a manner that respects human rights.
- Policing services are provided independently and impartially.
- In providing policing services every Police employee is required to act professionally, ethically, and with integrity.

⁶²¹ State Services Commission, *Standards of Integrity and Conduct* (Wellington: State Services Commission, 2007). www.ssc.govt.nz/sites/all/files/Code-of-conduct-StateServices.pdf

⁶²² State Services Commission, 2007.

⁶²³ SFO, “Chief Executive expense disclosure”. www.sfo.govt.nz/ce_expense_disclosure

⁶²⁴ New Zealand Police, *New Zealand Police Code of Conduct*, 2008. www.police.govt.nz/about-us/nz-police/code-conduct

The SFO Act 1990 includes an unusual section that removes a person's right to decline to answer questions on the ground that to do so would or might incriminate or tend to incriminate that person.⁶²⁵ Self-incriminating evidence is not generally admissible in court, and the limited usefulness of this power raises the question whether the exception from the normal protections is justified.

5.2.6 Integrity mechanisms (practice)

To what extent is the integrity of members of law enforcement agencies ensured in practice?

Score: 3

Progress is being made towards improved integrity, but the position is not yet satisfactory.

In 2004, the government ordered the Commission of Inquiry into New Zealand Police Conduct after allegations of police mishandling of historic rape complaints.⁶²⁶

The commission's terms of reference included an examination of Police standards and procedures for handling complaints of sexual assault and the adequacy of policing in the investigation of those complaints.⁶²⁷

The commission concluded that public trust and confidence are fundamental to providing good quality services to the public and that any behaviour that shows lack of integrity is a risk to this trust and confidence. It produced a 600-page report that outlined evidence of police misconduct involving the protection of other police officers but concluded there was no concerted attempt across Police as a whole to cover up the unacceptable behaviour. However, it said the risk of that misconduct was significant, and Cabinet directed Police to give high priority to ensuring that risk was minimised by changing attitudes and behaviour within the organisation.⁶²⁸

The commission's 60 recommendations included integrity training and a new code of conduct.⁶²⁹ Subsequent initiatives by Police include training courses about the code of conduct, leadership, ethical policing, Policing Excellence initiatives, and the Prevention First initiative that has a strong victim focus.⁶³⁰

The Auditor-General was charged with monitoring for 10 years the progress Police was making towards implementing the commission's recommendations and has produced three reports.⁶³¹

⁶²⁵ Serious Fraud Office Act 1990, section 27.

⁶²⁶ Order in Council, 18 February 2004; Order in Council, 2 May 2005.

⁶²⁷ Bazley, 2007: Appendix 1.1'.

⁶²⁸ See generally, New Zealand Police, "Commission of Inquiry into Police Conduct." www.police.govt.nz/about-us/nz-police/commission-inquiry

⁶²⁹ Bazley, 2007: 15–23.

⁶³⁰ www.police.govt.nz/sites/default/files/publications/prevention-first-strategy-2011-2015.pdf

⁶³¹ Office of the Auditor General, *Response of the New Zealand Police to the Commission of Inquiry into Police Conduct: First monitoring report*, June 2009, *Second monitoring report*, June 2010, *Third monitoring report*, October 2012.

In February 2013, Deputy Auditor-General Philippa Smith reported to a select committee on the latest police conduct monitoring report. She said change was mostly heading in the right direction but results were not yet satisfactory: “There’s still that understandable problem that police are reluctant to complain about their peers, even when they spot poor behaviour.” In particular Police was failing in the way it dealt with adult sexual assault complaints.⁶³²

Police commissions an independent annual survey – the Citizens’ Satisfaction Survey. One survey question is about trust and confidence in Police. The survey for 2011/12 found 77 per cent of respondents felt full or “quite a lot” of confidence in Police.⁶³³ For a police agency, this is a significant level of public confidence. The Global Corruption Barometer Survey 2013 showed that 24 per cent of New Zealand respondents believed Police to be corrupt or very corrupt, thus ranking the Police around the mid point of the institutions surveyed.⁶³⁴

In 2011, the public made 1,814 complaints to Police against Police employees. Of the 1,814 complaints, Police found 94 to be breaches of the code of conduct.⁶³⁵ A total of 1,874 complaints were made to the IPCA (the lowest number for five years). The IPCA opened 47 new investigation files and referred less-serious complaints back to Police for investigation, monitored by the IPCA.⁶³⁶

5.3.1 Corruption prosecution and prevention

To what extent do law enforcement agencies detect and investigate corruption cases in the country? To what extent do they engage in preventative activities? Do they engage in educational activities regarding corruption?

Score: 3

The SFO has a particular focus on corruption detection and prosecution. Little in the way of preventative or educational activity occurs.

Corruption cases are routinely investigated and prosecuted in the same way as other criminal cases. Because of the low level of corruption in New Zealand, preventative and educational activities have not been a priority.

The SFO and Police signed a memorandum of understanding in September 2011, agreeing that, in the first instance, all allegations of bribery and corruption would be referred to the SFO.⁶³⁷ The two agencies then jointly decide whether an investigation is warranted and which of them should take the lead in the investigation. The overriding criterion for opening a domestic or overseas corruption investigation is the public interest.

⁶³² Sam Boyer, “Auditor-general: Police still not doing enough on sex assaults”, *Stuff*, 27 February 2013. www.stuff.co.nz/dominion-post/news/8358531/Auditor-general-Police-still-not-doing-enough-on-sex-assaults

⁶³³ Gravitas Research and Strategy, *New Zealand Police Citizens’ Satisfaction Survey: Final report for 211/12 fiscal year* (Wellington: New Zealand Police, 2012). www.police.govt.nz/citizens-satisfaction-survey-2012

⁶³⁴ www.transparency.org/gcb2013/country/?country=new_zealand

⁶³⁵ New Zealand Police, response under the Official Information Act 1982, 15 June 2012.

⁶³⁶ IPCA, 2012: 10.

⁶³⁷ SFO and New Zealand Police, 2011.

The SFO has a particular focus on corruption and, in particular, has made public its intention to investigate and prosecute corruption related to the Christchurch earthquake rebuild.⁶³⁸ It has commenced investigations in the area of procurement and insurance fraud.⁶³⁹ Canterbury police are also developing an intelligence picture of potential fraud offending.

New Zealand law enforcement agencies have prosecuted several bribery and corruption cases in the recent past. These cases involved offending in New Zealand but have not yet included overseas bribery or corruption of foreign officials.

In general, the Police Asset Recovery Unit has been active in ensuring bribery and corruption offenders forfeit their gains. All investigations have an element of asset recovery to ensure the total profits offenders gained are forfeited.

Prominent recent cases include the SFO successfully prosecuting the Accident Compensation Corporation's national property manager (on bribery and corruption charges in 2011)⁶⁴⁰ and prosecuting a former Work and Income property manager.⁶⁴¹

Police successfully prosecuted a former minister of the Crown in *R v Field*.⁶⁴² It has also recently prosecuted a Police employee for corruption after the employee accessed the Police computer for information on his criminal cohorts⁶⁴³ and has commenced an electoral fraud prosecution of a political candidate.⁶⁴⁴

During 2012/13, the SFO started 40 new investigations, which were a mix of finance company cases (mostly allegations of fraud) and other investigations (for example, the NZ\$103 million Datasouth case) on top of ongoing projects.⁶⁴⁵

The SFO 2011/12 annual report said that during the year it had "charged persons with bribery, conspiracy, accepting secret commissions, attempting to pervert the course of justice, theft in a special relationship, dishonestly taking or using a document, obtaining by deception, false statements and false accounting".⁶⁴⁶

⁶³⁸ SFO, "Serious Fraud Office focus on Christchurch", 21 March 2013. www.sfo.govt.nz/n345,24.html

⁶³⁹ SFO, 2013.

⁶⁴⁰ "SFO ends probe into ACC property deal", *Stuff*, 26 March 2013. www.stuff.co.nz/business/8470664/SFO-ends-probe-into-ACC-property-deal

⁶⁴¹ "Rich fraudsters get off lightly: SFO", *New Zealand Herald*, 7 October 2004. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3598227

⁶⁴² *Field v R* [2010] NZCA 556; [2011] 1 NZLR 784.

⁶⁴³ "Corrupt police employee sentenced", *Stuff*, 22 March 2012. www.stuff.co.nz/national/crime/6619909/Corrupt-police-employee-sentenced

⁶⁴⁴ Ian Steward, "Eight face High Court over electoral fraud case", *Stuff*, 6 March 2013. www.stuff.co.nz/national/crime/8388381/Eight-face-High-Court-over-electoral-fraud-case

⁶⁴⁵ Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013. For a case description, see www.sfo.govt.nz/n240,21.html

⁶⁴⁶ SFO, *Annual Report*, 2012. For instance: SFO, "Three convicted of SFO charges", 24 June 2011. www.sfo.govt.nz/n204,21.html

SFO, "SFO lays corruption charges in ACC investigation", 23 November 2010. www.sfo.govt.nz/n150,13.html

In the last four years, the Department of Corrections,⁶⁴⁷ Inland Revenue Department, and Accident Compensation Corporation⁶⁴⁸ have referred cases to Police that have resulted in prosecutions by Police or the SFO. Other internal investigations by the Department of Corrections have resulted in the dismissal of staff because of bribery or corruption allegations that could not be proven to the necessary evidential standard.⁶⁴⁹

The Police discharge the responsibility of “National Central Bureau” under the charter of the International Criminal Police Organization (Interpol). Interpol establishes a formal communication network for police agencies and operates a number of international databases (for example, an international wanted criminal list and stolen passport lists). The charter specifically excludes political crimes. In addition, the New Zealand Police has strong bilateral operational relationships for criminal policing operations throughout the world. A critical area of corruption and bribery risk in New Zealand is donations and other benefits to political parties and to local and national politicians. There have been criticisms of police investigations in this area and suggestions that the Police have avoided politically sensitive prosecutions but the primary problem may be inadequate legislation. There is, for example, a time limit of only six months from the filing of a return for commencing a prosecution.⁶⁵⁰ This should be a priority area for stronger legislation.

At present there is no legislatively-mandated anti-corruption agency unit in New Zealand. The Director of the SFO has taken a management decision to establish a separate unit dealing with bribery and corruption cases inside the SFO, but this is not separately funded and has no legislative mandate. The unit’s continuing existence is unavoidably exposed to future administrative decisions, even if there is no present intention to change the current arrangement. The SFO itself is small, so resources are limited, particularly for prevention and education activities.

Neither the SFO nor the Police are specifically tasked with education or information on corruption, although their general authority is wide enough for them to undertake this work. SFO takes the view that, while there is no specific mandate or appropriation for prevention, raising fraud awareness or education, to support detection through reporting, it is appropriate for the office to be involved in education and fraud awareness raising, so that those who encounter financial crime can recognise it and

⁶⁴⁷ For instance: “Prison guard arrested trying to leave NZ”, *TVNZ*, 29 April 2011. tvnz.co.nz/national-news/prison-guard-arrested-trying-leave-nz-4147051

Antonio Bradley, “Prison guard accused of smuggling drugs for sex” *Stuff*, 6 November 2010.

www.stuff.co.nz/national/crime/4315274/Prison-guard-accused-of-smuggling-drugs-for-sex

Antonio Bradley, “Rimutaka Prison guard charged with corruption”, *Dominion Post*, 15 April 2010.

www.stuff.co.nz/dominion-post/news/local-papers/upper-hutt-leader/3583472/Rimutaka-Prison-guard-charged-with-corruption

Antonio Bradley, “Prison tutor charged with supplying drugs”, *Stuff*, 11 November 2010.

www.stuff.co.nz/national/crime/4332148/Prison-tutor-charged-with-supplying-drugs

⁶⁴⁸ “Corrupt tax man spurs IRD probe”, *Stuff*, 11 September 2008.

www.stuff.co.nz/national/crime/622191/Corrupt-tax-man-spurs-IRD-probe

Inland Revenue, “Woman jailed for fraud and corruption”, media release, 7 February 2013.

www.ird.govt.nz/aboutir/media-centre/media-releases/2013/media-release-2013-02-07.html

⁶⁴⁹ Shane Cowlshaw, “Rimutaka guards face employment inquiries”, *Stuff*, 7 March 2013.

www.stuff.co.nz/national/crime/8391838/Rimutaka-guards-face-employment-inquiries

⁶⁵⁰ Electoral Act 1993, section 226.

thus report it. An involvement with the promotion of ethics is similarly aimed at promoting reporting and thus detection.⁶⁵¹

The Police does not conduct any substantial educational or informational activities in respect of bribery or corruption. The SFO provides the staff for public speaking and it has worked with Transparency International New Zealand to develop a training package on best practice for preventing or avoiding bribery, domestically and overseas. The SFO is developing a new corruption and bribery section for its website.

5.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What do law enforcement agencies do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in its field of activity? In particular, where law enforcement agencies have legal rights and obligations in this respect given to it by the Crown, how well do they honour them, including any Treaty obligations passed on by the Crown?

Both Police and SFO have taken action to improve their relationship with Māori, and Police actively recruit Māori, but Māori remain over-represented in the criminal justice system.

The SFO recently had training from the Human Rights Commission on its duties under the Treaty as a public service department and an introduction to basic tikanga Māori (law, rules, and practice).⁶⁵²

Future SFO planning includes building a relationship with Māori organisations and the Māori business community, direct or through the accountancy profession to educate on fraud and corruption. Given the fast growth of such organisations in New Zealand, and several SFO cases involving Māori organisations and the alleged misuse of iwi funds, the SFO sees this as an important area for corruption education.⁶⁵³ This is in line with its general focus on business and the finance sector.

The Police code of conduct requires the Commissioner of Police to “value diversity and provide equity in employment, including recognition of the aims, aspirations and employment needs of Maori”.⁶⁵⁴ All police staff must “avoid discriminating behaviour or language in accordance with the Human Rights Act 1993”.⁶⁵⁵

Police has an active recruiting campaign to attract Māori into the organisation. In 2012 and 2011 the proportion of Māori police officers was 11 per cent, whereas Māori made

⁶⁵¹ Email communication with Simon McArley, former Acting Chief Executive, SFO, 21 October 2013.

⁶⁵² Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013.

⁶⁵³ Communication from Nick Paterson, General Manager Fraud and Corruption, SFO, 22 July 2013.

⁶⁵⁴ New Zealand Police, 2008: 2.

⁶⁵⁵ New Zealand Police, 2008: 6.

up over 15 per cent of the population. In 2010, Māori comprised 15 per cent of the recruits graduating from The Royal New Zealand Police College.⁶⁵⁶

Since 1996, Police has developed and implemented specific strategies to better respond to the Treaty of Waitangi. This includes the appointment of a senior adviser to the Commissioner of Police and the creation of a network of more than 35 iwi liaison officers nationally. This network has now extended to other ethnic groups.

The Commissioner of Police has a well-established Māori Focus Forum of senior Māori leaders who advise on strategy and policy and seek specific accountability for actions taken that affect Māori. Advisory committees of this nature are now a feature at district and area levels within Police. Specific policies implemented to respect Māori tikanga (law, rules, and practice) include a new approach to the deaths of Māori, the approach to the finding of human remains, and the respect offered at the scenes of death such as road crashes. Efforts to increase police understanding of the resources available within the Māori community were designed to open up alternatives to prosecution and to create avenues to carry messages about risk to that community.

Nonetheless, despite these progressive actions, the representation of Māori in criminal justice system statistics dramatically outweighs their representation in the population generally. Police, as the “gatekeeper” to the system, in that decisions to proceed against adults and children are primarily the responsibility of Police, is frequently asked whether there is a bias in the decision making of Police that results in the imbalance in the representation of Māori and Pasifika in the system. No such bias is evident in the representation of Asian peoples.

The Policy, Strategy and Research Group of the Department of Corrections published a study on this subject in September 2007. It endeavoured to answer this question: “when Māori make up just 14% of the national population, why do they feature so disproportionately in criminal justice statistics – 42% of all Police apprehensions, and 50% of the prison population?”⁶⁵⁷

The study investigated two different explanations. The first explanation was that “bias operates within the criminal justice system, such that any suspected or actual offending by Māori has harsher consequences for those Māori, resulting in an accumulation of individuals within the system”. The second was that “a range of adverse early-life social and environmental factors result in Māori being at greater risk of ending up in patterns of adult criminal conduct”.⁶⁵⁸

The report concluded that both explanations could be, and probably were, correct at the same time.⁶⁵⁹ A 2011 discussion paper, *Māori Over-representation in the Criminal Justice System: Does structural discrimination have anything to do with it?*, dug

⁶⁵⁶ “Percentage of Maori police officers static”, *Radio New Zealand News*, 18 October 2011. www.radionz.co.nz/news/te-manu-korihi/88599/percentage-of-Māori-police-officers-static (based on figures from New Zealand Police, 2010/11 *Annual Report*, 2011).

⁶⁵⁷ Department of Corrections, *Over-representation of Māori in the Criminal Justice System: An exploratory report* (Wellington: Department of Corrections, 2007), p. 38

⁶⁵⁸ Department of Corrections, 2007: 4.

⁶⁵⁹ Department of Corrections, 2007: 5.

deeper.⁶⁶⁰ The paper presented statistics and examples of police discrimination against Māori. In December 2012, the Police Commissioner launched Turning the Tide: A Whānau Ora Crime and Crash Prevention Strategy aimed at reducing “victimisation, offending, road fatalities and injuries among Māori”.⁶⁶¹ There are grounds for continuing to make this a priority area for effort by law enforcement agencies.

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⁶⁶⁰ Kim Workman, *Māori Over-representation in the Criminal Justice System: Does structural discrimination have anything to do with it?*, discussion paper (Rethinking Crime and Punishment, 2011). www.rethinking.org.nz/assets/Newsletter_PDF/Issue_105/01_Structural_Discrimination_in_the_CJS.pdf

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Electoral management body (pillar 6)

Summary

New Zealand's electoral management body, the Electoral Commission, plays a strong role in the country's national integrity system, and any concerns that exist about its performance are relatively minor. It has a reputation as an impartial and trustworthy institution, with particular credibility in administering general elections. As one expert interviewee told this study, "The Electoral Commission is about as independent as you can get".⁶⁶²

General elections in New Zealand have full integrity, which reflects well on the country's electoral management body. As an indication of this, one independent interviewee said, the commission "handles the task of running elections perfectly. I don't think that anyone has got any real concerns that the vote tally that you get at the end is a genuine representation of the people who showed up to vote".

The Electoral Commission was recently significantly reconfigured as the result of a merger of three separate electoral agencies, and this appears to have made electoral management even stronger. The new commission is generally a well-resourced and robust independent body. It is a highly respected agency that functions well within its competences. The main concern that does exist is in terms of the agency's role in distributing election broadcast advertising resources to political parties.

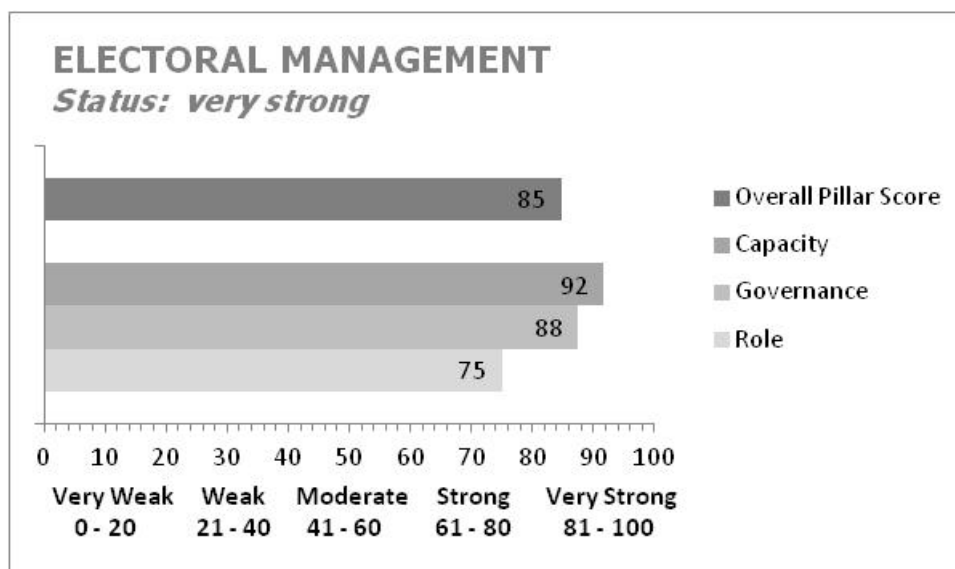
In some areas – particularly that of political finance regulation – the commission has limited scope and tools at its disposal but nonetheless carries out its functions adequately. There are also still some problematic issues with elections – especially with declining faith in the efficacy of general elections and with the distrust of the propriety of politicians in the area of political finance. In particular, in the last general election, voter turnout fell to the historic low of less than 70 per cent. But none of these factors necessarily reflects poorly on the role of the Electoral Commission itself.

General elections have full integrity, reflecting in part the independence and integrity of the Electoral Commission, which has a strong reputation as a trustworthy institution and credibility in administering general elections. The commission has little effective ability to respond to concerns about political party finances, and there are concerns over its allocation of state funding to political parties for broadcast election advertising.

Recommendations in Chapter 6 that relate to the role of the Electoral Commission also emerge from the pillar report on political parties. They call for a review of the arrangements for the allocation of election broadcasting funds and time and for greater disclosure of political party finances to the commission.

⁶⁶² This pillar report is based on publicly available material, supplemented by interview with three experts: Professor Andrew Geddis (author of *Electoral Law in New Zealand: Practice and policy* 2nd ed. (Wellington: Lexis Nexis, 2013)), Graeme Edgeler (an expert in electoral law and administration and an employee of the former Electoral Commission), and Robert Peden (the current Chief Electoral Officer).

Figure 8: Electoral management scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The Electoral Commission is an independent Crown entity that describes itself as “responsible for the administration of parliamentary elections and referenda, the delivery of enrolment services, the allocation of time and money for the broadcast of election programmes, conduct of the Māori Electoral Option, servicing the work of the Representation Commission, the provision of advice, reports and public education on electoral matters, and electoral enrolment services for both parliamentary and local elections”.⁶⁶³

The current Electoral Commission is a new agency created in 2010 and 2012 as a result of the merger of three previously existing agencies concerned with elections. The Electoral (Administration) Amendment Act 2010 (which amended the Electoral Act 1993) brought together the functions of the Chief Electoral Office and the former Electoral Commission, and the Electoral (Administration) Amendment Act 2011 (which also amended the Electoral Act 1993) transferred the functions of the Chief Registrar of Electors to the new body.

This pillar report, therefore, focuses on the role of the new body, but also draws on the historic performance and role carried out by the former Electoral Commission and the other electoral agencies.

The Electoral Commission operates under the mandate of two pieces of legislation: the Electoral Act 1993 and Crown Entities Act 2004. The Broadcasting Act 1989 confers some additional duties and powers on it with respect to the issue of election programmes. It is worth noting that the Electoral Act defines the objective of the Electoral Commission as being “to administer the electoral system impartially, efficiently, effectively, and in a way that ... facilitates participation in parliamentary

⁶⁶³ See Electoral Commission, “About the Electoral Commission”. www.elections.org.nz/about-electoral-commission

democracy; ... promotes understanding of the electoral system and associated matters; and ... maintains confidence in the administration of the electoral system".⁶⁶⁴

The structure of the Electoral Commission is like many other electoral management bodies in comparable countries – it has a policy-oriented board of commissioners and a National Office secretariat that carries out the administration function of the commission. In addition, the Enrolment Services division administers the electoral roll. However, this division is not a part of the commission, but is a business unit of New Zealand Post. The commission contracts with (as well as delegates some of its statutory powers to) New Zealand Post to maintain the elector database that serves as the basis for the electoral roll in each electorate.

6.1.1 Resources (practice)

To what extent does the electoral management body have adequate resources to achieve its goals in practice?

Score: 5

The Electoral Commission appears to be adequately resourced for most of its functions and there is no evidence to suggest its budget is insufficient for carrying out its duties.

The Electoral Commission is a highly professional body without obvious shortcomings in its resources. Both independent interviewees believed the commission is adequately funded. Also, according to Chief Electoral Officer Robert Peden, the commission has no complaints about its level of funding, especially given the current economic settings in which all government agencies are under funding pressures.

For the financial year ending 30 June 2012 – a period involving a general election – the commission spent NZ\$40.3 million. Half of this figure was spent on personnel costs.⁶⁶⁵ In the five weeks before election day, the commission also spent "[NZ]\$3.5 million in mass media advertising on the referendum" and a further "[NZ]\$900,000 promoting its general election messages".⁶⁶⁶ The commission also allocated – not from its own operational funds, but from a dedicated line item in the government Budget – about NZ\$3.3 million to political parties for election broadcast advertising.⁶⁶⁷

The commission's National Office operates year round with a small core administration team, averaging 24 full-time equivalent staff. In addition, in general election years, significant numbers of temporary staff are also employed – in 2011 this amounted to a staff of 23,225 (required to help run about 2,600 polling places on polling day). Further, the Enrolment Services division employs considerably more staff, but this is part of New Zealand Post.⁶⁶⁸

⁶⁶⁴ Electoral Act 1993, section 4C.

⁶⁶⁵ Electoral Commission, *Annual Report of the Electoral Commission for the year ended 30 June 2012*, 2012. www.elections.org.nz/sites/default/files/plain-page/attachments/Electoral_Commission_Annual_Report_2012.pdf

⁶⁶⁶ Electoral Commission, *Annual Report*, 2012: 9.

⁶⁶⁷ Electoral Commission, *Annual Report*, 2012: 15.

⁶⁶⁸ Electoral Commission, *Annual Report*, 2012: 6.

Some activities the commission is responsible for, have been seen in the past as being inadequately resourced such as voter education.⁶⁶⁹ In some recent elections, the former Electoral Commission complained of an inadequate budget for advertising the election. However, for the 2011 election there is strong evidence of public satisfaction with the information they received before the election: in a survey of voters in 2011, 88 per cent were satisfied with information the commission provided before the election.⁶⁷⁰

6.1.2 Independence (law)

To what extent is the electoral management body independent by law?

Score: 5

The Electoral Commission is a statutory body, independent from government. There are no apparent concerns about its legal independence or impartiality.

The legal framework that the Electoral Commission operates under requires and enables it to operate in a transparent and impartial manner – see the discussion of the different types of Crown entities in the pillar public sector report.

The commission is not subject to ministerial direction in discharging its electoral functions, and the Electoral Act 1993 specifies that it must act independently.

The agency has three commissioners, who are appointed by Parliament. The appointment is seen as taking place with proper discussion between the parliamentary parties, and the expectation is that appointments are made on a cross-party, consensus basis. It is notable, however, that for the 2010 amendment legislation, the government of the day decided against the requirement of a supermajority (that is, 75 per cent of agreement among members of Parliament) in the appointments. Nonetheless, voting on the issue takes place in a non-partisan manner. In theory, a majority in the House of Representatives could attempt to “stack” the commission, but as one interviewee said, “There would be a political price to be paid if it was stacked ... it’s highly unlikely that it would happen”. Appointments to the commission may be made for terms of up to five years, and terms can be renewed.

The new commission has greater legal independence than the former agency, as it has a separate structure from the Ministry of Justice. Previously, the commission’s members were appointed by the Minister of Justice, the Chief Electoral Office was part of the Ministry of Justice, and the Chief Electoral Officer was a public servant who (in theory) was under the direction of their minister. As Andrew Geddis says, now, “It looks a lot more independent. So you don’t have that worry that the old Chief Electoral Officer used to be a civil servant answerable to the minister – which I always thought

⁶⁶⁹ Justice and Electoral Committee, *‘Inquiry into the 2011 General Election*, report of the Justice and Electoral Committee, 50th Parliament, April 2013, p. 48. www.parliament.nz/resource/0000261500

⁶⁷⁰ Electoral Commission, *Report of the Electoral Commission on the 2011 General Election and Referendum*, 2012, p. 21.

looked bad. Now that you've got one agency that has guaranteed independence and which operates separately from other government agencies".⁶⁷¹

There is a separation in the Electoral Commission between policy and administration with the commissioners being broadly responsible for policy, and the National Office and Enrolment Services division being responsible for administration. However, these branches are fused by virtue of the Chief Electoral Officer being both a commissioner and the head of the National Office. Geddis says in this regard, that for operational matters, "In practice the [Chief Electoral Officer] would wield the most influence on that board. For instance, if he says to them 'We can or can't do something' then the others will have to agree. It's just a reality".⁶⁷²

In theory, the independence of the commission might be constrained by its resourcing arrangements, as its funding is dependent on year-to-year negotiations with government during the Budget process. The commission's Statement of Intent and its Estimates of Appropriations set out what is required to be delivered. Geddis says, "The minister can't just tell them that they need to 'do X'. But when you're negotiating over budgets, then the minister might say, 'wait before you get this money, I want to see improvements in these areas'." Geddis says, "even with the statutory independent Crown-owned model that [the Electoral Commission] is set up under, the government still holds the purse strings. And this is a potential point of influence. Even the threat of it could be something to worry about".

However, it's worth noting that Geddis does not support ring-fencing the commission's budget – as occurs in comparable countries such as Canada. He says such a mechanism risks creating a "fiefdom". Geddis does not believe that, even under the previous less-independent arrangement, there have been any signs that the commission has antagonised the government of the day, leading to funding cuts.

Alternatively, however, if the current funding model were deemed sufficiently problematic, the Electoral Commission could be given the status of a parliamentary office with funding being provided directly by Parliament. This is the arrangement in the United Kingdom. The government did, however, consider and reject this model when establishing the current commission.⁶⁷³

Some theories of integrity and corruption suggest that public servants in electoral agencies need to be more than adequately remunerated for them to be resistant to the attraction of external resources. It is notable, therefore, that among the National Office staff, eight (out of 24) are paid over NZ\$100,000 per year. Also, in the 2011/12 financial year, electoral commissioners were collectively paid NZ\$346,000: NZ\$87,000 for the chair, NZ\$33,000 for the deputy, and NZ\$226,000 for the chief executive.⁶⁷⁴

The independence of the commission is also reflected in the fact that in practice the Chief Electoral Officer is in charge of appointing and dismissing the personnel of the

⁶⁷¹ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁶⁷² Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁶⁷³ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁶⁷⁴ Electoral Commission, *Annual Report*, 2012.

agency. All staff enjoy adequate dismissal protection. Individual staff members of the administration are appointed by the Chief Electoral Officer of the commission in the usual manner set out under the Crown Entities Act 2004. For more information on the terms of employment in independent Crown entities, see the public sector pillar report.

6.1.3 Independence (practice)

To what extent does the electoral management body function independently in practice?

Score: 4

In general, the independence and impartiality of the Electoral Commission is assured, albeit with some concerns about the distribution model used when allocating election advertising funding to political parties.

As one expert interviewee has said, “The Electoral Commission is about as independent as you can get”.⁶⁷⁵ In terms of impartiality, it is notable that in previous years the commission pursued, investigated, and referred most political parties to the New Zealand Police – often including the parties in government. This gives some, albeit limited, evidence that the commission gives no favour in its application of the law. For further detail of these referrals to the Police, see the political parties pillar report.

There is little reason to believe that the commission does not have the confidence of government and citizens in terms of its independence, impartiality, or accountability. It is widely perceived as non-partisan and professional.⁶⁷⁶

Overall, the commission does not get much attention in academic articles or public debate. There are no known incidents in which the impartiality or independence of the commission or any commissioners or staff has been challenged.

In one notable area is the commission perceived as being less than fair. Every election year, the Electoral Commission has the statutory function of allocating broadcast advertising money to political parties, as well as free minutes for opening and closing addresses on television and radio. It is always a fraught process and inevitably results in dissatisfaction, particularly among smaller parties, because the money is not allocated equally among the parties competing in the election. Notably, the commission has repeatedly expressed its dissatisfaction with the model with which it has to work.

The governing legislation, the Broadcasting Act 1989, details that the commission must take into account the following criteria when allocating the money: the parties’ most recent election and by-election performances, their numbers in Parliament, their number of members, recent opinion poll results, and the need to give all nationwide parties a fair chance to promote their policies.⁶⁷⁷ Arguably, the commission gives little

⁶⁷⁵ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁶⁷⁶ Interview of Andrew Geddis with author, Dunedin, 8 February 2013; interview of Graeme Edgeler with author, Wellington, 12 January 2013.

⁶⁷⁷ Broadcasting Act 1989, section 75(2).

weight to the final criterion of “fairness”, because the commission invariably divides up the money in an unequal fashion. The lion’s share of the funding goes to the Labour and National parties, with much smaller amounts to minor parliamentary parties, and then with only minuscule amounts to those parties outside Parliament. This has been the case under both the first-past-the-post and mixed-member proportional representation electoral systems. In the last first-past-the-post election, of 1993, when the Broadcasting Standards Authority last made the allocations, 66.7 per cent of the total funds were allocated to Labour and National; in 2011, the commission allocated 71.9 per cent of funds to the two major parties.⁶⁷⁸

A strong argument can be made that all parties contesting the list vote in New Zealand should receive exactly the same allocation of funding. Any other allocation is contrary to natural justice and notions of democracy and “level playing fields”. Electoral expert Alan McRobie supports this view, saying, “the differential allocations of state funding and broadcasting time appear to run counter to the long-standing objective of providing all who seek elective office with equality of opportunity”.⁶⁷⁹

It appears that the commission’s allocation method is still based on the previous first-past-the-post electoral system, when a cartel effectively operated in dividing up the broadcast allocation mostly between only Labour and National. Historically, the overall effect of this system may have helped consolidate the present players in the party system, prevent the entry of new competitors, and make it more difficult for small parties to grow.

Many countries allocate direct access broadcasting time on the basis of equality between the different political parties or candidates. Of course, it is not clear that the Electoral Commission can move to significantly more equality under the existing Broadcasting Act provisions. The commission does, however, have substantial discretion as to how much weight it gives for the criterion of “fairness” in its allocation model. At the moment, the fairness criterion appears to be afforded the least weight of all the criteria the commission considers.

6.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the electoral management body?

Score: 4

Comprehensive provisions allow the public to obtain most information on the organisation and functioning of the Electoral Commission.

The Electoral Commission has a statutory obligation to produce publically available annual reports, Statements of Intent to the government, post-election reports, and

⁶⁷⁸ Bryce Edwards, “The inequitable allocation of TV advertising”, *liberation* blogsite, 12 October 2008. liberation.typepad.com/liberation/2008/10/political-finan.html

⁶⁷⁹ Alan McRobie, “Elections and the electoral system”, in Raymond Miller, ed., *New Zealand Government and Politics* (Auckland: Oxford University Press, 2001).

advice on election advertising. Furthermore, as a public authority, the commission is subject to the Official Information Act 1982, so must comply with requests for information (unless a defined exemption applies).

Despite provisions for making much of its information freely available, most meetings of the commission are closed to the public. Whereas in many countries observers are permitted at the sittings of the commissioners, this does not occur in New Zealand as there are no requirements for meetings to be open or for minutes to be regularly released; instead, all significant decisions are simply publicised through media releases.⁶⁸⁰

Of course there is not necessarily any public, political, or media demand for such open meetings. Nonetheless, this lack of transparency naturally raises questions about the integrity of the commission. The public might have less faith in this institution as a result of its secrecy – regardless of whether it is deliberate or not.

The commission has a role in making available information that it collects about political finance. Therefore, the public can expect to find information on the commission's website about the campaigning expenditure of political parties, candidates, and parallel campaigners. It can also expect to find information about donations received over a certain threshold by parties and candidates. The details of these requirements are complex – for more information, see the political parties pillar report.

When it comes to decisions the commission makes about the electoral behaviour and political finance that it regulates, there is less onus on the commission to publicise these. For example, nothing in the law requires the commission to release information about referrals to the police for breaches of the electoral law.

6.2.2 Transparency (practice)

To what extent are reports and decisions of the electoral management body made public in practice?

Score: 4

The public can readily obtain information about the activities of the Electoral Commission. However, not all information about referrals to the police is being put on the website.

The commission produces annual reports, corporate plans and annual accounts, all of which are available on its comprehensive website.⁶⁸¹ It also produces news releases, statements, and responses. In addition, the National Office publicises its 0800 free-phone number and has a contact and enquiry form on its website. The Enrolment Services division also has user-friendly contact details.

⁶⁸⁰ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

⁶⁸¹ Electoral Commission website, www.elections.org.nz [accessed 22 October 2013].

In general, the public can readily obtain relevant information on the organisation and functioning of the commission on decisions that concern them. In addition, the commission is transparent about the advice it gives to government and Parliament.

The public might not always be able to easily access electoral information through the commission. For example, much less information appears obtainable about how the commission has made decisions. And, as mentioned above, commission board meetings are not open to the public or media, and public records of the meetings are limited; instead the public is served by the media seeking out this information.⁶⁸² Electoral law specialist Graeme Edgeler commented, “This is one area where the [commission] is less transparent under the new regime. The old small [commission] was very open with police referrals, including giving issuing reasons for its doing so. The old [Chief Electoral Officer] didn’t do that. When they combined, they basically went with the old [Chief Electoral Officer] practice”.⁶⁸³

According to one expert interviewee, “There seems to be a lot less made public under the new [commission] model. As a general rule, the referrals to the Police are not being put online. They still put out their guidance documents, but they don’t put out their decisions (which they did during the [Electoral Finance Act 2007] period)”.⁶⁸⁴

6.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the electoral management body has to report and be answerable for its actions?

Score: 5

Extensive provisions ensure the Electoral Commission has to report and be answerable for its actions.

As an independent Crown entity under the Crown Entities Act 2004, the Electoral Commission is subject to the standard accountability requirements. For example, it is subject to the Official Information Act 1982, its decisions are subject to Ombudsman review, and its accounts must be independently audited by Audit New Zealand.

The most public accountability provision is the requirement for the commission to publish its annual report, which is comprehensive, to the Minister of Justice. The commission is also accountable to Parliament and must appear before the Justice and Electoral Law Committee when required. This committee of members of Parliament reviews each general election, which includes evaluating the performance of the commission. Similarly, the Electoral Act 1993 specifies that the commission must publish a review of its performance in running each general election. Both Parliament’s and the commission’s reviews result in significant reports that provide in-depth information.

⁶⁸² For example, at least one of the *New Zealand Herald*’s parliamentary press gallery journalists makes a monthly request for this information under the Official Information Act 1982.

⁶⁸³ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

⁶⁸⁴ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

In theory, Parliament could also vote to “remove or suspend members” of the commission, if such board members were found to have grossly underperformed. The Electoral Act 1993 refers to the “Power to remove or suspend members”, which can be necessitated by “just cause by the Governor-General acting upon an address from the House of Representatives”.⁶⁸⁵

The commission is answerable in law through the courts. In particular, it is subject to judicial review. Such reviews can establish whether the commission has acted reasonably, without bias, and in line with legislation.

6.2.4 Accountability (practice)

To what extent does the electoral management body have to report and be answerable for its actions in practice?

Score: 4

The Electoral Commission makes itself accountable through its public reports – especially through a comprehensive annual report.

The annual report of the Electoral Commission is ostensibly for the purposes of the executive and Parliament, but is easily available for the public and contains a wealth of information about the agency. However, it is not so apparent that the commission makes an effort to hold regular meetings with parties, the media, and observers to answer queries.⁶⁸⁶

Generally, the commission is not a well-known public agency, and its outreach seems limited. It does, however, engage in public consultation and holds public meetings when a particular project demands it. For example, in 2012, the commission held public hearings for its review of mixed-member proportional representation. And for the 2011 electoral system referendum, according to the commission, it held “601 community presentations and public meetings reached 28,151 people”.⁶⁸⁷

One case study of accountability relates to a notable case of poor performance by the electoral agencies in counting the vote in a timely fashion on polling day in 1999. As a result, staff were removed from their positions for “failure to perform”.⁶⁸⁸

The Electoral Commission has been subject to two recent judicial reviews that are of note. First, the 2008 case taken against the commission by the National party about the commission’s decision to register a union as a third party for the purposes of the Electoral Finance Act’s parallel campaigning rules.⁶⁸⁹ Second, the Alliance sought a judicial review of the commission’s allocation of time and money for the 2008 general election.⁶⁹⁰ It should be noted, however, that judicial reviews are slow and expensive.

⁶⁸⁵ Electoral Act 1993, section 4G.

⁶⁸⁶ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

⁶⁸⁷ Electoral Commission, *Report on the 2011 General Election*, 2012, p. 17.

⁶⁸⁸ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁶⁸⁹ *Kirk v Electoral Commission* 21 May 2008, High Court Wellington CIV 2008-485-756.

⁶⁹⁰ *Alliance Party v Electoral Commission* [2010] NZAR 222.

In the case of the Alliance, the party received its decision a year and a half after the election, which meant it was good only for setting a new standard for the next election.⁶⁹¹

6.2.5 Integrity (law)

To what extent are there mechanisms in place to ensure the integrity of the electoral management body?

Score: 5

Mechanisms to ensure the integrity of the Electoral Commission appear to be few, but appropriate.

As with any state sector board members, commissioners must declare potential interests or connections they may have. And the commissioners and staff also fall under the scope of the legal requirements of the Crown Entities Act 2004. In addition, a convention is emerging that a judge or retired judge chairs the commission while other members have no partisan affiliations.

The Electoral Act 1993 does not restrict political affiliation by members of the Electoral Commission or its staff. However, it is incompatible to be in office on behalf of a political party. The laws and regulations applicable to public servants apply to commission staff. (For more information on the rules applicable to public servants, see the public sector pillar report (p 123).)

The only staff who appear to be restricted in their political affiliations are the returning officers in each electorate who are prevented from holding official positions in political parties.

6.2.6 Integrity (practice)

To what extent is the integrity of the electoral management body ensured in practice?

Score: 5

An overall aim of the Electoral Commission is to preserve integrity and public confidence in the democratic process, and there is no suggestion of any impropriety or bias in the dealings of the commission.

Public surveys shows a high level of satisfaction with the way elections are run, which suggests little concern about the integrity of the Electoral Commission. Of those surveyed in 2011, 88 per cent expressed satisfaction with the electoral process – up from 85 per cent in 2008. Political parties were also surveyed, with 98.8 per cent of

⁶⁹¹ The Alliance judicial review established that the Electoral Commission was obliged to make allocations of both opening and closing broadcast addresses to all parties. It also resulted in Television New Zealand providing additional free time so all parties could make such addresses.

secretaries of political parties expressing satisfaction with the services the commission provided.⁶⁹²

In 2008, voters were also surveyed about the administration of parliamentary elections and referenda, with 85 per cent expressing that they were “confident or very confident”.⁶⁹³

To run general elections, the commission must hire large numbers of additional staff, increasing the risks for integrity, because of the significant numbers of temporary new staff operating with authority. The commission’s 2011/12 annual report makes the following declaration: “There were close family members of key management personnel among the 24,000 New Zealanders engaged to assist with the conduct of the November 2011 General Election and referendum on the voting system. The terms and conditions of those arrangements were no more favourable than the Electoral Commission would have adopted if there were no relationship to key management personnel”.⁶⁹⁴

6.3.1 Campaign regulation

Does the electoral management body effectively regulate candidate and political party finance?

Score: 3

The Electoral Commission generally enforces the laws governing political party finance.

The Electoral Commission regulates the financing of political parties, candidates, organisations, and individuals engaged in campaigning. The commission maintains and makes available several public registers of political parties and details of their donations and campaign expenditures.⁶⁹⁵ Limited information is also kept on registered parallel campaigners (known as “registered promoters”). But the law provides the commission with a limited number of campaign-regulation mechanisms. Therefore, as Graeme Edgeler (electoral law specialist and former lawyer for the commission) says, “In terms of the rules as they exist, the commission does everything that is asked of it. But the role of the commission is deliberately kept minimal. So really what the commission is there to do is to accept the reports that are given to it by the participants. They receive donation reports; they receive expenditure reports, and if a complaint is made they make a decision on whether to give this to the police. They have minimal powers to investigate”.⁶⁹⁶ The role can, therefore, be characterised as passive and limited.

Edgeler says, “They do have good internal processes for investigating allegations. They are very good at investigating the basics (dual-voting, etc.). They don’t go out and

⁶⁹² Electoral Commission, *Annual Report*, 2012: 16.

⁶⁹³ Electoral Commission, *Annual Report*, 2012: 16.

⁶⁹⁴ Electoral Commission, *Annual Report*, 2012: 35.

⁶⁹⁵ The Electoral Commission publishes these details on its website, www.elections.org.nz/parties-candidates

⁶⁹⁶ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

interview people under caution like the police – it's certainly not at that level. But in actually finding out what did happen they go and interview people, speak to electors". Edgeler stresses that the commission has few auditing powers: "they don't have auditors to investigate financial affairs. They receive expense reports and donation disclosures and as long as it all adds up and is on time – unless there's something that they know is missing then they won't do anything further unless someone complains".⁶⁹⁷ Therefore, although the commission does seek to regulate candidate and political finance, its approach is largely reactive, and its success could be seen as limited.

Whether the commission should take a more thorough, interventionist, and proactive role in regulating campaign finance is entirely a question for the law makers rather than the commission. This issue is addressed further in the political parties pillar report.

Since 2011, the commission has had a statutory role in providing advisory opinions about whether something is legally an election advertisement. In the 2011 election year it "received 718 advisory opinion requests dealing with 1099 separate advertisements for the 2011 election of which 90 per cent were requested by members of Parliament".⁶⁹⁸

6.3.2 Election administration

Does the electoral management body ensure the integrity of the electoral process?

Score: 5

The Electoral Commission is active and successful in ensuring free and fair elections.

Elections run smoothly in New Zealand with strong confidence in the integrity of the electoral process. The Electoral Commission is seen as performing strongly in this regard. According to Geddis, "It handles the task of running elections perfectly. I don't think that anyone has got any real concerns that the vote tally that you get at the end is a genuine representation of the people who showed up to vote".⁶⁹⁹

Serious voting irregularities and allegations of impropriety are rare. According to Geddis, "There's never been – in recent New Zealand political history – an allegation that an election result has been obtained by fraud or wrong behaviour. It just hasn't arisen".⁷⁰⁰ Geddis's opinion is backed up by the lack of obvious complaints about the commission or the electoral process and by the survey evidence that the vast majority of voters are happy with the process.⁷⁰¹

There is some evidence of a reduction in confidence in the integrity of the democratic process and in political party funding and campaign expenditure. But it is far from clear

⁶⁹⁷ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

⁶⁹⁸ Electoral Commission, *Report on the 2011 General Election*, 2012: 5.

⁶⁹⁹ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁷⁰⁰ Interview of Andrew Geddis with author, Dunedin, 8 February 2013.

⁷⁰¹ Electoral Commission, *Report on the 2011 General Election*, 2012: 4.

that the commission's work is related to this. In particular, there are serious problems with declining faith and participation in the electoral process. Voter turnout has generally been in decline over a long period, and, at the most recent election, sunk to the lowest turnout in over a century with only 70 per cent of eligible voters turning out on polling day, which was a decline of 6 per cent from the previous election. There is also a trend for fewer participants standing for office. The commission reported that "453 electorate candidates and 471 list candidates were nominated with 13 parties contesting the party vote. This was a significant reduction compared to 2008 when there were 522 electorate candidates, 593 list candidates and 19 parties contesting the party vote".⁷⁰²

Such trends are generally beyond the powers of the commission. In particular, the trend of declining voter turnout is one experienced in most Western liberal democracies and, obviously, relates to more-significant issues in modern politics. Nonetheless, the commission needs to be measured on this criterion, and its response should be examined. The commission has sought to make this issue a priority in future work, saying in its post-election review that, "An immediate area of focus for the Commission will be civics education"⁷⁰³ and in its 2012 annual report, "Promoting participation to reverse the downward trend is therefore a key objective for the Commission to be achieved over the next 9–12 years".⁷⁰⁴ It is questionable whether the level of electoral participation relates to such public education, but the commission could certainly play a stronger role in providing electoral information and encouragement.

Also, the commission claims that "Administrative barriers to participation in New Zealand elections are low by international standards".⁷⁰⁵ It is also the case that the electoral agencies have achieved enrolment rates that "compare favourably with enrolment rates achieved overseas".⁷⁰⁶

The commission surveys the public following each election, and the following details for the 2011 election suggest strong voter confidence and satisfaction in the administration of general elections: "Voter survey results showed 88% of voters were satisfied or very satisfied with the information they received before the election, the voting process, and their voting experience. The vast majority of voters considered the time spent in the polling place reasonable (98%), found the parliamentary (94%) and referendum papers (83%) straightforward, and were satisfied with the timeliness of the results (87%). Voters were very positive (93%+) about the location and layout of polling places and the politeness, efficiency and knowledge of electoral staff. These results are on a par with those for 2008".⁷⁰⁷

⁷⁰² Electoral Commission, *Report on the 2011 General Election*, 2012: 30.

⁷⁰³ Electoral Commission, *Report on the 2011 General Election*, 2012: 4.

⁷⁰⁴ Electoral Commission, *Annual Report*, 2012: 4.

⁷⁰⁵ Electoral Commission, *Statement of Intent 2011–2014*, 2011, p. 6.
www.elections.org.nz/sites/default/files/plain-page/attachments/Electoral_Commission_Statement_of_Intent_2011-14.pdf.

⁷⁰⁶ David McGee, *Parliamentary Practice in New Zealand*, 3rd ed. (Wellington: Dunmore Press, 2005).

⁷⁰⁷ Electoral Commission, *Report on the 2011 General Election*, 2012: 4.

The commission is relatively accessible to the public. There is a free-phone number for the answers to questions on electoral rights and elections. According to the commission, in the three months leading up to the last election, it received 54,193 enquiries.⁷⁰⁸ The Commission website is also a key communication device, and can be used, not just for contacting the agency, but also providing a facility to register to vote, and individuals can also check if they are already registered. The website received about 1.7 million visits during the 2011 election year. A separate “election results” website received 3.3 million visits during election day.⁷⁰⁹

The commission handles most complaints about electoral matters. During the 2011 election year it “investigated in excess of 600 complaints before election day”.⁷¹⁰ It should be noted that the judiciary, not the commission, deals with electoral recounts and electoral petitions. Requests for electoral recounts are dealt with and organised by a District Court judge. For electoral petitions, jurisdiction is split with the High Court having the power to hear electoral petitions about a particular electorate seat and the Court of Appeal hearing electoral petitions about the allocation of list seats.

The Electoral Commission administers only general elections not local body or district health board elections, although the commission provides the electoral rolls for those elections.⁷¹¹

Other areas relating to the integrity of elections are also outside of the commission’s role. The most critical one relates to the investigation and prosecution of electoral offences, which police carry out after the commission (or any member of the public) passes on serious allegations. Reflecting on the 2011 election year, the Commission stated that it was “concerned about the priority the Police seem able to accord these referrals”, noting that “Effective and timely investigation and prosecution of electoral offences is critical to ensuring public confidence in the integrity of the democratic process”.⁷¹² For more on this, see the law enforcement pillar report.

6.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the Electoral Commission do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? In particular, where the Electoral Commission has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

The Electoral Commission has a special role in administering the Māori vote and has expressed its intention to reduce barriers to the participation of Māori in elections. Māori are generally satisfied with the electoral process.

⁷⁰⁸ Electoral Commission, *Report on the 2011 General Election*, 2012: 37.

⁷⁰⁹ Electoral Commission, *Report on the 2011 General Election*, 2012: 16.

⁷¹⁰ Electoral Commission, *Report on the 2011 General Election*, 2012: 37.

⁷¹¹ The local body elections are subject to the Local Electoral Act 2001, and district health board elections are subject to the New Zealand Public Health and Disability Act 2000.

⁷¹² Electoral Commission, *Report on the 2011 General Election*, 2012: 39.

The Electoral Commission has a special role in dealing with Māori voters because of the seven Māori seats. Māori can choose to register on the Māori roll and vote in a Māori electorate. For this reason, the commission administers the Māori Electoral Option every five years following the national census.

In its Statement of Intent for 2011–2014, the Commission expressed its intention to reduce barriers to the participation of Māori in elections. Most significantly, it committed to “provide information in te reo Māori [Māori language] in our key communications”, to participate in “face to face outreach programmes that encourage Māori to enrol and vote”, to “ensure that those voting on the Māori roll get the same services as those voting on the general roll”, and to “integrate counting of votes for Māori electorates with the counting of votes for general electorates, so that there are no undue delays with reporting results for Māori electorates”.⁷¹³ In its role of voter education, the commission endeavours to “provide targeted information to suit the needs of Māori, ethnic minorities, migrants and youth”.

The commission can indirectly claim some successes in this regard. The 2011 post-election survey of voters found that 94 per cent of Māori voters had a very high level of overall satisfaction with the electoral process, which was higher than the level among non-Māori.⁷¹⁴

Also, as a public sector organisation, the commission strives to make itself an agency that is a good employer for Māori.

New Zealand’s declining voter turnout is particularly accentuated for those on the Māori roll. In 2011, the turnout of those on the Māori roll declined to 58.2 per cent – down from 62.4 per cent in 2008.⁷¹⁵

The Treaty of Waitangi has been invoked in issues relating to the Electoral Commission’s allocation of time and money for election broadcasting. For example, the Māori Party complained in 2011 that the commission had failed to give effect to the Treaty in deciding how much to distribute to the party. Member of Parliament Te Ururoa Flavell stated in Parliament that “we believe that decisions were made that in effect devalue the role of the Treaty and of te reo Māori as the official language of Aotearoa [New Zealand]”. But Flavell expressed optimism that the appointment of a Māori commissioner, Jane Huria (“tangata whenua”) might lead the commission to better reflect the Treaty.

The commission also makes a strong effort to translate much of its publicity material into te reo Māori. For example, the commission’s post-election review stated that “Core information brochures and media releases about key milestones were translated into te reo Māori”, “The Commission’s bilingual advertising was broadcast on Māori Television and iwi radio”, and “The Commission’s ‘Candidate Handbook – 2011 General Election and Referendum’ was also made available in te reo Māori”.⁷¹⁶ Also

⁷¹³ Electoral Commission, *Statement of Intent*, 2011: 7.

⁷¹⁴ Electoral Commission, *Report on the 2011 General Election*, 2012: 23.

⁷¹⁵ Electoral Commission, *Report on the 2011 General Election*, 2012: 24.

⁷¹⁶ Electoral Commission, *Report on the 2011 General Election*, 2012: 18–19.

during the election campaign, the commission's "Community Liaison Coordinators worked directly with communities nationwide, including three Pasifika and five Māori specialists".⁷¹⁷

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⁷¹⁷ Electoral Commission, *Report on the 2011 General Election*, 2012: 17.

Ombudsman (pillar 7)

Summary

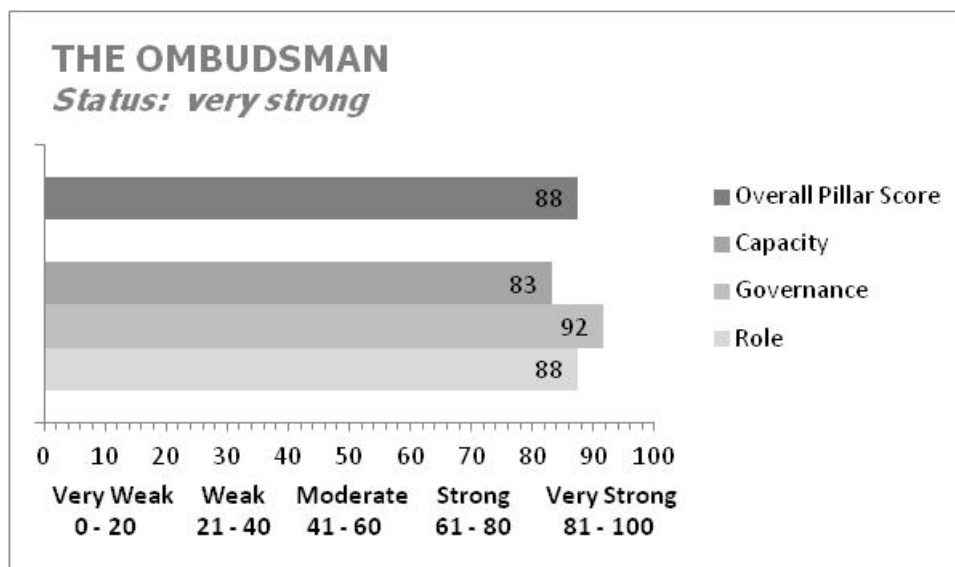
The Office of the Ombudsman meets high standards of independence, integrity, and accountability. It is an important check on the exercise of administrative power and on the proper use of the official information legislation.

Although the Ombudsmen's funding has not been reduced, it has not kept up with the increase in complaints, or with the new functions they have been required to undertake. This has resulted in a backlog of complaints and an ongoing inability to carry out some functions. A substantial increase in funding was recently announced, but the office may still be under-resourced.

The Ombudsmen are effective in their handling and resolution of citizens' complaints and thus in acting as a check on the exercise of administrative power. However, they are not funded to carry out educational functions or to assess the quality of agencies' systems for handling complaints and requests for information. In practice, they do some educational work, but do not systematically audit agencies' processes.

Recommendations in Chapter 6 relating to the Office of the Ombudsman reflect the need for more effective oversight by the Ombudsmen of agencies' compliance with both the spirit and the letter of the Official Information Act 1982, as well as a wider educative role. For both of these roles, and possibly even to carry out current functions well, more resources are needed, so a review of funding is recommended for 2014/15.

Figure 9: Ombudsman scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The Office of the Ombudsman has an important role to play in maintaining the integrity of government processes and practices. Its stated aim is to achieve an overall outcome that a “high level of public trust in government is maintained”.⁷¹⁸

The Governor-General appoints the Ombudsmen (there are currently two) on the unanimous recommendation of Parliament. Their statutory functions are to:⁷¹⁹

- investigate state sector administration and decision making
- investigate and review decisions made on requests to access official information
- deal with requests for advice and guidance about alleged serious wrongdoing
- monitor and inspect places of detention for cruel and inhumane treatment
- provide comment to the Ministry of Transport on applications for authorised access to personal information on the motor vehicle register.

The Ombudsmen are also an “independent mechanism”, protecting and monitoring the implementation of the United Nations Convention on the Rights of Persons with Disabilities.

There is a separate Human Rights Commission, and the Ombudsman does not take cases that can be considered under the Human Rights Act 1993.

New Zealand was the first English-speaking and the first common law country to appoint an Ombudsman, and the Office of the Ombudsman recently celebrated its 50th anniversary.

The Banking Ombudsman and the Insurance & Savings Ombudsman are private sector ombudsman schemes that investigate and resolve disputes between financial service providers and those who use those services. Although they do not carry out statutory functions, they do “provide the assurance that important private actors too are accountable and observe principles of fairness and consistency in decision-making”.⁷²⁰ They are not part of the Office of the Ombudsman and are not covered further in this assessment.

The main powers of the Ombudsmen derive from the Ombudsmen Act 1975. This has stood the test of time well, but is now in need of review to bring it into line with modern legislation.⁷²¹ The official information legislation has been the subject of a recent review by the Law Commission.⁷²²

⁷¹⁸ Office of the Ombudsman, *Annual Report 2011/12*, 2012, p. 8.

⁷¹⁹ See Office of the Ombudsman, *Statement of Intent for the period 1 July 2012 to 30 June 2015*, 2012.

⁷²⁰ See, for example, Dame Sian Elias, Chief Justice, “The place of the Ombudsman in the justice system”, paper presented at Australia and New Zealand Ombudsman conference It’s the Putting Right that Counts, Wellington, 6 May 2010.

⁷²¹ Mai Chen, “New Zealand’s ombudsmen legislation: The need for amendments after almost 50 years” *Victoria University of Wellington Law Review* vol. 40(4), 2010, p. 723.

⁷²² Law Commission, *The Public’s Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012).

Probably because of the diversity of forms taken by the institution of Ombudsman worldwide, there are few international benchmarks or norms. However, the international status of the Ombudsman of New Zealand is reflected in the fact several New Zealand Ombudsmen, including the current Chief Ombudsman, Dame Beverley Wakem, have been presidents of the International Ombudsman Institute. The Chief Ombudsman is also a member of the Australian and New Zealand Ombudsman Association, which sets stringent criteria for membership.⁷²³

7.1.1 Resources (practice)

To what extent do the Ombudsmen have adequate resources to achieve their goals in practice?

Score: 3

The Office of the Ombudsman has a serious backlog and despite a recently announced increase in funding is probably still under-resourced.

The Chief Ombudsman is of the view that since about 2009, the Ombudsmen have been seriously under-resourced and a substantial backlog of complaints is awaiting investigation. In addition, they have not been in a position to compete in the market for staff, and staff salaries are about 14 per cent below market rate. Staff turnover is low, but increased from 6 per cent in 2010 to 14 per cent in 2011.⁷²⁴

As part of the Budget for 2012, additional funding allowed the Ombudsmen to make a 3.5 per cent adjustment to staff remuneration. For 2013/14, sufficient funding is to be made available for six more investigating staff. In the current economic climate this is a substantial increase, although in the opinion of the Chief Ombudsman a further two investigating staff (that is, eight additional staff) are needed to bring workloads down to a reasonable level.⁷²⁵ The recent introduction of an ongoing continuous practice improvement initiative may make for more efficiency.⁷²⁶

From 2008/09 to 2011/12, the number of complaints on hand at any one time increased from about 1,000 to about 1,700, a 59 per cent increase. In contrast, the Ombudsmen's annual appropriation from Parliament increased only 6.3 per cent, from NZ\$8.33 million to NZ\$8.86 million over the same period. At 31 December 2012, 465 requests for assistance had not been allocated to a case officer.⁷²⁷ In 2011/2, only 53 per cent of complainants considered the ombudsman process to be timely and overall satisfaction with their standard of service has dropped, from 66 per cent in 2008/09 to 55 per cent in 2011/12.⁷²⁸

⁷²³ See the website of the Australian and New Zealand Ombudsman Association. www.anzoa.com.au [accessed 17 February 2013]. The criteria relate to independence, fairness, accountability, accessibility, efficiency, and effectiveness.

⁷²⁴ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷²⁵ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷²⁶ However, the 2012/13 annual report of the Office of the Ombudsman, which arrived too late for analysis in this report, records a further 29 per cent increase in work.

⁷²⁷ Office of the Ombudsman, *Budget Report 2012 for Officers of Parliament Select Committee*, 2012, p. 14.

⁷²⁸ Office of the Ombudsman, *Budget Report*, 2012: 10.

Senior lawyers say that although the Ombudsmen's investigations are thorough and fair, they are no longer referring clients to the Ombudsmen if there is an alternative.⁷²⁹ The process takes too long and irreparable damage may be done to their clients' interests before the investigation can be completed. A case was cited in which a family lodged a complaint in July 2011 against the Immigration Department, which had declared the family to be in New Zealand illegally.⁷³⁰ By January 2012, an Ombudsman had not yet decided whether to accept the case for investigation, and a deportation order was served on the family. Shortly afterwards, the Ombudsman decided to commence an investigation, but the Immigration Department refused to suspend the order and the family was deported.

The Ombudsmen sometimes have insufficient resources to perform new functions allocated to them, or at least to perform them to an acceptably high standard.⁷³¹

In their role under the UN Optional Protocol Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, for example, their inspection team consists of two staff, which is the minimum recommended in the guidelines provided by the Association for the Prevention of Torture.⁷³² No funding is available to employ a medically qualified team member as also recommended by the guidelines.⁷³³ Similarly, no extra funding was made available in 2010 when the Ombudsmen were required to take on the function of providing comment to the Ministry of Transport on applications for authorised access to personal information on the motor vehicle register.⁷³⁴

7.1.2 Independence (law)

To what extent are the Ombudsmen independent by law?

Score: 5

With the minor exception of the reappointment process., the independence of the Ombudsmen is strongly protected by law.

An Ombudsman is appointed by the Governor-General for a term of five years (with provision for reappointment) on the recommendation of the House of Representatives (that is, Parliament).⁷³⁵ It is established practice that the recommendation must be unanimous. An Ombudsman may be removed from office only by Parliament and only for a limited number of specified reasons such as bankruptcy or misconduct.

⁷²⁹ Interview of Tim Clarke, partner at Russell McVeagh, with author, 12 December 2012; interview of Doug Tennent, University of Waikato, with author, 21 December 2012; Mai Chen (public law specialist), "Celebrating 50 years of Ombudsmanship in New Zealand", paper presented at the International Ombudsman Institute conference, Wellington, 16 November 2012.

⁷³⁰ Interview of Doug Tennent, University of Waikato, with author, December 2012.

⁷³¹ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷³² Association for the Prevention of Torture, *Optional Protocol to the UN Convention against torture*, 2010, pp. 51, 71–72. www.ap.t.ch/content/files_res/opcat-manual-english-revised2010.pdf [accessed 2 May 2013].

⁷³³ Association for the Prevention of Torture, 2010.

⁷³⁴ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷³⁵ Ombudsmen Act 1975, section 3(2).

The Ombudsmen Act 1975, which governs the role of the Ombudsmen, contains no provision declaring it to be a constitutional Act, though there is judicial authority for the constitutional status of the Ombudsmen,⁷³⁶ and they are generally regarded as a constitutional watchdog.

An Ombudsman is an officer of Parliament and accounts to Parliament through the Officers of Parliament Committee, which is a non-partisan committee headed by the Speaker of the House. The Ombudsmen are not subject to the oversight of Treasury or any other government department.

An independent body, the Remuneration Authority, determines the Ombudsmen's salaries, and they may not be diminished during the continuance of an Ombudsman's appointment.⁷³⁷ They are roughly comparable to the salary of a District Court judge.⁷³⁸ Funding for the Ombudsmen's salaries is by way of "permanent legislative authority". An Ombudsman may not hold any other office or undertake any other employment without the specific approval of the Prime Minister.⁷³⁹ The annual budget for the Office of the Ombudsman is agreed with the Officers of Parliament Committee, and then automatically included in the national budget for the year. It is not controlled by Treasury or any other body over which the Ombudsmen have jurisdiction.

The Ombudsmen have sole authority to appoint and dismiss staff, and the relationship between the Ombudsmen and staff is governed by general employment law.

The independence of the Ombudsmen is fully protected by law. However, it should be noted that the reappointment, as well as the appointment, of an Ombudsman requires a unanimous recommendation of Parliament. Accordingly, any political party can block an Ombudsman's reappointment. It has been suggested that it might be preferable for an Ombudsman to serve a single term of five or seven years with no provision for reappointment.

Ombudsman processes (but not decisions) are judicially reviewable. No recent judicial review has involved an Ombudsman.⁷⁴⁰

7.1.3 Independence (practice)

To what extent are the Ombudsmen independent in practice?

Score: 5

Successive Ombudsmen have maintained high standards of independence in practice, and neither their independence nor that of their staff has been seriously questioned.

⁷³⁶ See *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 190 (HC).

⁷³⁷ Ombudsmen Act 1975, section 9(3).

⁷³⁸ Taking into account the allowance for general expenses paid to a District Court judge but not to an Ombudsman.

⁷³⁹ Ombudsmen Act 1975, section 4.

⁷⁴⁰ *Television New Zealand Ltd v Ombudsmen* [1992] 1 NZLR 106 (HC).

It is clear from reported cases⁷⁴¹ and, in particular, from the Ombudsmen's reports on investigations undertaken on their own initiative under the "own motion" powers⁷⁴² that the Ombudsmen act independently of government or any other outside influences.

There have been no examples of political influence (or attempts to exert political influence) on the appointment of Ombudsmen and their staff in the past 20 years. In 1992, a serving Ombudsman's reappointment was blocked by the government of the day,⁷⁴³ but since then Ombudsmen who have signified their availability for reappointment have always been reappointed, and there has been no apparent attempt to influence the appointment or reappointment process.

Complainants to the Ombudsmen are generally treated with respect by the agencies against whom the complaint is made. Any suggestion of retaliatory action could itself be the subject of an Ombudsman's investigation.⁷⁴⁴

In general, the courts support the independence of the Ombudsmen. In one of the few cases where an Ombudsman's decision has been before a court, the judge said, "Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another".⁷⁴⁵

An independent commentator recently noted that "the gravitas of the office, as an independent and professional Officer of Parliament, allows them to use persuasion to great effect in resolving complaints about matters of administration".⁷⁴⁶

7.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the Ombudsmen?

Score: 4

Adequate transparency provisions are in place, but they could be improved by adopting the Law Commission's recommendations.

The Ombudsmen must report annually to Parliament on the exercise of their functions.⁷⁴⁷ The report is comprehensive and is published electronically and in hard

⁷⁴¹ Available from www.ombudsmen.parliament.nz

⁷⁴² See, for example, the 2012 "own motion" investigation into prison health services: Chief Ombudsman Beverley Wakem and Ombudsman David McGee, *Investigation of the Department of Corrections in Relation to the Provision, Access and Availability of Prisoner Health Services*, 2012. www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/456/original/own_motion_prisoner_health.pdf?1349735789

⁷⁴³ See parliamentary questions recorded in *Hansard* for April 1992:

⁷⁴⁴ Although it is more likely to be the subject of comment in the Ombudsman's opinion on the complaint – email communication with Principal Adviser, Office of the Ombudsman, 18 July 2013.

⁷⁴⁵ See *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 190 (HC).

⁷⁴⁶ Chen, 2012.

copy. They are also required to publish an annual Statement of Intent.⁷⁴⁸ They have the power to publish reports about the exercise of their functions or about specific cases⁷⁴⁹ and regularly publish case notes, opinions, reports, and guidelines. However, they are not formally required to do so.

In its recent review of the official information legislation,⁷⁵⁰ the Law Commission recommended that the Ombudsmen should expressly be given the function of publishing opinions and guidelines on that legislation. The Ombudsmen accept the desirability of such a change and consider it should also be extended to their general jurisdiction under the Ombudsmen Act.⁷⁵¹

The Official Information Act 1982 does not apply to the Ombudsmen, but the Law Commission has recommended that it be extended to cover all officers of Parliament in respect of their administrative functions.⁷⁵² The government has not accepted the recommendation. It seems reasonable that the Ombudsmen should be open to the same scrutiny as other public bodies.

The Ombudsmen and their staff have a general duty of confidentiality in respect of information they receive⁷⁵³ and do not publish identifying information about complainants.

There is no legal requirement for Ombudsmen or their staff to publish declarations of assets.⁷⁵⁴

7.2.2 Transparency (practice)

To what extent is there transparency in the activities and decision-making processes of the Ombudsmen in practice?

Score: 5

There is a good level of transparency in practice, generally more than is required by law.

The Ombudsmen regularly publish the annual report required by the legislation. It gives a comprehensive account of the Ombudsmen's activities in the previous year, including the numbers and types of complaints and the time taken to complete investigations. Reports on own motion investigations are also published.

For many years, the Ombudsmen have published case notes, and they now offer an extensive range of guidance notes, newsletters, reports, and other publications. Their

⁷⁴⁷ Ombudsmen Act 1975, section 29.

⁷⁴⁸ Public Finance Act 1989, section 39.

⁷⁴⁹ Ombudsmen Rules 1989.

⁷⁵⁰ Law Commission, NZLC R125, '2012: 44.

⁷⁵¹ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁵² Law Commission, 2012: 339.

⁷⁵³ Ombudsmen Act 1975, section 21.

⁷⁵⁴ But see the discussion under "Integrity mechanisms", p. 222.

new website⁷⁵⁵ has the stated purpose of informing the public about the role of the Ombudsmen and providing a platform from which to build resources for both the public and state sector agencies.⁷⁵⁶

Information is available in several languages, including New Zealand's three official languages.⁷⁵⁷ A suite of information leaflets in different languages (including some directed specifically at prison inmates), was recently reviewed in view of New Zealand's changing demographic and now includes information in Braille.

A recently introduced policy requires the maintenance and publication of registers of interests for Ombudsmen and their staff.⁷⁵⁸

7.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the Ombudsmen have to report and be answerable for their actions?

Score: 5

The law requires the Ombudsmen to be fully accountable.

As already noted, the Ombudsmen are accountable to Parliament through a select committee – the Officers of Parliament Committee – and make an annual report to Parliament. The report is publicly available.

Audit New Zealand audits the performance of the Office of the Ombudsman in relation to its published performance measures as agreed with the select committee and in regard to its obligations under the Public Finance Act 1989.

In relation to their function as a “national preventive mechanism” under the Crimes of Torture Act 1989, the Ombudsmen contribute to a national report made by the Human Rights Commission to the UN Subcommittee on the Prevention of Torture.

The Ombudsmen are subject to the general law (including the Protected Disclosures Act 2000). There is an exception for the protection of confidentiality and for “anything [the Ombudsmen] may do or report or say” in the course of exercising the statutory functions, unless in bad faith.⁷⁵⁹ Ombudsman processes are judicially reviewable.

The Office of the Ombudsman has a formal, documented process for ensuring complaints about the Ombudsmen and their staff are taken seriously and handled appropriately.⁷⁶⁰

⁷⁵⁵ www.ombudsman.parliament.nz

⁷⁵⁶ Office of the Ombudsman, *Annual Report*, 2012: 9.

⁷⁵⁷ English, Māori, and New Zealand Sign Language.

⁷⁵⁸ See below under “Integrity mechanisms”.

⁷⁵⁹ Ombudsmen Act 1975, section 22.

⁷⁶⁰ Office of the Ombudsman, *Continuous Practice Improvement Manual*, 2012.

7.2.4 Accountability (practice)

To what extent do the Ombudsmen report and be answerable for their actions in practice?

Score: 5

The Ombudsmen comply with the legal accountability requirements. There has been no occasion in recent years for judicial review.

The Ombudsmen report to Parliament through the Speaker each year, and the report contains comprehensive information on the activities of the Ombudsmen and their staff, including performance against the measures specified in their public Statement of Intent. The report has always been submitted on time. Neither the House nor the Officers of Parliament Select Committee has recently debated the Ombudsmen's report,⁷⁶¹ though there has been debate in the Government Administration Select Committee.

It is not unusual for complaints about the Ombudsmen to be made to the Speaker. Although the Speaker has no legal duty to consider such complaints, there is a practice whereby the complaint is forwarded to the relevant Ombudsman, who then reports to the Speaker on it.⁷⁶²

There have been no cases of whistle-blowing within the Office of the Ombudsman and no suggestion of circumstances where whistle-blowing would be desirable.

A judicial review mechanism exists, but has not been used in recent years.

7.2.5 Integrity mechanisms (law)

To what extent are there provisions in place to ensure the integrity of the Ombudsmen?

Score: 4

The statutory provisions ensuring the integrity of the Ombudsmen have a few gaps, but the new code of ethics fills most of them.

On taking office, an Ombudsman is required to take an oath that "he will faithfully and impartially perform the duties of his office, and that he will not except in accordance with [certain specified exceptions] divulge any information received by him under this Act".⁷⁶³

An Ombudsman and the staff of the Ombudsmen's office are "officials"⁷⁶⁴ for the purposes of sections 105 and 105A of the Crimes Act 1961, which prohibit bribery of, and the corrupt use of official information by, officials.

⁷⁶¹ An Ombudsmen's report was last debated in 1999.

⁷⁶² Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁶³ Ombudsmen Act 1975, section 10.

⁷⁶⁴ Ombudsmen Act 1975, section 21.

There are no statutory provisions for a public declaration of an Ombudsman's assets or other pecuniary interests, and no restriction on post-service employment. An internal code of conduct (a code of ethics) was recently introduced, but is not yet fully in effect.

The code is contained in an internal office manual and includes policies that apply to Ombudsmen and their staff. Key points from the code are:

- staff and Ombudsmen must complete a comprehensive annual conflict of interest declaration, including financial assets and interests as well as gifts and hospitality invitations, and the Chief Ombudsman may publish this register
- all staff must proactively notify management of any potential conflicts of interest in areas for which they have official responsibility
- a conflict of interest register in relation to managing specific conflicts of interest is maintained
- staff and the Ombudsmen must avoid hospitality invitations unless the business benefit to the office exceeds any private benefit
- staff and the Ombudsmen must record details of all gifts and hospitality invitations on a gifts and hospitality register that will be publicly released at least annually.⁷⁶⁵

As noted above, the courts may conduct a judicial review of the process by which an Ombudsman determined a complaint, and this power would extend to a review of any allegations of bias or improper influence.

7.2.6 Integrity mechanisms (practice)

To what extent is the integrity of the Ombudsmen ensured in practice?

Score: 5

The integrity of the Ombudsmen and their staff has never been seriously questioned.

Staff of the Ombudsmen's office take an oath of secrecy, adhere to a code of ethics, go through formal induction and training programmes, make regular declarations of conflicts of interest, and have the necessary security clearances.⁷⁶⁶

The new code of ethics has been in place only a short time, so it is not yet possible to assess its effectiveness. The gifts and hospitality register (see above) has not yet been published.

In general, the integrity of the Ombudsmen is ensured through the appointment process, their accountability to Parliament, and the openness of their processes, including the process for handling complaints about the Ombudsmen.

⁷⁶⁵ Office of the Ombudsman, 2012. The two registers are being implemented.

⁷⁶⁶ Office of the Ombudsman, *Statement of Intent for the period 1 July 2011 to 30 June 2014*, 2011.

7.3.1 Investigation

To what extent is the Ombudsman active and effective in dealing with complaints from the public?

Score: 5

The Ombudsmen are highly active and effective and are greatly respected.

The jurisdiction of the Ombudsmen extends to almost all government departments and agencies, local government bodies, including the governing bodies of state-run schools, and (under only the official information legislation) ministers of the Crown. It does not extend to the Parliamentary Service. It extends to government trading enterprises, but debate is considerable about whether it should extend to mixed-ownership-model enterprises such as power companies that are currently state owned but the government has announced its intention to sell up to 49 per cent of its interest. There is a similar debate about the inclusion of proposed “charter schools” (currently excluded), which will be privately owned but receive public funding.

Complaints to the Ombudsmen are usually made in writing (including by email), but if a complainant has any difficulty making a written complaint, Ombudsmen staff will take an oral complaint, write it down, and check its accuracy with the complainant.

In 2011/12, the Ombudsmen received 10,636 complaints and other contacts requiring action and completed 10,250.⁷⁶⁷ Most investigations are of complaints from the public, but the Ombudsmen have, and regularly exercise, the power to investigate an issue of their own motion.⁷⁶⁸

There is a reasonable degree of public awareness of the right to complain to an Ombudsman. A survey an independent research organisation in 2012 found that 69 per cent of respondents had heard of the Ombudsmen, although 14 per cent of those respondents were not sure what the Ombudsmen did.⁷⁶⁹

Under the Ombudsmen’s general jurisdiction, they have recommendatory powers only. However, it is unusual for an Ombudsman’s recommendation to be declined. In 2011/12, 23 recommendations were made: 20 were accepted, 1 was partially accepted, and the Ombudsmen were awaiting the agency’s response on the other 2.

Under the official information legislation, an Ombudsman’s recommendation imposes a public duty on the relevant organisation to observe that recommendation.⁷⁷⁰ Cabinet may veto a recommendation, but has never done so. Rather different provisions apply to recommendations in respect of local government⁷⁷¹ where the veto has been used very occasionally.

⁷⁶⁷ Office of the Ombudsman, *Annual Report 2011/12*, 2012: 5.

⁷⁶⁸ Ombudsmen Act 1975, section 13(3).

⁷⁶⁹ UMR Research, *Nationwide Omnibus Survey*, May 2012

⁷⁷⁰ Official Information Act 1982, section 32.

⁷⁷¹ The Law Commission ‘recommended extending the Cabinet veto to local government recommendations in place of the existing provisions: Law Commission, 2012: 242.

In general, the Ombudsmen are highly regarded. Two independent lawyers interviewed for this assessment expressed the highest regard for the Ombudsmen, their staff, and the quality of their processes and decisions, with concern only about the time taken over investigations.⁷⁷² Surveys of complainant satisfaction are not a good indicator of the Ombudsmen's performance as unsuccessful complainants will usually be dissatisfied, however well the complaint was handled. However, note that complainant satisfaction has recently declined.⁷⁷³

The Law Commission stated that, "The flexible and inquisitorial nature of the processes followed by the Ombudsmen is effective for resolving official information disputes".⁷⁷⁴ It also noted that concerns had been raised about the time taken to complete investigations.

7.3.2 Promoting good practice

To what extent is the Ombudsman active and effective in raising awareness within government and the public about standards of ethical behaviour?

Score: 4

Although the Ombudsmen have been active through the complaint investigation process, especially in the use of the "own motion" powers, and do some training, they do not generally carry out oversight or educational activities.

There appears to be a case for reviewing the Ombudsmen's functions and funding with a view to enabling them to promote better administrative practices in the public sector and, thus, greater public trust in government.

The Ombudsmen have always been active in identifying and addressing all kinds of maladministration, usually through the investigation and resolution of specific complaints.

In recent years, the Ombudsmen have made greater use of the power to conduct an "own motion" investigation,⁷⁷⁵ especially in relation to conditions in prisons.⁷⁷⁶ The Chief Ombudsman also recently announced an investigation into the handling of requests for official information in certain government departments and agencies⁷⁷⁷ in view of concerns that delay and obstruction may have become institutionalised in them.

In 2012, the post of senior adviser wider administrative improvement was created to consider and recommend to the Chief Ombudsman issues that might warrant an

⁷⁷² Interview of Tim Clarke, partner at Russell McVeagh, with author, 12 December 2012; interview of Doug Tennent, University of Waikato, with author, 21 December 2012.

⁷⁷³ Office of the Ombudsman, *Budget Report*, 2012: 10.

⁷⁷⁴ Law Commission, 2012: 244, para. 11.102.

⁷⁷⁵ Section 13(3) of the Ombudsmen Act 1975 gives an Ombudsman power to investigate a complaint or "of his own motion".

⁷⁷⁶ Recent investigations related to self-harm in prisons (2010), prisoner complaints systems (2011), and prison health services (2012).

⁷⁷⁷ Media release, 18 December 2012.

investigation of this kind – that is, systemic issues or when investigation of a complaint identifies an opportunity for wider administrative improvement.⁷⁷⁸

There is a training programme for state sector agencies, and advice and comment are also provided on legislative, policy, and procedural matters.⁷⁷⁹ However, the Ombudsmen do not have the legislative authority or the funding to carry out more extensive educational or awareness programmes.

The Chief Ombudsman notes that in other jurisdictions Ombudsmen have published material on the principles of good administration and similar topics,⁷⁸⁰ and indicates that she would be able to do the same if funding were available.

The Law Commission, in its review of the official information legislation, identified the absence of an oversight function. It recommended that the legislation be amended to include provision for the functions of policy advice, review, statistical oversight, promotion of best practice, oversight of training, oversight of requester guidance, and annual reporting.⁷⁸¹ To date, the government has not accepted this recommendation. The Law Commission did not extend its comments to the operation of the Ombudsmen Act, but a similar oversight function would enable the Ombudsmen to act more effectively in raising awareness within government and the public about standards of ethical behaviour.

In the wake of a major mining disaster at Pike River after which a Royal Commission found that workers and management knew the mine was unsafe, questions were asked about public understanding and knowledge of the Protected Disclosures Act 2000.⁷⁸² However, there does not appear to have been any suggestion that the Ombudsmen are failing in their duty to provide advice and guidance to potential whistle-blowers, and they are not required or funded to provide general education on the Act's provisions. Any criticism has been directed at the Act itself and the level of protection it provides.

Agencies must develop their own processes for those who want to make protected disclosures, and these processes should include providing information about the advice and other information available from the Ombudsmen. However, the Ombudsmen have not audited the processes and have no resources to do so.⁷⁸³

⁷⁷⁸ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁷⁹ Office of the Ombudsmen, *Annual Report*, 2012.

⁷⁸⁰ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012 where she cited, in particular, Ann Abraham, *Principles of Good Administration*. www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples

⁷⁸¹ Law Commission, NZLC R125, 2012: 317.

⁷⁸² See, for example, "Where were the mine whistleblowers?", *The Press*, 11 November 2012.

⁷⁸³ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

7.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect, and participation. What do the Ombudsmen do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? In particular, where the Ombudsmen have legal rights and obligations in this respect given to them by the Crown, how well do they honour them, including any Treaty obligations passed on by the Crown?

Ombudsman staff receive training in the Treaty, and information is available in te reo. There are some outreach programmes in areas of high Māori population.

The Ombudsmen appear very conscious of the Treaty of Waitangi and their relationship with Māori. For example, when the Ombudsmen recently hosted the International Ombudsman Institute conference, Māori were involved in the planning and there was a formal welcome by Māori at the commencement of the conference.⁷⁸⁴

The Deputy Ombudsman advises that staff were given specific training on the Treaty of Waitangi five years ago, and such training has since been reviewed and incorporated into the staff training schedule. The Ombudsmen plan to use existing links with Māori communities and tailor aspects of the training to focus on the Treaty, and on constitutional arrangements from the perspective of the office, described as “fairness for all, how we impact on Māori communities, and being able to navigate Māori people to access information and education, particularly rights based education”.⁷⁸⁵ Discussions are under way with Port Nicholson Settlement Trust and Ngāti Poneke (a pan-tribal iwi) to build the capacity of the organisation and enhance the professional knowledge of staff for working with all communities, particularly Māori.⁷⁸⁶

The Ombudsmen’s information leaflets are produced in te reo Māori (language), and the office subscribes to Language Line, an interpretation service for telephone callers. Until mid-2012, the Ombudsmen had one staff member (now retired) who was a fluent speaker of te reo (Māori language) and had expertise in tikanga Māori (law, rules, and practice).⁷⁸⁷ Another staff member has some knowledge of te reo and tikanga Māori. Both were available to advise the Ombudsmen and staff and to accompany them as appropriate on business with public sector agencies and international visitors.

The Ombudsmen engage in some outreach programmes delivered by government in remote areas with substantial Māori populations. In areas such as Gisborne, Kaitiaki, Whangarei, Whanganui, and Hawke’s Bay, they deliver presentations to the public generally, to groups interested in Māori health, budgeting, and advocacy, and to interest groups such as Citizens Advice Bureaux and community law centres. In particular, they participate in an outreach programme organised by staff from the

⁷⁸⁴ See the conference programme for Speaking Truth to Power: The Ombudsman in the 21st century, Wellington, 12–26 November 2012.

⁷⁸⁵ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.

⁷⁸⁶ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.

⁷⁸⁷ An appointment has not yet been made to fill the vacant position.

Ministry of Consumer Affairs, who are extremely competent at promoting the programme to Māori communities.⁷⁸⁸

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⁷⁸⁸ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.

Supreme audit institution (pillar 8)

Summary

The supreme audit institution in New Zealand is the Office of the Auditor-General (OAG). The OAG is fully independent in the performance of all audit work and has the budget, staff, and legal powers it requires to carry out its audits. It is a trusted institution of governance and an effective watchdog of public integrity. It is able to set and enforce high standards of audit and integrity of auditors. It is subject to independent financial audit and commissions periodic independent reviews of its performance.

The OAG's reports and advice are nearly always delivered on time and made public. Its major reports generally receive significant media attention, and public officials take its findings seriously, although the direct responsiveness of Parliament to its findings depends mainly on their political salience. A few reports have a major political impact, but many findings receive only cursory attention in select committees and the House of Representatives.

The OAG plays a significant role in maintaining New Zealand's high standards of public financial management. It has supported the development of specific accounting and auditing standards for the public sector, particularly in the monitoring and reporting of service performance. Its criticisms of performance reporting are contributing to improvements in the quality of this reporting.

The OAG is required by its Act to take existing government policy as a given, and performance audits tend to focus on issues of process and service delivery and pay limited attention to effectiveness measured by outcomes. It is considering an appropriate methodology for value-for-money audits of public entities.

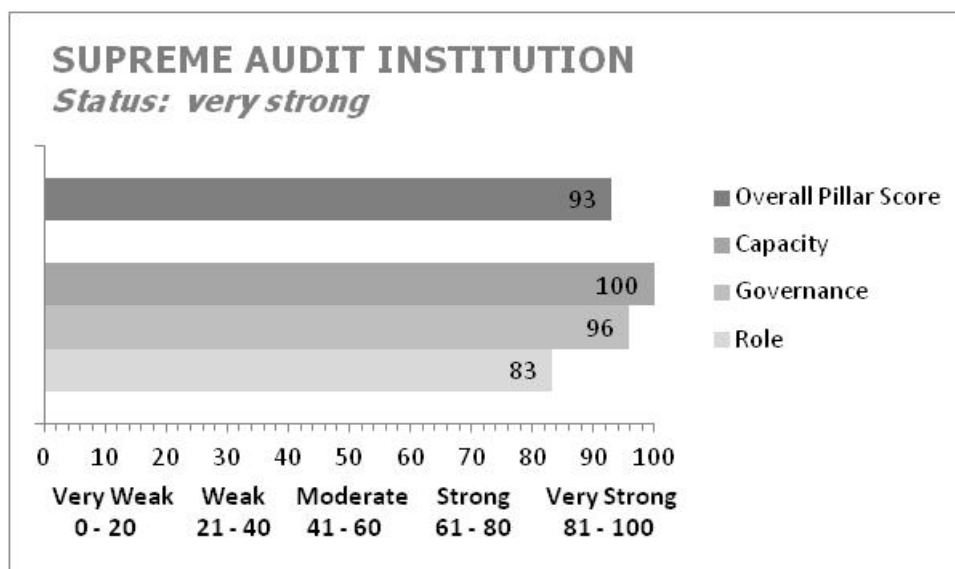
The recommendations (in Chapter 6) that flow from the analysis in this pillar report are directed more generally towards the legislature and the public sector pillars. Parliament is recommended to strengthen select committees to enable them, among other things, to follow up on findings by the OAG more consistently and effectively as a way of holding the executive to account and as part of the general emphasis for the public sector on the impact of policies. The OAG should examine those impacts in its performance reporting.

Structure and organisation

The OAG was established by the Public Audit Act 2001 and is headed by the Controller and Auditor-General, an officer of Parliament. The Controller and Auditor-General also employs the staff of Audit New Zealand, a public organisation that shares the work of public audits with private accounting firms.

As well as the responsibilities as Auditor-General, the Controller and Auditor-General has a controller function to provide assurance during a financial year that expenditure by central government has been lawfully made. This report does not cover this function. In the audit role, the Controller and Auditor-General is known simply as the Auditor-General.

Figure 10: Supreme audit institution scores



Source: Transparency International New Zealand, 25 October 2013.

The OAG is responsible for audits of over 3,900 public entities both of central and local government, including state-owned enterprises, public education institutions, and district health boards.⁷⁸⁹ Its powers of audit include mandatory annual audit of the financial statements and, where applicable, the statements of service performance of these entities, as well as discretionary audits of the performance of public entities and inquiries into matters of public interest. It also assists Parliament's select committees with advice on financial reviews and scrutiny of annual estimates of expenditure.

The OAG allocates almost all of the annual audit work to audit service providers, either Audit New Zealand or private accounting firms, that carry out the actual audits. Annual audits are funded by fees charged to the audited entity on a scale determined by the OAG.⁷⁹⁰ In many cases, staff of the OAG lead performance audits and inquiries.

Relevant international standards

The relevant standards for assessment of the supreme audit institution in New Zealand are the International Standards of Supreme Audit Institutions (ISSAI), issued by the International Organization of Supreme Audit Institutions (INTOSAI).⁷⁹¹ The most important of these standards for this review are the prerequisite standards on supreme audit institution independence (ISSAI 10 and 11), transparency and accountability (ISSAI 20 and 21), and ethics (ISSAI 30). The Auditor-General's Auditing Standards (AGAS)⁷⁹² also draw on the standards of the New Zealand Audit and Assurance

⁷⁸⁹ Controller and Auditor-General, *Statement of Intent 2012–2015* (Wellington: Office of the Auditor-General, 2012), p. 27.

⁷⁹⁰ Public Audit Act 2001, section 42.

⁷⁹¹ INTOSAI standards may be found at the ISSAI website: www.issai.org.

⁷⁹² Controller and Auditor-General, *The Auditor-General's Auditing Standards* (Wellington: Office of the Auditor-General, 2011).

Standards Board),⁷⁹³ supplemented by the Auditor-General's own standards and statements.

New Zealand government financial statements are based on international financial reporting standards supplemented by requirements appropriate for the public sector.⁷⁹⁴ New Zealand is probably now moving towards adoption of International Public Sector Accounting Standards,⁷⁹⁵ which are expected to better meet the specific requirements of the public sector, including the reporting of service performance.

Capacity

8.1.1 Resources (practice)

To what extent does the audit institution have adequate resources to achieve its goals in practice?

Score: 5

The OAG is fully independent in the performance of all audit work and has the budget, staff and legal powers it requires to carry out its audits.

Money and people: The OAG controls and manages its own budget and staff.⁷⁹⁶ Resources are sufficient for the OAG to complete all financial audits required by statute and an agreed programme of performance audits as discussed below. The OAG's budget bypasses the normal process of executive budget formation. OAG presents a draft budget to the parliamentary Officers of Parliament Committee, which recommends a budget to the House. By convention, this recommended budget is included unaltered in the Appropriation (Estimates) Bill.⁷⁹⁷ Any resource constraints are due more to limits on staff time than to budget limits and (particularly for sensitive ad hoc inquiries) limits on the time available from senior OAG staff for direction and oversight.⁷⁹⁸ The OAG's annual audits absorb about 88 per cent of the budget. The OAG completes 90 per cent or more of these annual audits on time and more often than not is held up by delays in the audited entities.⁷⁹⁹

Performance audits and inquiries, covering about 8 per cent of the OAG's budget, are funded by a specific parliamentary appropriation. The OAG chooses its own audit topics, but consults with Parliament on its programme. The OAG has produced about 20 reports (performance audits, inquiries, and other matters) in each of the last five

⁷⁹³ Under the framework of the External Reporting Board (XRB) in terms of the Financial Reporting Act 1993. Current standards can be obtained from xrb.govt.nz/Site/Auditing_Assurance_Standards/Current_Standards/default.aspx

⁷⁹⁴ Public Finance Act 1989, section 2.

⁷⁹⁵ The full conceptual framework for IPSAS is being developed by the International Federation of Accountants (IFAC) and should be complete by mid-2014 (www.ifac.org/public-sector).

⁷⁹⁶ Public Finance Act 1989, section 45F; Public Audit Act 2001, Schedule 3(8).

⁷⁹⁷ D McGee, *Parliamentary Practice in New Zealand* (Wellington: Dunmore Publishing, 2005), p. 474.

⁷⁹⁸ Interviews of David Macdonald, former Controller and Auditor-General, with author, Wellington, 13 December 2012 and 23 January 2013; interviews of Philippa Smith, Deputy Controller and Auditor-General, with author, Wellington, 20 November 2012, 14 February 2013, and 7 March 2013.

⁷⁹⁹ Controller and Auditor-General, *Annual Report 2010/11* (Wellington: Office of the Auditor-General, 2011)

years – a target number agreed with Parliament.⁸⁰⁰ It could undertake more performance audits with a larger budget, but is also considering whether its existing budget would be better spent on fewer but more in-depth audits.⁸⁰¹

Although the OAG and Audit New Zealand have a 20 per cent overall staff turnover rate,⁸⁰² they are, together with the private firms to which work is allocated, able to meet the requirement for qualified senior auditors to lead all public audits. Staff turnover is largely churn among more junior staff, which the OAG says is typical for the accounting profession in New Zealand.⁸⁰³ New recruits are immediately placed into audit teams, but study for (and generally pass) their professional exams. After a few years' experience, they are likely to seek other opportunities either in New Zealand or overseas. These "pull" factors seem to be the main reasons for leaving. Demand for positions in Audit New Zealand and staff climate surveys indicate that it remains a desirable place to work.⁸⁰⁴

Legal powers: The OAG has the legal power of access to documents and accounts, examination under oath, access to premises, and protection for people supplying information and can delegate these powers to an audit service provider.⁸⁰⁵ There are few, if any, cases where this power has had to be invoked.

The OAG audits public entities,⁸⁰⁶ which do not include non-public entities that receive public funding. Some jurisdictions also give their supreme audit institutions the legal power to inspect the accounts of any third party in receipt of public funding. The OAG's approach is to audit the public entity's management of the funding contracts or agreements, but, if necessary, it could directly inspect third-party records of public funding using its existing powers.⁸⁰⁷

8.1.2 Independence (law)

To what extent is there formal operational independence of the audit institution?

Score: 5

The OAG's empowering statute gives it full legal independence in all operational matters.

The legal basis for the OAG meets the requirements of the standards set by INTOSAI for the operational independence of a supreme audit institution. The OAG is fully independent of the executive, and the Auditor-General is required to act independently.⁸⁰⁸ The Public Audit Act 2001 "binds the Crown" to give effect to any of

⁸⁰⁰ Controller and Auditor-General, *Annual Report 2010/11*, 2011.

⁸⁰¹ Phillippa Smith interviews.

⁸⁰² Controller and Auditor-General, *Annual Report 2011/12* (Wellington: Office of the Auditor-General, 2012), p. 67.

⁸⁰³ Controller and Auditor-General, *Annual Report*, 2012.

⁸⁰⁴ OAG annual reports, for example, Controller and Auditor-General, *Annual Report 2011/12*, 2012: from p. 65.

⁸⁰⁵ Public Audit Act 2001, sections 24–31.

⁸⁰⁶ Public Audit Act 2001, section 14.

⁸⁰⁷ Public Audit Act 2001, section 25.

⁸⁰⁸ Public Audit Act 2001, section 9.

its provisions. Parliament appoints the Auditor-General, conventionally by unanimous resolution.⁸⁰⁹ The position is non-political. The incumbent generally may not hold any other public office,⁸¹⁰ may only serve a single term, and may be removed from office by Parliament only “for disability affecting the performance of duty, bankruptcy, neglect of duty, or misconduct”.⁸¹¹ Public auditors are protected from personal liability for work on public audit carried out in good faith.⁸¹²

The OAG must audit the financial statements of the government and of individual public entities. There are no other specific requirements in law for the programme of other audits or inquiries or the methods used by the OAG. The Auditor-General must consult the Speaker on a draft work programme. The OAG generally has full authority to set its own standards for audits.⁸¹³ The only exception is for its audits of public issuers of certain securities, which must meet standards set under the Financial Reporting Act 1993.⁸¹⁴

Private auditing firms undertake a substantial part of audit work on contract to the OAG. Because the OAG decides how work will be allocated, public entities, unlike firms in the private sector, have no choice of auditor. Conversely, private accountancy firms have an incentive to comply with the independence requirements of the Auditor-General’s standards in order to retain their public audit business.

8.1.3 Independence (practice)

To what extent is the audit institution free from external interference in the performance of its work in practice?

Score: 5

The OAG’s reports indicate that it is able to report frankly and fearlessly on significant matters of public governance.

The actual independence and neutrality of the OAG fully reflects its statutory independence and its duty to act independently. In accordance with the Public Audit Act 2001 (see above), no Auditor-General or Deputy Auditor-General has ever been reappointed; and none has ever been removed from office without proper cause. In the New Zealand context, political interference with the OAG’s activities would be very unlikely, although it is not inconceivable, particularly for inquiries, that the OAG could be persuaded at the draft stage to modify its findings. Findings later in this report support the view that the OAG is generally regarded as an independent and authoritative voice on standards in public governance.

⁸⁰⁹ McGee, 2005: 71–72.

⁸¹⁰ Public Audit Act 2001, section 8.

⁸¹¹ Public Audit Act 2001, Schedule 3, clause 4.

⁸¹² Public Audit Act 2001, section 41.

⁸¹³ Public Audit Act 2001, section 23.

⁸¹⁴ Public Audit Act 2001, section 15(3).

Governance

8.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the relevant activities and decisions by the supreme audit institution?

Score: 4

The law provides for reports on audits and inquiries and most written advice to be promptly published but not necessarily debated. There is no requirement to publish communications with audited entities.

All public entities are required to publish annual reports, which include their financial statements and the report of the OAG on its audit of the statements.⁸¹⁵ Those reports of central government entities must be tabled in Parliament with their audit reports. Other financial statements (of local authorities, education institutions, and health boards) must be published with audit reports, but are not required to be tabled in Parliament. Limited reports are published for security intelligence organisations and a special committee of Parliament reviews them. The OAG is also required to report annually to Parliament on matters arising from its public audits and inquiries⁸¹⁶ and on its own implementation of its annual plan.⁸¹⁷ All OAG reports, except those on security intelligence agencies, must be published when received.⁸¹⁸ Reports are referred to the Finance and Expenditure Committee of Parliament which may consider the reports itself or refer them to another select committee.⁸¹⁹ The Finance and Expenditure Committee also receives and reviews the Auditor-General's annual plan and report on implementation.⁸²⁰

There is no requirement for the reports of the Auditor-General to Parliament to be debated in the House. Select committees are required to conduct and report to the House on an annual financial review of every government entity, covering its performance in the previous financial year and its current operations.⁸²¹ The reports of the Auditor-General on the associated financial audits will form part of the evidence for these reviews. Other reports, for example on performance audits or inquiries, are also received and considered by a select committee. Any findings by the committee, including any recommendation, will be included in a report for consideration by the House.⁸²²

⁸¹⁵ Public Finance Act 1989, section 45; Crown Entities Act 2004, sections 150–151.

⁸¹⁶ Public Audit Act 2001, section 20.

⁸¹⁷ Public Audit Act 2001, section 37.

⁸¹⁸ Office of the Clerk of the House of Representatives, *Presentation of Papers to the House* (Wellington: Office of the Clerk, 25 September 2012), p. 5.

⁸¹⁹ House of Representatives, *Standing Orders of the House of Representatives*, 2011, No. 339. www.parliament.nz/en-nz/pb/rules/standing-orders (hereafter “*Standing Orders*, 2011”).

⁸²⁰ *Standing Orders*, 2011: Standing Order 393.

⁸²¹ *Standing Orders*, 2011: Standing Order 340.

⁸²² *Standing Orders*, 2011: Standing Order 340.

Information on other activities of the OAG, such as its advisory support for select committees of Parliament or the content of its management letters to public entities, is not covered by any legal requirement for publication. The OAG is not required to make any of this information publicly available. The OAG is not subject to the Official Information Act 1982 (OIA).⁸²³ The government did not accept a recent recommendation from the Law Commission that the provisions of the OIA should apply to officers of Parliament.⁸²⁴ Information supplied by the OAG or an audit service provider to a public entity (such as management letters) would, in the hands of the entity, be covered by the OIA and be potentially discoverable.

8.2.2 Transparency (practice)

To what extent is there transparency in the activities and decisions of the audit institution in practice?

Score: 5

In practice, the OAG and Parliament between them ensure that all significant Audit findings and written advice are made public and, although the OAG will not be drawn into debate on its findings, it has a proactive communications and publications policy.

All OAG reports to Parliament on public audits and inquiries appear to be publicly available on the OAG website.⁸²⁵ Publication of other information varies. OAG written briefings for select committees are generally published on the Parliament website,⁸²⁶ issues raised in briefings for select committees may also be taken up in the financial review or be referred by the committees to the entities reviewed for written response. Oral briefings for select committees are generally not made public although may be reported in the committee's minutes. The OAG does not publish management letters to public entities but they may be discoverable in the hands of the entity, under the provisions of the OIA. The OAG publishes other information, such as high-level overviews of its findings from annual audits, which will probably reflect the substance of management letters as well as the statutory audit reports, and occasional observations on specific topics drawing on overall audit findings.⁸²⁷ Information on most activities of the OAG itself is readily obtainable from its annual report or in other reports on the OAG website.⁸²⁸

Nevertheless, other than the legal requirements for publication of public audit reports, information from the OAG in the hands of Parliament is not legally discoverable. The retiring Speaker considered that Parliament should be proactive about releasing the written advice and assessments of the OAG, but that the principle should remain that

⁸²³ Official Information Act 1982.

⁸²⁴ Law Commission, *The Public's Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012), p. 16; New Zealand Government, *Government Response to Law Commission Report on The Public's Right to Know: Review of the official information legislation* (Wellington: House of Representatives, 2013), pp. 3–4.

⁸²⁵ www.oag.govt.nz

⁸²⁶ www.parliament.nz

⁸²⁷ Philippa Smith interviews.

⁸²⁸ www.oag.govt.nz

Parliament retained control of information supplied to it. In particular, he thought that oral advice should be confidential if release might inhibit what the OAG would say.⁸²⁹

In the past, Auditors-General have generally not entered into debate on the results of their reports and have taken a generally cautious approach to opening direct channels of communication with the public, although OAG representatives would be prepared to “discuss and explain” reports with the media.⁸³⁰ The OAG does, however, have a communications strategy, closely monitors requests for information and comment, and identifies issues where a “media strategy” is necessary.⁸³¹ The retiring Speaker considered that the OAG’s responsibility to Parliament should not be compromised by broadening its reach.⁸³²

8.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the supreme audit institution has to report and be answerable for its actions?

Score: 5

The OAG is subject to independent annual audit. There are limited provisions for auditees to challenge findings from annual audits.

The financial statements in the OAG’s annual report are independently audited.⁸³³ The Finance and Expenditure Committee carries out the financial review of the OAG.⁸³⁴ As the OAG reports to Parliament on public audits, and not to the governing bodies of audited entities, it is not in any sense accountable to the entities themselves. Public entities cannot choose who audits them; nor is there any legal provision for them to challenge any opinion of the OAG on those audits.⁸³⁵ Under principles of natural justice, a public entity might challenge the process by which an auditor formed an opinion, including a requirement to consult the entity during that process.⁸³⁶

8.2.4 Accountability (practice)

To what extent does the supreme audit institution have to report and be answerable for its actions in practice?

Score: 5

The OAG commissions independent reviews of its performance and it is reviewed in Parliament. It will discuss its findings in draft with affected organisations and people.

⁸²⁹ Interview of Dr Rt Hon Lockwood Smith MP, Speaker of the House of Representatives, with the author, Wellington, 13 February 2013.

⁸³⁰ David Macdonald interview.

⁸³¹ Phillippa Smith interview.

⁸³² Lockwood Smith interview.

⁸³³ Public Audit Act 2001, section 38.

⁸³⁴ *Standing Orders*, 2011: Standing Order 340.

⁸³⁵ The OAG has an Opinions Review Committee (AGAS 3-4804) but this is for purely internal reviews.

⁸³⁶ Phillippa Smith and David Macdonald interviews.

The OAG meets its commitments to report to Parliament, and the Finance and Expenditure Committee review will usually include substantive questions and comments by members on the activities of the OAG.⁸³⁷ How an audited entity might legally challenge an auditor's opinion is hypothetical since it has never happened. According to the OAG, the auditor would advise the entity of any modifications to the audit report or adverse comment in a management letter to give opportunity for comment.⁸³⁸ There are significant cases where the audit opinion on treatment of specific items in the financial statements has in effect been negotiated with the entity concerned.⁸³⁹ Entities are likely to be given opportunity to comment on draft reports on performance audits and inquiries, particularly where people or organisations may be criticised.⁸⁴⁰

Although there is provision for the independent auditor to audit the performance of the OAG,⁸⁴¹ there has never been a performance audit under this provision. The Finance and Expenditure Committee recently observed that there was no provision for the independent New Zealand auditor to be funded to audit performance and indicated that the OAG might need to "consider the provision it makes for inquiries or performance audits when it next reviews the contract with the independent auditor".⁸⁴² The OAG itself commissions an independent external review of its performance from time to time. The most recent, in 2008, was by a team led by a former Australian Commonwealth Auditor-General.⁸⁴³

8.2.5 Integrity mechanisms (law)

To what extent are there mechanisms in place to ensure the integrity of the audit institution?

Score: 5

The OAG has comprehensive standards to ensure its integrity and that of its appointed auditors.

The AGAS define standards of integrity and specific rules of conduct for appointed auditors. These standards conform to the INTOSAI principles of independence and objectivity. The AGAS Code of Ethics is based on that of the New Zealand Institute of Chartered Accountants with additional guidance for the public sector and applies to all public audits and other work carried out on behalf of the Auditor-General.⁸⁴⁴ The AGAS statement on independence in assurance engagements identifies potential risks to

⁸³⁷ Philippa Smith interview.

⁸³⁸ Philippa Smith interview.

⁸³⁹ David Macdonald and Philippa Smith interviews.

⁸⁴⁰ AGAS:AG-5 (performance audits) and AG-6 (inquiries) set out provisions for communicating draft findings to persons and organisations affected. Also David Macdonald and Philippa Smith interviews.

⁸⁴¹ Public Audit Act 2001, section 38(2), importing section 16 (performance audits).

⁸⁴² Finance and Expenditure Committee, *2011/12 Financial Review of the Office of the Controller and Auditor-General* (Wellington: Finance and Expenditure Committee, House of Representatives. 2013), p. 3.

⁸⁴³ International Peer Review Team, *Report on the Efficiency and Effectiveness of the Office of the Controller and Auditor-General of New Zealand*. (Wellington: Controller and Auditor-General, 2008).

⁸⁴⁴ Controller and Auditor-General, *The Auditor-General's Auditing Standards*, 2011: 3-200 et seq.

independence arising from relationships with the audited entity including financial, business, employment, or personal relationships; gifts and hospitality; and actual or threatened litigation.⁸⁴⁵ All staff engaged on audits must also make an independence declaration relating to conflict risk in terms of investments such as in shares, previous employment in audited entities, and personal relationships with employees in public entities more generally.

8.2.6 Integrity mechanisms (practice)

To what extent is the integrity of the audit institution ensured in practice?

Score: 5

In practice, the OAG and auditors observe high standards of integrity.

There are no cases of breaches of the AGAS Code of Ethics by OAG, Audit New Zealand staff, or private audit service providers. Two issues worthy of further comment are related to the employment of OAG staff and allocation of audit work.

Senior OAG officials previously employed in a public entity have a minimum two-year stand-down from audits of that entity. In some cases where an employee held a senior position in another public entity, the stand-down will be longer than two years. For example, the present Auditor-General was previously employed by New Zealand Police and is unlikely to be associated with any audit of Police during her tenure.⁸⁴⁶

On the other hand, there are no restrictions on employment of former employees of OAG or Audit New Zealand. Staff frequently take up employment in finance directorates in public entities. When former senior employees are employed in entities they may have audited, the OAG will consider whether arrangements need to be made for “firewalling” them from the team undertaking the audit (who may have worked for them).⁸⁴⁷

The OAG allocates audit work to Audit New Zealand (whose staff it employs) and to private auditors and has legal authority to set fees charged to audited entities. The OAG appoints an independent reviewer to report on the “probity and objectivity” of the “basis on which auditors are appointed and the basis on which appropriate levels of audit fees are determined”. The reviewer has raised no significant concerns with the processes in the last five years.⁸⁴⁸

⁸⁴⁵ Controller and Auditor-General, *The Auditor-General's Auditing Standards*, 2011: 3-201 et seq. and 3-302 et seq. Cite actual ranges

⁸⁴⁶ Phillippa Smith interview.

⁸⁴⁷ Phillippa Smith interview.

⁸⁴⁸ The reviewer's reports are published in the OAG's annual reports. See, for example, Controller and Auditor-General, *Annual Report 2011/12*, 2012: 109 et seq.

Role

8.3.1 Effective financial audits

To what extent does the audit institution provide effective audits of public expenditure?

Score: 4

The OAG is effective in its role of financial auditing, but could do more to evaluate the effectiveness of public spending.

In its basic role of financial auditing, the OAG is effective in maintaining high standards of financial reporting and control. A small percentage of audit opinions are modified in any way, and management letter recommendations are largely accepted.⁸⁴⁹ Between 80 per cent and 90 per cent of clients report satisfaction with audit work.

A comprehensive audit of a public entity would cover the efficiency, economy, and effectiveness of the entity and the governance and management attributes expected to contribute to these aspects of performance. Although the OAG audits statements of service performance, performance in the “comprehensive” sense is only a secondary topic in financial audits. The OAG asks financial auditors to “maintain an awareness of other performance audit matters” that can be taken up in its performance audits. These audits are an opportunity to evaluate “the extent to which a public entity is carrying out its activities effectively and efficiently”,⁸⁵⁰ but few appear to review achievement of the entity’s policy objectives. If a policy is in place, the audit is supposed to be of the efficiency and effectiveness with which it is implemented,⁸⁵¹ but the OAG has in practice interpreted this rather narrowly.⁸⁵² The independent 2008 review of the OAG also commented that “there was scope for performance audits to take a wider look at systemic issues and effectiveness”.⁸⁵³ The OAG would like to develop a better methodology for “value-for-money” evaluations of public entities’ efficiency,⁸⁵⁴ which may permit more evaluation of outcomes,⁸⁵⁵ but it seems likely that the OAG will continue to take a cautious approach to being seen to influence policy debates.

Relationship between external and internal auditor: An ongoing concern from government managers is that external audit can duplicate the work of internal audit. Legally, it is entirely up to the external auditors what use they make of the work of the internal auditors,⁸⁵⁶ but in practice an appointed auditor would usually design a work programme to take account of specific internal audit reviews.⁸⁵⁷

⁸⁴⁹ Controller and Auditor-General, *Annual Report*, 2012.

⁸⁵⁰ Public Audit Act 2001, section 16.

⁸⁵¹ Public Audit Act 2001, section 16.

⁸⁵² Philippa Smith and David Macdonald interviews

⁸⁵³ International Peer Review Team, 2008: 53.

⁸⁵⁴ Philippa Smith interview.

⁸⁵⁵ Interview with Nicola White, Assistant Auditor-General (Legal), by the author, Wellington, 20 February 2013.

⁸⁵⁶ Controller and Auditor-General, *The Auditor-General’s Auditing Standards*, 2011: 3-308.

⁸⁵⁷ David Macdonald interview.

8.3.2 Detecting and sanctioning misbehaviour

Does the audit institution detect and investigate misbehaviour of public officeholders?

Score: 5

The OAG makes a significant contribution to protecting New Zealand's high standards of probity in public life.

General role in issues of fraud and corruption: The OAG has extensive powers of access to all the information it would require to detect risk of fraud or other misuse of public funds and audited entities are legally required to cooperate in full.⁸⁵⁸ Auditors are not specifically responsible for detecting fraud, but if they encounter or suspect fraud during an audit they are required to report it to the OAG.⁸⁵⁹ Further investigation would then normally be the responsibility of the appropriate regulatory or enforcement authority. Auditors report other significant cases of non-compliance to the OAG, which will decide whether they are to be covered in the report on the audit. The OAG recently reported on a comprehensive survey of fraud awareness in the public sector.⁸⁶⁰

Investigation of misbehaviour by office-holders: Members of Parliament and ministers are subject to the law on fraud and other forms of corrupt behaviour. The sanctions for offences would be determined by the criminal code. Whether they would be applied is hypothetical because of the very small number of *prima facie* cases of corruption or other criminal offences involving national political office-holders. A rare exception (in which, however, audit investigations played no part) was the 2009 conviction and imprisonment of Taito Philip Field, a Labour member of Parliament, on charges of bribery and corruption and attempting to pervert the course of justice.⁸⁶¹

The OAG's public reputation for probity and independence in general carries sufficient weight for political office-holders to take its recommendations seriously.⁸⁶² Government continues to ask it to conduct specific inquiries into matters involving members of Parliament and ministers. In recent years, the OAG has reported on several matters touching on the ethical responsibilities of national political office-holders, including inquiries in 2006 into public funds used for party-political advertising and in 2009 and 2010 on how parliamentary and ministerial accommodation entitlements were administered. Each of these reviews was critical of some aspects of current practice by elected officials, and each resulted in changes in the rules. In response to the 2006 report the Labour Prime Minister denied that her party had spent public funds improperly, but agreed to repay the amounts found by the OAG to be unlawful.⁸⁶³ A

⁸⁵⁸ Public Audit Act 2001, sections 24 et seq.

⁸⁵⁹ Controller and Auditor-General, *The Auditor-General's Auditing Standards*, 2011: 3:2403.

⁸⁶⁰ Controller and Auditor-General, *Fraud Awareness, Prevention, and Detection in the Public Sector* (Wellington: Office of the Auditor-General, 2012).

⁸⁶¹ New Zealand Press Association, "Guilty verdicts for Taito Phillip Field", *New Zealand Herald*, 4 August 2009. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10587391 [accessed 29 March 2013].

⁸⁶² Lockwood Smith interview.

⁸⁶³ H. Clark, "Labour to refund funding", 12 October 2006. web.archive.org/web/20061023085134/http://www.labour.org.nz/news/latest_labour_news/news-061012/index.html [accessed 25 March 2013].

more recent report on consideration of SkyCity and other proposals for building a convention centre in Auckland found no evidence of corruption, but strongly criticised the process of considering the competing bids.⁸⁶⁴

The Local Authorities (Members' Interests) Act 1968 has provisions that can preclude elected local authority members from holding office if they have a significant contract or contracts with the authority to which they are elected, and also requires them to withdraw from involvement on any issue before the authority for decision if they have a pecuniary interest relating to that issue. The OAG can investigate and prosecute breaches of these provisions.

8.3.3 Improving financial management

To what extent is the supreme audit institution effective in improving the financial management of government?

Score: 4

The OAG has made a significant contribution to the quality of financial management in New Zealand and is a trusted independent watchdog. Parliament could play a stronger role in ensuring the OAG's findings are responded to. There is scope in the wider system for improving reporting of the results of public spending.

New Zealand ranks high on international governance and financial management indicators. The OAG's own assessments indicate that there is a high quality of management control and financial information systems in the New Zealand public sector.⁸⁶⁵ The specific contributions of the OAG to those scores and to further improvement are difficult to identify because they depend on many features of the public governance system. However, the indicators reported by the OAG for the last five years suggest that public entities and stakeholders are responsive to the OAG's reports and recommendations.⁸⁶⁶

- For financial audits, about 75–80 per cent of sampled public entities accepted management report recommendations.
- For performance audits and inquiries, the percentage satisfaction rating varies, but has averaged about 80 per cent for quality and usefulness. In the last three years, the OAG has also reported annually on the uptake of recommendations in past performance audit reports.⁸⁶⁷ No clear pattern emerges from these assessments, but in most of the audits surveyed there has been at least some uptake of OAG recommendations.

⁸⁶⁴ Controller and Auditor-General, *Inquiry into the Government's Decision to Negotiate with SkyCity Entertainment Group Limited for an International Convention Centre* (Wellington: Office of the Auditor-General, 2013).

⁸⁶⁵ Controller and Auditor-General, *Statement of Intent*, 2012: 31–33.

⁸⁶⁶ The following figures are estimated from charts in Controller and Auditor-General, *Statement of Intent*, 2012: 36–46. In some cases the statistics are sampled.

⁸⁶⁷ Controller and Auditor-General, *Performance Audits from 2008: Follow-up report* (Wellington: Office of the Auditor-General, 2010); Controller and Auditor-General, *Public Entities' Progress in Implementing the Auditor-General's Recommendations* (Wellington: Office of the Auditor-General, 2011); Controller and Auditor-General, *Public Entities' Progress in Implementing the Auditor-General's Recommendations* (Wellington: Office of the Auditor-General, 2012).

The role of Parliament in backing up the OAG is uneven. On the one hand, members of Parliament say they value the OAG's work. Between 85 per cent and 100 per cent of select committee members confirmed that OAG advice assists Estimates examinations and financial reviews, 75–100 per cent of select committee members rated OAG advice highly for quality, and 80–85 per cent of members rated the advice highly for usefulness.⁸⁶⁸ These results were broadly confirmed in interviews, although it appeared that select committees may value OAG advice for financial reviews, where the OAG can draw on its audit work, more than on Estimates scrutiny.⁸⁶⁹ The Finance and Expenditure Committee also recently said it “would like to see the [OAG] work to improve the usefulness of its reports and to reduce the cost of their publication; we believe they could be shorter and do more to facilitate systematic comparisons”.⁸⁷⁰ However, an opposition party finance spokesperson added that select committee members were “absolutely reliant” on the Auditor-General for advice in both Estimates scrutiny and financial review.⁸⁷¹ Informants agreed that the OAG has “political clout” in the sense that Parliament and executive have to respond to its reports if there is public interest in them.

On the other hand, the attention received by OAG reports in Parliament depends very much on their political salience.⁸⁷² A few reports have a major political impact, but many findings receive only cursory attention in select committees and the House. The review function is spread over several committees, rather than being concentrated as in some other jurisdictions in one Public Accounts Committee or its equivalent. The OAG is often left on its own to follow up public entities' responses to its findings or recommendations such as the annual reports on uptake of recommendations mentioned above. However, matters that are not discussed or debated in Parliament could still have effects: an adverse audit report “would be a black mark for a government official” and “should have consequences”.⁸⁷³

It was also argued that the OAG (like the Ombudsman) should not spend the capital of its independence too often: there would be a danger of it being seen by the government as just another political risk to be managed.⁸⁷⁴ The “damage limitation” responses of the government to the SkyCity report⁸⁷⁵ and another on defence restructuring⁸⁷⁶ are two examples.

The major priorities for further improvement are in the relevance and use of performance information for monitoring and evaluation in the financial management

⁸⁶⁸ Estimated from charts in Controller and Auditor-General, *Statement of Intent*, 2012.

⁸⁶⁹ Interview with David McGee, Ombudsman and former Clerk of the House of Representatives, by the author, Wellington, 4 February 2013; Phillippa Smith interview.

⁸⁷⁰ Finance and Expenditure Committee, 2013: 4.

⁸⁷¹ Interview with David Parker MP, Labour party finance spokesperson, with the author, Wellington, 20 February 2013.

⁸⁷² Lockwood Smith, David Parker, and David McGee interviews.

⁸⁷³ David Parker interview.

⁸⁷⁴ Lockwood Smith and David McGee interviews.

⁸⁷⁵ For the political debate on this report, see, for example, “Opposition keeps heat on Govt over SkyCity deal”, *TVNZ*, 20 February 2013. tvnz.co.nz/politics-news/opposition-keeps-heat-govt-over-skycity-deal-5346932

⁸⁷⁶ See “Minister disputes critical report on Defence restructure”, *Radio New Zealand*, 31 January 2013. www.radionz.co.nz/news/national/126854/minister-disputes-critical-report-on-defence-restructure

cycle. In recent years, the OAG has strongly criticised the quality of information about the non-financial performance of public sector entities.⁸⁷⁷ The OAG has noted some improvement in the last year or two but says that roughly half of entities' service performance information and associated systems and controls required improvement.⁸⁷⁸ In 2011, the Auditor-General released a revised (and significantly strengthened) auditing standard for service performance information⁸⁷⁹ for the first time requiring auditors to modify their audit opinion "if the performance information in the annual report does not, in their opinion, fairly reflect performance for the year".⁸⁸⁰ The standard applies to local authorities, government departments, Crown entities, and tertiary education institutions.⁸⁸¹ Auditing to this strengthened standard may contribute to further improvement.

8.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the OAG do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in its field of activity? In particular, where the OAG has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

The OAG has made significant efforts to ensure its responsiveness to Māori.

The OAG is not part of the Crown,⁸⁸² so does not inherit any Treaty of Waitangi obligations from the Crown; neither are there specific provisions relating to the Treaty in legislation affecting it. The audit function is conducted according to international standards of auditing and accounting, which contain no reference to ethnicity or indigeneity. The OAG has, however, developed a policy for its relations with Māori set out most recently in an "effectiveness plan for Māori"⁸⁸³ and based on "the protection of the right of Māori to live as Māori in New Zealand". The plan includes responsiveness to the specific interests of Māori in government services, specific Treaty initiatives and the settlement of Treaty claims; consultation with Māori on effective accountability and the responsiveness of entities working for the benefit of Māori; and being a good employer.⁸⁸⁴ The Public Audit Act 2001 also requires the OAG to implement good employer and equal employment opportunities policies in language very similar to the requirements for chief executives of government departments in the State Sector Act

⁸⁷⁷ See, for example, Controller and Auditor-General, *The Auditor-General's Observations on the Quality of Performance Reporting* (Wellington: Office of the Auditor-General, 2008).

⁸⁷⁸ Controller and Auditor-General, *Statement of Intent*, 2012: 32.

⁸⁷⁹ Controller and Auditor-General, *The Auditor-General's Auditing Standards*, 2011: AG-4 (revised), "The audit of service performance reports".

⁸⁸⁰ Controller and Auditor-General, *Central Government: Results of the 2010/11 audits (Volume 1)* (Wellington: Office of the Auditor-General, 2011), p. 70.

⁸⁸¹ State-owned enterprises and schools are not required to report service performance.

⁸⁸² The Public Audit Act interpretation section defines the Crown to exclude offices of Parliament.

⁸⁸³ Controller and Auditor-General, *Effectiveness for Maori Plan: Te Mana Arotake 2007–2009* (Wellington: Office of the Auditor-General, 2007).

⁸⁸⁴ Controller and Auditor-General, 2007.

1988.⁸⁸⁵ These obligations include recognition of “the aims and aspirations of the Māori people”. Although only about 10 staff identify as Māori, the OAG has made efforts to live up to these obligations as an employer.⁸⁸⁶ The OAG has also conducted performance audits on matters of specific interest to Māori. In a recent audit of Māori housing, the OAG sought the advice of kaumātua (elders), consulted Māori in a series of hui (meetings), and reported back to those consulted.⁸⁸⁷ A similar approach is being taken with the current audit of Māori education:⁸⁸⁸ fieldwork has included individual and group interviews of teachers and parents,⁸⁸⁹ and a Māori advisory group seems to be playing an effective role in providing advice and oversight.⁸⁹⁰ Thus, in practice, the OAG’s principles for engaging with Māori are not very different from those of government departments.

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Controller and Auditor-General, *Performance Audits from 2008: Follow-up report* (Wellington: Office of the Auditor-General, 2010).

⁸⁸⁵ Public Audit Act 2001, Schedule 3, clauses 9 and 10.

⁸⁸⁶ Interview of staff of the Performance Audit Group, Office of the Auditor-General, with the author, Wellington, 5 June 2013.

⁸⁸⁷ Nicola White interview.

⁸⁸⁸ Controller and Auditor-General, *Education for Māori: Context for our proposed audit work until 2017* (Wellington: Office of the Auditor-General, 2012); Controller and Auditor-General, *Education for Māori: Implementing Ka Hikitia – Managing for success* (Wellington: Office of the Auditor-General, 2013).

⁸⁸⁹ OAG Performance Audit Group staff interview.

⁸⁹⁰ Interview of Professor Wally Penetito, Te Kura Māori, Victoria University of Wellington, with the author, Wellington, 11 June 2013.

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tvnz.co.nz/politics-news/opposition-keeps-heat-govt-over-skycity-deal-5346932

Political parties (pillar 10)

Summary

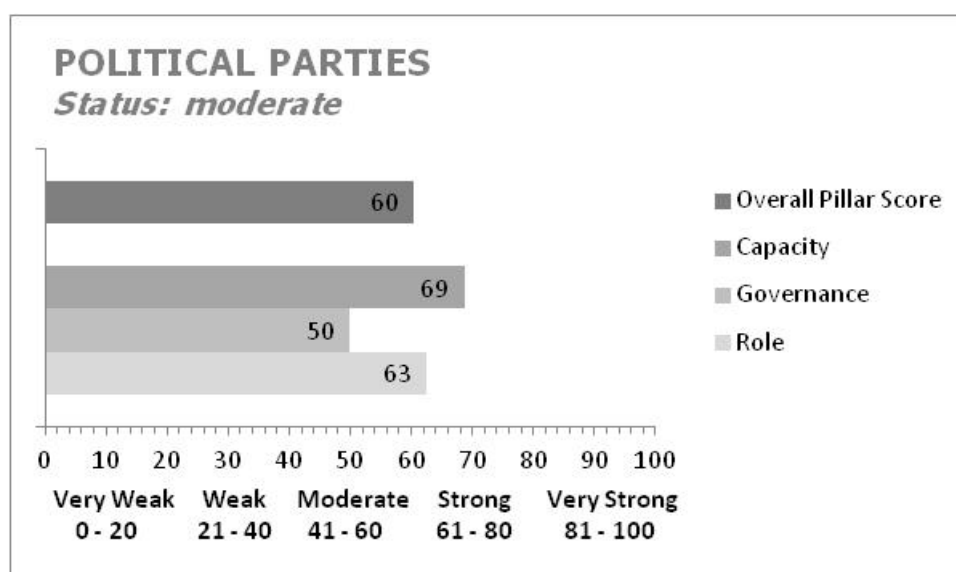
The institution of political parties is perceived to be one of the weakest in holding up the integrity of public life in New Zealand. The most problematic features of political party integrity in New Zealand involve political finance – how politicians raise and spend their funds, and how the state attempts to regulate these activities. Some of the problems relate not only to the usual concerns about the improper influence of donations and unequal private wealth, but also to the indirect state funding provided opaquely to the parties in Parliament and used for political campaigning. Significant political finance scandals in recent years have related to all types of political finance.

There is also a major problem of legitimacy for political parties. The parties are remote and isolated from the general community and are distrusted by many citizens. Their representational and engagement abilities are limited. Parties have few members, and their relationship with voters is weak.

Nonetheless, political parties do play a strong role in highlighting and combating impropriety and potentially corrupt practices in public life. Politicians are extremely on guard against the wrong doing of their opponents. Opposition parties are highly focused on exposing untoward activities of the government, and this has become a central theme of electoral competition.

The concerns about political parties raise further dimensions of transparency and monitoring. While the parties are not public institutions, they play a significant role in the operation of several other pillars, and they receive significant state funding. For these reasons, Chapter 6 recommends that there be greater transparency of the finances (income and spending) of political parties and that the powers of enforcement by the Electoral Commission be clarified and strengthened. It is also recommended that the allocation of election broadcasting time be reviewed with a view to reducing barriers inhibiting small and new political parties.

Figure 11: Political parties scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

Political parties form an important pillar in New Zealand's National Integrity System. This is because the institution of political parties is central to several other integrity pillars, especially the legislature and the executive. In particular, they have the central role in elections, so are essential to democracy. They simplify voting choices, organise competition, unify the electorate, bridge the separation of powers and foster cooperation among branches of government, translating public preferences into policy and providing loyal opposition.

However, it is precisely because of their central role in upholding the integrity of public life that political parties need to be extremely robust and healthy. Unfortunately, in some respects New Zealand parties are not playing a strong role in maintaining this integrity.

Several "democratic deficits" are found in relation to the way political parties operate. Most obvious is the weak relationship that parties now have with civil society: very few citizens are members of parties – let alone actively involved in the parties – and the capacity of parties to mobilise citizens to vote in elections is severely eroded. The public's trust and respect for political parties has been declining. This is seen in various statistics. One particularly salient opinion poll figure comes from the Transparency International Global Corruption Barometer for 2013, in which a survey of 1,000 people found that 75 per cent of New Zealanders believe political parties are affected by corruption. On a scale of 1–5, where 1 means "corruption is not a problem at all" and 5 means "corruption is a very serious problem", the average score for New Zealand political parties was 3.3 – the highest for any institution in the country.⁸⁹¹

⁸⁹¹ Transparency International, *Global Corruption Barometer 2013*, 2013.
http://transparency.org/gcb2013/country/?country=new_zealand

The New Zealand party system has evolved considerably in the last two decades. Thirteen political parties are registered with the Electoral Commission, and eight parties are represented in Parliament. By comparison, in the last election before the shift to mixed member proportional representation (MMP), only four parties were elected to Parliament, two of which held 95 out of the 99 seats.

The shift to MMP has helped make elections more competitive and has broken down New Zealand's previously long-standing two-party system. Not only are there many more political parties in Parliament, but the demographic profile of Parliament has broadened in significant ways, especially in ethnicity and gender.⁸⁹²

Elections and Parliament, therefore, have become more representative as a result. But there is still good reason to doubt that the parties are sufficiently fulfilling their necessary role of making elections meaningful and promoting public participation in politics.

Capacity

10.1.1 Resources (law)

To what extent does the legal framework provide an environment conducive to the formation and operations of political parties?

Score: 4

The New Zealand legal framework provides an environment that is relatively conducive to the formation and operation of political parties, but the rules around state funding are heavily biased towards larger parties and inhibit the establishment and growth of new parties.

The Electoral Act 1993 establishes the regulatory structure governing the registration and finances of political parties. The Electoral Commission is responsible for registering political parties and their logos. Parties that are unregistered cannot submit a party list and compete for the party vote, but are allowed to put forward candidates in electorate contests.

A central element in the registration process is the requirement for political parties to have at least 500 members.⁸⁹³ According to a former chief executive of the Electoral Commission, Paul Harris, the registration process and the requirement that parties have a certain number of members provide some assurance to voters that the parties they vote for are "reasonably substantial organisations". The Electoral Commission may place restrictions on the names and logos that parties register. All Electoral Commission decisions on registration can be subject to judicial review (which could encompass issues under the New Zealand Bill of Rights Act 1990).

⁸⁹² See the legislature pillar report (pillar 1).

⁸⁹³ See Electoral Commission, "Registered political parties". www.elections.org.nz/parties-candidates/registered-political-parties-0

Registered political parties must comply with statutory controls, including the submission of returns on their finances, especially controls on donations and expenditure – issues explored later in this pillar report.

The requirement to register is intended to provide a guarantee that the finances of all political parties are properly regulated. Parties are left to determine their own legal structure and the Electoral Act 1993 does not provide a legal definition of political parties. However, it does place legal obligations on parties and recognises them in law.

The state also provides considerable resources to help political parties operate. It is not commonly realised that such money is now the most important source of resources for political parties. The only direct form of state funding is the money and broadcasting time that the Electoral Commission provides to political parties for their election broadcast advertising. This funding administered under the Broadcasting Act 1989. As detailed in the electoral management body pillar report, the Act provides the commission with a great deal of independence in deciding how to allocate the resources. The commission may weigh up the various criteria for deciding the allocations – one of which is “fairness” – but invariably chooses to provide highly differentiated allocations to the various parties.

For the last five elections, the total amount of money available to the Electoral Commission has remained the same – NZ\$3.3 million. The commission also distributes broadcasting time on Television New Zealand (TVNZ) and Radio New Zealand – in 2011, it was 112 minutes.

It is also important to note that the state prohibits parties from purchasing their own broadcast election advertising – a rule that is particularly contentious for some small parties. For various reasons some minor parties receive inconsequential amounts or are denied any allocation. Former chief executive of the Electoral Commission Paul Harris has said that this is “undesirable and undemocratic”. Harris has called for a revamp of the rules on broadcasting funding, adding that, “A party should then be free to buy time for election broadcasting, subject only to a modest increase in the current limit on its election expenses, and perhaps also to a secondary limit on its election broadcasting expenditure”.⁸⁹⁴ Another critic of the broadcasting allocation process is Graeme Edgeler, an expert on electoral law and a lawyer for the former Electoral Commission: “Absolutely nothing can be said to defend the way the allocations are made ... You cannot come up with any arguments that the current broadcasting allocation model is a good idea”.⁸⁹⁵

Most of the taxpayer-funded resources provided to parties in New Zealand come under the category of “indirect” state funding because these resources are not given directly to the party organisations but instead are given to the parliamentary wing of the parties for the purpose of helping the members of Parliament (MPs) to carry out their parliamentary or ministerial activities. MPs receive resources intended to permit them

⁸⁹⁴ Paul Harris, “Broadcasting allocations and voter education at the 2002 general election”, paper for presentation to the 2002 Post-Election Conference, Parliament Buildings, Wellington, 23 August 2002. www.scoop.co.nz/stories/PO0208/S00086.htm

⁸⁹⁵ Interview of Graeme Edgeler with author, Wellington, 12 January 2013.

to carry out their legislative duties and serve their constituents – activities such as research, paying for office expenses, and consultation with the public – but some of this is used for partisan political purposes, electioneering, and organising their parties. Officially, such financial support is not known as state funding for parties, but as “parliamentary funding”.⁸⁹⁶

The Parliamentary Service and Ministerial Services distribute resources to the politicians. The Parliamentary Service is the more significant of these two bodies, administering Parliament and its MPs and their offices. In 2012, the Parliamentary Service had a budget of NZ\$72 million.⁸⁹⁷

The Parliamentary Service is controlled by the Parliamentary Service Commission, which is in turn controlled by the parties. The commission is made up of the Speaker of the House, the Leader and shadow Leader of the House, and a representative from each party in Parliament (or two representatives in the case of parties with over 30 MPs). It is, therefore, a case of the recipients of the resources devising the rules on how they can use them, something that would usually be viewed as a conflict of interest. As former MP Jim Anderton pointed out in a parliamentary debate, “It is not a good look for political parties to design schemes for party funding to get around the laws that they themselves are responsible for making”.⁸⁹⁸ This “poacher as gamekeeper” situation appears to have led to a lax regime where parties are easily able to convert parliamentary resources into political tools.

Non-state financial resources are relatively insignificant. The income that New Zealand parties derive from civil society is small – the two major party organisations have annual incomes of about NZ\$3 million, and the smaller parliamentary parties have incomes of less than a third of this figure. In election years, income from civil society increases somewhat to fund the election campaigns but, even then, remains relatively low.

This is a major shift from the past when the bulk of party resources came from their membership base or from organisations aligned with the party, such as trade unions and businesses. Less party funding now comes from these sources, as the parties have only minuscule memberships and their traditionally aligned organisations contribute relatively little.

Political scientist Raymond Miller says that “Over a number of years, but especially since the move to proportional representation, almost all of the parliamentary parties have been able to lay claim to the spoils of office”.⁸⁹⁹ The shift to proportional representation has played some role in this transformation, because the new electoral system has brought parliamentary party politics back to the centre of the governing process, whereas under the former system Parliament suffered from the dominance of

⁸⁹⁶ David McGee, *Parliamentary Practice in New Zealand*, 3rd ed. (Wellington: Dunmore Publishing, 2005), p. 85.

⁸⁹⁷ Parliamentary Service, *Parliamentary Service Annual Report for the Year Ended 30 June 2012*, (Wellington: House of Representatives, 2012). www.parliament.nz/en-nz/parl-support/agencies/ps/corp-docs/00NZPPSAnnualReport20121/annual-report-for-the-year-ended-30-june-2012-parliamentary

⁸⁹⁸ *Sunday Star-Times*, 6 May 2001, p. 2.

⁸⁹⁹ Raymond Miller, “New Zealand: A party system transformed”, in Kay Lawson, ed., *Political Parties and Democracy*, vol IV (Santa Barbara: Praeger, 2010), p. 164.

the political executive – what Lord Hailsham in the United Kingdom called “elective dictatorship”. A downside of this recentring of parliament has perhaps been intra-parliamentary horse-trading among parties in non-transparent ways.

There are some suggested international standards for disclosure requirements for political parties’ financial information, in addition to the more common requirements for disclosure of electoral campaign finances. The standards were developed because of the role parties play in the executive and legislative branches of government and because they often receive significant public funding. For example, the Council of Europe calls on states to oblige political parties to keep proper accounts and make them available to the public as well as presenting them to an independent oversight agency.⁹⁰⁰ The OECD shares this approach.⁹⁰¹

In the United Kingdom, which has fairly comprehensive rules, parties are obliged, among other requirements, to provide an overview of income and expenditure and a balance sheet. Income should include information on membership fees, money received from affiliated organisations, and donations as well as public funding. Equivalent details are required on expenditure. In countries where political parties are obliged to report to only an oversight body, that body should be required to make the information available to the public in a timely manner. Sanctions for non-compliance are also seen as necessary.

New Zealand should consider adopting requirements on these lines. In the meantime, parties in New Zealand could consider voluntary compliance with these international standards.

10.1.2 Resources (practice)

To what extent do the financial resources available to political parties allow for effective political competition?

Score: 3

The financing of political parties in New Zealand is highly problematic, with the extra-parliamentary party organisations run on shoe-string budgets of significantly varying sizes while the parliamentary wings of the parties enjoy generous state funding that is opaquely controlled and inequitably distributed.

The change in electoral systems – from first-past-the-post to MMP – has provided an electoral environment more conducive to minor parties, so voters clearly have more choice in elections. Since the introduction of MMP in 1996, eight small parties have gained parliamentary representation in addition to the two major parties – Alliance, Act, United Future, New Zealand First, Greens, Progressive, Māori Party, and Mana.⁹⁰²

⁹⁰⁰ Council of Europe, *Guidelines on the Transparency of Party Funding*, 2001, and Council of Europe, *Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*, 2003.

⁹⁰¹ OECD, *Transparency and Integrity in Political Finance* (Paris: OECD, 2012).

⁹⁰² This pillar report refers to the political parties by the name they are commonly known: Act (ACT New Zealand), Alliance, Greens (Green Party of Aotearoa New Zealand), Labour (New Zealand Labour), Mana,

Many other parties have failed to gain representation; 41 parties have been registered, set up, and disbanded since the introduction of MMP.⁹⁰³

Yet there are good reasons to doubt whether New Zealand's party system contains effective competition, and there is reason to see the funding regime as being strongly biased against small and emerging political parties. As discussed later (under question 10.3.1), there are serious issues of declining voter turnout and engagement with political parties. Also, survey evidence shows that a significant proportion of the public does not feel sufficiently happy with the degree of choice in elections and views the differences between the main parties as minor. For example, in the 2008 general election, half of voters (51 per cent) thought there were only "minor differences" between the parties during the campaign, while only 38 per cent thought there were major differences between the parties. Furthermore, when survey respondents were asked to place the parties on the left–right spectrum, "A third could not place Labour or National".⁹⁰⁴

Small parties have a precarious existence and often fail to compete with the large parties, at least in part because of the legal framework, electoral system, and provision of resources. There is little diversity in the political funding of parties. In theory, parties receive money from members, their fundraising activities, and from supporters, but in reality, the levels of money are relatively low. As pointed out previously, the balance between private and public funding is highly skewed towards public funding.

The ability of New Zealand political parties to recruit and retain members has drastically declined. Between the 1950s and 1990s New Zealand party membership as a proportion of the electorate fell from 23.8 per cent to 2.1 per cent – a decline of 21.7 percentage points. Of 16 OECD countries studied, New Zealand had the third lowest membership ratio.⁹⁰⁵

That New Zealand constitutes a particularly advanced case of party membership decline can be seen in the fact that, whereas the National and Labour parties were once able to claim branch memberships of 250,000 and 80,000 respectively, today National has only about 20,000 and Labour about 10,000 members. Likewise, the relatively new parties of New Zealand First, the Greens, Act, and United Future probably only have about 15,000 members among them. It seems that fewer New Zealanders belong to political parties today than at any time since the establishment of the two-party system in the 1930s.⁹⁰⁶

Māori Party (Māori Party of Aotearoa New Zealand), National (National Party of New Zealand), New Zealand First, Progressive, and United Future (United Future New Zealand).

⁹⁰³ Electoral Commission, "Register of political parties". www.elections.org.nz/parties-candidates/registered-political-parties-0/register-political-parties

⁹⁰⁴ Jack Vowles, "The 2008 election: Why National won", in Raymond Miller, ed., *New Zealand Government and Politics* 5th ed. (Sydney: Oxford University Press, 2009).

⁹⁰⁵ Susan Scarrow, "Parties without members? Party organization in a changing electoral environment", in Russell Dalton and Martin Wattenberg, eds., *Parties Without Partisans: Political change in advanced industrial democracies* (Oxford: Oxford University Press, 2000), p. 90.

⁹⁰⁶ Bryce Edwards, "Elections and campaigns: Voter participation and turnout", *Te Ara: The Encyclopedia of New Zealand*, updated 13 July 2012. www.TeAra.govt.nz/en/elections-and-campaigns/page-4

State funding has an important effect on the nature of political competition, especially in terms of consolidating the existing party system and artificially inhibiting change. Much like the state's ban on television advertising by parties and the Electoral Commission's inequitable allocation of state funding for election broadcasting, the provision of generous parliamentary funding operates as an impediment to the competitiveness of new parties in New Zealand politics. For the last election, the commission divided this election broadcasting funding among 11 parties, with the Labour and National parties receiving most of the money allocation – 72 per cent between them (or NZ\$1.15 million each) – the Greens, Act, and New Zealand First receiving much smaller amounts, and six other small parties getting minuscule allocations.⁹⁰⁷

It is significant that the only new political party to be elected to Parliament since the introduction of MMP is the Act party, which was bankrolled by millions of dollars of private wealth in 1996. Since then no other new party not already represented in Parliament has been able to compete with the millions of dollars of state-funded resources that the other parties have at their disposal. The other new parties currently in Parliament – the Greens, United Future, Māori Party, and Mana – were all launched by MPs already in Parliament.

The larger political parties – Labour and National – have access to the greatest amount of resources through Parliament, which puts them at a significant electoral advantage over other parties in political campaigning and organising their parties. In addition, the major parties receive a greater share of donations from civil society. Ever since 1996, when parties were first obliged to disclose elements of their donations and expenditure, the amounts of money for Labour and National have been broadly similar. Other parties like the Greens and Act have also been well resourced at various elections, but the wealth inequalities of Labour and National have caused the greatest concern about the political process. Hence, arguments are often made about the unfairness of electoral participants having unequal amounts of money to spend on their campaigns, and the possibility of corruption resulting from donations made to campaigns.

The most infamous scandal about political finance came during the 2005 general election when members of the Exclusive Brethren church spent a considerable amount of money publishing leaflets that were thought to assist the National party's campaign, thus circumventing the limits on expenditure for political parties.⁹⁰⁸

10.1.3 Independence (law)

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of political parties?

Score: 4

⁹⁰⁷ For further details, see Electoral Commission, "Broadcasting allocation decision 2011 general election". www.elections.org.nz/events/past-events-0/2011-general-election/parties-candidates-and-promoters-2011-ge/broadcasting

⁹⁰⁸ Nicky Hager, *The Hollow Men: A study in the politics of deception* (Nelson: Craig Potton, 2006).

Comprehensive legal safeguards exist to prevent unwarranted external interference in the activities of political parties.

The state is not easily able to monitor, investigate, or dissolve a political party. The surveillance of parties is not legally possible except under very tight conditions relating to criminal law.

10.1.4 Independence (practice)

To what extent are political parties free from unwarranted external interference in their activities in practice?

Score: 4

Political parties operate freely and are subject only to minimal oversight linked to clear and legitimate public interests.

State interference in the affairs of political parties mostly takes the form of state regulation of political finance (as discussed above). More intrusive state interference is extremely uncommon. For example, there are no examples of the state dissolving or prohibiting political parties. The last time this was even raised as an issue was in the early 1980s when National Prime Minister Robert Muldoon considered passing legislation to outlaw the Socialist Unity Party.⁹⁰⁹

There are few other examples of state interference in the activities of political parties and no examples of harassment or attacks on opposition parties by state authorities or actors linked to the state or a governing party. There are no examples of the detention or arrest of political party members because of their work. When attacks on political party members from members of the public occur, which is uncommon, the state engages in the sort of proper and impartial investigation that occurs in other civil society matters.

In general, it appears that authorities treat all political parties equally. There are some exceptions to this, when it comes to issues of political finance and regulating that finance (as outlined above), but in practice New Zealand political parties can operate independently from authorities.

There is more concern about political parties' linkages to civil society and business. Recent political finance scandals suggest that political parties are still not seen as being protected from external influence.⁹¹⁰ As one leading political journalist wrote in 2012, "the world believes Kiwis [New Zealanders] operate the world's cleanest government. Its politicians are rated incorruptible: fraud, bribes and sleaze-free. And yet, of late, domestic politics has been dominated by a series of grubby scandals".⁹¹¹

⁹⁰⁹ Nick Barnett, "The spies are coming in from the cold", *Dominion*, 7 April 2000, p. 11.

⁹¹⁰ For examples, of political finance scandals in recent years, see Bryce Edwards, "Review of New Zealand politics in 2008", *Liberation*, 27 April 2009. <http://liberation.typepad.com/liberation/2009/04/review-of-new-zealand-politics-in-2008.html>; Bryce Edwards, "Review of New Zealand politics in 2009", *Liberation*, 1 December 2010. <http://liberation.typepad.com/liberation/2010/12/review-of-new-zealand-politics-in-2009.html>

⁹¹¹ Andrea Vance, "Grubby scandals threaten New Zealand's reputation", *Dominion Post*, 29 July 2012. www.stuff.co.nz/national/politics/7370248/Grubby-scandals-threaten-NZs-reputation

Governance

10.2.1 Transparency (law)

To what extent are there regulations in place that require parties to make their financial information publicly available?

Score: 3

Comprehensive regulations require political parties to make some of their financial information publicly available. However, this does not cover all aspects of party finances, and some provisions contain loopholes.

New Zealand now has a large framework of electoral law that is supposed to prevent the illegitimate influence of wealth on parties. Donations to registered political parties and candidates are regulated. Political parties have been required, since 1996, to disclose the names and addresses of all donors who have given above a certain threshold. The records of donations for each calendar year must be audited and submitted by 30 April to the Electoral Commission, which makes them available for public inspection. The rules relating to the public disclosure of donations and limits on the size of anonymous donations and overseas donations changed on 1 January 2011.⁹¹²

A return is required even if the party has received no donations during the calendar year. An auditor's report must accompany the return, including where nil donations are declared. Parties are also required to make an immediate disclosure to the Electoral Commission when a donor gives a party more than NZ\$30,000 in a 12-month period.

The opaqueness of party finance is seen most strongly in the weak rules regulating the disclosure of the main source of (indirect) funding for political parties – that from Parliament – which is exempt from the Official Information Act 1982.

The use of parliamentary resources for party activities is also perpetuated by the fact the parties in Parliament have ensured the Parliamentary Service is exempt from the Official Information Act 1982. This means information about the parties' use of state funds is generally not available to the public. According to political journalist Vernon Small, "None of its meetings are open to the public, its agenda is not released and the Official Information Act ... does not apply to it – and that is the way most MPs like it. Ironically, the only people with routine access to the darkest secrets about individual members – which insiders say is rare in any case – are representatives of rival parties. It is this 'mutually assured destruction' that keeps much of what it does secret".⁹¹³ Gathering material for this report has proved difficult, as there are few sources of information on the parliamentary resources. The public is, therefore, uninformed about the situation.

⁹¹² The rules can be found on the Electoral Commission website: www.elections.org.nz/parties-candidates/registered-political-parties-0/party-donations

⁹¹³ Vernon Small, "Move to open 'secret society' ", *New Zealand Herald*, 28 March 2001. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=179648

New Zealand's disclosure rules are not as rigorous as in many countries and appear to be a compromise solution to objections to and support of regulation. On the one hand, the rules accept that when donations are relatively small then the right to privacy should prevail, but when donations are large they must be disclosed. Significantly, no limitations are imposed on donations, although recently there has been some support from the public and politicians for a ban on donations from anonymous sources.⁹¹⁴

10.2.2 Transparency (practice)

To what extent can the public obtain relevant financial information from political parties?

Score: 3

It is possible for the public to obtain financial information from political parties through the Electoral Commission, but this information is limited and its veracity is not assured.

New Zealand's disclosure laws cover only certain elements of political finance, and political parties are remarkably secretive about their finances. The parties do provide the necessary information to the Electoral Commission, but generally provide nothing further to the public. They tend to view themselves as private organisations with no obligation to provide transparency of their finances beyond what is required by law. Hence, the party websites usually do not provide any information about party finances.

The opaque nature of the use of parliamentary funding means that transparency is ultimately very limited. The institution of Parliament is exempt from the Official Information Act 1982, which means little information can be gathered about the use of parliamentary budgets by parties. One recent change, in 2012, occurred when the Speaker decided to start issuing limited information about the travel expenditure of MPs. Quarterly reports are now published on the Parliament website that show the global figures for how much money each MP has spent on travel and accommodation.⁹¹⁵ Details on how this money has been spent are not available.

10.2.3 Accountability (law)

To what extent are there provisions governing financial oversight of political parties by a designated state body?

Score: 3

The oversight of political parties is fragmented with responsibility and the potential for picking up abuse allocated to several institutions.

The Electoral Commission is the regulator of party and election finances and requires several returns from political parties. The Electoral Act 1993 provides the commission with a regulatory framework to make some of the financial activities of political parties

⁹¹⁴ Campaign expenditure is also subject to disclosure rules: Electoral Commission, "Party expenses". www.elections.org.nz/parties-candidates/registered-political-parties-0/party-expenses

⁹¹⁵ For details of MPs' expenses, see New Zealand Parliament, "MPs' expenses". www.parliament.nz/mi-nz/mpp/mps/expenses

transparent. Although legal provisions exist, they do not cover all aspects of the financial reporting and accounting of political parties, and some provisions contain loopholes.

The Electoral Commission has very limited powers in regard to the financial oversight of political parties (for more on this, see the electoral management body pillar report. The commission exists mainly to receive the official reports that parties are obliged to make public. It has limited ability to check the veracity of the reports or investigate potential violations of the rules, and has no prosecutorial powers.

More broadly, other mechanisms sometimes play a part in overseeing the activities of political parties. Investigations can be carried out by the Auditor-General (following a complaint by a member of the public), by the Justice and Electoral Law Committee of Parliament (if an MP on the committee raises an issue), and by the triennial parliamentary review of Parliament, which normally looks at funding issues. Of these bodies, it is the Office of the Auditor-General that appears to have the most potential for effective oversight of political party finance. As explored below, in 2006, the Auditor-General published a report about his investigations into the misuse of parliamentary funds by political parties in the weeks leading up to the 2005 general election. The landmark report showed that this independent office was highly capable of dealing with abuses in political finance. However, the office has become involved in such oversight roles on only an *ad hoc* basis, drawing attention to the fact there is no systematic oversight system.

10.2.4 Accountability (practice)

To what extent is there effective financial oversight of political parties in practice?

Score: 3

In practice, financial oversight of political parties mostly occurs on an ad hoc basis.

The lack of enforcement of the regulations on political party finance is more problematic than any failings in the legislation itself. The Electoral Commission and New Zealand Police are often criticised for not enforcing electoral finance laws. There have been many examples of clear violations of the rules not being referred to Police by the commission. A recent example was the discovery in May 2013 that the Labour party had failed to declare a donation of about NZ\$420,000. The rules state that parties must make an immediate disclosure to the Electoral Commission when a donor gives a party more than NZ\$30,000 in a 12-month period. Labour explained to the commission that it had been “confused” about the donation and had simply made a mistake in not declaring it. On this basis, the commission decided not to take the matter further.⁹¹⁶ This example, along with many others, suggests that when the political parties break the rules, the sanctions are lax.

⁹¹⁶ Kate Shuttleworth, “Political party donation returns published”, *New Zealand Herald*, 10 May 2013. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10882830

The next problem is that when the Electoral Commission does refer a political party to New Zealand Police for prosecution, the resulting investigation does not appear to be adequate and prosecutions are rare. One case study is salient (see also the law enforcement pillar report). After the 2005 general election, the Electoral Commission investigated Labour and five other political parties for alleged breaches of election spending rules. The commission referred Labour to Police after concluding that the party had overspent the legal limit by over NZ\$400,000. This occurred because Labour's election campaign included the production of a "pledge card" advertisement using Parliamentary Service funds. The party had wanted to exclude the NZ\$446,000 it spent on the pledge cards from its campaign expenses on the basis that parliamentary funds had paid for it, but the Electoral Commission ruled the pledge cards should be included nonetheless. Police stated, however, that while it considered "there was sufficient evidence to establish a prima facie case" of an offence, because it was not clear that the offence was intentional they decided not to lay a prosecution, preferring instead to warn Labour that similar future offences would risk prosecution. Police also said that other parties had used similar tactics, so it would have been unfair to single out Labour.⁹¹⁷

The Auditor-General, however, decided to intervene in this situation and investigate the use of public funds in the campaign. The report, released nearly a year after the election, found that parliamentary parties had improperly spent NZ\$1.17 million of taxpayer funds.⁹¹⁸ This led to retrospective legislation being passed under urgency to make the spending legal. At the time, Transparency International New Zealand objected to the legislation, stating that "Any retrospective changing of the law to legitimise something that was previously illegal we would criticise in the strongest possible terms".⁹¹⁹ The Auditor-General's investigation and findings produced an earthquake in New Zealand's political finance arrangements. And from that point on there has been increased interest and debate about campaign finance and the misuse of state funds by politicians.

10.2.5 Integrity (law)

To what extent are there organisational regulations regarding the internal democratic governance of the main political parties?

Score: 4

Political parties all have rules about democratic internal governance, although they could be strengthened.

All political parties have regulations on the election of their leadership and the selection of candidates. For most parliamentary parties, the selection of leadership is reserved

⁹¹⁷ New Zealand Police, "No prosecutions for electoral complaints", 17 March 2006.
www.police.govt.nz/news/release/2345

⁹¹⁸ Controller and Auditor-General, *Advertising Expenditure Incurred by the Parliamentary Service in the Three Months before the 2005 General Election* (Wellington: Office of the Auditor-General, 2006).
www.oag.govt.nz/2006/election-spending/docs/election-spending.pdf

⁹¹⁹ Kay Martin, 'Reputation "at risk" in funds row', *Dominion Post*, 13 September 2006, p.2.

for the parliamentary caucus. The key exceptions are the Greens and Labour – both of which have formal mechanisms involving members in the selection of leaders.

The state now imposes an element of internal democracy for all registered parties. The Electoral Act 1993 sets out a requirement “for registered parties to follow democratic procedures in candidate selection”.⁹²⁰ Before MMP, the processes for selecting parliamentary candidates were left entirely in the hands of the parties. Now, according to the Electoral Commission, every registered political party is obliged to make its selection of candidates in a way that involves at least the membership or party delegates.

The candidate selection and membership rules of each registered party must be deposited with the Electoral Commission, and thus made available for public inspection. However, the commission has no power to enforce the rules about democratic selection or to intervene in any other way. Although the Electoral Act 1993 stipulates that registration requires internal party rules that adhere to the candidate-selection regulations prescribed, the commission cannot investigate a party’s selection procedures as part of the registration process. However, legally, it is possible for any member of the public to seek a declaration from the High Court about the lawfulness of a party’s rules or procedures.

The lack of internal democratic practice extends to the selection of parliamentary candidates. While traditional methods prevail for the selection of electorate candidates, in most political parties the leaderships have chosen to retain the right to choose list MPs. In the formation of the party lists, most parties have established “moderating committees” of party elites that make the final decisions about list rankings.

10.2.6 Integrity (practice)

To what extent is there effective internal democratic governance of political parties in practice?

Score: 2

In practice, virtually all decision making in political parties occurs at the elite level – whether it is leadership selection, candidate selection and listing, or policy making, the upper-echelons of the parliamentary party invariably have the most power.

Traditionally, New Zealand political parties have been organised along democratic lines, with a bottom-up structure facilitating the involvement and decision making of all members. But these features of the party system have been almost totally eroded by changes in recent decades. Political parties now have many fewer members, and members have little meaningful role in decision making.

Despite supposedly democratic structures, it is the parliamentary elite of the parties who make the most important decisions. For example, John Henderson and Paul Bellamy point out that “while party members in theory have the opportunity to be actively involved in formulating party policy and candidate selection, in practice most

⁹²⁰ Electoral Act 1993, section 71.

key decisions rest with the party hierarchies. Party conferences are useful for floating policy ideas and parties maintain policy committees, but the decisions on policy tend to rest with the party leaders and their parliamentary caucus”.⁹²¹ This academic view was reinforced by the account of politics contained in Nicky Hager’s landmark book, *The Hollow Men*. Based on leaks of internal email messages and documents from within the National party, this book gave an insight into how decision making in modern political parties occurs at the elite level with the strong influence of highly pragmatic party professionals.⁹²²

Many commentators call on the political parties to make themselves more attractive to potential members. For example, political scientist Raymond Miller suggests the parties need to try “democratising decision-making processes with a view to giving membership and activism some value, and providing greater opportunity through the candidate-selection process for the revitalisation of the party leadership”.⁹²³

Role

10.3.1 Interest aggregation and representation

To what extent do political parties aggregate and represent relevant social interests in the political sphere?

Score: 3

While there is concern about the disengagement of the public from New Zealand politics, some interests are well represented.

Voter disengagement is especially seen in the declining voter turnout in New Zealand elections. Voter turnout has generally been in decline over a long period, and at the most recent election sank to the lowest turnout in over a century with only 69.57 per cent of those eligible to enrol turning out on polling day 2011 – a decline of six percentage points from the previous election.⁹²⁴

There is also a trend for fewer participants standing for office. For example, the Electoral Commission reported a decrease in parties and candidates between the last two elections, with the number of participating parties declining from 19 to 13, list candidates declining from 593 to 471, and electorate candidates declining from 522 to 453.⁹²⁵

⁹²¹ John Henderson and Paul Bellamy, *Democracy in New Zealand: International IDEA country study*, (Christchurch: Macmillan Brown Centre for Pacific Studies and International Institute for Democracy and Electoral Assistance, 2002), p. 70. www.idea.int/publications/democracy_nz/upload/New_Zealand.pdf

⁹²² Hager, 2006.

⁹²³ Miller, 2010.

⁹²⁴ Electoral Commission, *Report of the Electoral Commission on the 2011 General Election and Referendum*, 2012, p. 24.

⁹²⁵ Electoral Commission, 2012: 30.

10.3.2 Anti-corruption commitment

To what extent do political parties give due attention to public accountability and the fight against corruption?

Score: 4

Parties in New Zealand play a strong role in the “fight against corruption”. There is now a strong competitive element in the party system on issues of integrity and corruption in which parties constantly seek to expose and highlight the failings of their opponents.

There is a sense in which politicians and parties now use allegations of corruption as a campaigning political weapon. New Zealand politics has not traditionally been characterised by political finance, corruption, and scandals, but allegations about political finance, corruption, and scandal are now a key electoral weapon. Political debate about corruption, political funding, misuse of taxpayer funds, and personal political behaviour is one of the most prominent forms of electioneering in what is now a permanent campaign. Politicians trade heavily on claims, accusations, and complaints relating to these issues. There is little chance of corruption having a blind eye turned towards it.

On the other hand, however, political parties and politicians are often those that are seen to be part of the problem with corruption. Many, if not most, significant parliamentary political scandals now involve questions about politician and party impropriety, often involving parliamentary resources.

10.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What do political parties do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in its field of activity? In particular, where political parties have legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

As private institutions, political parties have no legal or special obligations in terms of the Treaty of Waitangi, yet most individual political parties in New Zealand take the Treaty seriously and pay special attention to its ramifications for public policy.

They generally publish policies, make commitments, carry out discussions on, and debate Treaty issues. This does not mean all parties agree on the status and policy ramifications of the Treaty. In fact, there continue to be diverse perspectives in this area, but virtually all political parties give substantial weight to the discussion of the obligations and the merits of these issues. Two parliamentary-based political parties in particular – Mana and the Māori Party – see themselves as embodiments of Treaty principles and Māori rights, both being based on and growing out of Māori struggles for political sovereignty.

Māori institutions are generally strong and support political activism. The Treaty of Waitangi has provided a platform that has helped to frame and organise Māori

attempts to engage with the political system in ways that for the most part have been peaceful and lawful.

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Media (pillar 11)

Summary

The media has a critical role to play in the maintenance of the National Integrity System in New Zealand. In theory it acts as a watchdog on the powerful, it keeps the public informed on political issues, and it provides a forum for the exchange of views. In many senses this sector is healthy – it is regarded as both free and independent, and much attention is placed by the media on holding the government of the day to account as well as uncovering corruption where it might occur in any of the other pillars. However, there are areas in which the media is seen as less healthy and robust – mostly in the lack of diversity of media and views present in New Zealand, the decline of serious investigative journalism, and the reduced state of public and community broadcasting. More than anything, economics rather than any direct government actions are impeding a strong fourth estate.

Four main points summarise the findings about the media pillar. First, the media is mostly independent and free in New Zealand. The media is very active and successful in informing the public on the activities of the government. There is seen to be a fair degree of objectivity in reporting on politics. Such reporting is relatively comprehensive (but not always in depth). Adequate legal safeguards prevent unwarranted interference in the activities of the media. Journalists are generally very free to operate. Intimidation and harassment of journalists is very rare. In general, media outlets have to answer for their activities to stakeholders. There are sector-wide accountability mechanisms in respect of content (the Broadcasting Standards Authority and Press Council), which work somewhat effectively even if they would benefit from an overhaul. The print media is reviewing the Press Council's jurisdiction and complaints processes. Media organisations normally operate in a relatively transparent way.

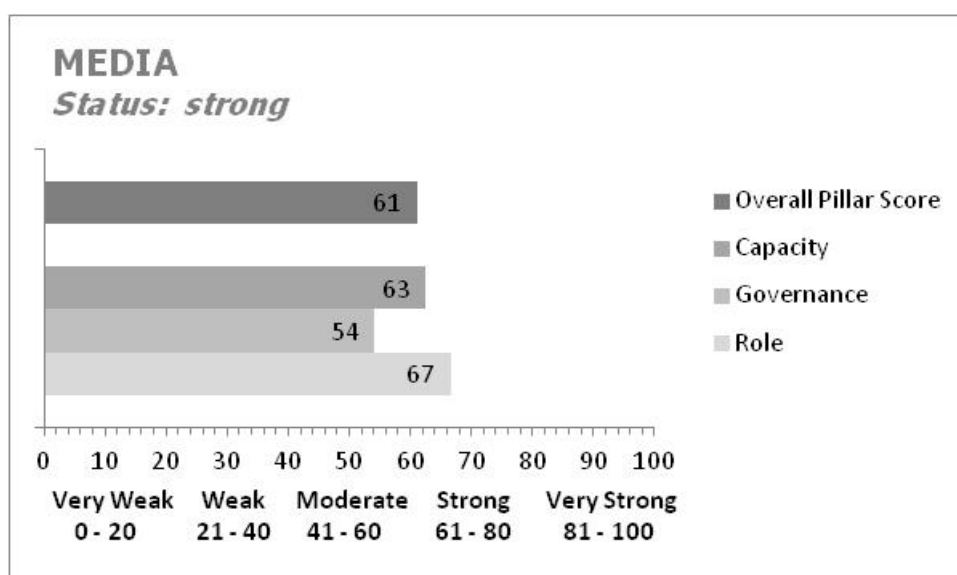
Second, New Zealand media outlets are active and successful in investigating and exposing cases of corruption. Journalists take a strong interest in highlighting and exposing corruption or lapses in integrity among those with power. However, often such reporting can be superficial and focused on the salacious and sensationalist elements of these stories. It should be noted that investigative journalism is not a key part of the media's work in this country. And while the media is active in investigating corruption cases, its work can be superficial and reactive.

Third, the New Zealand media is not diverse in terms of ownership or content. Where there is a plurality of media sources (in terms of type, ideology, or ownership), they do not cover the entire political and social spectrum. Therefore, only to a small extent is there a diverse media providing a variety of perspectives, and there are doubts that the mainstream media adequately represents the entire political spectrum. There are few legal impediments to the establishment and existence of an independent and diverse media – there are few general legal restrictions on setting up media. Instead, economic barriers inhibit the establishment and existence of media entities. And, arguably, media diversity is not promoted through the state. Some media scholars believe there is not adequate competition regulation and legislation. New Zealand is said to have the most deregulated media market in the Western world.

Fourth, public broadcasting and community broadcasting are fostered in New Zealand only to a limited extent. The commercial environment is not conducive to the development of public- and community-oriented media, and the state plays only a limited role in fostering public broadcasting. Although the state provides and owns broadcast media, the biggest entity, Television New Zealand, is no longer seen as a bona fide public service broadcaster. Conversely, both Radio New Zealand and Māori Television continue to credibly hold that status.⁹²⁶

The independence of the New Zealand media and its activities in informing the public about government activities and cases of corruption and maladministration are extremely valuable in the national Integrity System context. To sustain this level of benefit, more monitoring and oversight of the integrity of the media is needed, whether by self-regulation or public agencies. The less-formal frameworks that generally work effectively in New Zealand do need this ongoing monitoring and evaluation. Chapter 6, therefore, recommends strengthening the existing integrity frameworks applying to the media, and suggests the government should publish reports on its oversight of the effectiveness of those frameworks.

Figure 12: Media scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

Media options are plentiful in New Zealand with a vast array of newspapers, radio stations, televisions, magazines, and websites. Ownership in most sectors is, however, highly monopolised, as is the trend in other countries. Public broadcasting takes the form of three main television channels – TV One and TV2 (both Television New Zealand) and Māori Television – and in terms of radio two non-commercial networks – Radio New Zealand National and Radio New Zealand Concert.

⁹²⁶ Judith Collins and Craig Foss, “Government responds to news media report”, 12 September 2013. www.behive.govt.nz/release/government-responds-news-media-report

Outside publicly owned broadcasting, four media companies dominate the landscape – Fairfax Media, APN News and Media (APN), MediaWorks, and Sky TV. In terms of newspapers, two Australian companies dominate the market – Fairfax Media and APN. Commercial radio is dominated by APN, which owns the Radio Network, and by MediaWorks, which owns RadioWorks. In television, aside from the publicly owned channels, the main players are MediaWorks, which operates TV3 and Four, and Sky TV, which dominates the pay-television market and runs free-to-air Prime Television.

The news media plays a vital role in New Zealand's democracy. New Zealanders expect the 'fourth estate' to act as an independent watchdog – a role in which journalists "speak truth to power", act "on behalf of the people", and highlight abuses of power. The role of the media is also to inform the public about complex policy and issues and provide a forum for debate and diverse views.

According to Victoria University of Wellington media scholar Kate McMillan, "The news media's ability to fulfil its democratic role is affected by: the laws protecting freedom of expression, regulation and censorship, media access to official information, ownership of the media, levels of funding for public-service broadcasting, commercial pressures to increase advertising revenues, and levels of newsroom resourcing".⁹²⁷ This pillar report looks at these components. There are also concerns about both the bias of the media – especially in political coverage – and the concentration of media ownership in relatively few hands.

It is also important to note that a proposal from the Law Commission for the regulation of the media has been recently debated and considered. The commission proposed an independent unitary regulator to combine the roles of the Broadcasting Standards Authority and the Press Council.⁹²⁸

Currently, the Press Council regulates the print industry and the Broadcasting Standards Authority governs the television and radio industry. Print media organisations established the Press Council, so it has a self-regulatory role, whereas the Broadcasting Standards Authority is a statutory body. In both cases, the main focus of this regulation is on the content in the media, with each body responding to complaints about material that complainants consider does not meet prescribed standards.⁹²⁹

The government decided not to accept the Law Commission's recommendation,⁹³⁰ leaving the two regulatory bodies separate. The Ministry for Culture and Heritage will have policy oversight of the self-regulation in the industry. The Newspaper Publishers Association is reviewing the Press Council's jurisdiction and complaints processes. In

⁹²⁷ Kate McMillan, "Media and politics", *Te Ara: The Encyclopedia of New Zealand*, updated 29 May 2012. www.TeAra.govt.nz/en/media-and-politics

⁹²⁸ Law Commission, *The News Media Meets "New Media": Rights, responsibilities and regulation in the digital age*, NZLC R128 (Wellington: Law Commission, 2013). www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media/report

⁹²⁹ Judith Collins and Craig Foss, "Government responds to news media report", 12 September 2013. www.behive.govt.nz/release/government-responds-news-media-report

⁹³⁰ Ministers of Justice and Broadcasting, press statement, 12 September 2013.

addition, the broadcasting media recently established the Online Media Standards Authority to hear complaints about news and current affairs material published online by broadcasters who are members of the Online Media Standards Authority. (The Broadcasting Standards Authority's jurisdiction does not extend to online material.)

The media sector continues to grapple with incredibly pressing economic, cultural, and technological issues. Quite simply, the business models that characterised media production in the 20th century are breaking down, so a great deal of flux is occurring in this sector. This is producing uncertainty about the media's ongoing role in helping maintain the National Integrity System.

Capacity

11.1.1 Resources (law)

To what extent does the legal framework provide an environment conducive to a diverse independent media?

Score: 3

The regulatory framework pertaining to the existence and operations of independent media is conducive to the establishment of media, but not to the diversity of media; nor is it particularly conducive to strong public broadcasting.

New Zealand has an extremely deregulated media market with little in the way of state regulations and impediments to the establishment of new and competing media. According to media scholar Geoff Kemp, "Market liberalization in the late 1980s and 1990s produced one of the world's most deregulated media sectors".⁹³¹ Ownership of media entities is now regulated only by the general competition laws of the Commerce Act 1986. There are virtually no legal constraints on setting up broadcast media entities, there are absolutely no restrictions on setting up print media entities, and entry into the journalistic profession is unrestricted by law.

On the other hand, however, the market model means there is little regulatory encouragement of diversity in the media or widespread ownership of media. A strong feeling among many experts is that media regulation is not adequate enough to promote media diversity.⁹³²

New Zealand's broadcasting legislation does not provide for an environment conducive to public, commercial, and community broadcasting. According to McMillan, "Deregulation and the development of private radio and television since the 1980s has meant that public broadcasting now competes with private broadcasters".⁹³³

In 2013, the main public service broadcasters are Radio New Zealand and Māori Television.⁹³⁴ TVNZ is also state owned, but does not appear to have any particular

⁹³¹ Geoff Kemp, "Democracy, the public and the media", in Raymond Miller, ed., *New Zealand Government and Politics*, 5th ed. (Sydney: Oxford University Press, 2000).

⁹³² Kemp, 2000.

⁹³³ McMillan, 2012.

⁹³⁴ McMillan, 2012.

qualities that define it as a public service broadcaster. Instead, it is required to operate as a private commercial company and provide dividends to the state.

11.1.2 Resources (practice)

To what extent is there a diverse independent media providing a variety of perspectives?

Score: 3

The New Zealand media does not adequately represent the entire political spectrum;; nor does it reflect a full broad spectrum of social interests and groups.

Media in New Zealand is highly monopolised. This does not mean there are few media outlets – there is certainly a plurality of media sources – but that diversity in terms of ideology and ownership is lacking. Many important social and political interests do not find a voice in the media landscape of the country. A large part of the lack of diversity relates to the intense concentration of media ownership in New Zealand. Media academic Gavin Ellis notes that “ownership of New Zealand’s media became so concentrated that a report published in 2003 by the United Nations Research Institute for Social Development stated that the country presented the starkest example of media company consolidation”.⁹³⁵

Outside publicly owned broadcasting, four media companies dominate the landscape – Fairfax Media, APN, MediaWorks, and Sky TV. In terms of newspapers, two Australian companies dominate the market – Fairfax Media and APN. They own most daily newspapers in a country in which all cities – even the larger ones – now have only one daily newspaper.

Commercial radio is dominated by APN, which owns the Radio Network, and by MediaWorks, which owns RadioWorks. In television, aside from the publicly owned TV One, TV2, and Māori TV, the main players are MediaWorks, which operates TV3 and Four, and Sky TV, which dominates the pay-television market and runs free-to-air Prime Television. Sky TV has about 850,000 subscribers, representing a residential household penetration of about 49.4 per cent.⁹³⁶

Public broadcasting takes the form of three main television channels – TV One and TV2 (Television New Zealand) and Māori Television – and in terms of radio two non-commercial networks – Radio New Zealand National and Radio New Zealand Concert.

Radio New Zealand and Māori Television rely, according to McMillan, “largely on government funding. In contrast, TVNZ [Television New Zealand] receives 90 per cent of its funding from advertising. This has raised questions over TVNZ’s ability to deliver public service broadcasting, in particular news and current affairs”.⁹³⁷ The current National government is frequently criticised over its attitude to public broadcasting. In

⁹³⁵ Gavin Ellis, “Who owns the media?”, in Raymond Miller, ed., *New Zealand Government and Politics*, 5th ed. (Sydney: Oxford University Press, 2009).

⁹³⁶ Merja Myllylahti, *JMAD New Zealand Media Ownership Report 2012*, 23 November 2012. www.aut.ac.nz/__data/assets/pdf_file/0005/323546/JMAD-New-Zealand-Media-Ownership-2012.pdf

⁹³⁷ McMillan, 2012.

2012, it closed down the smaller, non-commercial channel TVNZ7. Funding from the Broadcasting Commission (otherwise known as New Zealand On Air) for news and current affairs in community broadcasting helps to support 25 community radio stations.

According to Freedom House's review of New Zealand media, a "serious blow to media diversity" occurred with the closure in 2011 of the 132-year-old cooperative news agency the New Zealand Press Association.⁹³⁸

There are questions about the adequacy of resources and training for journalists. In New Zealand, journalism is generally seen as a vocational trade, and qualifications in the industry are normally expected to be skills-based rather than academic. Few media companies encourage their staff to acquire higher qualifications once in the job.

The development of social media is seeing lower entry barriers for the public. Opportunities for citizen journalism are changing the media environment in ways that are beginning to increase the diversity of media outlets at a micro level.

11.1.3 Independence (law)

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of the media?

Score: 4

New Zealand's regulatory framework is conducive to a relatively independent media with few restrictions and little overt censorship.

In any country, the democratic functions of the media depend on laws that protect freedom of expression, the extent to which official information can be obtained, and the levels and nature of censorship and regulation. In all these areas the New Zealand media functions well because comprehensive legal safeguards prevent unwarranted external interference in the media. All media is subject to the Films, Videos, and Publications Classification Act 1993. The activities of broadcasters are also covered by the Broadcasting Act 1989, which makes them subject to the requirements of accuracy and balance in the content they broadcast. However, libel laws are still relatively restrictive for the media, and official information legislation does not function effectively.

Legal safeguards ensure the independence of the media. The New Zealand Bill of Rights Act 1990 protects the media's freedom of expression, and the Privacy Act 1993 provides exemptions for the media from requirements that might otherwise make it less free.

Journalists are generally able to protect their sources, and the Evidence Act 2006 allows media to keep the details of their sources confidential. However, in restricted circumstances both the police and the Serious Fraud Office can force journalists to reveal their sources. For the police, this requires a request for a warrant from a judge, and journalists can make appeals to the High Court to keep their sources protected.

⁹³⁸ Freedom House, "New Zealand", in *Freedom of the Press*, 2012. www.freedomhouse.org/report/freedom-press/2012/new-zealand

However, the Serious Fraud Office can act on its own initiative without any judicial process. One such recent example of this was when the Serious Fraud Office demanded that the *National Business Review* hand over all material, including sources, of its investigation into the collapse of South Canterbury Finance.⁹³⁹

The work of journalists is also greatly enhanced by the Official Information Act 1982, which makes available to the public, on request, most internal government documents,. However, journalists are increasingly thwarted by the use of exemptions by government departments (see the public sector pillar report for more information).

State censorship is relatively moderate and infrequent in New Zealand. Few complaints about the suppression of expression occur nowadays; instead it is defamation law that results in more problems for the media.⁹⁴⁰

Traditionally, libel laws have also played a role in suppressing the freedom of the press, especially because defamation proceedings have – as in the traditional Westminster model – often produced considerable burdens on publishers. It is often argued that the defamation laws are “overly plaintiff-friendly”.⁹⁴¹

However, since the 1998–2000 landmark case *Lange v Atkinson*, the media has been able to rely on the defence of “qualified privilege”, which means journalists can avoid defamation actions if it is clear that any criticism of public figures arises out of “honest belief”. The *Lange v Atkinson* Court of Appeal decision, means the performance of politicians can more easily be commented on in the media.⁹⁴² Nonetheless, there are occasions when the media pays a high price for defamation. For example, in 2010 the 18-year-old *New Korea Herald* newspaper was forced to close after being ordered by the High Court to pay NZ\$250,000 in damages after defaming a prominent Korean businessman.⁹⁴³

New Zealand governments have generally been reluctant to impose regulatory controls over the press. Instead, for newspapers and magazines, the print media has established its own voluntary regulatory system – the Press Council; the broadcast media has a state entity, the Broadcasting Standards Authority, regulating it. The broadcast media has also recently established the Online Media Standards Authority as a self-regulatory body for online material published by broadcasters.

As noted earlier, the government decided not to accept the Law Commission proposal that these organisations be merged into a new agency that would cover virtually all forms of media.

⁹³⁹ “NBR in stand off with SFO over file seizure”, *National Business Review*, 20 October 2010. www.nbr.co.nz/article/sfo-demands-nbr-documents-refusal-risks-40k-fine-jail-131836

⁹⁴⁰ Ursula Cheer, “Reality and myth: The New Zealand media and the chilling effect of defamation law”, PhD thesis at the University of Canterbury, 2008.

⁹⁴¹ Cheer, 2008.

⁹⁴² *Lange v Atkinson* [2000] 3 NZLR 385.

⁹⁴³ Lincoln Tan, “Defamation kills Korean paper”, *New Zealand Herald*, 9 December 2010. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10693024

11.1.4 Independence (practice)

To what extent is the media free from unwarranted external interference in its work in practice?

Score: 4

The New Zealand media is relatively free from unwarranted external interference. While the state or other external actors occasionally interfere with the activities of the media, these instances of interference are usually non-severe, without significant consequences for the behaviour of media.

The 2013 Global Press Freedom Index produced by Reporters Without Borders ranks New Zealand at 8 (out of 175 countries) and rates media freedoms as “good”.⁹⁴⁴ New Zealand is noted as being the only non-European country in the top 10. Similarly, a 2012 Freedom House report rates the media as “free” and gives New Zealand a total score of 17 on a 0–100 scale (whereby 0 means most free and 100 means least free).⁹⁴⁵ Therefore, New Zealanders can be confident that journalists can assert their right to freedom of expression without fear. The various media regulatory agencies are seen to operate independently of state interference.

There have, however, been concerns about the political harassment of journalists and media agencies in recent years. Two investigative journalists endured particularly strong attacks from the Prime Minister in 2011. Nicky Hager published *Other People's Wars*, which was critically dismissed by Prime Minister John Key, who had not read the book, but said it was a work of fiction and Hager had no credibility.⁹⁴⁶ Similarly, award-winning investigative journalist Jon Stephenson was forced to defend himself against a bitter attack on his credibility by the Prime Minister and defence officials after *Metro* magazine published his exposé on the New Zealand military's arrangement for handing over prisoners in Afghanistan to US forces.⁹⁴⁷

However, a potentially more chilling episode occurred during the general election of 2011 when the Prime Minister condemned the media and officially complained to the police against various media agencies. The controversy related to what became known as the “teapot tape” scandal in which the Prime Minister met at a café with Act Party candidate John Banks for a photo opportunity, and they were covertly recorded by freelance cameraman Bradley Ambrose.

Ambrose claimed the audio recording had been made unintentionally. Along with other members of the media, Ambrose had been invited to record the initial meeting of the two politicians in the café, but when all journalists were ushered out of the café, Ambrose claimed he was prevented from being able to remove his microphone from

⁹⁴⁴ “New Zealand rises in press freedom ranking”, *New Zealand Herald*, 2 February 2013. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10863009

⁹⁴⁵ Freedom House, 2012.

⁹⁴⁶ Belinda McCammon, Danya Levy, and Vernon Small, “Key dismisses Hager book claims”, *Stuff*, 2 September 2011. www.stuff.co.nz/national/politics/5551661/Key-dismisses-Hager-book-claims

⁹⁴⁷ Derek Cheng, “PM attacks journalist over SAS torture claims”, *New Zealand Herald*, 3 May 2011. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10723016

the café table, and it was only after the event that he discovered it had recorded the whole conversation. He took the recording to the *Herald on Sunday* newspaper, which chose not to publish the recording.

The Prime Minister publically condemned what he called “*News of the World* style tactics”, describing the issue as “the start of a slippery slope”. After the Prime Minister’s complaint to police and the intervention of the Solicitor-General, the police issued search warrants to various media outlets and carried out an investigation, which never led to a conviction. These events were characterised as “insidious attacks” on media freedom by the former chair of the New Zealand National Commission for the UN Educational Scientific and Cultural Organization, Bryan Gould.⁹⁴⁸

According to the New Zealand Media Freedom Committee chair, Tim Murphy (also editor-in-chief of the *New Zealand Herald*), this incident possibly played a part in New Zealand dropping five places in the 2011 media freedom rankings produced by Reporters Without Borders.⁹⁴⁹

Untoward statements to the media come from any government, of all colours, of course, and in 2006, for example, then Minister of Finance Michael Cullen spoke out against a *New Zealand Herald* campaign against proposed government legislation. According to Ellis, “Cullen issued a veiled threat against the owners ... suggesting that the government could withdraw retrospective legislation validating the company’s position on a potential [NZ]\$219 million [goods and services tax] liability if the newspaper persisted in its campaign”.⁹⁵⁰

There are, then, potential areas for concern over legal interference with the freedom of the press. That said, these interferences and issues are relatively minor when placed in the context of the problems that face the media in other parts of the world. And as Freedom House’s 2012 review of New Zealand noted, “Despite these incidents, journalists are generally able to cover the news freely, and physical attacks or threats against the media are rare”.⁹⁵¹

State funding for broadcasting is, in theory, an area whereby the government of the day can have an influence over the media. New Zealand On Air is the state agency responsible for the funding of public-good broadcasting content across television, radio, and new media platforms. The agency spends about NZ\$130 million a year to fund radio, television, music, and digital media production carried out by a variety of public and private broadcasters and platforms.

For example, New Zealand On Air fully funds Radio New Zealand. Although the agency is an autonomous Crown entity separate from central government and governed by a board, appointments to the board are made by the Minister of

⁹⁴⁸ Bryan Gould, “Insidious attacks on press freedom”, *New Zealand Herald*, 23 January 2012. www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10780431

⁹⁴⁹ Matthew Backhouse, “New Zealand’s media freedom ranking drops after teapot tapes saga”, *Otago Daily Times*, 26 January 2012. www.odt.co.nz/news/politics/195740/nzs-media-freedom-ranking-drops-after-teapot-tapes-saga

⁹⁵⁰ Ellis, 2009.

⁹⁵¹ Freedom House, 2012.

Broadcasting, raising issues of partisan bias. For example, in 2012, allegations of a conflict of interest were levelled at board member Stephen McElrea, because he was also Prime Minister John Key's National party electorate chairman and had allegedly attempted to stop the broadcast of a controversial documentary, *Inside Child Poverty*, from occurring four days before the 2011 general election. The agency subsequently made enquiries about its legal powers to prevent broadcasters from screening politically sensitive programmes that it funded during election campaigns.⁹⁵²

Governance

11.2.1 Transparency (law)

To what extent are there provisions to ensure transparency in the activities of the media?

Score: 2

New Zealand has no specific legislation to ensure transparency in the media, and instead relies on civil law to ensure a high degree of transparency.

Media entities in New Zealand are subject to the same rules as any other private company.⁹⁵³ It is also not always clear that the media generally has clear rules on disclosure of information relating to internal staff, reporting, and editorial policies. But few concerns appear to exist about this area.

11.2.2 Transparency (practice)

To what extent is there transparency in the media in practice?

Score: 4

There is considerable transparency of New Zealand media in practice, both in print and broadcast media.

Media ownership in New Zealand is widely disclosed, as are editorial policies and information on internal staff. In general, New Zealand media outlets provide full and effective disclosure of relevant information on their activities. Sometimes, however, this is partial or outdated information.

Also, the media generally makes information on its internal staff, reporting, and editing policies publicly available. But this is hard to access – especially by the general public.

The regulatory bodies – the Broadcasting Standards Authority, Online Media Standards Authority, and Press Council – make their decisions public, mainly through press releases and by publishing the information on their websites.⁹⁵⁴

⁹⁵² Claire Trevett, "New Zealand on Air to stop docos in election lead-up", *New Zealand Herald*, 18 January 2012. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10779390

⁹⁵³ For further information on the operations of private companies, see the business pillar report (pillar 13).

⁹⁵⁴ The decisions of the Broadcasting Standards Authority are published on its website (bsa.govt.nz/decisions/latest), and the Press Council publishes its rulings on its website (www.presscouncil.org.nz/rulings.php).

11.2.3 Accountability (law)

To what extent are there legal provisions to ensure that media outlets are answerable for their activities?

Score: 4

Comprehensive mechanisms in New Zealand ensure media outlets are answerable for their activities, but accountability regulations are complex and outdated.

The Law Commission proposed sweeping changes in the regulation of the media. In particular, it recommended a new independent regulatory body that would cover nearly all media. Nonetheless, existing laws and industry practices can be evaluated.⁹⁵⁵

The broadcasting sector is subject to the statutory regulation found in the Broadcasting Act 1989. This legislation puts broadcast media under the oversight of the Broadcasting Standards Authority, a body that considers public complaints about broadcasters. The Act also requires broadcasters to maintain standards consistent with the observance of good taste and decency, the maintenance of law and order, individual privacy, balance, fairness and accuracy, and approved codes of broadcasting practice. As noted earlier, the broadcasting media recently established the Online Media Standards Authority to hear complaints about news and current affairs material published online by this media.

The print media sector, by contrast, is not regulated by a statutory body, but by self-regulation through the Press Council, a voluntary and industry-funded organisation that considers complaints against members. The council involves representatives of the public, publishers, and journalists.⁹⁵⁶

There are also legal restraints on the media – especially laws protecting other public rights. According to McMillan, “The [New Zealand] Bill of Rights Act 1990 and the Human Rights Act 1993 have provisions designed to prevent discrimination on the grounds of race, ethnic or national origin, age, gender or disability. If a person considers that false statements have been made about them through the media, they can sue the broadcaster or publisher of the statement, under the Defamation Act 1992. This does not apply to statements made under parliamentary privilege. The media are also banned from publishing the name of anyone granted name suppression in court”.⁹⁵⁷

11.2.4 Accountability (practice)

To what extent can media outlets be held accountable in practice?

Score: 4

In general, New Zealand media outlets have to answer for their activities to stakeholders.

⁹⁵⁵ Law Commission, 2013.

⁹⁵⁶ McMillan, 2012.

⁹⁵⁷ McMillan, 2012.

New Zealand has sector-wide accountability mechanisms for media outlets. The various government and industry regulators and professional oversight boards – the Press Council and Broadcasting Standards Authority – operate relatively effectively. The agencies frequently rule against media organisations for breaching standards, and the Broadcasting Standards Authority also issues fines.⁹⁵⁸ The Online Media Standards Authority is too new for its effectiveness to be assessed.

Both media regulatory authorities are reactive in nature, generally only responding to complaints rather than monitoring the media. The Press Council responds to about 80 complaints a year and the Broadcasting Standards Authority to about 200. There are few legal requirements for media to be accountable to the public. For instance, there are no laws requiring the media to correct erroneous information in a timely manner; instead, the defamation laws together with the industry complaints processes are meant to encourage such behaviour.

Media is also made accountable and accessible by a plethora of blogs, Twitter accounts,⁹⁵⁹ and journalists' forums that enable journalists to interact with the public.

11.2.5 Integrity mechanisms (law)

To what extent are there provisions in place to ensure the integrity of media employees?

Score: 2

The media industry generally lacks formal rules and provisions to ensure employee integrity.

While some provisions exist, they do not cover all aspects related to the integrity of media employees and some contain loopholes. There is certainly no sector-wide code of ethics or code of conduct, nor any legal requirement for one. The Press Council has a “set of principles” that applies to all of its members. The Broadcasting Act 1989 also outlines principles and standards for radio and television broadcasters to adhere to.

No laws cover the conduct of journalists, so conflicts of interest or other relationships do not have to be legally disclosed. Similarly, there are no rules or regulations pertaining to any issues of the “revolving door” type in the relationship between the parliamentary press gallery and ministerial and parliamentary press secretaries.

⁹⁵⁸ Broadcasting Standards Authority, *BSA Annual Report 2012*, 2012. bsa.govt.nz/images/assets/Annual-Reports/Annual-Report-2012-Web.pdf

⁹⁵⁹ A list of media organisations and journalists on Twitter is aggregated at billbenett.co.nz/new-zealand-media-twitter

11.2.6 Integrity mechanisms (practice)

To what extent is the integrity of media employees ensured in practice?

Score: 3

The integrity of media employees in New Zealand is difficult to determine, but public confidence in the profession is lacking.

Considerable evidence exists that the public does not feel confident of the media's integrity. For example, according to pollster UMR, in 2012 only a third of New Zealanders had either "a great deal" or "quite a lot" of confidence in the media generally, with two-thirds having only "some" or "very little" confidence in the institution.⁹⁶⁰

A 2013 *Reader's Digest* survey of trusted professions in New Zealand ranked journalists 43rd out of 50 professions – just below real estate agents and insurance salespeople, but above sex workers and car salespeople.⁹⁶¹ The 2013 Transparency International Global Corruption Barometer also signalled that New Zealanders have a low opinion of the integrity of the media. Those surveyed were asked to rate how affected the media is by corruption on a 1–5 scale (where 1 means not at all corrupt and 5 means extremely corrupt), producing an average score of 3.3.⁹⁶²

In general, there appears to be a piecemeal and reactive approach to ensuring the integrity of media employees, including only some of the following elements: enforcement of existing rules, inquiries into alleged misbehaviour, sanctioning of misbehaviour, and staff training on integrity issues.

It is questionable whether journalists widely and regularly refer to the regulatory bodies' sets of principles. One group of media academics commented on this issue: "when asked where these principles can be found in written form or what document clarifies them, there is a kind of confusion: is it in the Press Council's Statement of Principles, the union's code of ethics or the news organisation's style book?".⁹⁶³

This does not mean journalists are not ethical, but that there is little formal focus on codes of conduct. Generally, it is not common for journalists to receive independent instruction on ethics.

It is hard to gauge how widely journalists follow procedures when they are offered gifts or hospitality. But the recent release of information relating to the credit card expenditure of government ministers has given a glimpse of the fact journalists are often wined and dined by politicians. For example, in early 2010 the release of National

⁹⁶⁰ UMR Research, *Annual Review of the Nation*, 2013.

umr.co.nz/sites/umr/files/umr_mood_of_the_nation_2013_online_0.pdf

⁹⁶¹ "New Zealand's most trusted professions 2013", *Reader's Digest*, July 2013. www.readersdigest.co.nz/most-trusted-professions-2013

⁹⁶² Transparency International, *Global Corruption Barometer 2013*.
transparency.org/gcb2013/country/?country=new_zealand

⁹⁶³ Sean Phelan, Verica Rupa, and Martin Hirst, *Scooped: Politics and power of journalism in Aotearoa New Zealand* (Auckland: AUT Media, 2012).

party ministerial credit cards showed that Tim Groser had spent NZ\$247 on dinner at Wellington's Matterhorn with *Dominion Post* journalist Paul Easton, and that Nick Smith paid back NZ\$84.50 for a dinner with two journalists.⁹⁶⁴

Political journalists are also subsidised by the government to travel on prime ministerial trips abroad. Generally, press gallery journalists are charged a nominal fee, such as NZ\$100, to travel on the Prime Minister's Royal New Zealand Air Force aircraft.⁹⁶⁵ There are undoubtedly good reasons for such media subsidies being given and accepted, but it is notable that such subsidies are not normally disclosed in the journalists' reports.

During election campaigns, a very different situation can occur with journalists being charged high rates to travel with politicians. For example, in the last two days of the 2008 general election campaign the National party hired a plane to give leader John Key a presidential-style tour of the country, and the 12 travelling journalists were charged NZ\$1,200 each, thereby subsidising the party's campaigning costs.

Role

11.3.1 Investigate and expose cases of corruption practice

To what extent is the media active and successful in investigating and exposing cases of corruption?

Score: 4

In general, the New Zealand media is active and successful in reporting on individual cases of corruption, but tends to be reactive, reporting scandals rather than investigating and uncovering them.

The New Zealand media is extremely vigilant about the abuse of power or other improprieties by governments and other pillars of the integrity system. A case could be made that the media exaggerates the level of corruption in New Zealand. Of course, it is difficult to evaluate whether the media accurately reflects levels of corruption in New Zealand. It has become common for the media to give voice to those alleging corrupt practices. The high number of corruption-oriented stories in the media, therefore, appears at variance with the high ranking New Zealand enjoys in Transparency International's Corruption Perceptions Index.

However, such a heavy focus on corruption is often superficial and non-systematic. Instead of a rigorous pursuit of corruption and understanding the complexities of integrity in public life, the media's investigations appear driven by a sense of fleeting news sensationalism.

There is a serious lack of investigative journalism in New Zealand. However, as Hager says, a properly wide definition of investigative journalism shows there is still plenty of

⁹⁶⁴ Tracy Watkins and Vernon Small, "Minister caught short on credit card", *Stuff*, 23 February 2010. www.stuff.co.nz/national/politics/3361482/Minister-caught-short-on-credit-card

⁹⁶⁵ Deborah Coddington, "Surprise: The pen is pricier than the horse", *New Zealand Herald*, 5 July 2009. www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10582590

it in practice: “it is a mistake to see daily journalism and investigative journalism as separate occupations. It is actually a continuum ... Each of those journalists who have kept digging, driven by wanting to find out the truth, are doing investigative journalism.”⁹⁶⁶

While it is hard to define “investigative journalism” precisely, and therefore separate it from other journalistic roles, a decline of such journalism is certainly noticeable. There are also common complaints from within the media industry of a lack of funding for investigative journalism, although some broadcasting funding is available for assistance in making documentaries, and a lack of industry support and recognition of investigative journalists and their work.

11.3.2 Inform public on corruption and its impact

To what extent is the media active and successful in informing the public on corruption and its impact on the country?

Score: 3

While media outlets pay some attention to informing the public on corruption and its impact, reports are often limited or of poor quality.

There are no apparent programmes run by the media to educate the public on corruption or how to curb it; rather the media operates more as an investigator of corruption, playing the part of holding government, politicians, public officials generally, and business to account.

The media always gives significant coverage to New Zealand’s annual Corruption Perceptions Index ranking. However, the coverage does not generally report what the ranking means or how it is derived. One study of media coverage showed that “27 per cent of reviewed media articles [incorrectly] draw comparisons of rankings and scores over time” and “70 per cent of reviewed media articles refer to the rankings without taking confidence intervals into account”.⁹⁶⁷

11.3.3 Inform public on governance issues

To what extent is the media active and successful in informing the public on the activities of the government and other governance actors?

Score: 4

In general, the New Zealand media is active and relatively successful in keeping the public informed on the regular activities of the government and other governance institutions. However, a lack of resourcing inhibits its performance.

⁹⁶⁶ Nicky Hager, “Investigative journalism in the age of media meltdown: From National party headquarters to Afghanistan”, Bruce Jesson Memorial Lecture, 31 October 2012. www.brucejesson.com/?p=394

⁹⁶⁷ C. Dalzell, J. Fenwicke, A. Komarovskiy, S. Leduc, and F. Morrisson, “New Zealand and the Corruption Perceptions Index: How is New Zealand’s rating compiled and what can be inferred from it”, Ignite Consultants paper to Transparency International New Zealand. www.transparencynz.org.nz/index.php/component/content/article/8-news/116-2011-

The New Zealand media reports daily on politics and various political actors. Impartial and unbiased radio and television programmes are dedicated to current affairs. Newspapers also include coverage and analysis of government and governance actors. For example, Radio New Zealand National has several widely followed programmes such as *Morning Report*, *Nine-to-Noon*, and *Checkpoint* covering political events and current affairs and interrogating politicians and members of the government. Various television programmes are dedicated to the analysis of current affairs, including daily news programmes and programmes such as *The Nation* and Q+A where politicians are quizzed. There are also programmes seek to uncover, probe, and analyse government policy, corruption, and political developments in New Zealand – for example, *3rd Degree* and *Campbell Live*. New Zealand newspapers have regular columnists who critique government policy, political parties, and current affairs.

However, financial imperatives are certainly driving down the resourcing of newsrooms. For example, Ellis reported that “the number of journalists working full-time in the Parliamentary Press Gallery was estimated to have fallen by between 10 and 20 per cent after the 2008 general election as staff were redeployed or vacated positions left unfilled”.⁹⁶⁸

11.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the media do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? In particular, where the media has legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

The mainstream media still lacks some proficiencies in its coverage of Māori issues, but a significant attempt is normally made to work with partnership, respect, and participation with Māori.

The media’s orientation and relationship to Māori and all issues related to Māori have changed considerably in the last two decades. Whereas once the media was overwhelmingly monocultural, unreflective of Māori society, and poor at reporting on Māori and Treaty issues, that is not always the case now. Furthermore, the media landscape has fundamentally altered, and it now includes significant Māori-oriented media and journalists.

Within the last two decades, iwi-based radio stations and newspapers have proliferated. But, most importantly, the Māori Television Service started broadcasting in 2004. The service is funded almost entirely from the government, with a budget of about NZ\$45 million, and is widely seen as successful. The main channel is Māori Television, which broadcasts in both Māori and English. A second channel was launched in 2008, Te Reo, which is New Zealand’s first 100 per cent Māori language television channel.

⁹⁶⁸ Ellis, 2009: 409.

Māori broadcasting is funded by Te Māngai Pāho (the Māori Broadcast Funding Agency), which is a New Zealand Crown entity responsible for promoting Māori language and culture. The state established the agency as part of its obligations under the Treaty of Waitangi.

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Civil society (pillar 12)

Summary

This pillar report summarises themes from informant interviews and desk research across the community and voluntary sector, Māori, and Pasifika. The scope of this pillar report is wide; many organisations and individuals are active in civil society organisations (CSOs). A wide variety of organisations contributed, but it has not been possible to cover them all – sporting, religious, and professional associations are not included.

There is a note on the methodology used in this pillar report at the beginning of Chapter 5. There is a favourable legal environment for CSOs in New Zealand and most have sufficient funding and other resources, including volunteers, to operate, albeit on a short-term planning horizon. Improvements could be made by confirming the suite of training available to CSOs across all disciplines, establishing formal qualifications in civil society activities and management (including training and qualifications on CSOs), and progressively in government funding contracts.

CSOs enjoy high legal independence. Many feel well established and report no constraints on their independence. For some, however, independence is limited by political relationships and funding uncertainty. Standards for clarity should be adopted in government funding contracts for service types (for example, advocacy) and multi-year funding should be considered and valued.

Transparency in CSOs varies widely, and it can be difficult for the public to tell in whose interests a CSO is operating (community, government, or business) and to respond appropriately. Public information on CSOs should include information on who benefits from the organisation's activities and overhead rates (that is, how much of a donated dollar gets to front-line services).

By extending the scope of public information to cover all CSOs, not only those that are registered charities, and by promoting a code of conduct for the disclosure of information to the public by all CSOs, CSOs would become more transparent. This could be achieved by making disclosure a requirement for charitable status and not-for-profit tax treatment.

CSOs take on advocacy and public watchdog roles; some are set up explicitly for these roles. Many are actively engaged in policy reform initiatives, although (apart from TINZ) there is little focus on anti-corruption in view of perceived low levels of corruption in New Zealand. Government policy-making processes need to be clarified to ensure timely and well-resourced input from CSOs. Earlier input would generate better results and put less pressure on formal consultation at the end of the process to capture issues and problems.

Other actions that could be considered as a result of the findings of this report include acknowledging CSOs' charitable and advocacy work in their own right, separate from service delivery. Accounting and reporting requirements and tax status for this work should be clarified.

A publicly available annual report should be required of all community organisations that carry out public fundraising (above a given minimum donation dollar value to ensure the measure passes a cost benefit test) and are not registered charities. This report should include minimum requirements such as the organisation's purpose, members and beneficiaries, activities, and audit results.

There should be a coordinated single government environment scan for CSOs that wish to apply for contracts.

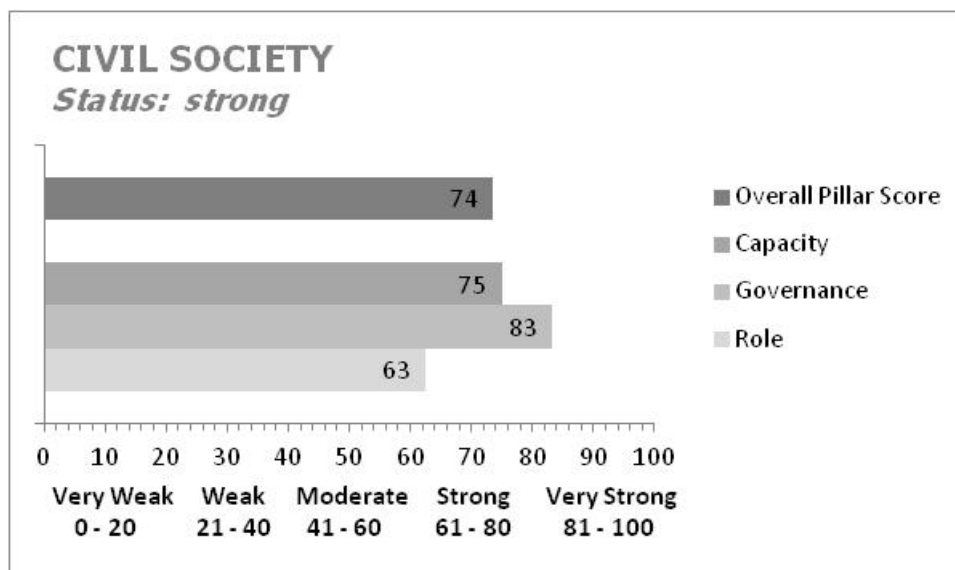
Government should commit funds to increasing information technology capacity in CSOs to assist their service role as well as their communication with funders.

Community and voluntary organisations can flourish in New Zealand, and there is high public participation. They are characteristically flexible and independent. CSOs are significant in holding the government to account over a wide range of its activities.

Transparency is variable with some organisations providing a high level of disclosure about their activities and others much less. Because New Zealanders are not well informed about what information they should expect from their civil society organisations, it would be valuable to clarify what they should disclose to the public and/or their members to assist in assuring their integrity, and then inform the public accordingly. Chapter 6 recommends on these issues.

There is merit in using CSOs more effectively as vehicles for integrity and civics education and training, both in their own organisations and at least indirectly for wider civil society and to meet the need for education about the role of CSOs and what should be expected of them. That would enhance their ability to engage effectively with government in policy development consultations.

Figure 13: Civil society scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The term “civil society” is not in general use in New Zealand, and it is hard for citizens to understand and engage with the concept. People in the street are unlikely to respond to a question such as “How is civil society progressing in New Zealand?”, but would talk energetically about their involvement with their local sports group, club, community initiative, religious group or other community activities they know about and value. Talking about community groups, interests, and activities is more accessible.

CSOs play an important and complex role in New Zealand society. They cover a wide variety of activities from community connection and social profit to service delivery to advocacy and direct challenge to government and business. They represent New Zealanders across all non-government and non-business aspects of society – community, cultural, sport, faith, education, interest groups, philanthropy, community development, and specific-issue lobby groups – and are the glue holding society together. In 2005, there were 97,000 not-for-profit institutions of which 45 per cent were concerned with culture, sports, or recreation; 11.6 per cent with social services, 10.2 per cent with religion, 7.8 per cent with development and housing; and 7.6 per cent with education and research. The remainder covered health, environment, trades unions, business and professional associations, law, advocacy, and politics.⁹⁶⁹

New Zealanders are very active in their communities because of smaller populations, fewer degrees of separation, and a strong cultural and pioneering history where voluntary assistance is expected as part of society. Volunteering is estimated to be worth 2.3 per cent of gross domestic product (NZ\$4.8 billion per year) to the New Zealand economy.⁹⁷⁰ Some communities rely on local CSOs such as local social service agencies for their survival.⁹⁷¹ The emergence of social enterprise is bringing new enthusiasm, technology, and financial support to these activities.

Māori society has strong expectations based on the Treaty of Waitangi. Māori have shared expectations, as well as diverse perspectives across tribal areas and rural and urban groupings, about the nature of society and how components within communities should be functioning to ensure society is meeting the needs of the people. The general expectations and definitions of civil society in the context of the Treaty principles, including partnership and active protection (of taonga)⁹⁷² are a work in progress by both Treaty partners.

Pasifika communities are well engaged in many areas of civil society, contributing to wider society while also retaining some independence in their association, which benefits their maintenance of identity. Pasifika leaders are active in politics, academia, social services, education, ethnic and language issues, and churches.

⁹⁶⁹ Statistics New Zealand, “Counting non-profit institutions in New Zealand 2005”.
www.stats.govt.nz/browse_for_stats/people_and_communities/Households/Non-ProfitInstitutionsSatelliteAccount_HOTP2005/Commentary.aspx

⁹⁷⁰ Office for the Community and Voluntary Sector, *Key Facts*; Statistics New Zealand.

⁹⁷¹ For example, Wesley Community Action, Cannons Creek, Porirua, runs budgeting services, food banks, and a community garden and promotes relationship skills.

⁹⁷² State Services Commission, *All about the Treaty* (Wellington: State Services Commission, 2005).
www.nzhistory.net.nz/files/documents/All_about_the_Treaty.pdf

Many CSOs such as the Association of Non-Governmental Organisations of Aotearoa consider that separation from government and business influence is critical for their success, while others rely on service funding from government or donations from business to do their work.

International literature and experience confirm that increased social engagement and cohesion drives growth in CSOs. “Just as current roles of civil society actors vary widely in the turbulent present, across and within the unique contexts of countries and cultures, the future roles of civil society will be diverse and multiple. However, individual factors such as technological change, demographic shifts, environmental pressures and political and economic uncertainty, as well as the demands of multi-stakeholder models strongly suggest that the roles that civil society plays will gain in importance”.⁹⁷³ CSOs can be the bulwark of local, regional, and national political stability; can build community assets and resilience; can provide a community mandate to government processes; and can be trusted means for the delivery of a variety of social services as well as advocating for social and political change.

There is no significant national debate on whether New Zealand is providing an enabling environment for CSOs (for example, in terms of legal, governance, funding, and disclosure requirements). New Zealanders like and value the work of CSOs, and want them to continue. New Zealanders generally have a passion for contribution, but are less interested (even passive) in checking whether the best arrangements are in place to enable these organisations. They seem to take the view the current systems work adequately and will just continue to work.

12.1.1 Resources (law)

To what extent does the legal framework provide an environment conducive to civil society?

Score: 4

The legal framework is generally sound.

The soundness of the legal framework was confirmed by those interviewed and by New Zealand’s 87 per cent ranking at the top of the Civicus Enabling Environment Index 2013.⁹⁷⁴ There are areas of concern around definition and disclosure. Addressing these areas would improve the medium and long-term performance of the framework.

Those interviewed found the legal environment largely enabling for CSO formation and development and accepted the various legal requirements as necessary safeguards.

The fundamental legal protection for freedom of association, expression, and assembly is the New Zealand Bill of Rights Act 1990. The legal framework for CSOs is provided by law through statutes such as the Charities Act 2005, Incorporated Societies Act 1908, and Income Tax Act 2007. In addition, there are contractual requirements from funders and sector best practice requirements such as adhering to codes of conduct or

⁹⁷³ World Economic Forum, *The Future Role of Civil Society*, World Scenario Series, January 2013.

⁹⁷⁴ CIVICUS, “CIVICUS 2013: Enabling Environment Index”. civicus.org/what-we-do-126/2013-05-06-10-38-39

practice. Many CSOs operate across a wide variety of community activities, so they must comply with a wide variety of organisational and sector requirements.

The Charities Commission, now the Department of Internal Affairs – Charities Services,⁹⁷⁵ completed several reviews in recent years and made changes to improve the framework within which CSOs operate, including promoting the enactment of the Charities Act 2005, developing financial reporting standards, researching the characteristics of charities in New Zealand, promoting tax changes, and clarifying audit requirements. While those interviewed respected the results of these activities in some administrative improvements and clarity around reporting, they raised issues relating directly to transparency and integrity, which have not been addressed. These issues are described in the relevant sections of this pillar report.

CSOs can be structured in a variety of legal ways (significantly as incorporated societies), and there is little that prevents them from doing the work they are set up to do as long as their objects relate to social and community benefits. The Law Commission is reviewing trust structures and may recommend new structures.⁹⁷⁶ The commission has also recommended updating the Incorporated Societies Act 1908.⁹⁷⁷

However, a problem with the Charities Act 2005 is that it denies the benefits of registration as a charity to those organisations with a main purpose of advocacy.⁹⁷⁸ The purpose may have been to exclude organisations fronting (or advocating) on behalf of industry and business, but the National Council of Women was de-registered in 2010 for stating that advocacy was its primary purpose and then reinstated in 2013 when it described more significant purposes such as community education.⁹⁷⁹ Legislative change to exclude advocacy by charities was considered and abandoned during the development of the Charities Act and again in 2012. Debate remains live in this area.

There are no legal limits or disclosure requirements on administration overheads as a percentage of donations. It is reasonable for the donating public to expect that a high proportion of their donation would be used for the purpose stated (that is, to provide services) and not be used up in administration costs. It would be possible to regulate for limits on registered charities' overheads as a proportion of donated funds.

Government contracting, which is a major source of income for many CSOs, can be complex with different requirements between government agencies, particularly for accreditation, monitoring, and auditing. The combination of requirements is often excessive for the amounts involved and results in extra demands on community organisations' limited resources. Respondents felt strongly that if registration

⁹⁷⁵ The Charities Commission was disestablished and its functions transferred to the Department of Internal Affairs, taking effect from 1 July 2012. Since most of the information in this pillar report refers to the previous administration of charities, the former name has been retained where relevant.

⁹⁷⁶ Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand*, NZLC R130 (Wellington: Law Commission, 2013) was tabled in Parliament on 11 September 2013. www.lawcom.govt.nz/project/review-law-trusts

⁹⁷⁷ Law Commission, *A New Act for Incorporated Societies* NZLC R129 (Wellington: Law Commission, 2013).

⁹⁷⁸ Charities Act 2005, section 5.

⁹⁷⁹ Interview with Dr Judy Whitcombe, New Zealand Federation of Graduate Women (Wellington), Zonta (Mana), and National Council of Women (Wellington), March 2013.

processes and standards could be improved for community organisations and then relied on to streamline contracting, more value would be generated from government funding. An integrated contract has long been an objective of many community organisations.

The above issues generate mixed service and charity business models for most community organisations. Service activity often subsidises representation or advocacy activity, and funders often fund community organisations at lower rates and for shorter terms than they fund commercial providers (relying on the organisation gaining donations to bridge the gap). This situation creates very unclear and short-term operating conditions, resulting in lower medium-term value from a given funding stream. Faced with these uncertainties, community organisations are less likely to put effort and investment into arrangements with medium-term beneficial results (for example, internal efficiencies, collaborations, alliances, and mergers) to help them build sustainable business.

12.1.2 Resources (practice)

To what extent do CSOs have adequate financial and human resources to function and operate effectively?

Score: 3

In practice, there are problems with the clarity of funding arrangements, the definition of advocacy and service activities, and the influence of funding agencies over CSO activities.

CSOs obtain resources from different sources – government, private funders, business, and the public. It is relatively easy for these organisations to appeal to the public through requests for donations and street-collection days. The administration costs of gaining these funds differ widely between organisations and can be a high proportion of funds collected (see the administration overhead point above). Funding sources can be multi-layered, depending on which part of the CSO is being funded, and funding can be from multiple sources for the same service.

Some CSOs raise concerns that the issues they deal with are intergenerational such as violence, gambling, abuse, and lack of adequate housing and require long-term interventions, but the CSOs' reliance on yearly funding cycles puts extreme pressures on limited resources with a requirement to constantly fund-raise.

Short-term funding is a particular problem for CSOs that need to employ and train staff. "We need well-trained, well-qualified people, especially for our field staff, who work under very little supervision. Even if we can get staff who are well qualified, it may take up to six months for them to be fully effective in their role. But because we only get government funding on an annual basis we can only offer them year-to-year contracts. It is almost impossible to get good staff under such conditions."⁹⁸⁰

⁹⁸⁰ Interview with Raewyn Fox, Chief Executive, New Zealand Federation of Family Community Budgeting Services, 21 August 2013.

For some CSOs, independence from government funding is a core principle, particularly those involved in social change and new social entrepreneurship models. These organisations have seen the restrictions placed on advocacy and innovation that can result from significant government funding, so have decided to avoid this funding source, even if it limits their funding options.

CSOs that rely on government funding can become important allies to government agencies involved in social change. Examples include the areas of family violence, compulsory seat-belt use, and immunisation campaigns, and in new social entrepreneurship models such as young enterprise schemes, youth parliament, and climate change issues. These organisations state that service provision is their primary activity and advocacy is a secondary activity. Therefore, they are not restricted from receiving funding from central and local government for their activities.

For many CSOs, government funding is supplemented by strong relationships with companies, local businesses, and philanthropic organisations. Some CSOs, however, will not apply for public charity funds, which may arise from gambling, or accept sponsorship from agencies associated with the alcohol industry.

While most CSOs consulted certainly say they are under-funded, this may simply reflect their desire to carry out additional activities valued by their community. Most organisations confirm that they have sufficient funding to operate in their current situation, albeit on a short-term planning horizon. Many small CSOs, especially diaspora groups in the international sector, however, closed when their prospects for funding disappeared in 2008 with the absorption of NZAID into the Ministry of Foreign Affairs and Trade and the replacement of the KOHA/Partnerships for International Community Development Scheme with another funding scheme with more stringent accessibility conditions.⁹⁸¹

Community organisations often rely on volunteers and dedicated employees who are prepared to work at lower rates of pay than they would receive elsewhere. Generally, organisations report no difficulty in attracting enthusiastic people knowledgeable about the cause, but say that attracting business skills can be difficult, including at board level. This, plus the short-term funding environment deliver organisational structures and processes that are less effective and efficient than they might otherwise be, resulting in reduced output from available resources.

Several government agencies offer training and mentoring resources to build CSO capability (the Charities Commission; Te Puni Kōkiri (the Ministry of Māori Development); and the Ministries of Social Development, Health, and Education), as well as the Institute of Directors (governance), businesses (through community work days), and philanthropic organisations. Government also delivers a workforce development agenda of training and support to CSO service providers through the Department of Internal Affairs; the Ministries of Health and Justice; Child, Youth and Family (which is a service of the Ministry of Social Development); and district health

⁹⁸¹ Banks, G., Murray, W., Overton, J. and Scheyvens, R. (2012), Paddling on One Side of the Canoe? The changing nature of New Zealand's development assistance Programme. *Development Policy Review*, 30: 2010, pp.169–186. doi: 10.1111/j.1467-7679.2012.00570.x

boards. Even the Electoral Commission provides funding to CSOs to meet common objectives,⁹⁸² especially where the government relationships with local communities are weak. Some major philanthropic organisations provide training, information, advice, and support to their client CSOs to assist their development and achieve positive outcomes. Some banks provide practical support to CSOs, which can generate more funding for CSOs.

Use of technology is improving but still lags behind government and business. Administration systems are typically labour intensive (not automated) and high cost for low volumes, with a risk of lost intellectual property and institutional knowledge when staff leave. Community organisations have much to gain from modern information technology, because it allows more effective dispersed membership activity, creates efficiencies in administration processes, and permits new areas of activity and innovations to be introduced in a sustainable way. It also assists communication with funders.

Some CSOs duplicate services and activities in their regions and local communities. And some CSOs are overly burdened by multiple reporting requirements to multiple funders. Government is slowly addressing these issues by considering improved funding models – with input and advice from CSOs – where multi-agency funding would be pooled and service tendering and contracting processes would be more transparent and streamlined across various government agencies. Whānau Ora is an example of such a model,⁹⁸³ combining resources from multiple agencies and establishing national models for commissioning CSO delivery of services that meet specific whānau (extended family) needs.

Improved models are long overdue and would significantly increase the value CSOs could generate from a given level of resources. Flow-on effects would include CSOs clustering services into networks and combining administration functions. Fragmentation in government funding contracts is a major impediment to this goal.

CSOs find that it can be difficult to attract employees and volunteers. While some CSOs pay expenses, many volunteers are not reimbursed. People accepting a voluntary or partially paid role with a community organisation are providing a donation to that organisation. It is noted that donations of money to registered charities attract a tax rebate while donations of time do not and many of those interviewed would like to see a tax rebate for voluntary time. Many government departments regularly complete environmental scans of the CSO sector to plan for future investments and supports. The Ministry of Foreign Affairs and Trade, for example, has an extensive registration process for eligibility for its Partnerships Fund. These scans are usually conducted by individual departments whereas many CSOs provide services for multiple government agencies, so have to participate in multiple similar exercises, taking time from their core business.

⁹⁸² Electoral Commission, “Resources and learning”. www.elections.org.nz/resources-learning

⁹⁸³ Whānau Ora is an inclusive interagency approach to providing health and social services to build the capacity of all New Zealand families in need. It empowers whānau as a whole rather than focusing separately on individual family members and their problems: Te Puni Kōkiri, “Whānau Ora”. www.tpk.govt.nz/en/in-focus/whanau-ora [accessed 14 October 2013].

12.1.3 Independence (law)

To what extent are there legal safeguards to prevent unwarranted external interference in the activities of CSOs?

Score: 5

Legal safeguards exist, and there are no significant or immediate concerns.

CSOs enjoy high legal independence through several legal safeguards.

- Human rights law allows New Zealanders to form and engage in groups regardless of political ideology, religion, or objectives.⁹⁸⁴
- The law on trusts requires trustees to make decisions independently, and incorporated societies have constitutions or rules that require them to act in the interest of their members (through the stated objects of the society).

Government intervention is limited by law to legitimate areas of national security, public order, public health, and the protection of the rights of others.⁹⁸⁵

- The Charities Commission can investigate whether a registered charity is acting in line with its objects and has the power to de-register a charity.
- There are no regulations stipulating government membership of community organisation boards.
- There are no regulations allowing for mandatory government attendance at community organisation meetings.
- Consultation and tendering requirements for government agencies⁹⁸⁶ ensure processes for awarding contracts are carried out according to best practice. Complaints about poor practice on the part of government agencies (including influence from external parties) can be made, in which case they are investigated by the relevant government agency. There is also the right to complain to the Ombudsman.

Those consulted report no other issues or actions relating directly to legal safeguards.

12.1.4 Independence (practice)

To what extent can civil society function without undue external interference?

Score: 4

Civil society is generally independent in practice, with improved performance possible through better disclosure of influence and the clarification of funding arrangements to enhance the public's knowledge of civil society and CSOs' ability to act independently in practice.

⁹⁸⁴ New Zealand Bill of Rights Act 1990.

⁹⁸⁵ Human Rights Act 1993.

⁹⁸⁶ See Bill Paterson, *Integrity Plus 2013: New Zealand National Integrity System Assessment – Public procurement*, supplementary paper 4 (Wellington: Transparency International New Zealand, 2013). www.transparency.org.nz/docs/2013/Supplementary-Paper-4-Public-Procurement.pdf

On a practical level, most of those consulted felt their organisation enjoyed a high level of independence, and that they could build necessary relationships on their own terms. Many community organisations reported that they were able to engage with other organisations in the community, government, and business as they needed to deliver their role. Many felt quite well established and did not report any constraints on their independence.

For some, however, independence is limited by political relationships and funding uncertainty, as noted above. A funder (whether government or business) can influence the activity of a community organisation in non-transparent ways.

Government service contracts can include contractual terms requiring the provider not to contradict or criticise government policy in that contract area or not to speak publicly about it. A community organisation may decide not to comment or to limit its comments for political reasons, including uncertainty around future funding and the need to compete effectively for scarce government funds. These factors can limit a community organisation's ability to represent and advocate for its members and to hold the government to account – a core role of CSOs.

Businesses or private interests may support organisations that understand their views and interests with the expectation that the organisation will help influence public opinion and gain them commercial advantage. They may fund an organisation directly to represent their interests, engage on their behalf, and advocate for them with government and the public to put their businesses or industry in a more positive light. These organisations play an important role representing their industries (for example, Federated Farmers of New Zealand, the New Zealand Forest Owners Association, Aquaculture New Zealand, and the Researched Medicines Industry Association) or providing services (for example, the Aged Residential Care Association, IHC,⁹⁸⁷ the Paediatric Society of New Zealand, and the Disability Services Network). These organisations may claim to act in the public interest, publish good research, and even seek public donations.

It can be difficult for the public to tell in whose interests a CSO is operating (community, government, or business) and to respond appropriately. It can be difficult to differentiate between advocates for industry, business, or government and organisations that clearly represent the interests of a community group (such as Diabetes New Zealand, the Disabled Persons Assembly, the Association of Blind Citizens, Women's Refuge, and Transparency International). Effectively, the lack of transparency in the arrangements creates the potential for external interference in the operation of the more genuine CSOs or for self-imposed limitations.

CSOs must maintain their work and reputation across a broad range of stakeholders, including the public. They guard their brand and services against being associated with undue external influence. The variety of mechanisms to ensure this includes transparent appointment processes and strong governance and management processes.

⁹⁸⁷ IHC is the organisation formerly known as the Intellectually Handicapped Children's Parents' Association and New Zealand Society for the Intellectually Handicapped.

12.2.1 Transparency (practice)

To what extent is there transparency in CSOs?

Score: 4

Transparency is generally good with improved performance possible through better education of CSOs and citizens to help them interpret the available information, for example, from financial reports. This would increase public expectations about their operations, reduce variability in performance across CSOs, and identify poor-performing CSOs that should close.

There are some legal safeguards relating to transparency. The Charities Commission has supported or promoted regulatory changes to improve transparency in the operation of charities and other CSOs, including the External Reporting Board's programme of setting financial reporting standards for registered charities.⁹⁸⁸ The Law Commission has recommended that these standards also apply to incorporated societies. The Fair Trading Act 1986 now requires third-party organisations that raise funds on behalf of charities to disclose the remuneration they receive for the service they provide to the charity.⁹⁸⁹

The Charities Act 2005 allows for information on the register of charities to be restricted if it is in the public interest to do so (such as for the protection of individual privacy).⁹⁹⁰ The criteria are available on the Charities Commission website and include the right to challenge the decision. Those consulted felt satisfied with this process.

Disclosure requirements for non-registered community organisations are minimal, covering the basic legislative reporting requirements for their legal form, and do not reflect the wider interest that the public has in these organisations.

The Official Information Act 1982 assists the public to find information about government dealings with community organisations. Community organisations are not subject to the Official Information Act, but the government agencies with which they deal have disclosure obligations (unless information can be withheld under Official Information Act provisions, perhaps because it is commercial sensitive or would impede the provision of free and frank advice), and may be required to disclose information about their dealings with the organisations.

CSOs are subject to the Privacy Act 1993 and must release personal information about individuals to those individuals on request (unless withholding provisions apply).

Comment from consultations focused on how to ensure that the public had clear information about the many CSOs in order to make informed decisions when dealing with CSOs. There is a case for providing CSOs with education on best practice disclosure for organisations of their type and size, such as an easy check-list or self-

⁹⁸⁸ The External Reporting Board is an independent Crown entity established under section 22 of the Financial Reporting Act 1993 and subject to the Crown Entities Act 2004.

⁹⁸⁹ Fair Trading Act 1986 s28(a)

⁹⁹⁰ Charities Act 2005, section 25.

assessment process and links to education advice through the websites of the Charities Commission, Institute of Directors, and Ministry of Social Development.

Those consulted described a wide variety of activity and engagement approaches with their communities of interest. This is understandable given the large number of organisations operating across civil society activities. Common approaches involve the use of annual general meetings, strategic plans, audited accounts and financial reports, appointment processes, customer and client surveys, public gatherings and events, and clinical and service audits. The internet has significantly increased public access to information about individual CSOs. The public can access a substantial amount of information from CSOs because their nature as community organisations is built on principles of openness and transparency. The media also plays a significant role through its reporting activity and through specialised outlets and blogs that take watchdog roles on specific social issues.

Communities can be the strongest critics of their CSOs. They can require a CSO to review its overall agenda and processes in response to a new issue or event. The growing awareness of the effects of climate change, especially on small Pacific nations, and requests from their communities for assistance require organisations such as Oxfam New Zealand and Caritas to be ready to adapt plans and respond to such emergencies. The CSO needs to be flexible and dynamic in its approach to remain relevant to its community and supporters.

Parliamentary process offers several ways to profile and investigate concerns about undue influence – through a local member of Parliament, opposition parties, and the media attention such issues can attract.

Some registered charities maintain a high level of transparency with most reporting that they disclose more than legally required – “everything” is available to members, usually through annual reports with audited accounts. Incorporated societies with an active membership also generally report that they have very open and transparent processes as demanded by their members (irrespective of whether they are a registered charity). The pattern is one of regular newsletters, updates, and web content with members active in raising issues and expecting the organisation to respond quickly.

When seeking donations and public support, any organisation can present itself as a charity, whether registered with the Charities Commission or not. Unregistered charities face no requirement to disclose their use of funds. This raises transparency and credibility concerns.

Sporting clubs, independent schools, and faith-based organisations seem to be generally less transparent with a small number of active officers at the core of the organisation and the wider membership uninvolved. Sometimes, this is a result of smaller size and resources, but often it is simply a lack of discipline or knowledge or a desire to avoid questions (and the time required to answer them). The risk of inefficiency, tax problems, fraud, and poor accounting is still real for these organisations. Publicised examples include a religious organisation making large profits from donations from its congregation but not using them for charitable purposes, and a sports club spending a surplus on “investigatory” trips for club officials to international sporting events.

New Zealanders are largely under-informed about the levels of transparency and disclosure they should expect from their community organisations and even what disclosure to expect from registered charities. While some organisations provide a high level of information, greater public understanding of what to expect would create greater “pull” or demand for best practice disclosure and transparency. This is particularly relevant for sports clubs and faith-based organisations.

CSOs representing disadvantaged groups point out that many government agencies and many community organisations are uninformed about human rights requirements or ignore them. While attention is paid to equal employment opportunities and language requirements, attention to human rights overall is patchy. Examples for people with disabilities include access to sites, employment, interpreters, and the use of sign language. It would be helpful to define disclosure requirements on a CSO’s performance against human rights legislation. Such disclosure could be graduated from self-reporting to more direct requirements where problems are found or self-reporting fails.

12.2.2 Accountability (practice)

To what extent are CSOs answerable to their constituencies?

Score: 4

CSOs are generally answerable to their constituencies with improved performance possible through better education of CSOs on good governance.

Information and training are available for CSOs to lift their capability and performance, but uptake is largely voluntary. Formal requirements (either legal requirements or strong industry standards) would improve governance performance.

Those consulted identified governance documents (constitution, rules, and memoranda) as the main form of accountability to constituents. Generally, organisations feel very accountable due to high transparency and a high or very high level of engagement with and challenge from their members.

These highly connected community organisations often exceed legal requirements. However, there is still a need for educating community organisations on the value of good governance, external input, and training and board evaluation.

Interviewees said the Department of Internal Affairs - Charities Service provides good guidance about “strengthening your charity” and covering the qualities of an effective charity in terms of governance, board composition, income, financial management, communications and information technology, human resources, planning, and evaluation.

New social media technology is enabling community organisations to engage more and at lower cost with their members and supporters. There is faster access to media, faster generation of views, and faster response to issues. Process improvements continue to refine this engagement and increase its effectiveness.

Community organisations that are not incorporated societies or registered charities often have very low levels of accountability to their constituencies. Examples include independent schools, churches, and business associations, which do not report financial and performance information, preferring to keep it private. Legal structures, such as some forms of trust, intended for private organisations require very little transparency about their purpose, members or beneficiaries, performance, or financial audit information. It is not always easy to distinguish between a semi-private organisation of this kind presenting as a CSO and a fully accountable CSO.

Those consulted described mixed results when asked about external membership of their boards and external review of board and organisation performance. Most reported that monitoring reviews by their funder provided some useful information, but were focused on monitoring a particular contract rather than overall board or organisational performance. Some organisations have no external input, satisfied that their diverse membership provides all the critique they need. Others who could benefit from external input (see above on attracting business skills) may be prevented from doing so by internal politics or the belief that only members can fill board roles. Some organisations have active external input and review as well as board governance training and performance assessments.

12.2.3 Integrity (practice)

To what extent is the integrity of CSOs ensured in practice?

Score: 5

CSOs generally display high integrity in practice with no significant or immediate concerns identified. There is a wide variety of CSOs and some concerns that smaller CSOs are limited in delivering on their integrity aspirations by factors such as limited resourcing and governance capability.

All respondents reported that integrity was of prime importance to them, their organisations, and their members. Community organisations with high engagement reported that membership trust and confidence and a wider public profile were paramount, and any issues around integrity were swiftly attended to. The quality of governance and management had a direct impact on delivering and maintaining a high integrity organisation.

As with all businesses, there have been occasional cases of fraud in CSOs. The manager of a women's refuge, for example, was convicted in 2013 of stealing NZ\$100,000 from refuge funds.⁹⁹¹ There is no evidence of corruption or bribery in CSOs, even in the area of sport where problems in Australia prompted the Crown to conduct an investigation (now nearly complete) into corruption, crime, and doping.⁹⁹²

⁹⁹¹ Kirsty Johnston and Rob Kidd, "No jail for Refuge manager who stole \$100k", *Stuff*, 1 October 2013. www.stuff.co.nz/auckland/local-news/western-leader/9226290/no-jail-for-Refuge-Manager-who-stole-100k

⁹⁹² Simon Plumb, "Crown's probe into dope, corruption nears end", *Stuff*, 13 October 2013. www.stuff.co.nz/sport/other-sports/9277518/Crowns-probe-into-dope-corruption-nears-end [accessed 13 October 2013].

Most CSOs rely on their constitution or rules to define their objectives and way of working, and several had a code of conduct for their membership and regularly reviewed compliance with the code. The New Zealand Red Cross, for example, adheres to the Code of Conduct of the International Committee of the Red Cross. Other CSOs working in international disaster relief also follow this code.⁹⁹³ The use of codes of conduct seems to be a growing trend, possibly enabled by the useful guidelines and training on offer from the Charities Commission and other agencies (noted above). All reported active complaints processes, some through normal membership engagement and about half through formal complaints processes. Small and unregistered CSOs that do not have constitutions or rules, however, are less likely to adhere to codes of conduct.

Integrity also comes from credible (fast, informed, and forward-looking) responses to issues, enabled by social media technology. How a community organisation uses social media has a significant and increasing impact on the public's (especially young people's) views of an organisation's integrity. A recent forum at Victoria University of Wellington advertised through social media to promote women in politics attracted over 100 people, and the forum's Facebook page promoting causes such as preventing violence against women attracts wide interest.

Other community organisations and organisations seeking to "look like" community organisations in order to influence public opinion for their stakeholders and funders are likely to allow the public to make positive assumptions about their integrity and public purpose by suppressing information to the contrary. As noted above, there is public benefit in tightening disclosure requirements for these organisations and tightening definitions around community or charity, service provider, and industry or business lobby group.

12.3.1 Hold government accountable

To what extent is civil society active and effective in holding government to account?

Score: 4

Civil society is active and effective in holding government to account with few significant or immediate concerns identified. There have been some significant successes. Overall, New Zealand CSOs are very capable in raising and promoting issues with the public to hold government to account. A range of mechanisms is available and CSOs are relatively free to utilise them.

CSOs take on advocacy and public watchdog roles, and some are set up explicitly for that purpose. Representing groups in the community and advocating for them are core activities in civil society. Lobby groups working for business or the narrow interests of a few individuals are outside civil society, so it should be easy for the public to identify them.

⁹⁹³ www.ndrf.org.nz

New Zealanders are proud of their ability to challenge the government through the usual political processes or through more overt public efforts such as marches, petitions, and public debate. New Zealand's political process is very open to this and generally responsive.

There are many examples of community organisations influencing government; in fact, a strong history of this in New Zealand. Notable campaigns have involved women's suffrage, Māori land, nuclear-free policies and legislation, the Springbok Tour 1981 (anti-apartheid action), women's rights, smoke free New Zealand, gay and lesbian rights, whistle-blower legislation, the introduction of mixed member proportional representation, the UN Convention of the Rights of Persons with Disabilities, Sign language as an official New Zealand language, and same-sex marriage. Recent challenges to the government have occurred on asset sales, a minimum or living wage, and charter schools. Pasifika have campaigned for a Pacific language framework and early childhood education.

Citizens can access independent commissioners or ombudsmen responsible for protecting their rights and dealing with queries from the public in the areas of human rights, privacy, health and disability, children, judicial conduct, environment, banking, and insurance. Citizens can also access the Office of the Ombudsman with complaints about central and local government agencies, requests for official information that have been refused or ignored by government agencies, and whistle-blowing.

Recent examples where concerns raised by the public were not addressed quickly enough included paedophiles in schools, an Accident Compensation Corporation security breach, and the Ministry of Education pay system (Novopay). These issues have generated considerable political heat and pressure on the government to address such issues and act more quickly in future.

Technology enables community organisations to drive more and more public engagement, debate, and comment. This poses a challenge to government to keep up to date and fully utilise new technology.

There are complex issues about the role of media – whether commercial media models are reducing the standard of investigative journalism and making it harder to raise public debate. These issues are addressed in the media pillar report.

12.3.2 Policy reform

To what extent is civil society actively engaged in policy reform initiatives on anti-corruption?

Score: 3

Government engagement with CSOs appears haphazard and often late or non-existent. Greater clarity is needed about how government gains high-value CSO input into policy development.

The main anti-corruption focus comes from TINZ, which is very active. In addition to conducting this NIS assessment, it monitors and comments on government activity, especially in relation to progress towards adopting international best practice, has

developed an anti-corruption training programme in conjunction with the SFO and actively recruits members and allies in the public and private sector. It also holds regular public forums, seminars and workshops, works closely with the other five TI chapters in the Pacific, and has a strategy to work in partnership with the public sector, civil society organisations and business to strengthen integrity systems.⁹⁹⁴

There is less general focus on anti-corruption in New Zealand, because the country considers itself to enjoy low levels of corruption. Although there is therefore little civil society activity that is directly linked to anti-corruption policy, it is likely that any such activities would face the same problems as other attempts to participate in government policy reform.

CSOs are involved in policy activity when the opportunity arises – either they are asked to participate in policy development or they respond to formal consultation processes. Given the variety of community organisations and interests, some are very engaged in policy processes while others only become interested if there is an issue of specific interest to them. The result is a variety of examples of engagement across all aspects of government activity.

Organisations with representative or advocacy roles for their members, such as disabled peoples organisations consulted, report that it is often hard to gain involvement and input early in policy processes. They believe government could better use their intimate knowledge of the subject-matter and their members' views at an earlier stage, resulting in better policy advice and lower costs. As these organisations build up their credibility through more-effective online functionality, increased transparency on issues, and faster responses, they are likely to demand greater and earlier input into policy processes.

Input is improving for disabled peoples organisations following acknowledgement in the UN Convention on the Rights of Persons with Disabilities (which New Zealand ratified in 2008) that they have a partnership role with government in policy development, service design, decision making, and reviews of effectiveness.⁹⁹⁵ The purpose is to ensure that “lived experience” informs policy development from the outset. This is a new and innovative approach, and New Zealanders were closely involved in developing the convention (for example, Don Mackay chaired the Ad Hoc Committee to draft the convention). This approach places community organisations representing (and advocating for) people with disabilities at the centre of policy development. This is a significant challenge for government, requiring new approaches to community engagement and use of modern technology.

The key issue is ensuring community organisations are resourced to provide effective input into policy processes and that this input occurs at early stages. All of the actions listed earlier in this report will assist this, particularly actions to clarify the funding of representation and advocacy services as distinct from service delivery.

⁹⁹⁴ www.transparency.org.nz

⁹⁹⁵ UN Convention on the Rights of Persons with Disabilities: Article 4.3.

Clear government process and timing, with early involvement from representative groups in policy development is key. Often government agencies use tight timeframes and the need for confidentiality as reasons to avoid early input from representative groups, thereby missing the opportunity for highly informed input early in the process. These groups are then disadvantaged by trying to redress poorly defined policy late in the process or, worse, through formal consultation processes. Government would gain significant value from designing ways to gain early input from highly informed representative groups.

12.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What do the institutions that make up the civil society sector do to partner with Māori, to respect and affirm Māori rights to make decisions and to enhance Māori participation in their field of activity? In particular, where civil society institutions have legal rights and obligations in this respect given to them by the Crown, how well do they honour them, including any Treaty obligations passed on by the Crown?

Civil society generally gives effect to the spirit and principles of the Treaty of Waitangi. There is large variation across CSOs given their diversity. Continued effort by Māori and government to define the status of the Treaty and set performance standards for government organisations will, in turn, provide greater clarity for CSOs. Education remains a key first step to increasing overall community awareness and attention to Treaty partnership in the direction and progress of Aotearoa (New Zealand).

There is no overall legal requirement for community organisations to observe the Treaty and its principles of partnership, respect, and participation, but there are requirements within specific legislation. Organisations established by Māori and those focused on Māori issues will obviously have tikanga Māori at their core, and many other community organisations see incorporation of Treaty principles and tikanga as essential to their integrity and credibility within the community. Treaty principles are accessible, but organisations need to create shared understanding with iwi and Māori generally as relevant to the community of interest.

There are views within Māori society that the principles of the Treaty⁹⁹⁶ are a set of themes that, while valuable, can take the emphasis away from the core of the Treaty contained in its articles. The articles were signed up and agreed to by Māori and the Crown in 1840, and it is the articles that define the relationship that should exist between Māori and the Crown. The reduction of the Treaty articles to a set of principles occurred because the State Services Commission was required to define the application of the articles to other government agencies. The current complexities of the constitutional debate about the place of the Treaty and differing Māori views on the Treaty mean it is difficult to describe what community organisations should do to appropriately reflect Treaty principles and tikanga in their work. Most Māori advocate for their rights as tangata whenua who have a sense of obligation to all who live in Aotearoa.

⁹⁹⁶ State Services Commission, 2005.

The Human Rights Commission reports survey results showing low levels of public awareness about the Treaty – only 55 per cent of New Zealanders considered the Treaty New Zealand's founding document, and only 25 per cent rating the Māori–Crown relationship as healthy.⁹⁹⁷ The commission is working actively to make Treaty status and principles more accessible to New Zealanders mainly to raise the base level of awareness.

To increase the level of integrity in the debate about a better understanding of the Treaty, an approach needs to be centred on strong education initiatives and, as a first step, focused on why it is important to engage in a culturally appropriate manner. Such an approach would look at how relationships could be enhanced to build the sustainable relationships required to lift overall understanding across the population, and create a more fertile base for further improvement.

More and more community organisations are taking account of local tikanga when forming, choosing a relevant organisation name, and defining their kaupapa. These organisations may not incorporate Treaty principles into their work, but many will recognise and practice Māori greeting protocols (waiata, mihi, pōwhiri) and te reo Māori (language) in their signage and websites. Māori is one of two official New Zealand languages (the other being New Zealand Sign Language). Interestingly, English is not an official language, but a convention due to its wide use. Several organisations reported that they had, or were introducing, tikanga workshops for staff and members. Almost all stated that their efforts to learn and practise tikanga Māori were increasing each year, and a few indicated attention to assisting staff to develop te reo Māori and use it in their organisation.

Education should be provided for CSOs on minimum and proficient levels of achievement in attending to Treaty principles and tikanga Māori, including self-assessment tools. Consideration could be given to including these requirements in the information on registered charities that the Department of Internal Affairs – Charities Service holds. CSOs that work in this area could provide Treaty education.

Many government funding contracts contain requirements for providers to incorporate Treaty principles into their work, to make their information available in te reo Māori, and to ensure staff are trained in tikanga Māori.

Māori are active in providing volunteer workers throughout New Zealand society including marae activities, the Māori Woman's Welfare League, sports clubs, youth groups, justice organisations, Māori wardens, and others. Māori identification with their traditional area (tūrangawaewae) as well as with whānau, hapū, and iwi is a strong driver of this volunteerism. Volunteering and political involvement at all levels involves Māori in the growth and development of Aotearoa New Zealand.

Special occasions such as Waitangi Day and the annual event at Ratana Pa provide opportunities for ordinary citizens, predominantly Māori in these cases, to present their views on issues of the day directly to politicians.

⁹⁹⁷ UMR survey results: *The Treaty Relationship in 2011*. Human Rights Commission.

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Business (pillar 13)

Summary

This pillar report examines the role, governance and capacity of the business sector in terms of the strengths of its integrity systems to address corruption.. An enabling legal environment allows companies to form and businesses to operate. The regulatory settings generally promote competition, and there is practically no evidence of corruption in government dealings with business. Business is largely free from unwarranted interference from government agencies. The regulatory frameworks in the financial sector have been significantly overhauled, both before and since the beginning of the global financial crisis, and now include stronger disclosure measures and enhanced licensing, prudential oversight, and governance requirements.

Within that overall positive conclusion, however, findings in this pillar report suggest a low level of anti-corruption awareness and behaviour both domestically and in dealings in offshore markets. A recent Serious Fraud Office survey found only 37 per cent of respondents thought the country was “largely free” of serious fraud and corruption.⁹⁹⁸ There have been numerous significant fraud cases in the financial sector in the last six years, so, in addition to the new stronger regulatory frameworks, maintaining regulatory vigilance and enforcement will be an important factor in restoring public trust. Risks are still evident in the extent of non-disclosure of beneficial ownership and financial matters allowed in respect of private companies, including all but the largest foreign-controlled companies.

More directly relevant to this assessment of bribery and corruption, there appears to be a substantial domestic black economy, which supports organised criminal activity and has given rise to concerns about tax evasion and illegal employment and immigration practices. There are grounds to argue that these activities are capable of being defined as corrupt, as they all go to the potential to “cultivate an atmosphere in which the bottom line justifies criminal activity”.⁹⁹⁹

In export markets, qualitative interviews conducted for Transparency International New Zealand (TINZ) suggest some business people, particularly in smaller exporting enterprises, view potentially corrupt or unethical business “norms” in other markets as acceptable as long as they are conducted by third-party, in-country agents who do not inform the New Zealand company of their ways of doing business.¹⁰⁰⁰ See also Chapter 3. For both large and small enterprises, there is the slightly different risk that even if they find such activities unacceptable, they may not have sufficient oversight of the activities of their overseas agents.

⁹⁹⁸ Reg Birchfield, “The Director: Cover story – Boards blase about management”, *New Zealand Management*, September 2012.

⁹⁹⁹ Jeremy Pope, *Confronting Corruption: The elements of a national integrity system*, TI Source Book (Berlin: Transparency International, 2000).

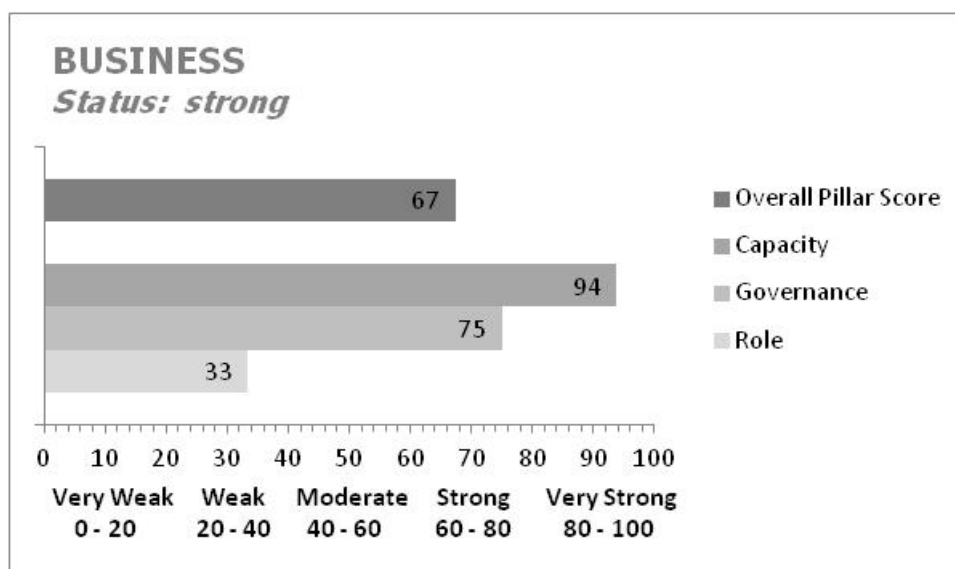
¹⁰⁰⁰ UMR Research with Transparency International, *Experiences of Corruption in Export Markets*, 2012.

The suite of company and securities laws and systems is reasonably comprehensive and effective.

While there is little sign of corruption in government dealings with businesses in New Zealand, the business community is not well informed about the criminalisation of bribery of foreign public officials and has, to date, taken a passive approach to managing its exposure to risks from bribery and corruption. Also, an overly permissive regime for company incorporation allowed some “shell companies” involved in questionable activities to incorporate in New Zealand.

The recommendations in Chapter 6 that flow from these concerns seek to raise awareness about the changing rules relating to corruption in overseas markets and generally to ensure adequate training on and awareness of corruption and integrity risks and their management. A vehicle for leading this is through good governance and recommendation 6 includes working with the Institute of Directors to encourage the highest standards of governance. Another specific recommendation that flows from this pillar report is directed at the executive and the public service – establish stronger disclosure requirements about the beneficial owners of companies registered in New Zealand.

Figure 14: Business scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

According to the Statistics New Zealand Enterprise Survey, approximately 440,000 enterprises are in New Zealand.¹⁰⁰¹ Of these, Statistics New Zealand states 97,000 are not-for-profit organisations.¹⁰⁰²

¹⁰⁰¹ Statistics New Zealand, “Business directory update survey: Annual”.

www.stats.govt.nz/surveys_and_methods/a-z-of-our-surveys/bus-directory-update-survey-annual.aspx

¹⁰⁰² Statistics New Zealand, “Business directory update survey: Annual”

By far the most common size of an enterprise is five or fewer staff with over 80 per cent of enterprises being of this size. Only 2.5 per cent of enterprises employ over 50 staff, although a third of employees work for organisations with 50 or more staff.¹⁰⁰³

Most enterprises earn just sufficient revenue to continue trading. Only 6,000 earn NZ\$10 million or more per year.¹⁰⁰⁴

Of the known top 200 enterprises by revenue, most are publicly listed companies and unlisted ones that are required to disclose their results. The 200th on the list in 2012 earned revenue of just over NZ\$128 million. Of the top 200, 116 companies had more than 50 per cent overseas ownership, 48 were listed on the New Zealand stock exchange (NZX) (14 of which were more than 50 per cent overseas owned), 19 were co-operatives, 12 were state-owned enterprises, and 1 was a council-controlled organisation.¹⁰⁰⁵

Of the top 30 financial institutions, 19 had more than 50 per cent overseas ownership, 4 were listed on the NZX, and 1 was a state-owned enterprise.¹⁰⁰⁶

New Zealand is heavily import-dependent for final goods and for the raw materials that contribute to final goods. Almost all, if not all, enterprises rely on some proportion of their inputs to be imported.

In contrast, fewer than 14,000 of the enterprises exported products to overseas markets, and, of these, only 260 had revenue of NZ\$25 million or more in 2012. In the 1970s, about 50 per cent of New Zealand exports were destined for Europe. In 2012, about 50 per cent of New Zealand exports were destined for Austral/Asia. China is vying with Australia to become the largest export destination.¹⁰⁰⁷

Other features of the New Zealand business sector are as follows.

- There are 182 NZX-listed companies in 2013.¹⁰⁰⁸
- There are 12 state-owned enterprises as well as partially floated Mighty River Power.
- Other Crown-owned companies are Crown entities.¹⁰⁰⁹

Other than government services providers, tourism and international education, New Zealand's main industries are primary sector based, including dairy, red meat, wine, natural products, aquaculture, and horticulture. The Ministry of Business, Innovation and Employment oversees the regulation of businesses. The other main regulatory agencies are the Reserve Bank of New Zealand (financial regulation),

¹⁰⁰³ Statistics New Zealand, "Business directory update survey: Annual".

¹⁰⁰⁴ Deloitte, "Top 200 companies", *Management*, 2012.

¹⁰⁰⁵ Deloitte, "Top 200 companies", 2012.

¹⁰⁰⁶ Deloitte, "Top 200 companies", 2012.

¹⁰⁰⁷ Statistics New Zealand, *Overseas Merchandise Trade*, February 2013.

¹⁰⁰⁸ NZX, "NZX half year 2013 results", 19 August 2013. www.nzx.com/companies/NZX/announcements/239821

¹⁰⁰⁹ Kristin Mednis, *Integrity Plus 2013: New Zealand National Integrity System Assessment – Crown entities*, supplementary paper 1 (Wellington: Transparency International New Zealand, 2013). www.transparency.org.nz/docs/2013/Supplementary-Paper-1-Crown-Entities.pdf

Financial Markets Authority (financial markets), and Ministry for Primary Industries (biosecurity). Other authorities cover specific regulations for the environment, electricity and gas, and telecommunications.

Laws and regulations that pertain to business cover consumer rights, health and safety, environmental protection, biosecurity, importing and exporting, and employment regulations. Codes of practice also pertain, for example, in advertising and the finance sector.

Business New Zealand represents the interests of its business members and of business in general. It works closely with the regional Chambers of Commerce throughout New Zealand, the members of which tend to be small and medium-sized businesses.

New Zealand was protected from the worst effects of the global financial crisis because most of its banking is carried out through local subsidiaries of four of the Australian-owned banks that had credit-ratings in the top 13 of the world, and were banks that had few off-balance sheet sub-prime loans. On the other hand, the Reserve Bank of New Zealand Act 1989 applied prudential oversight only to trading banks, leaving the financial services sector exposed as property price collapses impacted on the balance sheets of finance companies, the governance structures of which were too weak to respond to the rapid collapse in their revenues. In several cases, fraud and disclosure failures aggravated the situation. Recent developments in response to these events included amendments to the Reserve Bank of New Zealand Act to cover the prudential supervision of finance companies, other changes to finance sector regulation, and the creation of the Financial Markets Authority to oversee the governance of finance companies and their other advisory and financial management activities.

Capacity

13.1.1 Resources (law)

To what extent does the legal framework offer an enabling environment for the formation and operations of individual businesses?

Score: 5

A comprehensive and enabling suite of companies and securities law¹⁰¹⁰ governs the corporate environment, and the court system is free from corruption and unlawful influence.¹⁰¹¹

Private property, including intellectual property rights, has reasonable protection in law.¹⁰¹² The banking and insurance sectors are licensed and prudentially regulated by the central bank,¹⁰¹³ and the Ministry of Justice oversees insurers to a limited extent.

¹⁰¹⁰ For example, the Companies Act 1993, Financial Reporting Act 1993, Limited Partnerships Act 2008, Overseas Investment Act 2005, Partnership Act 1908, Personal Property Securities Act 1999, Securities Act 1978, and Security Markets Act 1988.

¹⁰¹¹ See sections 13.1.4 and 13.2.6 in Chapter 5.

¹⁰¹² Birchfield, 2012.

¹⁰¹³ Reserve Bank of New Zealand Act 1989.

As outlined in sections 13.2.1, 13.2.3, and 13.2.5 in this pillar report, banking law and regulation have been substantially upgraded recently,¹⁰¹⁴ including anti-money laundering legislation and changes to the disclosure requirements of private issuers. Comprehensively rewritten securities legislation is before Parliament.¹⁰¹⁵

13.1.2 Resources (practice)

To what extent are individual businesses able in practice to form and operate effectively?

Score: 5

The overall economic environment is supportive of commercial enterprise so that new business start-ups can enter the market and businesses can generally operate effectively.

The creation of a new company in New Zealand is very simple, is low cost, and can be achieved within about 30 minutes online, subject to provision of signed director and shareholder documents.¹⁰¹⁶ There is no requirement for permission by a regulatory authority to register or operate a private company.¹⁰¹⁷ Concerns and evidence that this simplicity was being exploited to operate shell companies involved in commercially and legally questionable activity prompted the introduction of legislation in June 2013 requiring, among other elements, that at least one director be New Zealand-domiciled.¹⁰¹⁸ Whether this proves sufficient to prevent criminal exploitation remains to be seen, and is discussed further in section 13.2.1.

There are no significant barriers of a legal or regulatory nature to a business operating, other than health, safety, environmental, professional registration, and employment law requirements. The World Bank's annual *Doing Business* report for 2013 gives New Zealand an overall ranking of 3 out of 185 countries surveyed against 10 indicators. On measures relevant to the National Integrity System, New Zealand ranks 1 for "starting a business" and for "protecting investors", 2 for "registering property", and 17 for "enforcing contracts".¹⁰¹⁹ Both government and non-government agencies responsible for such licensing are in operation. Systemic abuse of power or corruption or susceptibility to bribes among such agencies is not apparent.

Economic policy over the last three decades has removed most subsidies and price controls. Regulatory settings may have various policy objectives, but generally are intended to promote competition.

¹⁰¹⁴ Consolidation of market conduct regulatory functions previously shared across agencies, including the NZX under the newly constituted Financial Markets Authority (Financial Markets Authority Act 2011).

¹⁰¹⁵ The Financial Markets Conduct Bill (which has passed its second reading) will replace the Securities Act 1978 and Securities Markets Act 1988 and other legislation relating to the financial markets.

¹⁰¹⁶ Companies Office, "Starting a company". www.business.govt.nz/companies/learn-about/starting-a-company

¹⁰¹⁷ Author's recent experience.

¹⁰¹⁸ New Zealand Parliament, "Legislation: Supplementary order papers – Companies and Limited Partnerships Amendment Bill". www.parliament.nz/en-NZ/PB/Legislation/SOPs/d/7/3/50DBHOH_SOP1688_1-Companies-and-Limited-Partnerships-Amendment-Bill.htm

¹⁰¹⁹ World Bank, "Ease of doing business in New Zealand", 2013. www.doingbusiness.org/data/exploreeconomies/new-zealand

At variance with this trend, some government decisions have favoured particular commercial outcomes to align with public policy or politically desired outcomes.

For example, the government's choice of Chorus¹⁰²⁰ to roll out fibre nationally for most of the government-assisted ultra-fast broadband project has led it to seek to overrule the actions of the telecommunications regulator and initiate a policy review process in conflict with the regulator's statutory mandate. The regulator proceeded as prescribed by legislation and is unhindered in legally doing so. It should be noted that this has been a source of uncertainty rather than commercial advantage for Chorus. The intent of this intervention has been to encourage faster uptake of ultra-fast broadband, which in the process also preserves Chorus's profitability.¹⁰²¹

There is no evidence at a central government level of corruption in the way businesses are treated. There are cases in which local government officials have shown preferment to certain businesses over others.

One source of potential risk to the capacity to operate effectively is the integrity of the tax collection system, the information technology systems of which are undergoing replacement and upgrade at an estimated cost of NZ\$1.5 billion.¹⁰²² Difficulty achieving competent execution of government information technology projects has been a recurring issue in New Zealand.

The current government has made business-friendly government services a key priority, including a commitment to e-government initiatives with low-cost and free services and information available seamlessly online.¹⁰²³

13.1.3 Independence (law)

To what extent are there legal safeguards to prevent unwarranted external interference in activities of private businesses?

Score: 5

Companies, securities, and public sector laws protect the right of private businesses to operate freely. Public officials are empowered to enforce health, safety, environmental, and regulatory requirements in accordance with the law.

Under legislation passed in 2013, the Government Communications Security Bureau may monitor some New Zealand telecommunications traffic, including corporate email and data in limited circumstances (for example, where critical national infrastructure is at risk because of sustained and sophisticated cyber-attacks). The bureau is an intelligence agency with ties to counterpart agencies in the United States, Canada, the

¹⁰²⁰ Chorus is a telecommunications infrastructure company.

¹⁰²¹ Paul McBeth and Chris Keall, "Investor, Labour, Tuanz slam govt as Chorus price regulation put on hold", 8 February 2013. www.nbr.co.nz/article/chorus-gets-reprieve-government-puts-price-regulation-hold-pending-review-bd-135567

¹⁰²² Peter Dunne, "Dunne: Cabinet approves major IRD work", 1 May 2013. beehive.govt.nz/release/dunne-cabinet-approves-major-ird-work

¹⁰²³ State Services Commission, "Better Public Services: Improving interaction with government", 2013. www.ssc.govt.nz/bps-interaction-with-govt

United Kingdom, and Australia. Its mandate has recently been clarified under statute to more explicitly include information assurance and cyber security.¹⁰²⁴ This change has arisen following a review of legislative compliance at the bureau (resulting in the Kitteridge Report).¹⁰²⁵

13.1.4 Independence (practice)

To what extent is the business sector free from unwarranted external influence in its work in practice?

Score: 4

There is little evidence of unwarranted external influence on private businesses.

As far as could be ascertained, there is no evidence of public officials abusing their office to exploit the private sector. There is also little evidence of unwarranted interference by public officials to influence the operation of businesses inappropriately, although the Chorus and SkyCity cases are examples of interventions by the executive.¹⁰²⁶ As reported in the Transparency International Global Corruption Barometer, a locally conducted survey of 1,000 people found 3 per cent of New Zealanders said they had paid a bribe. This was reported as a warning signal.¹⁰²⁷

Governance

13.2.1 Transparency (law)

To what extent are there provisions to ensure transparency in the activities of the business sector?

Score: 4

There are provisions to ensure annual reporting for public companies and requirements for continuous disclosure of listed companies.

Public listed companies are governed by companies and securities law,¹⁰²⁸ which specifies minimum standards for annual reporting,¹⁰²⁹ and the Listing Rules of the NZX,¹⁰³⁰ which include requirements for the continuous disclosure of material information. NZX Market Supervision, a regulatory division of the exchange, polices the

¹⁰²⁴ See section 5.2.2 In Chapter 5.

¹⁰²⁵ Rebecca Kitteridge, *Review of Compliance at the Government Communications Security Bureau*, 2013. www.gcsb.govt.nz/newsroom/reports-publications/Review%20of%20Compliance_%20final%2022%20March%202013.pdf

¹⁰²⁶ See sections 13.2.1 and 13.2.2 in Chapter 5.

¹⁰²⁷ Transparency International, "Global Corruption Barometer 2013". www.transparencynz.org.nz/index.php/indices-reports/global-reports/161-global-corruption-barometer-2013

¹⁰²⁸ Companies Act 1993, Securities Act 1978, and Securities Markets Act 1988.

¹⁰²⁹ The Financial Reporting Act 1993 is being replaced by the Financial Reporting Bill, which is at its Second Reading in Parliament, 19 July 2013.

¹⁰³⁰ NZX, *NSZX/NZDX Listing Rules*, October 2012. <https://nzx.com/files/static/cms-documents/NZSX:NZDX%20Listing%20Rules%205%20October%202012.pdf>

Listing Rules.¹⁰³¹ These rules also specify reporting and assurance requirements. Inquiries into unusual price movements are reasonably common, as are exemptions from the Listing Rules, the reasons for which are published. The NZX Disciplinary Tribunal¹⁰³² considers complaints against members and alleged breaches of the Listing Rules. The Commerce Commission,¹⁰³³ Takeovers Panel,¹⁰³⁴ and Financial Markets Authority¹⁰³⁵ provide further layers of capital markets supervision and regulation.

Issuers of securities must comply with a variety of disclosure requirements.¹⁰³⁶ These include the requirement to issue a prospectus and provide an investment statement to investors. The prospectus must contain an auditor's report and a trustee's report. Trustees must be licensed and report to both the Reserve Bank of New Zealand and the Financial Markets Authority. Under the Financial Reporting Act 1993, approved accounting standards have the force of law.

The licensing regime for auditors of issuers of financial statements¹⁰³⁷ aims, among other objectives, to ensure auditors are up to the task. It addresses a concern expressed that some small accounting firms lack the technical skills to effectively audit the accounts of complex financial institutions. From 1 July 2012, only licensed auditors or registered audit firms may conduct issuer audits.¹⁰³⁸

In the finance sector, banks must issue quarterly public disclosure statements; the full-year report must have been the subject of a complete audit and the half-year report subject to a short-form audit. The four major banks in New Zealand are Australian owned and are regulated by the Australian Prudential Regulation Authority, the prudential oversight of which also covers the banks' New Zealand operations. Because these banks are listed on the stock exchanges in both Australia and New Zealand, specific reporting and assurance requirements also apply in both countries.¹⁰³⁹

The Reserve Bank of New Zealand Act 1989 provides the framework for the registration and supervision of banks in New Zealand, including the power to recommend public disclosure requirements.¹⁰⁴⁰ New capital-related and associated disclosure requirements of Basel III have been introduced and these apply from 31 March 2013.¹⁰⁴¹

¹⁰³¹ NZX, "Market supervision". www.nzx.com/market-supervision

¹⁰³² NZX, "NZ markets Disciplinary Tribunal". www.nzx.com/regulators/DISP

¹⁰³³ www.comcom.govt.nz

¹⁰³⁴ <http://takeovers.govt.nz>

¹⁰³⁵ www.fma.govt.nz

¹⁰³⁶ Financial Markets Authority, "Who needs to comply". www.fma.govt.nz/help-me-comply/issuers/who-needs-to-comply

¹⁰³⁷ Financial Markets Authority, "Who needs to comply".

¹⁰³⁸ From 1 July 2012, the Auditor Regulation Act 2011 comes fully into force: Financial Markets Authority, "How to get licensed". www.fma.govt.nz/help-me-comply/auditors/how-to-get-licensed

¹⁰³⁹ See Reserve Bank of New Zealand, "Memorandum of understanding", 2003. www.rbnz.govt.nz/regulation_and_supervision/banks/relationships/0137035.html

See also the Australian Prudential Regulation Authority Act 1998: www.comlaw.gov.au/Details/C2013C00076

¹⁰⁴⁰ Reserve Bank of New Zealand Act 1989, section 81.

¹⁰⁴¹ Reserve Bank of New Zealand Act 1989, Part 5.

In the finance sector, considerable work has been done to improve disclosure and investor protection following the collapse of numerous non-bank deposit takers before and during the global financial crisis. The crisis hit New Zealand as the country entered a recession and suffered substantial commercial property value corrections. The regulatory framework for finance sector entities is broadly based, is consistent, and encompasses registration, reporting, and assurance components. All financial service providers must now be registered on a searchable register that the Companies Office maintains (with some few exceptions).¹⁰⁴²

In addition to the general legislative requirements of the Companies Act 1993, finance sector entities are subject to explicit regulatory audit requirements. Compliance with reporting and disclosure standards is overseen variously by the Reserve Bank of New Zealand or the Financial Markets Authority or both. Trustee companies, statutory supervisors, and auditors, who are licensed, have a direct responsibility to satisfy themselves that regulatory requirements are being met. They report their findings to the Reserve Bank or the Financial Markets Authority or both.

Amendments to the Reserve Bank of New Zealand Act 1989 were enacted in September 2008 to add provisions relating to the regulation of non-bank deposit takers.¹⁰⁴³ The Non-bank Deposit Takers Bill currently before Parliament¹⁰⁴⁴ will create a licensing regime and introduce suitability assessment of directors and senior officers. Many of these initiatives are a response to the poor governance in the sector that was exposed by the economic recession of the late 2000s.¹⁰⁴⁵ Non-bank deposit takers are not covered by macro-prudential tools made available to the Reserve Bank of New Zealand in July 2013 to manage financial system stability.¹⁰⁴⁶

Changes to privacy regulation, effective from 1 April 2012, allowed comprehensive credit reporting.¹⁰⁴⁷ This may improve credit assessments, lower credit risk, and permit greater financial inclusion for some consumers.

Public disclosure of information about financial products and providers and the right to take complaints to independent dispute resolution organisations were enhanced markedly under the Financial Advisers Act 2008 and Financial Service Providers (Registration and Dispute Resolution) Act 2008.

These recent reforms are intended to offer improved protection for investors and depositors by providing greater transparency of the performance of companies, banks,

¹⁰⁴² Companies Office, "About the Financial Service Providers Register". www.business.govt.nz/fsp

¹⁰⁴³ Reserve Bank of New Zealand Amendment Act 2008.

¹⁰⁴⁴ New Zealand Parliament, "Legislation: Bills – Non-bank Deposit Takers Bill". www.parliament.nz/en-nz/PB/Legislation/Bills/3/7/a/00DBHOH_BILL10813_1-Non-bank-Deposit-Takers-Bill.htm

¹⁰⁴⁵ Buddle Findlay, "Legal update on banking and commercial law", 2011. www.buddlefindlay.com/legal-update-on-banking-and-commercial-law-september-2011

¹⁰⁴⁶ Reserve Bank of New Zealand, "Macro-prudential policy". www.rbnz.govt.nz/financial_stability/macro-prudential_policy

¹⁰⁴⁷ Privacy Commissioner, "Credit Reporting Privacy Code". privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/credit-reporting-privacy-code

and fund managers. But vigilance will be required to ensure the reforms are adequately resourced and working as intended.¹⁰⁴⁸

Foreign-controlled corporations must file financial accounts annually with the Companies Office.¹⁰⁴⁹ However, a proposal to remove this obligation for all but foreign-controlled firms deemed to be “large” was dropped, explicitly to improve transparency as a means of discourage tax avoidance. New Zealand-owned private companies operate in the absence of significant transparency obligations and are not obliged to file financial accounts with the Companies Office.¹⁰⁵⁰

A gap in the Companies Act 1993 raises a serious corruption and bribery risk. This legislation has been found to be easily used by people with illegal intent because it allows companies to be established without requiring the companies’ beneficial owners (that is, the real people who own the companies) to be disclosed. Beneficial ownership can be further disguised by the use of nominees. Trust law in New Zealand also allows secrecy in dealings, and there is no central register, thus allowing property and funds to be hidden in New Zealand-based foreign trusts with no identification of beneficial owners.

Tim Hunter, the Fairfax Business Bureau deputy-editor, wrote that he could not help wondering why New Zealand “maintains a regime so obviously advantageous to tax dodgers and criminals. We’re not only not part of the solution, we’re a big part of the problem”.¹⁰⁵¹

There continues to be a lack of political commitment to require beneficial ownership to be revealed for all New Zealand companies and trusts. For instance, the Companies and Limited Partnerships Amendment Bill before Parliament looked first at requiring a company “agent” to live in New Zealand, but more recently recommended that there be at least one director living in New Zealand “or who lives in and is a director of a company in a country with which New Zealand has reciprocal arrangements for the enforcement of low-level criminal fines”.¹⁰⁵²

Criticism of these measures led to the Companies and Limited Partnerships Amendment Bill being revised further in July 2013. A supplementary order paper provided for the New Zealand Registrar of Companies to be able to require a company director to give details of the beneficial owner (referred to as a “control interest”) of a

¹⁰⁴⁸ Ministry of Business, Innovation and Employment “Trading securities and derivatives”. www.med.govt.nz/business/business-law/trading-securities-and-derivatives

¹⁰⁴⁹ Financial Reporting Act 1993, section 19.

¹⁰⁵⁰ Companies Office, “New Zealand companies”. www.business.govt.nz/companies/learn-about/updating-company-details/financial-reporting/new-zealand-companies

¹⁰⁵¹ Tim Hunter, “NZ foreign trusts among global tax havens”, *Stuff*, 22 August 2012.

www.stuff.co.nz/business/opinion-analysis/7521775/nz-foreign-trusts-among-global-tax-havens

¹⁰⁵² Commentary to the Companies and Limited Partnerships Amendment Bill.

www.legislation.govt.nz/bill/government/2011/0344/latest/DLM4928800.html?search=ts_act%40bill%40regulation%40deemedreg_Companies+and+Limited+Partnerships+Amendment+Bill_resel_25_a&p=1

company.¹⁰⁵³ It is hard to imagine any more minimal requirement for beneficial owners of companies to be disclosed.

If this wording is adopted in the legislation, the beneficial owners will need to be disclosed only when the Registrar of Companies makes a specific inquiry. They will never be disclosed on a public register, so the news media, non-government organisations, and the public, who are important contributors to the detection of corruption and crime, will not be able to discover the beneficial owners of companies.

The Financial Action Task Force emphasises the links between money laundering and corruption. Money laundering can help to facilitate corruption by providing the means to move and hide the proceeds of corruption and bribery.¹⁰⁵⁴ Tightening New Zealand companies and trust law is a priority to avoid facilitating illegal activities and to minimise corruption and bribery in New Zealand.

As a general point, the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 are available as transparency mechanisms for people who wish to pursue details of interactions between central or local government and business organisations. Similarly, the Protected Disclosures Act 2000 is available for the disclosure of serious wrongdoing in businesses. These provisions are discussed in the public sector pillar report.

A significant deficiency exists in the level of financial literacy skills of consumers of financial products, which reflects the lack of education available for New Zealanders both in this area and in the wider frame of civics and ethics. If these areas of knowledge are not improved across the population, the benefits of enhanced transparency in the financial and business sectors will be limited. Serious attention must be given to improving financial literacy among a higher proportion of New Zealanders, to ensure a higher skills base among those whose dealings require knowledge to assess financial performance and use financial products. Improved financial literacy would complement enhanced transparency requirements.¹⁰⁵⁵

13.2.2 Transparency (practice)

To what extent is there transparency in the business sector in practice?

Score: 4

Transparency in the business sector is covered by legislation, regulation and guidelines. The NZX has strict disclosure rules for listed companies. The Commerce Commission actively polices price-setting practices in the retail sector, prosecuting

¹⁰⁵³ New Zealand Parliament, "Hansard: Companies and Limited Partnerships Amendment Bill – Second Reading". www.parliament.nz/en-nz/pb/debates/debates/50HansD_20130702_00000028/companies-and-limited-partnerships-amendment-bill—second

¹⁰⁵⁴ Financial Action Task Force, "Corruption". www.fatf-gafi.org/topics/corruption

¹⁰⁵⁵ Commission for Financial Literacy and Retirement Income (formerly the Office of the Retirement Commissioner), "Financial literacy research and reports". www.cflri.org.nz/research-and-reports/financial-literacy

where necessary.¹⁰⁵⁶ This is pursuant to the Commerce Act 1986, which regulates restrictive trade practices, including prohibiting practices substantially lessening competition such as cartel-type behaviour and price fixing.¹⁰⁵⁷ The commission is also deeply involved in monitoring regulated pricing for monopoly network services, including telecommunications, electricity transmission, shipping, airports, and pay-television. The Reserve Bank oversees disclosure in the financial sector.

Listed companies produce six-monthly and 12-monthly reports of their profitability and balance sheets, while NZX continuous disclosure rules appear effective in ensuring all shareholders are equally informed of listed company material events. Sanctions for non-compliance are available and used. Exemptions are publicly sought and granted.¹⁰⁵⁸

The introduction of registration requirements for most finance sector entities provides for online public access to current data at no cost and at any time.¹⁰⁵⁹ The Financial Service Providers Register also contains details of the dispute resolution organisation to which the provider belongs.

The Reserve Bank of New Zealand's financial stability reports¹⁰⁶⁰ provide an accessible insight into the regulator's perceptions of strengths and weaknesses and allows for informed debate.

Numerous practical information resources are available that detail compliance with legislative requirements. Some are provided by regulatory agencies; much is accessible from market participants or from the Companies Office. This information is internet based, available at all times, and available at no cost.

Again, higher levels of financial literacy would increase public awareness of these resources. Regulatory requirements introduced as a result of the finance sector review have operated for only a short time, and some refinements are likely as experience accumulates.

Recent growth in equities market trading suggests a combination of economic factors (for example, low global interest rates) is encouraging private investors back into investment areas in which they lost confidence over the last 20 or more years as a result of high-profile commercial failures and perceived inadequate regulation. This growth in trust needs to be sustained, but also balanced to avoid a situation of overconfidence that unscrupulous operators could use. Maintaining regulatory vigilance and enforcement will be important in restoring and retaining public trust.

¹⁰⁵⁶ For example, Commerce Commission, "Nufarm's prosecution brings fines in NZ's biggest cartel case over \$7.5m", media releases, 12 February 2008. www.comcom.govt.nz/media-releases/detail/2008/nufarmsprosecutionbringsfinesinnzs

¹⁰⁵⁷ Commerce Act 1986, sections 27 and 30.

¹⁰⁵⁸ For more, see NZX, *Guidance note: Continuous disclosure*, April 2011. www.nzx.com/files/static/GN_contin_disclosure.pdf

¹⁰⁵⁹ Companies Office, "About the Financial Service Providers Register". www.business.govt.nz/fsp

¹⁰⁶⁰ Reserve Bank of New Zealand, "Financial stability report". www.rbnz.govt.nz/financial_stability/financial_stability_report/

Transparency issues relating to the interactions between the executive and business were raised in a supplementary order paper creating an exclusion zone around offshore oil industry infrastructure in New Zealand's exclusive economic zone. The SOP followed representations from the oil industry about threatened protest actions against deep-sea drilling proposals.¹⁰⁶¹ Subsequent disclosures under the Official Information Act 1982 showed meetings between a multinational company and the Minister of Energy and Resources to discuss the change had been under way for months before the relevant legislation passed.¹⁰⁶² The issues are not the policy decision or the lobbying, but the lack of select committee scrutiny created by using a supplementary order paper inserted late into legislation close to its passage and the lack of transparency about lobbying.

Similar issues relating to the transparency of interactions between the executive and the business sector were raised in the Sky City project.¹⁰⁶³ In both cases, the concern primarily relates to transparency in the activities of the executive. There is no suggestion Sky City or the oil industry acted inappropriately in its dealings with the executive.

13.2.3 Accountability (law)

To what extent are there rules and laws governing oversight of the business sector and governing corporate governance of individual companies?

Score: 5

MBIE enforces rules and laws governing the oversight of the business sector and the governance of individual companies. In the finance sector, governance requirements in terms of board composition (the proportion of independent directors, their suitability for the role, and the required focus of their work), are detailed in or under the Reserve Bank of New Zealand Act 1989 and apply to registered banks¹⁰⁶⁴ and non-bank deposit takers.¹⁰⁶⁵ The Institute of Directors has taken a leadership role in regards to the responsibilities of directors.

Persons who do not meet "fit and proper" requirements cannot register or be involved in the management of financial service providers. "People who have been convicted of crimes involving dishonesty under the Crimes Act 1961, in the last five years, such as fraud, as well as anyone convicted of a money laundering, or financing of terrorism offence, will be excluded from registering or from being involved in the management of

¹⁰⁶¹ New Zealand Parliament, "Legislation: Supplementary order papers – Crown Minerals (Permitting and Crown Land) Bill", 2013. www.parliament.nz/en-nz/pb/legislation/sops/50DBHOH_SOP1646_1/crown-minerals-permitting-and-crown-land-bill

¹⁰⁶² Moana Mackey, "Joyce backroom deal led to sea protest ban", *Labour*, 30 May 2013. www.labour.org.nz/news/joyce-backroom-deal-led-to-sea-protest-ban?utm_source=twitterfeed&utm_medium=twitter – confirming documents released under the Official Information Act 1982 sighted and held by author.

¹⁰⁶³ See sections 4.2.2 and 8.3.2 in Chapter 5.

¹⁰⁶⁴ Reserve Bank of New Zealand Act 1989, s157L.

¹⁰⁶⁵ Reserve Bank of New Zealand Act 1989, s157L.

a registered financial service provider. Undischarged bankrupts and banned directors will also not be able to register.”¹⁰⁶⁶

Insurance companies must also meet fit and proper standards for board members, relevant senior officers, and appointed actuaries as part of their licensing requirements.¹⁰⁶⁷ Full licensing obligations have applied to continuing insurers from 7 September 2013 when the transitional provisions ended.

These are additional to public company legislative requirements. Companies listed with the NZX (and the Australian Securities Exchange, where dual listing is involved) face specific requirements that may repeat or be in addition to these requirements. Issuers require director certification in numerous circumstances.¹⁰⁶⁸ Certification is generally required when an issuer produces advertisements – the certificate acknowledges that the directors of the issuer have read, seen, or listened to the advertisement and that the advertisement complies with the relevant securities legislation.

Disclosures in offer documents, annual reports, and reports to supervisors must all be signed off by a director.¹⁰⁶⁹ Personal liability attaches to these. Assurance is also reinforced by audit and, where appropriate, trustee attestations. Directors of listed companies must disclose share purchases and disposals.¹⁰⁷⁰ In some circumstances trustees or auditors or both¹⁰⁷¹ must also comment on non-compliance with regulatory requirements in offer documents to regulators.

Specific disqualifications under many statutes operate to exclude unsuitable people from being a director irrespective of and before any positive qualifying attributes are assessed.¹⁰⁷²

New legislative requirements have been created and existing requirements are being made more explicit and uniform, as a result of the review of finance sector regulation over the past five years. Current requirements set higher minimum standards. As an example, inadequate prudential requirements previously agreed by some trustees with non-bank deposit takers are no longer possible, because all must now meet regulatory minimum requirements.¹⁰⁷³ Trustees continue to be free to set higher standards.

¹⁰⁶⁶ Companies Office, “Who cannot register? www.business.govt.nz/fsp/about-the-fspr/frequently-asked-questions-faqs/registration-who/who-cannot-register

¹⁰⁶⁷ Reserve Bank of New Zealand Act 1989, s157L.

¹⁰⁶⁸ Institute of Directors, “Company directors’ course”.
www.iod.org.nz/DirectorDevelopment/Courseprogramme/CompanyDirectorsCourse.aspx

¹⁰⁶⁹ Securities Regulations 2009.

¹⁰⁷⁰ Companies Act 1993, Schedule 4.

¹⁰⁷¹ Financial Markets Authority, “Who needs to comply?”. www.fma.govt.nz/help-me-comply/auditors/who-needs-to-comply

¹⁰⁷² The Companies Act amended the power of the Registrar of Companies to prohibit directors or managers of failed companies with a track record of commercial failure, from future directorships or management positions. See Companies Office, “Banned directors”, last updated 16 August 2013.
www.business.govt.nz/companies/about-us/enforcement/archived-content/banned-directors

¹⁰⁷³ Reserve Bank of New Zealand Act 1989.

13.2.4 Accountability (practice)

To what extent is there effective corporate governance in companies in practice?

Score: 3

Interviews for this section expressed concern that New Zealand's pool of experienced company directors is small and requires active development; a relatively small number of professional directors serve on the boards of numerous companies of substance. Diversity initiatives are only partially successful, although the issue is actively recognised.¹⁰⁷⁴ Succession planning for the current generation of experienced company directors and greater targeting and training of the next generation of company directors warrant further effort.

The vast majority of New Zealand businesses are at a micro scale (10 or fewer employees) by global standards. In most instances, these businesses are owner-operated and may lack formal governance arrangements.¹⁰⁷⁵

The numerous finance company failures since 2007 have highlighted inadequate past governance practices and a failure (by trustees and investors) to adequately recognise investment risk. They have also brought to light many instances of failures of integrity and transparency. As at April 2013, the Serious Fraud Office had investigated the affairs of 15 finance companies that collapsed between 2007 and 2010. Criminal charges have been laid in nine of the cases investigated, and convictions have so far been obtained in seven of those cases. Overall, 23 individuals have faced charges. Four cases remained in prosecution, with the prosecution phase likely to continue until April or May 2014. Of the six cases the Serious Fraud Office did not proceed with, four have been the subject of proceedings or regulatory action brought by the Financial Markets Authority or other agencies.¹⁰⁷⁶ Integrity, *per se*, was not an element of the charges and some directors were convicted notwithstanding a finding they had an honest belief in their conduct.

This area of weakness has tainted the non-bank deposit taker sector, and, although regulatory deficiencies have been addressed, it will take time for confidence to be restored. The successful prosecutions were undertaken under pre-existing legislation. Enforcement was not lacking, but fraud is usually detected after the event and securities enforcement for wrongful disclosure is similar.

13.2.5 Integrity mechanisms (law)

To what extent are there mechanisms in place to ensure the integrity of all those acting in the business sector?

Score: 4

¹⁰⁷⁴ Women on Boards, "About Women on Boards New Zealand." www.wob.org.nz

¹⁰⁷⁵ Capital Market Development Taskforce Secretariat, *The Structure and Ownership of New Zealand Companies and its Impact on Capital Market Development*, 2012. www.med.govt.nz/business/economic-development/pdf-docs-library/cmd-taskforce-research/structure-of-nz-companies.pdf

¹⁰⁷⁶ Serious Fraud Office, "SFO concludes finance company investigations", 30 April 2013. www.sfo.govt.nz/n351,24.html

*As outlined in sections 13.2.1 and 13.2.3, a comprehensive overhaul of financial and securities markets law and regulation was already under way before the global financial crisis and local finance company collapses. These efforts were strengthened following finance company non-bank deposit taker collapses between 2008 and 2011.*¹⁰⁷⁷

Financial advisers must now be registered with the Financial Markets Authority, under legislation that imposes obligations broadly proportional to investor risk.¹⁰⁷⁸ Authorised financial advisers who deal with more complex matters must meet a minimum educational requirement.¹⁰⁷⁹ Securities trustee companies and statutory supervisors must be licensed also with the Financial Markets Authority.¹⁰⁸⁰

The Financial Markets Authority replaced the Securities Commission and has a more explicit enforcement mandate than the commission had.

The recently introduced insurance prudential supervisory regime¹⁰⁸¹ comes in the aftermath of the Christchurch earthquakes, reputedly the fourth largest insurance claim event ever. While the sector was “stress tested” by these events, the new legislative framework appears to be soundly based and well received.

The Secret Commissions Act 1910 criminalises private sector bribery and corruption, including giving or offering a gift, inducement, or reward to gain business advantage.¹⁰⁸² “Corruption” is not defined in the Act, and it is therefore difficult to prosecute and relevant provisions minor penalties. As outlined in Chapter 4, there is a move to update this legislation.¹⁰⁸³

Since 30 June 2013, a new regime covering money-laundering has been in force. The Anti-Money Laundering and Combating Financing of Terrorism Act 2009 sets in place regulations intended to be underpinned by a risk-based approach to allowing businesses to make decisions about how to best manage and mitigate their money-laundering and terrorist-financing risks.¹⁰⁸⁴ The regulations appear, where possible, to set thresholds to align with Australia for trans-Tasman harmonisation, to comply with the Financial Action Task Force’s recommendations, and to minimise compliance costs to the industry. The new regime for anti-money laundering and combating financing of

¹⁰⁷⁷ Simon Power, “Once-in-a-generation re-write of securities law introduced”, 12 October 2011. beehive.govt.nz/release/once-generation-re-write-securities-law-introduced

¹⁰⁷⁸ Financial Markets Authority, “Financial Advisers Act 2008”. www.fma.govt.nz/laws-we-enforce/legislation/acts-and-regulations/financial-advisers-act-2008

¹⁰⁷⁹ Financial Markets Authority, “AFA competence and assessment”. www.fma.govt.nz/help-me-comply/financial-advisers/how-to-get-licensed/afa-application-resources-and-templates/afa-competence-and-assessment

¹⁰⁸⁰ Financial Markets Authority, “Trustees”. www.fma.govt.nz/help-me-comply/trustees

¹⁰⁸¹ Reserve Bank of New Zealand, “Register of licensed insurers in New Zealand”. www.rbnz.govt.nz/finstab/insurance/4268257.html

¹⁰⁸² Secret Commissions Act 1910, section 3.

¹⁰⁸³ Matt Nippert, “NZ companies in overseas bribery spotlight”, *Stuff*, 13 May 2013. www.stuff.co.nz/business/industries/8666764/New-Zealand-companies-in-overseas-bribery-spotlight

¹⁰⁸⁴ PwC, *Your Guide to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and Regulations* (New Zealand: PwC, 2012). www.pwc.co.nz/KenticoFiles/54/5499551c-7aeb-4161-b284-fb394ded54db.pdf

terrorism is intended to have a significant impact on those entities designated as “reporting entities”, which, in essence, are all financial organisations.¹⁰⁸⁵ It is too early to judge the Act’s impact. In addition to domestic oversight by supervisory agencies, country compliance will be assessed on a periodic basis against international standards.

Assurance requirements exist in law and regulation for most companies, particularly securities issuers. These have widened in scope over recent years and set a high standard.

13.2.6 Integrity mechanisms (practice)

To what extent is the integrity of those working in the business sector ensured in practice?

Score: 3

Large corporates operate internal audit procedures which increasingly include a module for testing for corrupt practices, but as a nation of small businesses, checks and balances to guard against corrupt or unlawful practice tend to be ad hoc and highly variable.

Explicit and detailed regulation applies to the finance sector, much of it resulting from the review of finance sector regulation and securities law. The oversight and supervision of regulated organisations take different forms, depending on size and scope (for example, contrast between bank and non-bank deposit taker supervision) but are extensive in nature and undertaken by government agencies established for the role. NZX requirements are applied to listed entities and are subject to public scrutiny.

Several significant cases have been brought by the Serious Fraud Office and the Financial Markets Authority, dealing in particular with non-bank deposit taker failures.¹⁰⁸⁶ The weakness of the rating on this indicator in part reflects the extent of offences and failures observed in the lightly regulated finance company sector and the fact legislative and enforcement initiatives intended to prevent recurrence are too recent to allow judgement.

Instances of fraud have been company specific rather than systematic.¹⁰⁸⁷ Bribery has not been a feature in the finance sector.

More widely, in the 2012 Deloitte New Zealand Bribery and Corruption Survey, the General Manager of the Serious Fraud Office, Nick Paterson, was quoted as saying, “It would be easy to sit back and say that New Zealand is the country perceived to have the least corruption, and that it only happens to others. However, we are seeing more

¹⁰⁸⁵ PwC, 2012.

¹⁰⁸⁶ Financial Markets Authority, “FMA releases Investigations and Enforcement Report 2013”, news release, 1 July 2013. www.fma.govt.nz/keep-updated/newsroom/media-releases/2013/fma-releases-investigations-and-enforcement-report-2013

Serious Fraud Office, “Media releases”. sfo.govt.nz/mediacentre

¹⁰⁸⁷ See section 13.2.4.

instances of domestic corruption such as bribes paid to public officials, and corrupt payments made within the private sector. Organisations need to be awake to the changing environment as well as the legal and reputational risks and consequences associated with engaging in corrupt practices”.¹⁰⁸⁸

Occasional instances of bureaucratic corruption are prosecuted under existing law and freely reported in the news media.¹⁰⁸⁹

The Serious Fraud Office has been proactive since the Canterbury earthquakes of 2010 and 2011 in seeking evidence of fraudulent commercial behaviour in an environment where reconstruction costs of NZ\$40 billion are estimated and opportunities for fraud are deemed greater than usual because of the scale, complexity, and urgency of the task.¹⁰⁹⁰ The Serious Fraud Office has been investigating two cases relating to the Christchurch rebuild since March 2013.¹⁰⁹¹

New Zealand has a so-called “black” economy. Its size is not officially estimated, and there is no internationally recognised methodology to measure this underground market. Australia has attempted to measure its underground economy, estimating it at about 2 per cent of gross domestic product.¹⁰⁹² The Commissioner of Inland Revenue has noted that a rise in the hidden economy in New Zealand could be attributed in part to the large increase in cash paid work in the wake of the Christchurch earthquakes.¹⁰⁹³

“There is a vast underground economy in New Zealand, always has been: mate’s rates, cash jobs, jobs in kind, all of those sort of things which are very hard to track down”, said Minister of Revenue Peter Dunne in December 2011.¹⁰⁹⁴

“There will be some high-level corporate evasion ... but I think in the New Zealand context, it is more likely to be those ingrained sorts of things – the mate’s rates, the ‘do a mate a favour’, which has been part of our informal system forever really.”¹⁰⁹⁵

Cash for service payments by small businesses appears to be the main form this hidden economy takes and is widely tolerated. This is at odds with the country’s self-image as an open, taxpaying democracy. Businesses operating in this way are breaking tax laws if they fail to declare income. Activities covered in this part of the

¹⁰⁸⁸ Deloitte, *Deloitte Bribery and Corruption Survey 2012 Australia and New Zealand: A storm on the horizon?* (Sydney: Deloitte, 2012), p. 4. www.deloitte.com/assets/Dcom-NewZealand/Local%20Assets/Documents/Services/Forensics/nz_Bribery_and_Corruption_Survey_2012.pdf

¹⁰⁸⁹ For example, Michelle Duff, “WINZ unit fails to stop staff fraud”, *Stuff*, 2 April 2001.

www.stuff.co.nz/national/crime/4839741/WINZ-unit-fails-to-stop-staff-fraud

Phil Kitchin, “Honeywell contract not disclosed”, *Stuff*, 23 December 2010.

www.stuff.co.nz/national/politics/4487828/Honeywell-contract-not-disclosed

¹⁰⁹⁰ Serious Fraud Office, “Serious Fraud Office focus on Christchurch”, 21 March 2013.

www.sfo.govt.nz/n345,24.html

¹⁰⁹¹ Serious Fraud Office, 2013.

¹⁰⁹² Australian Bureau of Statistics, “Feature article: The underground economy and Australia’s GDP,” 2003.

www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1350.0Feature%20Article3Oct%202003?opendocument&abname=Summary&prodno=1350.0&issue=Oct%202003&num=&view=

¹⁰⁹³ Clio Francis and Michael Field, “Economy’s \$7 billion black hole”, *Dominion Post*, 1 December 2011.

www.stuff.co.nz/dominion-post/business/6065399/Economys-7-billion-black-hole

¹⁰⁹⁴ Francis and Field, 2011.

¹⁰⁹⁵ Francis and Field, 2011.

economy also include illicit drug dealing and human trafficking by organised criminal gangs and the employment of illegal migrants at below legal minimum wage rates and employment conditions.

Although the use of foreign-flagged fishing vessels working in New Zealand waters is not part of the local black economy generated by New Zealand businesses, the New Zealand Government has taken action, and legislation to curtail these activities is before a parliamentary select committee.¹⁰⁹⁶

Interviewees suggest New Zealand's relatively small and close-knit commercial community acts as a discipline in itself on unethical or corrupt behaviour. While this may be true, it is somewhat belied by recent experience in the finance company sector. Other interviewees suggested a degree of complacency about the potential for both known and unacknowledged conflicts of interest to persist in such a relatively small economy.

Civics and business education in the New Zealand school system is weak, leading to poor general knowledge of the legitimate expectations of ethical business practice.¹⁰⁹⁷

A cohort of migrant-owned businesses that operate in relative isolation from the mainstream (for language or other reasons), may not be aware of New Zealand business practices and norms. Government needs to get information about ethical expectations to this group. Also, a collaborative effort is needed for government to better connect with small businesses. Research is lacking on the practices of small and medium-sized enterprises, which makes it difficult to assess how to connect with these businesses and identify the drivers relevant for them.

Role

13.3.1 Anti-corruption policy engagement

To what extent is the business sector active in engaging the domestic government on anti-corruption?

Score: 2

The issue of corruption is of such little apparent relevance in the New Zealand context that it is not a major consideration by the business sector and consequently, the business sector engages little with the government on anti-corruption.

Transparency International suggests that this indicator should be used only in countries where corruption has been identified as a key problem. New Zealand's place at the top of the Corruption Perceptions Index, therefore, suggests this indicator should not be especially relevant to New Zealand.

However, some evidence suggests a level of naivety is contributing to anti-corruption being a low priority among New Zealand businesses, especially among those

¹⁰⁹⁶ Fisheries (Foreign Charter Vessels and Other Matters) Bill.

¹⁰⁹⁷ Commission for Financial Literacy and Retirement Income, "Financial literacy research and reports".
www.cflri.org.nz/research-and-reports/financial-literacy

assuming they are not complicit because in foreign markets they use local agents whose own standard of business ethics may be subject to question. This is not to say that New Zealand businesses are corrupt or unethical, but that the issue is of such little apparent relevance in the New Zealand context that it is not a major consideration. Consequently, the business sector engages little with the government on anti-corruption.

Turning to New Zealand businesses' engagement with the rest of the world, either as exporters or importers of goods and services, and with the government's resources and power to support these businesses in offshore markets, research conducted for Transparency International New Zealand in 2012 clearly shows that New Zealand exporters put a good deal of faith in the support offered by New Zealand government organisations in overseas markets.¹⁰⁹⁸ New Zealand Trade and Enterprise, for example, is often seen as a primary source of information on operating in overseas markets, including the best ways to access markets and to deal with corrupt practices in those markets.

A small to medium-sized exporter in a recent start-up, said, "Because of the language barrier I take a lot of information from New Zealand Trade and Enterprise, the New Zealand Embassy and some other organisations like the Asian New Zealand Business Association. They're good organisations to connect with. Most of the information I get is in Japanese so it's good to get that information, and others may already have had similar experiences. Having good advice is a short cut into the system".¹⁰⁹⁹

And a large food and beverage exporter said, "They won't get involved in a ...fight but they're very good on advice. They know enough about the dodgy things that go on to know what to do".¹¹⁰⁰

That said, there is one notable recent example of a large New Zealand exporter falling foul of an agent's activities.

Zespri, which controls exports of the country's kiwifruit crop under special legislation, was fined \$960,000 in a Chinese court, and two Chinese agents for the organisation were jailed for up to five years in March 2013 for their involvement in malpractice estimated to have involved \$11.6 million in gains from the practice of creating double invoices between 2008 and 2010 to avoid Chinese customs duties.¹¹⁰¹

"There are things we could have done better, but we're not corrupt", Zespri Chief Executive Jager told Television New Zealand in an interview in July 2013.¹¹⁰²

¹⁰⁹⁸ UMR Research, *Exporters' Experiences*, qualitative research for Transparency International, 2010.

¹⁰⁹⁹ UMR Research, 2010: 22.

¹¹⁰⁰ UMR Research, 2010: 22.

¹¹⁰¹ *Bay of Plenty Times*, 17 July 2013. www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=11104983

¹¹⁰² TVNZ Q&A, 28 July 2013. <http://tvnz.co.nz/q-and-a-news/susan-wood-interviews-zespri-ceo-lain-jager-5520727>

During the Q&A interview, Jager said he had no knowledge or seen any suggestion that bribery was involved. The company has acknowledged it was warned there was a “reputation risk” associated with dual-invoicing in 2008.¹¹⁰³

The New Zealand Serious Fraud Office confirmed in October that it had begun an investigation into unspecified matters relating to Zespri.¹¹⁰⁴ The *Sunday Star-Times* newspaper claimed in a report after the SFO’s confirmation that its earlier reports on the issue had led to the probe after publishing the text of a 2007 email in which a senior marketing manager for Zespri wrote “everyone in China ...does this [double invoicing] and we need to do this too to remain competitive”.¹¹⁰⁵

Business does look to government for support, indicating a level of respect for and reliance on government by New Zealand businesses operating offshore. Business New Zealand, Export New Zealand, the New Zealand Business Council for Sustainable Development, the Human Rights Commission and others have moved increasingly to adopt principles of corporate social responsibility that include building strong governance and integrity systems. See Appendix 4 for the United National Guiding Principles on Business and Human Rights.

At the same time, exporters do not seem to be actively pressuring the New Zealand government to do more to help them in overseas markets where corruption is more of a problem. The research for TINZ cited earlier suggested that this seems mainly to be because exporters do not believe there is much the New Zealand government could do – the size and importance of New Zealand relative to its export markets means it is assumed difficult for the New Zealand Government to influence other governments.

The research suggests, however, that not all exporters are committed to action by the New Zealand Government on corruption in overseas markets. It is not so much that they see government action as being wrong but as futile and possibly even naive. They see the New Zealand Government as too small to have any real influence. There is also a perception that people in many other countries see New Zealanders, and by extension the New Zealand Government, as naive. These exporters, therefore, sometimes worry that overt government action will ultimately harm New Zealand’s reputation by making the country seem quaint, overly optimistic, and able to be taken advantage of.

This reflects an acceptance by some exporters, particularly the smaller exporters participating in a UMR qualitative survey, of practices they would regard as being corrupt if they happened in New Zealand as being standard in certain export markets. These exporters often cite gifts and small facilitation payments as examples of this, especially those made by local agents. There is frequently a willingness to ignore such activities, often on a “don’t ask, don’t tell” basis where the local agent does “whatever is

¹¹⁰³ Tony Wall, “Zespri had invoice warning years ago”, *Stuff*, 26 May 2013.

www.stuff.co.nz/business/farming/agribusiness/8718065/Zespri-had-invoice-warning-years-ago

¹¹⁰⁴ “SFO confirms Zespri probe”, *New Zealand Herald*, 22 October 2013.

www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11144151

¹¹⁰⁵ Tony Wall, “Story leads to Zespri fraud investigation”, *Sunday Star-Times*, 27 October 2013.

www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=2055&topicId=100004077&docId=1997966029&start=7

necessary” to make the deal or solve the problem without telling the exporter exactly what they have done. The key point here is that, while exporters often suspect that their local agents are engaged in corrupt practices, some exporters are choosing not to investigate further. Such exporters believe that, if they did not ignore such activities, they might end up losing the contract or deal to someone who would.

Exporters often feel they are too small to have real power in some of these markets – even medium-sized New Zealand exporters are often fairly small in overseas markets.

The same research did not find evidence that this finding applies to the larger New Zealand exporters. These companies often have enough gravitas in overseas markets to enforce their own standards. They expect the New Zealand government to help with this, but also expect to take on a lot of responsibility themselves.

Larger exporters may also be less susceptible than smaller exporters in their willingness to ignore the possibility of corrupt practices. Specifically, the costs of being involved in corruption and the benefits of not being involved are more likely to be seen as significant by large exporters.

Large exporters are typically involved in multiple markets, including some that have strict regulations on corruption. Some also have multiple contacts within the same market. Smaller exporters, on the other hand, are often involved in only one or two markets, and have limited numbers of contracts and contacts within each. Therefore, if a large exporter is found to be involved in corrupt practices in one market, they could be putting their reputation at risk in other markets. This risk is less likely to be present for the small exporter.

Similarly, if a large exporter loses a contract because it refuses to engage in corrupt practices, then it may well have other contracts on offer. Small exporters who lose contracts, however, may not have such alternatives.

Smaller firms tend to suffer from a lack of institutional depth, so that issues such as this may not be recognised or acted on when they occur and may not have been planned for.

The findings above derive from interviews with exporters, and the Transparency International New Zealand research it draws from did not cover importers. However, other UMR Research projects, which cannot be cited as they were prepared under non-disclosure agreements for specific clients, give some insight into the likelihood of mirror-image issues for importers to New Zealand dealing in foreign markets.

On that basis, importers who are most at risk will most likely be small importers. New Zealand’s relatively light border regulation and tariff structure¹¹⁰⁶ and its acceptance of parallel imports, to some extent, facilitate the commercial viability of smaller import businesses.

¹¹⁰⁶ “Ease of doing business in New Zealand: Trading across borders”, *Doing Business*, 2013. www.doingbusiness.org/data/exploreeconomies/new-zealand/#trading-across-borders
NZIER, *Tariffs in New Zealand*, working paper 2010/1 (Wellington: New Zealand Institute of Economic Research, 2010).

Many of the same principles identified for exporters logically also apply to importers. Small importers will often need to work with local agents, and feel they need to rely on the recommendations of those agents to be able to get the best deal.

While the costs of not being involved in corrupt practices may not be as large as for small exporters (in that there may well be other local companies they can buy through), it seems unlikely that many of these very small importers will have seriously considered the possible impact on their business, if they were found to be sourcing imported goods in a way that involved corruption in the foreign source market.

Small import businesses (including sole operators) are unlikely to have formal processes for dealing with corruption.

Large importers, like large exporters, are more likely to see the consequences of being caught as significant and to have procedures for dealing with corrupt practices. However, this area has not been tested.

In summary, New Zealand exporters of scale appear well attuned to the need to ensure their dealings in foreign markets are of a standard consistent with international best practice. However, interviews suggest New Zealand businesspeople dealing in export markets are insufficiently focused on the need to be sure their local agents are operating to a similarly high standard. The potential for a “blind eye” approach to local business agents’ commercial norms, where corrupt, has considerable potential to damage New Zealand brands and the country’s corruption-free reputation. Similar concerns exist for importers, especially those operating on a small scale.

13.3.2 Support for or engagement with civil society

To what extent does the business sector engage with/provide support to civil society on its task of combating corruption?

Score: 2

Considerable scope exists for CSOs to work more closely with business, both as part of developing the ethics programme and as part of the response to the Open Government Partnership.

Whether through complacency or a genuine belief that corruption is rare in this country, New Zealand companies tend not to engage at all with civil society in the task of combating corruption. Anecdotes suggest anti-corruption considerations are not rated highly as topics for a governance focus.

To what extent does the business sector engage with/provide support to civil society in fostering ethical business practice and maintaining a reputation for high integrity?

Score: 3

New Zealand businesses are arguably indifferent about their obligations to support civil society and foster ethical business practice. This may indicate that New Zealand businesses are confident the country’s relatively corruption-free environment makes this a second-order issue.

On a case-by-case basis, examples can be found of businesses that support good governance and public probity initiatives through sponsorship and education programmes, secondments, or direct involvement. However, this is not an entrenched focus of business activity. Sponsorships are sought primarily for commercial fit and advantage, or for community “licence to operate” benefits. Since corruption is not a major public issue, being seen to combat it is not a natural focus for commercially advantageous sponsorship or educational initiatives.

Governance training is provided through voluntary agencies such as the Institute of Directors, and tertiary educational short courses are available.

13.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What do the institutions that make up the business sector do to partner with Maori, to respect and affirm Maori rights to make decisions and to enhance Maori participation in their field of activity? In particular, where business sector institutions have legal rights and obligations in this respect given to them by the Crown, how well do they honour them, including any Treaty obligations passed on by the Crown?

The Treaty of Waitangi is part of New Zealand's constitutional arrangements and creates a relationship between the New Zealand Government (the Crown) and Māori. There is no legal requirement on private sector actors with respect to the Treaty as such but the principles enshrined in Article 3 regarding equality, non-discrimination, and participation are relevant.

The Māori economic base has increased significantly in the last 20-plus years, spurred by a combination of recovery by iwi to economic health by the passage of time, higher educational attainment by younger Māori leaders, the impact of Treaty settlements on tribal assets, and the interest shown by certain classes of foreign investor in partnering with Maori for industry development and resource exploitation. In turn, this experience has provided a basis for Maori to gain the experience and to gain a position on Crown Entity, public sector, NGO and private sector boards.

In 2010, BERL, an economic consultancy, estimated the total Māori asset base at NZ\$36.9 billion, of which some NZ\$20.8 billion was the business of Māori employers, NZ\$4 billion was attached to Māori trusts and incorporations, and other Māori entities represented NZ\$6.7 billion.¹¹⁰⁷

Tribal asset-owning bodies are generally registered, with constitutions and associated reporting and fiduciary requirements, which govern collective Māori land ownership, Treaty settlement assets, and commercial ventures undertaken under tribal or sub-tribal entities.

The Federation of Māori Authorities, the Māori Trustee, and Te Ohu Kaimoana (the Māori Fisheries Commission) are charged with ensuring governance arrangements of

¹¹⁰⁷ berl.co.nz/assets/Economic-Insights/Economic-Development/Māori-Economy/Presentation-to-Summit-050511.pdf

tribal commercial entities. The Office of the Auditor-General has repeatedly raised concerns about relatively large numbers of late or incomplete audits of Māori incorporations, although there has been improvement in the latest reporting.¹¹⁰⁸ With regard to the Maori Trustee, reforms are looking to drive a greater service level ethos and capability momentum amongst those entities who interact with the MT.¹¹⁰⁹

Settlement of Treaty of Waitangi-based claims for historic injustices are delivering assets, both cash and physical assets, to most iwi, often requiring the establishment of new legally binding, but culturally appropriate, structures to ensure appropriate governance of those assets to achieve a variety of economic, social, and cultural aims. There is some evidence that asset-holding companies are better advanced than tribal incorporations in this process. It will be important for iwi to ensure that not only are asset-holding companies well governed, but that tribal authorities are able to exercise similarly skilled governance to ensure assets intended to help overcome historic economic, social, and cultural deprivation achieve their purpose. This is likely to create challenges arising from governance and accountability behaviours that are justified on cultural grounds and structures, but might conflict with the rights and needs of all stakeholders.

Hamiora Bowkett notes: “The reforms around Maori Land – Te Ture Whenua Maori – are also looking to enable landowners to utilise their assets through an enabling legislative and service framework. However, core questions of governance, management and business capability remain. There is a dialogue to be had around the extent to which Maori and iwi interests support economic development particularly around the exploitation of certain natural resources and what this means for guardianship and stewardship of these resources. Commercial and public sector partners have a journey to take now with Maori to explore these areas and understand what it means, through the Treaty relationship, to seek the types of economic and social outcomes business activities can contribute to.”¹¹¹⁰

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¹¹⁰⁸ Controller and Auditor General, “Part 4: The status of Māori Trust Board audits”, in *Central Government: Results of the 2009/10 audits*, vol. 2, 2011. www.oag.govt.nz/2011/2009-10-volume-2/part4.htm

¹¹⁰⁹ Hamiora Bowkett, email November 2013.

¹¹¹⁰ Hamiora Bowkett, email November 2013.

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CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

Transparency, democratic participation, and accountability clearly have important roles to play in ensuring integrity. They also play key roles in ensuring social cohesion and the rule of law. As Professor Jeremy Waldron has said, “there is such a degree of substantive disagreement among us about the merits of particular proposals ... that any claim that law makes on our respect and our compliance is going to have to be rooted in the fairness and openness of the democratic process by which it was made”.¹¹¹¹

In Jeremy Pope’s conception, the pillars of the National Integrity System (NIS) form an interlocking system. When properly governed, regulated, and managed, each pillar will both support good performance in other pillars and provide checks and balances across the system that reduce and limit inappropriate behaviour. Supported by sound societal foundations, the result will be an overall system that is more likely to sustain integrity and promote public policies that are considered to be fair, effective, and sustainable.

This analysis of New Zealand’s NIS then is essentially a risk assessment. The focus is mainly on developments over the last 10 years since the first New Zealand NIS assessment report, which provides a useful benchmark for the analysis. In some areas, such as the detailed assessment of the public management system (Pillar 4 report), the analysis spans the period since the major reforms in the 1980s and identifies deep-seated tensions in the system that suggest caution in concluding that recent reforms will “fix” them.

¹¹¹¹ Jeremy Waldron, ‘Parliamentary Recklessness: Why we need to legislate more carefully’. Lecture given at the Maxim Institute, October 2008. New Zealander Jeremy Waldron holds a professorship at the New York University School of Law and is Chichele Professor of Social and Political Theory at All Souls College, Oxford University.

Strengths and weaknesses of New Zealand's National Integrity System

Figure 15 contains a summary of the main strengths and weaknesses in the individual pillars, drawn from the summaries of the pillar reports in Chapter 5.

Figure 15: Strengths and weaknesses of the National Integrity System pillars

Strengths	Weaknesses
Legislature (pillar 1)	
The work of the legislature is generally transparent, parliamentary debate is covered in full on television, and access by the public to select committee processes is particularly good. The New Zealand legislature has a long history of producing stable governments. Since the introduction of mixed member proportional representation it has been more representative of New Zealand society.	Parliament does not have specialised committees in some key areas (treaties, or human rights) and lacks independent technical capacity for oversight of public expenditure and fiscal policy. At times it resorts to urgency to pass important legislation without the opportunity for a full debate. Its administrative arrangements and officers are not subject to the Official Information Act 1982, nor is there a code of conduct for members of Parliament or transparency of lobbying of members of Parliament.
Political executive – Cabinet (pillar 2)	
Cabinet is uncontested the apex of government power, and its processes promote coherent national decision making. The executive operates free from undue external influence, and the <i>Cabinet Manual</i> sets out clearly the behaviour expected of ministers that is reinforced through Cabinet collective responsibility. Cabinet minister accountability is acute in areas of high political profile. Ministerial interactions with the public sector system are governed by laws and processes that promote transparency and accountability for policies and their implementation.	By developed country standards, there is a high concentration of power in the Cabinet, including over key appointments. At times, this creates public mistrust. There is some resistance (also in the public sector) to the spirit and intent of the Official Information Act 1982. Cabinet minister accountability for the effectiveness of policies is relatively weak.

Strengths	Weaknesses
Judiciary (pillar 3)	
The judiciary is an important check on executive decision making. It displays high standards of independence, accountability and integrity. The court system is seen to be free of corruption and unlawful influence	Financial disclosure by members of the judiciary is lacking, there are some weaknesses in public access to court information, regular reporting to the public on the activities of the judiciary is lacking, and more transparency in judicial appointments is needed.
Public sector (pillar 4)	
Institutional arrangements are very effective in supporting ethical behaviour and suppressing corruption. Advanced levels of transparency are apparent in public financial management, including public procurement systems that are generally sound. High accountability exists for the use of resources to deliver outputs. By international standards, there is a high degree of public access to official information in practice. There are some strong integrity institutions for environmental governance.	Serious regulatory failures have occurred in recent years. The public service has a diminishing capacity for professional policy advice, and the convention of free and frank advice is under pressure. The public sector does not provide systematic analysis and information on the impact of policies (including public management policies), and there are gaps in “state of the nation” environmental and social reporting ¹¹¹² . There is resistance to the obligations imposed by the Official Information Act 1982, and transparency gaps exist in public procurement. There are concerns about the interface between central and local government.

1112 On 8 August 2103 the Minister for the Environment announced that legislation would be introduced that would provide for a ‘comprehensive synthesis [state of the environment] report covering all environmental domains’ to be prepared and ‘released every three years.’ (<http://www.beehive.govt.nz/release/govt-mandate-three-yearly-state-environment-reports>).

Strengths	Weaknesses
Law enforcement and anti-corruption (pillars 5 and 9)	
Overall, New Zealand law enforcement agencies maintain high standards of transparency, integrity, accountability, and independence.	The government has been slow to implement international policies and laws for deterring and combatting bribery and corruption. In several key areas, legislation, resources, and government policy are inadequate for addressing bribery and corruption and little exists in the way of risk monitoring, preventative, or educational activity. Some concerns exist about transparency and accountability in respect of surveillance activity. There is concern about the extent of the over-representation of Māori in the criminal justice system and possible structural discrimination.
Electoral management body (Electoral Commission) (pillar 6)	
General elections have full integrity, reflecting in part the independence and integrity of the Electoral Commission, which has a strong reputation as a trustworthy institution and credibility in administering general elections. The recent merger of three separate electoral agencies and consequent reconfiguration has strengthened electoral management.	The Electoral Commission has little effective ability to respond to concerns about political party finances, and there are concerns over its allocation of state funding of political parties for broadcast election advertising. It has no ability to influence significant trend decline in voter turnout at general elections.
Ombudsman (pillar 7)	
High standards of independence, integrity, and accountability are apparent. The Ombudsman operates as an effective check on the exercise of administrative power and recommendations are almost invariably accepted.	A backlog of cases will take some time to overcome, and recent increased funding may be insufficient. The Ombudsman is not mandated to have a general oversight role with respect to policy advice, review, statistical oversight, promotion of best practice, training, requester guidance, and annual reporting; nor is there a mandated function of educating the public or government agencies about their rights and obligations under the Official Information Act 1982 and other relevant legislation. Some formal integrity and accountability mechanisms are absent.

Strengths	Weaknesses
Supreme audit institution (Auditor-General) (pillar 8)	
The Auditor-General is trusted and influential in maintaining public standards of integrity and accountability. The office plays a significant role in lifting standards of public financial management.	The direct responsiveness of Parliament to findings of the Auditor-General is variable. The office's performance audits pay limited attention to the effectiveness of government spending in achieving intended outcomes.
Media (pillar 10)	
The media is independent, free, and active in informing the public about the activities of the government. It is active and successful in exposing individual cases of corruption and maladministration.	Industry self-regulatory and regulatory bodies need to be more proactive in reviewing and promoting adherence to their integrity frameworks. The capacity for investigative journalism is lacking, and diversity is limited in terms of media industry ownership and content.
Political parties (pillar 11)	
Political parties play a strong role in highlighting and combating impropriety and potentially corrupt practices in public life, which has become a central theme of electoral competition. Political parties are able to operate independently and without unwarranted state intervention.	The most problematic features involve political finance – how politicians raise and spend their funds, including indirect state funding provided opaquely to the parties in Parliament, and how the state attempts to regulate their activities. Legitimacy is a major problem with low levels of membership of and public trust in political parties.
Civil society (pillar 12)	
The environment for community and voluntary organisations is favourable and enabling. High integrity is apparent through public involvement and civil society organisations' flexibility and responsiveness. Generally, there is a high level of information disclosure to keep the public informed. Some significant successes in holding governments to account have occurred.	Some civil society organisations feel their independence is limited in practice by their reliance on government funding for service delivery. New Zealanders are largely under-informed about what transparency and disclosure they should expect from their civil society organisations, and there is variability in information disclosure across civil society organisations, particularly about in whose interest a civil society organisation is operating, and who is funding them. Government consultation over new policies sometimes takes place too late.

Strengths	Weaknesses
Business (pillar 13)	
The suite of company and securities laws and systems is reasonably comprehensive and effective. Business regulation generally aims to promote competition in an open economic environment. There are no inappropriate barriers to establishing a business. The court system is free of corruption and unlawful influence, and there are legal protections for property.	An overly permissive regime for company incorporation has allowed “shell companies” involved in questionable activities to incorporate in New Zealand. The business community is not well informed about the criminalisation of bribery of foreign public officials, and has to date taken a passive approach to managing its exposure to risks from bribery and corruption. The domestic black economy is substantial, with links to organised crime.

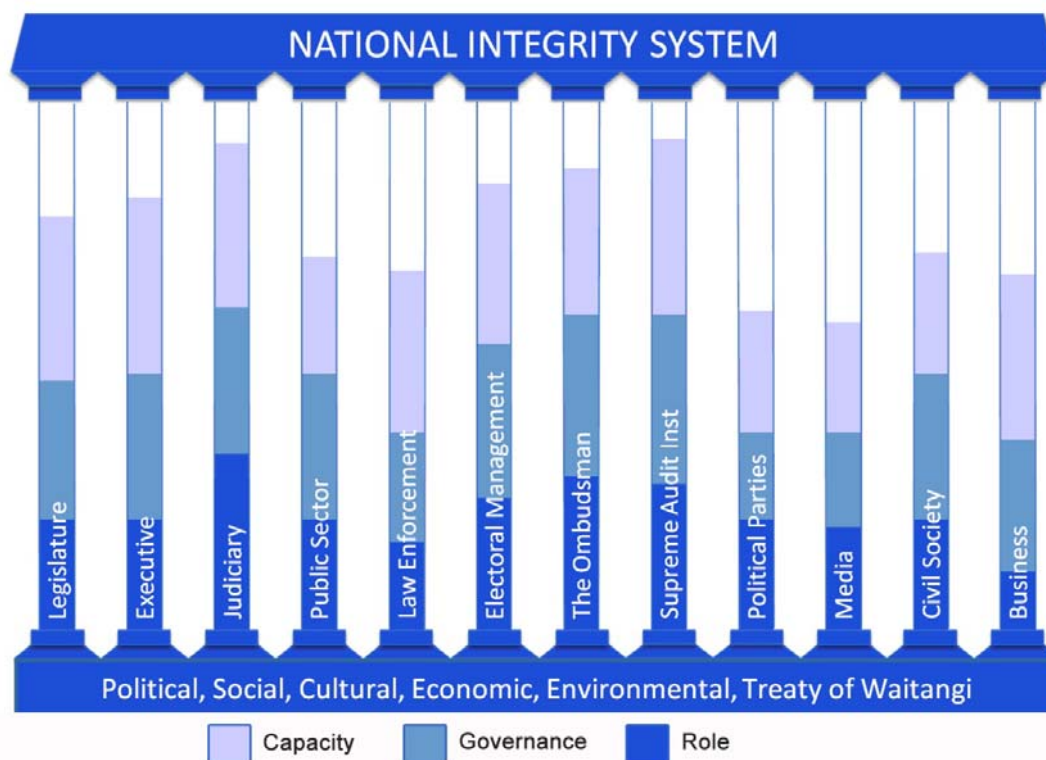
New Zealand’s NIS remains fundamentally strong. By international standards there is very little corruption in New Zealand. It is clear that New Zealand remains legitimately highly rated against a broad range of international indicators of transparency and quality of governance. Successive governments have taken further actions to increase transparency and accountability since the 2003 NIS assessment. The 2010 and 2011 Canterbury earthquakes represented a severe test of governance systems, in terms of compliance with building standards and integrity in reconstruction, and (with two tragic exceptions, the collapses of the CTV and Pyne Gould Corporation buildings)¹¹¹³ systems have generally held up well.

A number of areas of concern, weakness, and risk highlighted in 2003, however, remain in the face of ongoing and new challenges to integrity. In some key areas, there has been continued passivity and complacency. This is exemplified by New Zealand’s failure to ratify the UN Convention against Corruption more than 10 years after signing the convention, and its failure to fully comply with the legal requirements of the OECD Anti-Bribery Convention more than 14 years after signing it.

Figure 16 presents the findings from the pillar-by-pillar analysis in Chapter 5 in the form of the “temple diagram”. The diagram incorporates the overall pillar scores; the height of the shaded bar columns represent the full pillar score. The diagram also displays the scores for the sub-components used to assess and score each pillar – capacity, governance, and role within the system. The scores applied to the assessment are derived from the reasoning behind answers to the NIS assessment questions. Note, however, that the scores are indicative only, and the findings and recommendations draw largely on the in-depth qualitative analysis.

¹¹¹³ With the exception of the two building collapses, and the design of stairs in multi-storey buildings, ‘modern commercial buildings generally performed in accordance with the key objective of life- safety set by the Building Code.’ Canterbury Earthquakes Royal Commission, *Final Report: Volume 6: Canterbury Television Building (CTV)*, p. 6. <http://canterbury.royalcommission.govt.nz/Final-Report-Volume-One>

Figure 16: Assessment summary, showing pillar scores and components



The diagram shows that the relatively strong pillars are the supreme audit institution (Office of the Auditor-General), the judiciary, the electoral management body (the Electoral Commission), and the Ombudsman. The weakest pillars are political parties and the media. Of these, political parties are of the most concern, as discussed further below. The media score reflects some weaknesses in terms of diversity of ownership and content, lack of capacity for in-depth investigative journalism, and the need for attention to accountability and integrity mechanisms.

Comparing the relative pillar scores in Figure 16 against the synthesis of NIS reports in 25 European states in 2011 (discussed in Chapter 1), the similarities include the relative strength of the supreme audit institution and of electoral management, and the relative weakness of political parties, particularly political party financing.

In addition to the pillar-by-pillar analysis, key strengths arise from interactions between specific pillars.

- The effectiveness of the officers of Parliament and other key watchdog institutions in acting as a check on the executive. More specifically, the effectiveness of the:
 - judiciary as a check on executive action
 - Office of Auditor-General in supporting parliamentary oversight of the public finances – the Auditor-General's public reputation carries sufficient weight for political office-holders to take the office's recommendations seriously and, on occasion, to implement its recommendations for changes to the rules relating to spending by elected officials (sections 8.3.2, and 10.2.4)

- Ombudsman as a restraint on the exercise of administrative power and in enforcing citizens' rights of access to information under the Official Information Act 1982
- Office of the Parliamentary Commissioner for the Environment in strengthening transparency and accountability for environmental governance.
- When cases of corruption or unethical behaviour by those in power become public, they are usually pursued vigorously. In varying degrees and circumstances, the media, political parties, the Office of Auditor-General, law enforcement agencies, and the judiciary all play a part in that pursuit.

Some significant weaknesses also arise from the interactions between specific pillars.

- Problems exist at the interface between political party financing and public funding. The combination of continuing concerns about the transparency of political party financing and of donations to individual politicians, a long-term decline in party membership, increased party reliance on public funding, and a lack of full transparency of public funding of the parliamentary wings of the parties interacts with the refusal to extend the coverage of the Official Information Act 1982 to include the administration of Parliament.
- Weaknesses in parliamentary oversight of the executive include the use of urgency to pass controversial legislation, and the lack of specialist expertise and committees to hold the executive to account.
- The interface between the political executive and public officials shows evidence of an erosion of the convention that public servants provide the government of the day with free and frank advice, an apparent weakening over the last decade or so of the quality of policy advice that public servants provide to ministers, and public concern about perceived non-merit-based appointments.
- Problems at the interface between central and local government include concerns about intervention by central government in the decision-making authority of local government bodies and weaknesses in the design and implementation of regulations.

Sources of strength and weakness are also identified through the assessment of the NIS foundations.

Key strengths in the foundations include:

- support from the foundations of the integrity system for a high-trust society, economy and polity, and a general culture that does not tolerate overt corruption
- overall, democratic institutions are widely supported by New Zealanders, and elections are free and fair
- overall, the political and civil rights of citizens are assured
- significant social, ethnic, religious, and other conflicts rarely occur in New Zealand, and diversity is accepted with differences normally resolved or ameliorated
- the role of the Treaty of Waitangi as a founding document that creates citizenship rights for all, seeks to protect the rights of Māori, and contributes to social cohesion.

Key weaknesses in the foundations include:

- the presence of significant socio-economic inequalities, which has the potential to strain social cohesion and, international experience suggests, creates some risk of increased corruption¹¹¹⁴
- 44 per cent of respondents in the New Zealand Survey of Values 2005 thought the country was run by a few big interests looking after themselves rather than for the benefit of all people¹¹¹⁵
- a 2013 survey of trusted professions in New Zealand ranked politicians 46th out of 50 professions¹¹¹⁶
- only 37 per cent of respondents to a recent Serious Fraud Office survey thought the country was “largely free” of serious fraud and corruption¹¹¹⁷
- only 55 per cent of those surveyed by the Human Rights Commission consider the Treaty of Waitangi to be New Zealand’s founding document, and only 25 per cent rate the Crown–Māori relationship as healthy¹¹¹⁸
- the extent of the over-representation of Māori in the criminal justice system with research indicating that suspected or actual offending by Māori has harsher consequences than suspected or actual offending by non-Māori.

Six system-level cross-cutting themes

The analysis of the 12 pillars and the societal foundations of the NIS also identified six broader themes that cut generally across the whole NIS. The report identifies these cross-cutting, system-level themes as characterising integrity in the exercise of authority in New Zealand.

New Zealand has a strong culture of integrity, with most decisions conforming to a high ethical standard, but this culture is coming under increasing pressure. The culture of integrity helps sustain the formal and informal frameworks that support New Zealand’s integrity systems, in the context of a relatively small society where citizens are often close to decision makers, and there is relatively high adherence to the law. The need to take the Treaty of Waitangi into account in many areas of national life also helps to sustain integrity by acting as a restraint on some elite influences and vested interests, and by providing a framework for the recognition of the position of Māori as equal Treaty partners. However, several developments and risks may threaten the strength of this broad culture. These include increasing numbers of fraud

¹¹¹⁴ You Jong-Sung and Sanjeev Khagram (2005). “A comparative study of inequality and corruption”, *American Sociological Review*, 70: 136–157.

¹¹¹⁵ Massey University, “New Zealand Values Survey 2005”.
www.whariki.ac.nz/massey/learning/departments/centres-research/shore/projects/new-zealand-values-survey-2005.cfm

¹¹¹⁶ “New Zealand’s most trusted professions 2013”, *Reader’s Digest*, July 2013.
www.readersdigest.co.nz/most-trusted-professions-2013

¹¹¹⁷ Reg Birchfield, “The Director: Cover story – Boards blase about management”, *New Zealand Management*, September 2012.

¹¹¹⁸ *UMR survey results: The Treaty Relationship in 2011*. Human Rights Commission.

and corruption cases, particularly fraud in the finance sector; trend shifts in the direction of New Zealand's trade, business, and other international interactions to countries where corruption is relatively high; trend falls in voter turnout and political party membership; and the Canterbury earthquake rebuild, where the volume of transactions between stressed people and various government agencies and private businesses has put real pressure on normal operational systems and on standard expectations for responsiveness and behaviour.

The relative structural dominance of the executive branch of government. Some of the checks and balances on the executive that are typical of other countries are not part of New Zealand's institutional landscape:

- constitutional provisions are not entrenched, in the sense of requiring more than a simple majority in Parliament to amend them¹¹¹⁹
- there is no second house of Parliament
- there are some weaknesses in parliamentary oversight of the executive, as evidenced by the use of urgency to pass some contentious legislation, a lack of follow-up to some reports of the Auditor General, and a lack of specialised technical support for Parliament in key areas
- the role of local government *vis-à-vis* central government is not entrenched.

These factors are ameliorated somewhat by the experience of coalition governments under mixed member proportional representation, which have enhanced the role of Parliament, and by the short three-year parliamentary term. The point remains, however, that a real risk exists in New Zealand's Westminster-based system that the executive may become too powerful and that potential abuses of power or breaches of integrity would not be effectively constrained. One illustration of this is that in New Zealand the role of local government in general, or of a specific local authority, can be changed through an Act of Parliament passed by a simple majority. More recently, the passage of legislation removing the right of family carers to appeal administrative decisions in court represents an executive constraint on judicial review. In these circumstances, any gaps in transparency or accountability of the executive branch assume added importance (see recommendations 3–6).

A lack of transparency is a concern in a number of areas. This raises questions about accountability and the potential for undue influence or bias in decision making. As well as the gaps in the coverage of the Official Information Act 1982 and some resistance to compliance with disclosure obligations under the Act, examples include a lack of public registers of trusts and the beneficial owners of companies, some deficiencies in the transparency of public procurement, a lack of transparency about the impacts of government regulation and spending and of environmental indicators, inadequate transparency of the finances of political parties and of lobbying of politicians, and gaps in the transparency of the judiciary. With respect to the lack of a public register of trusts, *Fairfax Business Bureau* deputy-editor Tim Hunter wrote in late 2012 that he could not help wondering why New Zealand “maintains a regime so

¹¹¹⁹ While Section 268 of the Electoral Act requires a 75% majority in Parliament or a plurality in a referendum to amend certain provisions, Section 268 itself can be changed by a simple majority in the House.

obviously advantageous to tax dodgers and criminals. We're not only not part of the solution, we're a big part of the problem".¹¹²⁰

The degree of formality in the frameworks that regulate the pillars in New Zealand's NIS varies considerably from legislation to self-regulatory or co-regulatory codes or even judicially recognised behavioural conventions. This is both a potential strength and a potential weakness. A trade-off exists between the flexibility and adaptability to changing circumstances that this structure can bring to governance, and the potential for such flexibility to be hostage to political expediency rather than to promotion of the public interest.

Constitutional law expert Matthew Palmer has observed, "While I am comfortable ... with an unwritten constitution I am very concerned that we pay attention to what it is. It may be harder to change aspects of an unwritten constitution if they exist only in implicit practices which are not articulated as 'constitutionally' important. More importantly having our constitution located in many different elements is that it is easier for those elements to change, and for some groups of people to consciously change them, without serious public discussion, or even awareness, that a change is contemplated".¹¹²¹

To continue operating well, conventions need to be well known and widely understood. To this end, the recommendations in this report place some weight on civics education and training. Conventions need the reinforcement that comes from good transparency and ongoing evaluation, because without these features the quality of conventions and practices may be at greater risk of erosion. In the face of new challenges, and if we are less able to rely on our broader norms of fairness and integrity, New Zealand may need to formalise in law some of its conventions, practices, and codes. This observation underpins the recommendations in this report to close integrity gaps by introducing new or strengthened codes and rules, enforcing them better, and subjecting behaviour to more scrutiny through improved transparency.

Conflicts of interest are not always well managed. Many of the gaps and deficiencies identified in the pillar reports open the prospect of officials using their power or influence to favour personal, private, or political interests rather than acting in the public interest. The relatively small size of New Zealand's population facilitates mutual monitoring of behaviour but by the same token also creates frequent potential conflicts of interest. Public officials need to know how to deal with such conflicts, whether by recusal or by informing senior officials if the conflict cannot be avoided. The concern arises when someone does not carry out a task, trust, or function in a way that follows the prescribed processes and instead favours personal, private, or political interests. A lack of transparency aggravates the situation, as it can create a suspicion that conflicts of interest are hidden and not being properly managed. The fact that there is inadequate transparency, central monitoring, or reporting of suspected and proven conflict of interest (misconduct) matters or similar favouritism within the public sector is a cause for concern (recommendation 4(2)).

¹¹²⁰ www.stuff.co.nz/business/opinion-analysis/7521775/New-Zealand-foreign-trusts-among-global-tax-havens

¹¹²¹ Matthew Palmer, "NZ constitutional culture", *New Zealand Universities Law Review* vol. 22, p. 565, 2007.

Specific examples of conflicts of interest referred to in the pillar reports include concerns about the management of conflicts of interest in procurement, the potential for political influence in appointments to boards of government entities, and the small pool of listed company board directors with overlapping directorships in the private sector. Conflicts of interest can also exist at the institutional level, and this report raises concerns about the exclusion of the administration of Parliament from the Official Information Act 1982 and the role of the Parliamentary Services Commission in setting the rules for public spending by the parliamentary wings of the parties.

New Zealand would benefit from greater emphasis on prevention of fraud and corruption. Enforcement of anti-corruption and related measures tends to be reactive, and there is little focus on educational or preventive effort by the law enforcement agencies. Attention to prevention is needed in a number of pillars and, indeed, across society as a whole where more civics and financial literacy education should be undertaken. Also, legal provisions that support prevention, such as the implementation of anti-corruption treaties and international agreements, and improvements in transparency (as noted above), should be brought into effect positively and speedily. Overall, a more pro-active approach is required, exemplified by the need for a comprehensive national anti-corruption strategy (recommendation 1).

Recommendations

The core message of this report is that stronger action to promote and protect integrity in New Zealand is overdue. New Zealand's recently announced decision to join the Open Government Partnership provides the opportunity and impetus to launch a concerted national effort to this end.

The following recommendations draw on the findings in each of the pillar reports, the analysis of interactions between pillars, and the support from societal foundations, and on the six cross-cutting themes. An attempt has been made to identify the concerns, interests, institutions, or interventions that are the most likely triggers for change.

Seven primary recommendations are specified in this chapter, supported with more detailed recommendations. The evidence-based research supporting the recommendations is in the relevant pillar report or foundation section of the report. There are cross-references in the text of each recommendation to the relevant numbered indicator questions in Chapter 5. These high-level recommendations have been prioritised to represent seven key areas for change. Recommendations have been addressed to a specific pillar, sector, or institution in an attempt to ensure clarity and to promote accountability for considering, responding to, and implementing the recommendations.

Recommendation 1: Ministry of Justice to lead the development of a comprehensive National Anti-Corruption Strategy, developed in partnership with civil society and the business community, combined with rapid ratification of the UN Convention against Corruption (UNCAC). This is a matter of urgency to protect and address risks to New Zealand's integrity systems (Chapters 3 and 4, and reports on pillars 5 and 9 in Chapter 5).

The government should develop and implement a comprehensive National Anti-Corruption Strategy through broad and deep engagement with civil society, the business community, and the general public, as required by UNCAC (Appendix3). The strategy should include the government's existing work plan in this area, but should be extended to cover all pillars in the NIS, and should aim to strengthen and protect our relatively high integrity society as a taonga and as a national asset. This should be combined with rapid implementation of the legislative changes required to enable New Zealand to fully comply with and then ratify UNCAC and to fully comply with the OECD Anti-Bribery Convention.

Specific components of the National Anti-Corruption Strategy should include.

- a up-dating and strengthening anti-bribery legislation, substantially increasing penalties for bribery and corruption, and considering the offence of misconduct in public office¹¹²²
- b introducing a public register of trusts and of the beneficial owners of companies (section 13.2.1)
- c where there are gaps, extending requirements for public office holders in all branches of government to register pecuniary interests, declare assets, face restrictions on post-public office employment, and declare acceptance of gifts and hospitality (sections 1.2.5, 2.2.5, 2.2.6, 3.2.5, 7.2.5, 7.2.6)
- d reviewing the regulation of political party and candidate campaign financing, and the enforcement of the regulations
- e reviewing organisational and other options to improve the effectiveness of anti-corruption law enforcement and education
- f promoting more actively the importance and role of ethics
- g identifying priority areas for further research, monitoring, evaluation, and policy development with respect to identifying, measuring, preventing and reducing corruption.

Recommendation 2: Ministry of Justice initiate a a cross-government programme of, wide public consultation to develop an ambitious New Zealand Action Plan for the Open Government Partnership (Chapter 1, Appendix 5). New Zealand's membership of the Open Government Partnership provides a clear opportunity for the Ministry of Justice, as New Zealand's designated lead agency, to initiate a broad multi-stakeholder process to develop a National Action Plan. Many of the recommendations in this report are potential elements in New Zealand's Open Government Partnership National Plan of Action.

Recommendation 3: Transparency and integrity need to be strengthened in a range of priority areas.

- a Parliament

¹¹²² See Chapter 4 for recent developments in this area

- i Extend the coverage of the Official Information Act 1982 to the Parliamentary Counsel Office, officers of Parliament, the Speaker in the role of Responsible Minister for parliamentary agencies under the Public Finance Act 1989, the Office of the Clerk, and the Parliamentary Service (sections 1.2.1 and 4.2.1).
 - ii Strengthen parliamentary oversight of the executive, including through a review by Parliament of its select committee structure and consideration of establishing new cross-cutting specialist committees, for public accounts (sections 1.1.3 and 8.3.3), for treaties, and for human rights (section 1.1.3); providing select committees with more independent analytical support (sections 1.1.2, 1.1.4, 1.3.1, and 4.2.2).
 - iii Enhance the quality of legislation by more pre-legislative public disclosure of draft bills and the adoption by select committees of tests for legislative quality (section 1.2.4).
 - iv Introduce a code of conduct for members of Parliament (section 1.2.6).
 - v Introduce measures that provide an adequate degree of transparency to ensure that public officials, citizens, and businesses can obtain sufficient information on, and scrutinise lobbying of members of Parliament and ministers (section 2.2.6).
- b Political executive
- i Commission an independent review of the respective responsibilities of Cabinet, ministers, and public servants with a view to clarifying the conventions concerning the duty of, and capacity for, free and frank advice between the political executive and the public sector, to mark the centenary of the introduction of the merit-based public service in New Zealand (section 4.1.3).
 - ii Introduce a centralised approach to the systematic proactive release of official information, including Cabinet papers, by all public entities (section 4.2.2).
 - iii Initiate discussions with civil society and the business community on a general government-wide framework for timely consultation on the development of new policy initiatives and encouragement of direct public participation in policy development and implementation (section 12.3.2).
- c Local government
- i Initiate a national conversation on the constitutional place of local government (sections 4.1.2 and 4.1.3).
 - ii Develop a central government/local government protocol on the design and implementation of regulations where regulation-making powers have been delegated to local authorities (section 4.1.3).¹¹²³

Recommendation 4: The integrity of the permanent public sector, and its role in promoting integrity should be strengthened in a range of priority areas.

- a Strengthen transparency and accountability for public procurement (section 4.3.3)

¹¹²³ As recommended by the Productivity Commission.

- i Extend proactive disclosure of project information, both upstream and downstream of tendering, including projects exempted from open tendering and without compromising commerciality.
- ii Incorporate explicit anti-corruption provisions in procurement procedures and documents.
- iii Build capacity, especially in smaller entities.
- iv Improve requirements for record-keeping so that data on different types of procurement can be readily extracted, and also for complaint mechanisms.
- v Publish principles, objective criteria, and a robust management framework for 'hybrid procurements' (section 4.2.2).
- vi Conduct periodic reviews of transparency and integrity of spending and procurement in the Canterbury earthquake re-build in view of the scale of the procurements.
- b Strengthen integrity and accountability systems in public sector entity operations
 - i Introduce greater transparency in the process for public appointments to boards of Crown entities and other public bodies, and strengthen the capacity of the public sector to nominate suitable candidates (sections 2.3.2 and 4.1.3).
 - ii Strengthen the Protected Disclosures Act for both the public and private sectors (section 4.2.6).
 - iii Introduce central reporting and monitoring of all misconduct and breaches of integrity within public entities, when they involve issues going to honesty and integrity (for example, suspected fraud, corruption, conflicts of interest, favouritism, and abuse of position) (section 4.2.5)
 - iv Institutionalise on-going regular integrity and conduct surveys across the public sector (section 4.2.6)
 - v Introduce central reporting, monitoring and knowledge-sharing between agencies on 'best practice' options and initiatives in fulfilling Treaty of Waitangi obligations (section 4.4.1)
 - vi Increase fiscal transparency and accountability by deepening the reporting of tax expenditures, publishing a Citizens' Budget, and investigating options for an independent body to advise Parliament on key fiscal strategy reports to deepen the public debate about fiscal policy (section 4.2.2).
 - vii Require public entities to publish management letters from the Office of the Auditor-General, and report to Parliament their responses to issues of significance identified in these letters, for consideration in the annual select committee reviews (section 8.2.2).
 - viii Actively promote the importance of ethics, transparency, accountability, and financial literacy among the public in New Zealand through civics education, including in the secondary and tertiary curricula (sections 13.2.1, 13.2.2 and 13.2.6, and 12.2.1).
 - ix Review the evidentiary status of Government Communications Security Bureau evidence provided to domestic law enforcement agencies (section 5.2.2).

- c Strengthen accountability in public policy processes
 - i Develop and implement a new government strategy to promote ‘evidence-based policy making’,¹¹²⁴ including enhanced monitoring and evaluation of the impacts of government policies (section 4.3.3).
 - ii Introduce greater transparency about the anticipated effects of proposed departmental restructuring and institutional reform exercises in the public sector, and, *ex post*, their actual effects (section 4.2.3).
 - iii Enhance reporting on the social, economic, and environmental impacts of government regulation and spending (sections 4.2.2 and 8.3.1).
 - iv Commence regular, technically independent reporting on State of the Nation environmental indicators (section 4.2.2),¹¹²⁵ and reintroduce regular publication of the Social Report (section 4.2.2).

Recommendation 5: Support, reinforce and improve the roles of key independent integrity agencies and bodies.

- a Electoral management
 - i Review public funding of political parties, the allocation of broadcasting time to political parties and the restrictions on parties purchasing their own broadcast election advertising (section 10.1.1).
 - ii Require greater transparency of the finances (including donations) of political parties (sections 10.2.1–10.2.4).
 - iii Strengthen the Electoral Act 1993 to make the lines clearer between legal and illegal activities and investigate the options for strengthening enforcement in response to complaints (sections 10.2.3, 10.2.4, and 5.1.3).
- b Judiciary
 - i The judiciary should publish an annual report on its activities and performance (section 3.2.1).
 - ii Increase public access to information about the operation of the court system (section 3.2.1).
 - iii Enhance the transparency of the judicial appointment process (section 3.2.2).
- c The Ombudsman
 - i Promote enhanced compliance with and understanding of the Official Information Act 1982, better processes for handling Official Information Act requests, and implementation of the Law Commission’s recommendation for an Official Information Act oversight function as well as instituting a similar oversight function for the Ombudsmen Act 1975 (section 7.3.2).

¹¹²⁴ Consistent with the findings and recommendations in the report from the Prime Minister’s Chief Science Advisor in September 2013. See www.sciencemediacentre.co.nz/2013/09/03/sir-peter-gluckman-on-the-role-of-evidence-in-policy-making/

¹¹²⁵ The government announced on 8 August its intention to introduce technically independent state of the environment reporting.

- ii Review in 2014/15 the adequacy of funding for the Office of the Ombudsman (section 7.1.1).

Recommendation 6: The business community, the media, and non-government organisations should take a much more pro-active role in strengthening integrity systems and addressing the risks of corruption as ‘must-have’ features of good governance. Specific actions include the following.

a Business community

- i Raise awareness and understanding of the implications of the criminalisation of bribery of foreign public officials in the Crimes Act 1961 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Chapter 3 and section 13.3.1).
- ii Ensure adequate training on and awareness of corruption and integrity risks and their management and encourage the reporting of foreign and domestic bribery suspicions to the authorities (section 13.2.6).
- iii Investigate and evaluate the costs and benefits to business from continual vigilance around maintaining and strengthening integrity systems.
- iv Work with the Institute of Directors to encourage the highest standards of governance.

b Media

- i Media industry self-regulatory and regulatory bodies should review and strengthen their integrity frameworks and promote adherence to them (sections 11.3.1 and 11.2.5).
- ii The government should publish regular monitoring reports on the effectiveness and integrity of media industry regulation and self-regulation (sections 11.3.1 and 11.2.5).

c Civil society:

- i Review the appropriateness of contractual and/or statutory restrictions on public advocacy by non-government organisations.
- ii Educate the public on what information they should expect from non-government organisations.
- iii Assess the need for capacity building of Māori organisations to enable them to contribute to local authority decision making in ways currently expected of them.

Recommendation 7: Public sector agencies should conduct further assessments and research to strengthen integrity systems over time. Priority areas are as follows.

- a Research to investigate the actual incidence of corruption in New Zealand, why it is occurring, and how it might best be reduced to supplement existing surveys on how exporters and importers of goods and services are managing bribery and corruption risks.

- b A review of possible causes of and responses to the role of structural discrimination in the over-representation of Māori in the criminal justice system (section 4.1.1).
- c Important sectors and institutions not assessed in this study, notably the state-owned enterprise sector and the Reserve Bank of New Zealand, should be independently bench-marked in the next 12 months against relevant international standards of transparency, public participation, integrity, and accountability.
- d Transparency and awareness relating to the Treaty of Waitangi should be increased by increasing the level of public education on the Treaty.

Appendix 1: Schedule of interviews for the National Integrity System report

Alex Matheson, pillars 1, 2, and 4

David Bagnall, Office of the Clerk of the House. Email correspondence August 2013.

Ross Carter, Parliamentary Counsel. Email correspondence July–August 2013.

Len Cook, former Government Statistician for New Zealand and Head of the UK Office of Statistics. Meeting 8 March 2013 and email correspondence.

Christopher Elder, author on New Zealand and China; former Ambassador to China, Russia, and Indonesia for the Ministry of Foreign Affairs and Trade. Meeting 1 August 2013.

Derek Gill, New Zealand Institute of Economic Research; former senior public servant with the Treasury, State Services Commission, and Ministry of Social Development. Meeting 12 December 2012 and email correspondence.

Rob Laking, School of Government, Victoria University of Wellington; former public service chief executive, former senior officer in Treasury. Meeting 5 February 2013.

Christine Lloyd, State Services Commission. Meeting 15 March 2013.

David McDonald, School of Government, Victoria University of Wellington; former Controller and Auditor-General. Interview 5 February 2013.

David McGee, expert and author on parliamentary affairs; former Ombudsman, former Clerk of the House. Meeting 5 February 2013.

Dr Elizabeth McLeay, Adjunct Professor of Political Science, Victoria University of Wellington, expert and author on Parliament and Cabinet. Meeting 14 February 2013.

Dr Ryan Malone, Director (Training and Research) Civic Square, constitutional expert. Telephone and email conversations 9 July to end July 2012.

Dianne Morcom, Remuneration Authority; former Cabinet Secretary. Meeting 14 February 2012.

Simon Murdoch, former Chief Executive of the Department of the Prime Minister and Cabinet and Ministry of Foreign Affairs and Trade. Email correspondence July 2013.

Sir Geoffrey Palmer, constitutional expert and author; former Prime Minister, Deputy Prime Minister, and Minister of Justice. Meeting 11 July 2013.

Dr Matthew Palmer, barrister and solicitor; former Deputy Solicitor-General (Public Law), Deputy Secretary for Justice (Public Law), and Dean of Law at Victoria University of Wellington. Meeting 4 December 2012.

Andrew Royle, Acting Chief Legal Adviser, State Services Commission. Meeting 15 March 2013.

Professor Bill Ryan, School of Government, Victoria University of Wellington. Meetings 16 April and 11 June 2013 and email correspondence.

Deborah Te Kawa, State Services Commission. Meeting 8 May 2013.

Ian Templeton, former Minister of Revenue, former Minister for Trade and Industry, former public servant with the Ministry of Foreign Affairs and Trade. Meeting 8 July 2013.

Neil Walter, former chair of two Crown entity boards, former Chief Executive of the Ministry of Foreign Affairs and Trade. Meetings 3 December 2012 and 25 June 2013 and email correspondence.

Michael Webster, Deputy Secretary of the Cabinet, Department of the Prime Minister and Cabinet. Meeting 26 June 2013.

Margaret Wilson, pillar 3

Dame Sian Elias, Chief Justice. 1 February 2013, Wellington.

Christine Grice, Chief Executive, New Zealand Law Society. 29 January 2013, Hamilton.

Stephen Mills QC, President, New Zealand Bar Association. 13 February 2013, Auckland.

Liz Brown, pillar 7

Tim Clarke, Partner, Russell McVeagh. 12 December 2012, Wellington.

Doug Tennent, University of Waikato. Telephone interview 21 December 2012.

Dame Beverley Wakem, Chief Ombudsman. 11 December 2012, Wellington.

Rob Laking, pillar 8

David Macdonald, former Controller and Auditor-General. 13 December 2012 and 23 January 2013, Wellington.

David McGee, Ombudsman and former Clerk of the House of Representatives. 4 February 2013, Wellington.

David Parker, Member of Parliament, Labour Party finance spokesperson. 20 February 2013, Wellington.

Professor Wally Penetito, Te Kura Māori, Victoria University of Wellington. 11 June 2013, Wellington.

Dr Rt Hon. Lockwood Smith Member of Parliament, Speaker of the House of Representatives. 13 February 2013, Wellington.

Phillippa Smith, Deputy Controller and Auditor-General. 20 November 2012, 14 February 2013, and 7 March 2013, Wellington.

Nicola White, Assistant Auditor-General (Legal). 20 February 2013, Wellington.

Staff from Performance Audit Group, Office of the Auditor-General. 5 June 2013, Wellington.

Murray Petrie, fiscal transparency

Omar Aziz, John Creedy, and Alex Harrington (all with The Treasury) and Jim Gordon (Inland Revenue Department). 21 March 2013, Wellington (with Jonathan Dunn).

Carmel Peters, John Nash, David Corrigan, and Gordon Witte (all with Inland Revenue Department, Tax Policy). 26 March 2013, Wellington.

Ken Warren, Chief Accounting Advisor, and Becky Prebble, Senior Analyst, Treasury.
21 February 2013, Wellington.

Bryce Edwards, pillars 6, 9, and 10

Graeme Edgeler. 12 January 2013, Wellington.

Ian Fraser. 17 August 2013, Wellington.

Andrew Geddis. 8 February 2013, Dunedin.

Robert Peden. Telephone 15 March 2013.

Junior parliamentary press gallery journalist. 12 January 2013, Wellington.

Senior parliamentary press gallery journalist. 12 July 2013, Wellington.

Julian Inch, pillar 12

Fiona Alan, Chief Executive, Paralympics New Zealand. Informal input and comment.

Graham Cameron, Merivale Community Centre, Tauranga. Informal input and comment.

Raewyn Fox, Chief Executive, New Zealand Federation of Family Community Budgeting Services. Interview 21 August 2013 (with Liz Brown).

Trevor Garrett, former Chief Executive of the Charities Commission. March 2013.

Dave Henderson and David Robinson, Association of Non-Governmental Organisations of Aotearoa. Interview March 2013.

Lachlan Keating, Chief Executive, Deaf Aotearoa. Interview April 2013.

Makerita Makapelu, Wesley Community Action, Cannons Creek, Porirua. Interview April 2013.

Rachel Noble, Chief Executive, Disabled Persons Assembly. Interview April 2013.

Taku Parai (Ngāti Toa) and informants from several representative organisations in relation to Māori society.

Claire Teal, Programme Manager, Volunteering New Zealand; previously with Wellington Citizens Advice Bureau, and former social worker, Child, Youth and Family. Interview March 2013.

Fuimaono Tuiasau and informants from several representative organisations in relation to Pasifika society.

Dr Judy Whitcombe, member, New Zealand Federation of Graduate Women (Wellington), Zonta (Mana), and National Council of Women (Wellington). Interview March 2013.

Disabled persons organisations involved in the Convention Coalition also provided informal input and comment.

Suzanne Snively, socio-economic foundation, pillars 5 and 9, 12, and 13

Michael Cullen, Wellington. Three interviews with the final on 24 October 2013.

Gary Hawke, Emeritus Professor, Economics, Wellington. August 2013.

Girol Karacaoglu, Deputy Secretary, The Treasury. Wellington, August 2013.

Stefan Linssen, Chief Editor, *Ethisphere*. Wellington, December 2012.

Max Rashbrooke, Senior Journalist and Author. Wellington, August 2013

Gavin White, Pillar 13 (*all interviews conducted on a confidential basis*)

Exporter – adviser/infrastructure. Telephone interview 12 April 2012.

Exporter – adviser/infrastructure. Telephone interview 23 April 2012.

Exporter – education services. Telephone interview 16 April 2012.

Exporter – fashion and textiles. Telephone interview 26 April 2012.

Exporter – food and beverage. Telephone interview 16 April 2012.

Exporter – food and beverage. Telephone interview 14 May 2012.

Exporter – food and beverage. Telephone interview 24 May 2012.

Exporter – primary products. Telephone interview 24 May 2012.

Exporter – recent start-up. Telephone interview 19 April 2012.

Exporter – tourism. Telephone interview 18 April 2012.

Fuimaono Tuiasau, Pasifika perspective

Vilimane Davu, Teacher.

Frank Godinet, President, Auckland District Law Society.

John Kotuisuva, Chair, Fiji Association Auckland.

Dr Jean Mitaera, Lecturer, Whitireia Community Polytechnic.

Richard Pamatatau, Senior Lecturer, AUT.

Kiwi Tamasese, Senior Therapist, Researcher, Anglican Family Centre.

Ronji Tanielu, Policy Adviser, Salvation Army.

Lani Tupu Snr, Treasurer, Methodist Church (national).

Betty Sio, General Manager, The Project.

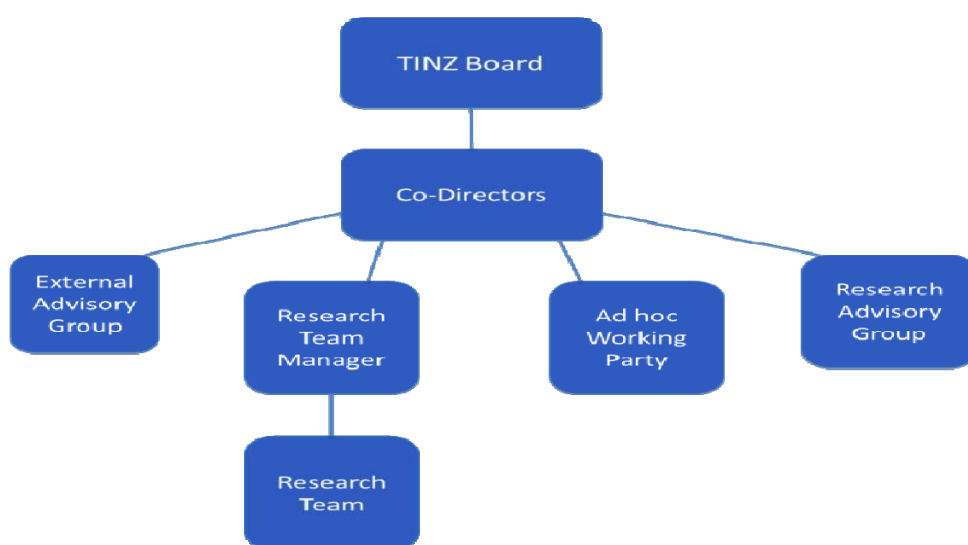
Nove Vailaau, Ekalesia Faapotopotoga Kerisiano Samoa (Samoan Congregational Church)

Su'a Viliamu Sio, Member of Parliament.

Appendix 2: National Integrity Assessment 2013: Project governance, management, and finances

Governance and management

Figure 17: New Zealand National Integrity Survey project management structure



The TINZ Board retained overall oversight and responsibility for the NIS assessment, in accordance with the memorandum of understanding between TINZ and TI-S. The board approved a structure in which the chair and deputy-chair of the board were designated as co-directors of the NIS.

The co-directors were responsible for all decisions on project design, management, resourcing, and implementation, including the content of reports, within parameters the board set.¹¹²⁶

Reporting directly to the co-directors was a research team manager (Liz Brown) who was recruited at the outset and attended a training course on the NIS methodology conducted by TI-S in Berlin in September 2012. The research team manager assumed overall responsibility for directing and supervising the large research team, and ensuring all research outputs and the final report were delivered on time and to an acceptable standard.¹¹²⁷

Between June 2012 and May 2013, TINZ recruited a highly qualified research team that eventually numbered more than 30 (researchers are listed by pillar in the acknowledgements section of this report). The objective of assembling such a large

¹¹²⁶ One of the co-directors also wrote the section on the economic foundation, while the other co-director completed the research for, and the supplementary paper on, fiscal transparency.

¹¹²⁷ The research team manager also conducted the research for, and wrote the pillar report on, the Ombudsman (pillar 7).

team was to ensure in-depth specialist expertise for each pillar and additional desk research and consultation time for each pillar and foundation topic.¹¹²⁸

The large number of researchers also provided a diverse background. The researchers included current academics from three different New Zealand universities across a range of disciplines (law, political science, public management, and environmental policy). Many researchers had worked at senior levels in government and watchdog institutions, and included a former Speaker of Parliament and former minister of the Crown, a former Police Commissioner, and a former chief executive of a government department. Others included an investigative journalist, a business commentator, a regular political commentator, a kaumātua (Māori elder), and several New Zealand-based international consultants in diverse fields.

This approach to the research allowed a large number of interviews and consultations to be conducted – over 100 for the whole NIS. Each researcher was also encouraged to individually seek peer review of their draft pillar or supplementary reports from recognised independent experts (as well as checking factual matters with the pillar entity being assessed). About 25 expert reviews of this type were obtained.

A key additional quality control mechanism for the NIS was the Integrity Plus Research Advisory Group (IPRAG), which the co-directors established to provide further quality assurance and advice on technical matters. IPRAG comprised independent experts from diverse backgrounds, was chaired by Helen Sutch, a former senior official in the New Zealand government who subsequently had a long career in the World Bank, specialising in governance and anti-corruption.

IPRAG's key functions were to support the co-directors by:

- i. advising on the main aspects of project design and implementation, especially on research methodology
- ii. reviewing and commenting on all draft material, including all the pillar reports (from first to final drafts), scores, and individual chapters in the final report.
- iii. advising on consistency of approach across pillars, assisting in identifying cross-cutting issues, and checking the NIS indicator scores for consistency with the text.

The group's full Terms of Reference are reproduced at the end of this Appendix.

IPRAG's role, however, was advisory. It is not responsible for the text of the report or the final scores.

In view of the substantial financial contributions from domestic public sector entities and to increase the likelihood that the recommendations in the final report would be implemented, TINZ also established the External Advisory Group (EAG), comprising representatives of the New Zealand entities that provided financing (including in-kind contributions) for the project, most of which have also committed to the implementation

¹¹²⁸ Although there were costs of additional project management time, additional efforts to ensure consistency of approach across all the researchers and time spent by researchers in review, the benefits were that a wider group is now familiar with the assessment process.

phase to follow the 2013 assessment. The EAG was chaired by TINZ patron Sir Anand Satyanand, was supported by a secretariat provided by the Office of the Auditor-General, and had its own terms of reference (reproduced at the end of this Appendix). EAG members had significant relevant knowledge, access to factual material, and experience, which resulted in helpful comments on draft pillar reports and more accurate and complete final reports.

To preserve the actual and perceived independence of the NIS assessment, the EAG had no decision-making or formal review function. In all cases, the judgement and decision on the pillar reports remained with the individual researchers, NIS project team, and co-directors and, ultimately, the TINZ Board.

The following are the key milestones for this assessment.

In May 2012, the Office of the Auditor-General suggested updating the 2003 New Zealand NIS assessment to mark the centenary of the Public Service Act 1912.

The TI-S provided an initial estimated budget for the project, noting that the usual cost was in the order of 150,000 euros, usually funded by aid agencies. In June 2012, TINZ prepared a project proposal that attracted initial seed funding from the Office of the Auditor-General and support for raising funds from other sources, thus enabling the study to commence.

On 3 September 2012, the TINZ Board endorsed the project purpose statement agreed with the TI-S and incorporated in a memorandum of understanding with the TI-S.

A large number of official entities and a private foundation committed funding to meet the direct costs of the NIS (see sub-section II below on project finances).

On 13 November 2012, the project was launched officially at a day-long event at the Victoria University of Wellington School of Government. At the launch, 20 break-out groups commenced detailed discussions about the different pillars.

In the first part of 2013, TINZ and the Victoria University of Wellington Institute of Governance and Policy Studies co-hosted two seminars on topics covered in the NIS.

On 8 May 2013, the first wave of emergent findings was released at a seminar at Victoria University of Wellington, and five draft pillar reports and three supplementary papers for the public sector pillar were posted on the TINZ website for comment.

On 14 August 2013, a public forum was held at the University of Auckland Business School, at which the second wave of emergent findings were presented.

On 30 August 2013, IPRA held a scoring meeting to review and moderate pillar scores and make recommendations on their consistency.

On 9 September 2013, the TINZ Board met to discuss and ratify the key findings of the draft final report and the recommendations to be discussed at an NIS workshop. The board met again on 7 October 2013 to review the scores and process for ratifying the final report.

In the final NIS workshop, in Wellington on 16 September, the draft final report was used as a platform from which to engage with a wide variety of stakeholders on the findings and recommendations and on the priorities for anti-corruption policy, and to build momentum for reforms to strengthen integrity and the quality of governance in New Zealand.

Project Finances

2013 National Integrity Assessment

Summary of income and expenditure to 31 October 2013

Income	Actual year ended. 30 June 2013 (\$)	Actual July–October 2013 (\$)	Total (\$)
Ministry of Justice	30,000	-	30,000
Ministry of Social Development	10,000	-	10,000
Thorndon New World	200	-	200
Civil Aviation Authority	5,000	5,000	10,000
Department of Corrections	5,000	-	5,000
Department of Internal Affairs	5,000	-	5,000
Department of Conservation	5,000	5,000	10,000
Inland Revenue Department	5,000	-	5,000
Maritime New Zealand	5,000	5,000	10,000
Ministry for Primary Industries	5,000	5,000	10,000
Ministry of Transport	5,000	5,000	10,000
New Zealand Defence Force	5,000	5,000	10,000
New Zealand Transport Agency	5,000	5,000	10,000
Statistics New Zealand	5,000	-	5,000
Te Puni Kōkiri	5,000	5,000	10,000
The Gama Foundation	15,000	10,000	25,000
Office of the Auditor General	30,000	15,000	45,000
State Services Commission	10,000	-	10,000
Statistics New Zealand (additional contribution)	10,000	-	10,000
The Treasury	30,000	-	30,000
Total income	195,200	65,000	260,200
Expenditure	Actual year ended 30 June 2013 (\$)	Actual July–October 2013 (\$)	Total (\$)
Personnel			
Co-direction*	45,500	20,000	65,500
Lead researchers	80,250	50,710	130,960
Researchers	31,200	250	31,450
Administrative support	4,234	2,639	6,873
Workshops	-	1,249	1,249
Administration	2,500	2,055	4,555
Travel & meeting expenses	2,201	1,703	3,904
Publication/dissemination			
NIS launch	7,519	-	7,519
Contingency	916	-	916
Total project costs	174,320	78,606	252,926
*Includes Admin Murray Petrie received no payment			
Surplus / (deficit)	20,880	-13,606	7,274

Organisations made significant pro bono contributions in the form of advisory time, access to meeting rooms, conference call facilities, hospitality, administrative assistance, travel, printing, and so on. The organisations included:

Auckland Chamber of Commerce
BDO Spicers
Bell Gully
Business New Zealand
Chapman Tripp
Chen Palmer
Claudia Orange
Matthew Palmer and Thorndon Chambers
Deloitte
Financial Services Complaints Limited
Gibson Sheat
Human Rights Commission
Institute of Directors
Institute of Governance and Policy Studies, Victoria University of Wellington
Juliet McKee
KPMG
Local Government New Zealand
MediaWeb (New Zealand Management magazine)
Ministry of Business, Innovation and Employment
Ministry of Pacific Island Affairs
New Zealand Trade and Enterprise
PwC
Russell McVeagh
School of Governance, University of Auckland
School of Government, Victoria University of Wellington
Te Papa
UMR Research Ltd

Terms of reference for the Integrity Plus Research Advisory Group (IPRAG)

Integrity Plus Research Advisory Group: quality assurance

Overall aim:

The NIS Report will be accepted as methodologically sound, well grounded in facts and analysis, and as having done justice to the good governance principles embodied in the questionnaire and the Integrity Plus objectives. The report, therefore, will be taken seriously and its recommendations acted on.

List of review questions and criteria:

Do the pillar reports and other relevant sections of the NIS Report adequately respond to the questions in the TI questionnaire, to the additional questions on the Treaty of Waitangi, and to the need to draw out implications for good governance values and principles? (This is needed so as to make this NIS go beyond the usual template and add a credible Integrity Plus dimension.)

Has each pillar been treated in a consistent way and with the same degree of rigour? (the NIS will seek to identify the strongest and weakest pillars so there needs to be a consistent basis for comparison).

Are the findings justified by the evidence and analysis brought to bear?

Are the recommendations well founded, and are they clear and credible in the wider context in which recommendations would have to be implemented?

Members of the Integrity Plus Research Advisory Group

Members joined the group at different times and are listed by length of membership.

Member	Role	Description
Helen Sutch (Chair)	Public Economist	Chair of the Governance Committee, Victoria University Council. After posts in the New Zealand public service, the UK Government Economic Service, and the OECD, Helen specialised in development, governance, and anti-corruption at the World Bank.
Geoff Fougere	Sociologist	Senior lecturer, Department of Public Health, University of Otago, Wellington. Geoff is a former member and chair of several ministerial and other advisory committees on health policy.
Te Huia Bill Hamilton, Ngāti Kahungunu, Ngā Rauru, Ngāti Raukawa, Kotimana	Manager, Human Rights Commission	Manager for Te Mana i Waitangi and works with Māori communities at the New Zealand Human Rights Commission. Bill has a background in education, union work, and iwi governance.
Michael Macaulay	Acting Director, Institute of Governance and Policy Studies	Associate Professor (Public Management), School of Government, Victoria University, Wellington. Michael was lead researcher for the UK National Integrity System Assessment.
Hemi Toia, Te Mahurehure	Māori business management specialist	General Manager, Ngati Rarua Iwi Trust, and a specialist in Māori business development. Hemi is a former academic from Victoria University of Wellington and the University of Auckland.
Michael Powles	Former Ambassador and Human Rights Commissioner	Former New Zealand Ambassador in Asia-Pacific countries and at the United Nations, and later, a Human Rights Commissioner with Treaty of Waitangi responsibilities and founding Chair of the Pacific Cooperation Foundation.
Robert Gregory	Emeritus Professor of Political Science, Victoria University of Wellington	Emeritus Professor of Political Science in the School of Government, Victoria University of Wellington. Robert has specialised in public administration and policy, with particular reference in recent years to issues of accountability, responsibility, and corruption.
Deborah Battell	Banking Ombudsman	Deborah previously held senior management positions at the Commerce Commission. These positions aimed to hold New Zealand businesses to the highest standards of integrity, ensuring that consumers have information to enable good purchasing or investment decisions.

Terms of reference for the External Advisory Group (EAG)

Purpose

The purpose of the external advisory group is to provide a forum for sharing of information about and communicating the results of Transparency International New Zealand's (TINZ) National Integrity Study to promote understanding and improvement in New Zealand's system of national integrity.

Membership

The external Advisory Group is chaired by former Governor General, Ombudsman and patron of TINZ, the Rt Hon Sir Anand Satyanand. Its initial membership is from representatives across the pillars including SSC, Statistics, Treasury, MSD, Office of the Ombudsmen, Human Rights Commission, Transport, DoC, and Defence from entities providing funding support to the National Integrity System (NIS). Other stakeholders will be solicited. The Office of the Auditor-General (OAG) is the Secretariat for the Advisory Group. Meetings are attended by officers of Transparency International New Zealand and of the NIS project team and steering committee as required.

The External Advisory Group and its member entities are not involved in the governance, management or operation of TINZ or the NIS project to preserve the need for independence of:

TINZ in its decision-making and activity for itself (including for the NIS): each member entity in respect of its responsibility to carry out the mandate of its organisation.

Preserving independence

To achieve this independence, the External Advisory Group's focus is on matters to achieve its purpose through activities set out below. The Group does not have decision-making for the NIS research programme or the NIS Assessment Report.

Activities

The External Advisory Group will support TINZ in carrying out the project through:

being aware of and supporting TINZ in carrying out of the study;

providing expert advice and offering recommendations on matters related to the areas of the study;

providing feedback on matters of factual accuracy, emphasis and fairness on the draft study report; and

supporting the project by participating in and promoting workshops and forums.

Following completion of the study the External Advisory Group will identify from the Study report's recommendations mutually beneficial work, including through:

disseminating and communicating report findings and recommendations within our organisation and with our stakeholders;

carrying out joint seminars and presentations to encourage shared knowledge about integrity and transparency trends, challenges and risks;

devising projects and initiatives to make progress on the NIS recommendations.

Endeavouring to share the information

Appendix 3: Excerpts from the United Nations Convention against Corruption

Article 5. Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

Article 7 Public Sector

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

Article 13. Participation of society

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
 - (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
 - (b) Ensuring that the public has effective access to information;
 - (c) Undertaking public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or ordre public or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Appendix 4. United Nations Guiding Principles on Business and Human Rights

Protect, Respect, Remedy: United Nations Guiding Principles on Human Rights and Business – brief summary

The first international, definitive framework establishing principles for implementation, to address human rights issues in the context of business. Guiding Principles were endorsed by the UN Human Rights Council on 16 June 2011

Major step as UN institutions not traditionally focused on private sector actors. This left a so-called international governance gap (often outside of domestic frameworks and international laws). This gap was recognised by the UN in the 2000s with the appointment of the UN Special Representative.

The Guiding Principles provide an implementation framework for the Protect, Respect and Remedy Framework which was endorsed by the Human Rights Council in 2008

The core ideas of the framework are, as the name indicates:

- Protect, Respect, Remedy; and
- Do no harm

The framework is an internationally agreed roadmap for addressing human rights impacts and aspects of business. Taken together, the framework and the Guiding Principles can be seen as emerging international human rights norms in this area, however, they do not create new international law obligations

The Guiding Principles are grounded in recognition of:

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights;
- The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Guiding Principles apply to all States and all business enterprises – transnational and others, regardless of size, sector, location, ownership and structure.

They should be implanted in a non-discriminatory manner and with particular attention to rights and needs of individuals from groups or populations which may experience heightened risk of vulnerability, and with regard to the differing risks faced by women and men.

The Guiding Principles are focused on implementation of the framework – giving clear recommendations for how to uphold and protect human rights in business operations, and defining the duties incumbent on business. This involves:

- risk assessment
- development of policies and procedures

The Guiding Principles are divided in the following three sections:

Role of the State – duty to protect

The core principle here is that “States must protect against human rights abuse within their territory and jurisdiction by third parties, including business enterprises, and this includes taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.

Corporate social responsibility to protect

The foundational principle here is that “Business enterprises should respect human rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impact with which they are involved”.

Operationally, this requires that businesses have policies and processes in place to support this:

- A policy commitment to meet their responsibility to respect human rights
- A human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights
- Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

The concept of human rights due diligence is clearly outlined in guiding principle 17. It should identify human rights risks, put in place procedures to prevent violations, and put in place procedures to mitigate negative impacts if violations occur, and should be ongoing to identify risks over time

Additionally, to gauge human rights impacts, businesses should undertake human rights impact assessments and integrate the findings into their operations appropriately, and track effectiveness over time, and in instances where human rights violations occur, businesses must undertake appropriate remedial action.

Access to remedies

The core principle here is that States must take appropriate steps to ensure, through judicial, legislative, administrative and other appropriate means that when business related human rights abuse occurs within their territory or jurisdiction, that those affected have access to an effective remedy

Note that corporate legal accountability is a growing field of human rights litigation. This is really coming to bear in legal regimes with extraterritorial reach, such as the Alien Tort Claims Act in the United States. A helpful place for more information on case law in this area is the *Corporate Legal Accountability Portal*.

UN Global Compact

The UN Global Compact is another UN led initiative that is important to mention in the business and human rights context

Established in 2000, the UNGC is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with 10 universally accepted principles in the areas of human rights, labour, environment and anti-corruption.

Overall, the Global Compact pursues two core goals:

- Mainstream the 10 principles in business activities around the world
- Catalyse actions in support of broader UN goals, including the Millennium Development Goals

Six UN agencies support the UNGC: UNEP, ILO, OHCHR, UNDP, UNIDO, UNODAC.

The Ten Principles that the UNGC asks companies to embrace, support and enact within their sphere of influence are grouped into 4 categories:

Human Rights

- 1) Businesses should support and respect the protection of internationally proclaimed human rights; and
- 2) make sure that they are not complicit in human rights abuses.

Labour

- 3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- 4) the elimination of all forms of forced and compulsory labour;
- 5) the effective abolition of child labour; and
- 6) the elimination of discrimination in respect of employment and occupation.

Environment

- 7) Businesses should support a precautionary approach to environmental challenges;
- 8) undertake initiatives to promote greater environmental responsibility; and
- 9) encourage the development and diffusion of environmentally friendly technologies.

Anti-corruption

- 10) Businesses should work against corruption in all its forms, including extortion and bribery.

Relevant links:

- UN Office of the High Commissioner for Human Rights – Business and Human Rights page: www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx
- Business and Human Rights Resource Centre – Portal of the UN Secretary-General's Special Representative on business and human rights: www.business-humanrights.org/SpecialRepPortal/Home
- United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises:
www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx
- UN Global Compact: www.unglobalcompact.org/Issues/human_rights/index.html
- OECD Guidelines for Multinational Enterprises:
www.oecd.org/daf/inv/mne/48004323.pdf
- The Arc of Human Rights Priorities: A new model for managing business risk:
www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/9June09_Arc_of_Human_Rights_Priorities_-_Road_Testing_Version.pdf

Appendix 5: Open Government Partnership

Open Government Declaration

September 2011

As members of the Open Government Partnership, committed to the principles enshrined in the Universal Declaration of Human Rights, the UN Convention against Corruption, and other applicable international instruments related to human rights and good governance:

We acknowledge that people all around the world are demanding more openness in government. They are calling for greater civic participation in public affairs, and seeking ways to make their governments more transparent, responsive, accountable, and effective.

We recognize that countries are at different stages in their efforts to promote openness in government, and that each of us pursues an approach consistent with our national priorities and circumstances and the aspirations of our citizens.

We accept responsibility for seizing this moment to strengthen our commitments to promote transparency, fight corruption, empower citizens, and harness the power of new technologies to make government more effective and accountable.

We uphold the value of openness in our engagement with citizens to improve services, manage public resources, promote innovation, and create safer communities. We embrace principles of transparency and open government with a view toward achieving greater prosperity, well-being, and human dignity in our own countries and in an increasingly interconnected world.

Together, we declare our commitment to:

Increase the availability of information about governmental activities. Governments collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities. We commit to promoting increased access to information and disclosure about governmental activities at every level of government. We commit to increasing our efforts to systematically collect and publish data on government spending and performance for essential public services and activities. We commit to proactively provide high-value information, including raw data, in a timely manner, in formats that the public can easily locate, understand and use, and in formats that facilitate reuse.

We commit to providing access to effective remedies when information or the corresponding records are improperly withheld, including through effective oversight of the recourse process. We recognize the importance of open standards to promote civil society access to public data, as well as to facilitate the interoperability of government information systems. We commit to seeking feedback from the public to identify the information of greatest value to them, and pledge to take such feedback into account to the maximum extent possible.

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

Implement the highest standards of professional integrity throughout our administrations. Accountable government requires high ethical standards and codes of conduct for public officials. We commit to having robust anti-corruption policies, mechanisms and practices, ensuring transparency in the management of public finances and government purchasing, and strengthening the rule of law. We commit to maintaining or establishing a legal framework to make public information on the income and assets of national, high ranking public officials. We commit to enacting and implementing rules that protect whistle-blowers. We commit to making information regarding the activities and effectiveness of our anti-corruption prevention and enforcement bodies, as well as the procedures for recourse to such bodies, available to the public, respecting the confidentiality of specific law enforcement information. We commit to increasing deterrents against bribery and other forms of corruption in the public and private sectors, as well as to sharing information and expertise.

Increase access to new technologies for openness and accountability. New technologies offer opportunities for information sharing, public participation, and collaboration. We intend to harness these technologies to make more information public in ways that enable people to both understand what their governments do and to influence decisions. We commit to developing accessible and secure online spaces as platforms for delivering services, engaging the public, and sharing information and ideas. We recognize that equitable and affordable access to technology is a challenge, and commit to seeking increased online and mobile connectivity, while also identifying and promoting the use of alternative mechanisms for civic engagement. We commit to engaging civil society and the business community to identify effective practices and innovative approaches for leveraging new technologies to empower people and promote transparency in government. We also recognize that increasing access to technology entails supporting the ability of governments and citizens to use it. We commit to supporting and developing the use of technological innovations by government employees and citizens alike. We also understand that technology is a complement, not a substitute, for clear, useable, and useful information.

We acknowledge that open government is a process that requires ongoing and sustained commitment. We commit to reporting publicly on actions undertaken to realize these principles, to consulting with the public on their implementation, and to updating our commitments in light of new challenges and opportunities.

We pledge to lead by example and contribute to advancing open government in other countries by sharing best practices and expertise and by undertaking the commitments expressed in this declaration on a non-binding, voluntary basis. Our goal is to foster innovation and spur progress, and not to define standards to be used as a precondition for cooperation or assistance or to rank countries. We stress the importance to the promotion of openness of a comprehensive approach and the availability of technical assistance to support capacity- and institution-building.

We commit to espouse these principles in our international engagement, and work to foster a global culture of open government that empowers and delivers for citizens, and advances the ideals of open and participatory 21st century government.

Appendix 6: Author biographies and report responsibilities

Author	Responsibility
Sophie Bond – Senior Lecturer, Geography Department, University of Otago.	Supplementary paper on environmental governance
Howard Broad, CNZM, LLB (VUW), Dip NZ Pol (RNZPC) – former New Zealand Commissioner of Police, Transport Accident Investigation Commissioner, Public Sector Consultant, Acting Chief Executive, Turn Your Life Around Youth Development Trust.	Assistance with law enforcement agencies (pillar 5)
Liz Brown, ONZM, MA (Oxon), MPP (VUW) – former Banking Ombudsman.	Ombudsman (pillar 7), Chapter 1, and general oversight
Ralph Chapman – Associate Professor and Director, Graduate Programme in Environmental Studies, Victoria University of Wellington.	Supplementary paper on environmental governance
Claire Charters, BA (Otago), LLB(Hons) (Otago), LLM (NYU), PhD (Cantab) – Ngāti Whakaeue, Ngā Puhi, Ngāti Tūwharetoa, and Tainui – Senior Lecturer, Faculty of Law, University of Auckland.	Chapter 2 (Treaty of Waitangi)
Keric Chin, BS (United States Air Force Academy), MA (East-West Center Graduate Degree Fellow, University of Hawaii), JD (Honours) (University of Texas), LLM (The Judge Advocate General's Legal Center and School).	Supplementary paper on public procurement and assistance with public sector (pillar 4)
Stephen Drain – Director in PwC's Forensic Services team, specialising in the prevention of, detection of, and response to financial crime, particularly fraud, corruption, and money laundering.	Chapters 3 and 4
Dr Bryce Edwards – Lecturer in politics, University of Otago, teacher and researcher in aspects of New Zealand politics, in particular, elections, political parties, public policy, and political communications.	Electoral management body (pillar 6), political parties (pillar 10), media (pillar 11), parts of Chapter 2 (political-institutional and socio-political foundations)
Eddie Goldberg – independent environmental consultant	Supplementary paper on environmental governance
Nicky Hager, BSc (physics), BA Hons (philosophy) – author and investigative journalist, Wellington.	Law enforcement agencies (pillar 5), assistance with Chapters 3 and 4 and business (pillar 13)
Ash Johnstone, Dip Bus Studies (ACC) – Senior Investigator, Interpol, New Zealand Police.	Assistance with Chapters 3 and 4, law enforcement agencies (pillar 5), business (pillar 13)

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Appendix 6: Author biographies and report responsibilities

Author	Responsibility
Rae Julian, QSO – National President, UN Women National Committee New Zealand, previously Executive Director, New Zealand Council for International Development, and Commissioner, New Zealand Human Rights Commission.	Assistance with civil society (pillar 12)
Justin Kerr, BCA (VUW), DipBank (Massey) – former Executive Director, Financial Services Federation.	Assistance with business (pillar 13, finance sector)
Rob Laking, BA (VUW), MPA (Harvard) – Senior Associate, Institute of Government and Policy Studies, Victoria University of Wellington.	Supreme audit institution (pillar 8)
Chris Livesey, BA (Hons), BSc – independent public policy (environmental and economic) consultant, owner and manager of a small commercial forest, co-owner of a block of native bush held for conservation purposes.	Chapter 2 (environment foundation) and supplementary paper on environmental governance
Alex Matheson, MA (Cantab), Master of International Law (ANU), DipMgt (Templeton College, Oxford), former New Zealand senior executive service member in three departments, senior public management adviser Commonwealth Secretariat, and Head, Budgeting and Management Division, Governance Directorate OECD.	Legislature (pillar 1), executive (pillar 2), public sector (pillar 4)
Kristin Mednis – studying bioethics and health law at the University of Otago, formerly with the Office of the Auditor-General.	Supplementary paper on Crown entities and assistance with public sector (pillar 4)
Taku Parai – Pou Arahi (Education Review Office), Chair of Te Rūnanga o Ngāti Toa, Kaumātua of Whitiāreia New Zealand and member of its Executive Team.	Assistance with Māori perspective in Civil Society and Business
William (Bill) Paterson, BE(Hons), PhD (Canterbury), MIPENZ – independent consultant (infrastructure governance) in Wellington, former Lead Infrastructure Specialist, World Bank.	Supplementary paper on public procurement and assistance with public sector (pillar 4)
Murray Petrie, MPA (Harvard) PhD (Public Policy) (VUW) – Lead Technical Advisor to the Global Initiative for Financial Transparency, worked for the New Zealand Treasury, since 1997 has consulted on public financial management for New Zealand government agencies, the International Monetary Fund, World Bank, and International Budget Partnership.	Supplementary paper on fiscal transparency, executive summary, Chapters 1 and 6
Dr Murray Sheard, BE, MA, PhD – Education and Advocacy Manager at TEAR Fund NZ; founder of The Kitchen, innovation hub for social entrepreneurs, former Director of Professional Integrity Education at Integrity Action (London and Jerusalem), former secretary of the <i>Arab Journal of Public Integrity Management</i> .	Chapters 3 and 4

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Author	Responsibility
Patrick Smellie – Wellington-based journalist and co-founder of the BusinessDesk business news wire service, which services all major New Zealand news sources and is distributed in Australia.	Business (pillar 13)
David Smyth – formerly previously a public servant in New Zealand, including appointments as Deputy Commissioner, State Services Commission, and Chief Executive, Ministry of Housing; recently a consultant on aspects of public sector governance, performance, and risk management.	Executive summary, Chapters 1 and 6
Suzanne Snively, MA Distinction (Victoria), BA Hons (Victoria), BA Econ (Reed College, Portland, Oregon) – economist, former partner PwC with experience in governance through civil society organisations and business.	Chapter 2 (socio-economic foundation) and assistance with business (pillar 13)
Alison Stephens, BA – has worked on policy projects in the justice sector for 18 years.	Chapter 2 (socio-cultural foundation)
Amanda Thomas – PhD candidate, Geography Programme, Victoria University of Wellington.	Supplementary paper on environmental governance
Fuimaono Tuiasau, LLB, BA (University of Auckland).	Assistance with Pasifika perspectives
Ian Tuke – leads the Counter Fraud Service for the New Zealand Deloitte Forensics team.	Chapters 3 and 4
Michael Wearne, BA, MPP, COP Public Sec Acctg (VUW), DipTP, MTP (UA), MNZPI (retired), MRTPI (until 2012) – international consultant, public sector modernisation, 1997–2010; Director, Research, Development and Training, then Manager Policy and Research, New Zealand Local Government Association Inc, 1989–1997; Planning Advisor, New Zealand Planning Council; Urban and Regional Planner, New Zealand, London (UK), Australia and Hong Kong, 1970–1989.	Additional paper on local government, assistance with public sector (pillar 4, local government)
Gavin White, MA (Hons) (University of Auckland) – Research Director with UMR Research.	Assistance with business (pillar 13, overseas trade)
Margaret Wilson, LLB(Hons), MJur (1st), Honorary Doctorate (University of Waikato) – Professor of Law and Public Policy, University of Waikato, former Attorney-General and Associate Minister of Justice, former Law Commissioner.	Judiciary (pillar 3)