‘Reflections’ on the Commentary contained in the Report by the Economic Development, Science and Innovation Committee on the Digital Identity Services Trust Framework (DISTF) Bill 78-2 (2021)

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Foreword

The future of the trust economy, public-private sector services, and digital equity for individuals is dependent on the future of digital identity. The convergence of the digital and physical worlds creates new opportunities for all players in the ecosystem but improving trust and delivering on those opportunities requires a new vision of digital identity underpinned by a trust framework consisting of a set of rules and standards.

This ‘Reflections’ document is intended to serve as a contribution to the ongoing meta-level discussion and debate about the development of the DISTF bill for Aotearoa New Zealand.

As this legislation continues to evolve, the document can be understood as a community-led perspective that reflects the views from industry and DINZ members. The document does not constitute a political statement on behalf of DINZ, nor should it be interpreted as such. Likewise, the experts’ contributions do not imply any political statement on behalf of their respective organisations. This ‘Reflections’ document is intended for all stakeholders in New Zealand, whether from politics, business, academia, or administration, who are interested in the ongoing development of the DISTF bill and its future operation.

Under the umbrella of DINZ more than 70 entities, consisting of association members and politically neutral community partners, are working together to achieve this goal.

Select Committee Report commentary and DINZ’s Reflections report

The Economic Development, Science and Innovation Committee prepared and published a Report containing commentary on the Digital Identity Services Trust Framework Bill 78-2 (2021) following public submissions in December 2021, publishing the Report in April 2022.

Digital Identity New Zealand **(DINZ)** provided both written and oral submissions into the process in December 2021. Its DISTF Working Group (DISTF WG) has reviewed the Report’s commentary prepared by the Committee over the winter and sets out its reflections on that commentary below. DINZ welcomes the opportunity to be consulted and to provide further clarification and feedback.

DINZ understands that, at the time of writing, the DISTF Bill has passed its Second Reading and has been referred to the Committee of the whole House. The Government may decide to not allow for amendments in advance of the Bill's further progress. It could be that this Reflections document becomes especially relevant at the time of the two year review following enactment.

About DINZ

DINZ is a not for profit, membership-funded association and a member of the New Zealand Tech Alliance. DINZ is an inclusive organisation bringing together members with a shared passion for the opportunities that digital identity can offer. It supports a sustainable, inclusive and trustworthy digital future for all New Zealanders through its vision: that every New Zealander can easily use their Digital Identity in its mission to empower a unified, trusted and inclusive Digital Identity ecosystem for Aotearoa New Zealand that enhances Kāwanatanga (honourable governance), Rangatiratanga (self-determination & agency) and Ōritetanga (equity & partnerships).

Overall Support for the Report's commentary

Although the Select Committee's Report considered some of the recommendations arising from the public call for submissions as well as adding new ones itself, the DINZ DISTF WG believes that certain recommendations in its Report come with unanticipated and unintended consequences and certain others do not go far enough to ensure that the legislation operates smoothly and with satisfactory levels of adoption — the ultimate measure of success. DINZ generally endorses the Committee's Report commentary but offers its Reflections report in the spirit of 'getting-it-right-the-first-time'.

Sat Mandri and Colin Wallis
Co Chairs DISTF Working Group

Digital Identity Services Trust Framework Bill

Government Bill

As reported from the Economic Development, Science and Innovation Committee

Commentary

Recommendation

The Economic Development, Science and Innovation Committee has examined the Digital Identity Services Trust Framework Bill and recommends that it be passed. We recommend all amendments unanimously.

DINZ Comment: Overall, DINZ supports the recommended amendments as they do improve the bill, but the recommendations do not go far enough in some cases to avoid the likelihood of a significant number of changes at the 2 year review stage. DINZ appreciates that the Select Committee is supported by the advice of officials but in contrast to DINZ, it is not known if those officials have demonstrable practical experience of operating within a digital identity conformity assessment and certification scheme, to date only found overseas. This is an emerging area of domain expertise so not one official or expert may have all the answers to stand the best chance of the Act's ultimate broad acceptance, adoption and sustainable operation over time. Of course, not all areas of concern to industry raised by DINZ in its submission have been addressed by the Select Committee in its review e.g. the optics around the potential for conflict of interest if any entity involved in regulatory oversight also has a digital identity service operating in the ecosystem.

Introduction

About the bill

Digital identity services are tools, products, and services that allow the collection, sharing, or other use of information when authorised by individuals and organisations that own the information.

DINZ Comment: This very general and incomplete description of a DIS is not precisely what the bill is about. The bill has a clear focus on the legislation rather than defining what is to be regulated. As the Select Committee comments later, it encourages people to read the bill clause to understand its meaning. Perhaps the first paragraph of this Introduction could have been more thoughtfully worded, so that readers could pick up the essence of the purpose immediately.

As DINZ goes on to point out later, the fundamental problem here is that Clause 9 'The meaning of digital identity service' is incomplete and unhelpful for the target readership. It describes identification but does not describe important aspects of digital identity services such as its primary purpose - to authorise access to other digital services - which may include identification as the definition has done but also authentication and verification activities. Lastly, 'products' is not typically found in a digital identity service description, even if a commercial organisation providing such services may use that term.

This bill would establish the legal basis for a statutory trust framework for digital identity services. The Digital Identity Services Trust Framework seeks to support the provision of secure and trusted digital identity services for individuals and organisations, to give people more control over their information, to support people to prove who they are online, and to make it easier to access online services.

The bill would create an opt-in accreditation scheme for digital identity service providers (TF providers). It is envisioned that the service providers would include government departments, existing identity service providers, and other private sector organisations that verify identities. TF providers would be required to adhere to trust framework rules (TF rules), and would be able to use a mark to identify their accredited services. Users and parties that rely on digital identity services (for example, liquor stores asking for age verification) would not have to be accredited to use the accredited service. The bill would not override any obligations under the Privacy Act 2020.

The trust framework would be governed by the Trust Framework Board (the TF board). The TF board would be responsible for providing guidance about the TF framework, and monitoring the performance and effectiveness of the framework. It would also advise the Minister on the making and updating of the TF rules, including through consultation with interested parties. A Māori Advisory Group would advise the TF board on Māori interests and knowledge as they relate to the trust framework.

A Trust Framework Authority (the TF authority) would also be established to make decisions about accreditations, investigating complaints from the public or issues it identifies, enforcing the TF rules, and granting remedies for breaches.

The bill would come into effect on dates determined by Order in Council, or on 1 January 2024 if not yet in force.

DINZ Comment: While this Commentary was written prior to the announcement of the 22/23 Budget and could not have predicted that the budget would be severely cut for the DIA DISTF Programme to continue the development of the rules, standards and governance - thereby jeopardising the expectation that all the support processes would be in place by 1 January 2024 - the fact remains that subsequent review of the Commentary should acknowledge this likelihood. With the departure of expertise, competences, and the programme leadership, the DISTF programme's funding cut is set to have a profound impact. This may lead to significantly less engagement with the public, Māori & private sector stakeholders, and industries at the forefront of innovation, technological development, and advancement of the digital economy.

About the public submission process

We received over 4,500 written submissions on this bill. An overwhelming majority of submissions (4,049) were received in the last two days of our six-week public submission period, or after the six-week period ended. This included almost 3,600 between 8:00pm and 11:59pm on the last night alone.1 We attribute this influx to misinformation campaigns on social media that caused many submitters to believe that the bill related to COVID-19 vaccination passes. We note that submissions on this bill closed at the same time that the COVID-19 Protection Framework (known as the traffic light system) came into effect (11:59pm on 2 December 2021). This was coinci- dental. The commencement of the COVID-19 Protection Framework required members of the public to present vaccination passes (in digital or paper form) to enter many businesses.2 The Digital Identity Services Trust Framework Bill has no bearing on vaccination passes. Mandatory vaccination passes have since been phased out.

Many submissions also compared this bill to social credit systems, centralised state control of identity (for example, the removal of physical driver licences), and moving to a cashless society using digital currencies. None of these ideas are related to the content of this bill.

This bill seeks to put a framework in place so that, when New Zealanders choose to disclose their private information to online companies, those companies protect that data appropriately.

The exact text of the bill is publicly available, as is a clause-by-clause analysis detailing exactly how the bill seeks to protect the private data of New Zealanders when they choose to disclose their information.3 Before introducing the bill, the Department of Internal Affairs conducted targeted consultation with interested stakeholders. We encourage people to read about this bill's actual purpose, which we summarised above. We are pleased that advisers from the Department of Internal Affairs have stated that they are reviewing the public communication about this work, to ensure that the purpose and provisions of the bill are made clearer to the public.

DINZ Comment: DINZ supports the Select Committee's comment since it is clear that targeted consultation did not achieve the desired objective. DINZ sympathises with the dilemma facing DIA - to consult quickly so as to achieve the Government's objective of regulation within a 3 year parliamentary term - and yet carry the populace with it on such a foundational and sensitive topic as digital identity. Re-engagement will start from arguably a more entrenched position by those opposed to this bill, be that opposition based on disinformation or not. Having an independent body really is key to "trust" - a body other than the Government to undertake re-engagement would remove one further barrier to trust. There is opportunity for DINZ to be strategically funded and leveraged to support the re-engagement effort. The Government should take it.

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1 Submissions opened on 21 October 2021 and closed at 11:59pm on 2 December 2021.
2 The framework became law through the COVID-19 Public Health Response (Protection Framework) Order 2021.
3 Legislation can be found via the Parliament website and the Legislation website.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. Although advice we received did not directly address the matters we raised in this area, we have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

The rest of this commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

DINZ Comment: While it is too late for this review, we believe that technical aspects are essential to the efficient operation of the bill once enacted, and encourage any future reviews to include technical amendments in scope.

Digital identity services trust framework

Part 2 of the bill sets out the key concepts for the new regime. Clause 8 sets out what the main components of the trust framework would be:

- two administering bodies (the TF board and the TF authority)
- an accreditation regime for digital identity service providers and the digital identity services they provide
- rules and regulations that set requirements for accredited providers and accredited services
- approved marks to identify accreditations.

DINZ Comment: Regarding the 2nd bullet point above, it is good to note that DINZ's submission that the draft bill text confused/conflated the service and the service's provider was accepted in principle. But the point remains that the bill appears to have been drafted as if the service provider was the target of the accreditation and not the service. It's almost possible to envisage that after being pointed out to the drafter, a cursory and inconsistent rewording has taken place, resulting in text that is difficult to interpret. DINZ recommends that the bill undergo a comprehensive review to ensure that all wording focuses on the service, and not the service provider, to avoid the all-to-obvious unintended consequence of the public trusting a service provider of a service that is not in and of itself accredited.

Tiriti o Waitangi/Treaty of Waitangi

The bill as introduced includes requirements to consult and engage with Māori in decision-making. We recommend inserting clause 8A to consolidate and clarify these requirements, and to explain the ways in which the bill would recognise the Crown's responsibility to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi.

DINZ Comment: While DINZ supports the insertion of clause 8A reflecting its submission inference on this point, it continues to maintain that the wording can be improved, to remove any misinterpretation that Māori are engaged after the point that a proposal is made, rather than being an essential component of the co-creation of the process.

Changing "trust marks" to "accreditation marks", and making them apply only to services

As introduced, clause 12 of the bill provides that TF providers could use trust marks approved by the TF board to identify themselves and which of their services are accredited under the trust framework. Some submitters suggested that where a TF provider provides both accredited and non-accredited services, the bill should require them to make clear which services are accredited and which are not. We agree that it is important that people are clear about which services are accredited. Therefore, we propose that "trust marks" be renamed "accreditation marks" and only be issued for accredited services, and not for TF providers generally. We recommend amending clause 12(1) accordingly.

DINZ Comment: While it is great that the Select Committee accepted DINZ's submission on the point regarding the lack of clarity between accredited and non-accredited services offered by a TF provider, this recommended change actually accentuates another point lacking in clarity while attempting to resolve one. This stems from the fact that other schemes around the world familiar to DINZ members use the International Accreditation Forum (IAF) structure and the ISO 17000 series of standards as the backdrop to their conformity assessment and assurance regimes. In that standards suite the 'Accreditation Body (AB)' is the term used to apply to the body that accredits a 'Certification Body (CB)' to operate the scheme - in the UK for example the AB is UKAS (UK Accreditation Service) and CBs are the likes of Age Check Certification Scheme Ltd and Kantara Initiative. If that model were followed in NZ the equivalent would be JAS-ANZ. In NZ, where this legislation departs from the IAF model so as to align with the approach taken by Australia, the AB role roughly maps to that of the TF board and the CB role roughly maps to that of the TF authority. The ISO 17000 series uses the term 'Certification' for those providers or services receiving a mark from a CB to demonstrate audited compliance with a given standard. Some schemes use the term 'trust marks' as synonymous with 'certification marks'. The recommended change gives a term that already has an accepted meaning elsewhere a new meaning in NZ. This unintended consequence introduces a further point of friction into the march towards international interoperability beyond Australia for international TF providers operating certified services in other jurisdictions.

Trust framework rules

Content of TF rules and who can make them

Clause 17 allows for rules to be made to regulate the operation and administration of the trust framework. The Regulations Review Committee wrote to us about this provision.

As introduced, clause 17 provides that rules could be made either by Order in Council or by the Minister, and both would be known as TF rules. The bill does not specify which matters must be made by Order in Council on the recommendation of the Minister, and which matters can be addressed by rules set by the Minister. We consider that the bill should specify this distinction. The distinction would be based on the proposed content of the rules, which are set out in clause 19 as introduced. We discuss the distinctions below, and note that both rules made by Order in Council and those set by the Minister would have status as secondary legislation.

DINZ Comment: DINZ is supportive of the general intent of the Select Committee but has specific comments below regarding the substance.

Matters that should have regulations set by Order in Council

As introduced, clause 19(1)(a) provides that rules could prescribe the types of digital identity services that could be accredited under the bill. We consider that these should more appropriately be prescribed by regulations, which means that they should be made by Order in Council. We note that clause 9 of the bill sets out the meaning of digital identity services. It refers to a service or product that, either alone or together with 1 or more other digital identity services, enables a user to share personal or organisational information in digital form. The clause describes what types of things the service or products might do. We recommend amending clause 19 and inserting clause 9(3) accordingly to provide for the regulation-making power.

DINZ Comment: While DINZ is supportive of inserting clause 9(3), it points out that a: because 9(1) and 9(2) are deficient, the addition of 9(3) only partly ameliorates that problem while potentially creating a further one. It should be remembered that the rules and their requisite baseline standards have to be in place before accreditation can proceed, so in the case where the regulations must prescribe the types of digital identity services that may be accredited, that subsequent accreditation can't take place because the rules and standards aren't developed in advance as is the case with the initial suite of digital identity services delineated for the Act.

Similarly, we consider the matters set out in clause 19(1)(c) should be prescribed by regulations. They relate to self-assessments and reporting requirements for TF providers, compliance and dispute resolution processes, and other matters considered appro- priate by the TF board and Minister. We recommend inserting new clause 26A accordingly. We also recommend including the regulation-making power for setting cost-recovery fees in this new clause.

DINZ Comment: 26A is confusingly titled and drafted because it obfuscates the target service with the service provider providing it, which is not the target of the accreditation, but lies within the context of the target service and is responsible for certain activities, like reporting, that the inanimate service can't perform. This is a classic example of the conflation found throughout the text. A cursory effort has been made to turn this around, but scattered throughout the text are frequent instances where the text begins with TF providers, followed by 'and their services'. Detailed work is needed to redraft the bill to get this in the correct order.

Matters that could be addressed under rules set by the Minister

We understand that the content of the rules set out in clause 19(1)(b) are likely to be technical details. We consider that these matters could appropriately be decided by the Minister under a rule-making power. The matters include setting standards relating to identification management, privacy and confidentiality, information and data management, and the sharing and facilitation of information sharing.

DINZ Comment: It should be specified that the Minister only decides on these matters upon the express recommendation of the TF Board and its subject matter experts. Technical details and their impact in implementation and deployment need to be understood to avoid unintended consequences. We cannot just assume that the Minister has/had access to the technical expertise!

Further clarifications to rule-making power

Clause 18 as introduced sets out that the TF rules could apply to TF providers only to the extent relevant to the provision of accredited services. We recommend making it clear that the rules must not apply to digital identity services that are not accredited services.

DINZ Comment: 100% agree! It is good to see that the Select Committee took note of this point made in DINZ's submission.

We also recommend amending clause 19 to make it clear that:

- if there is inconsistency between a rule made by the Minister and a regulation made by Order in Council, the regulation takes precedence
- the TF rules do not override the Privacy Act 2020.

Consultation before recommending trust framework rules to Minister

Clause 20 sets out the consultation requirements that the TF board must follow before recommending draft TF rules to the Minister.

The clause lists who the TF board must invite submissions from. As introduced, subclause (1)(b) would require the TF board to consult "people or groups outside the board with expert knowledge of te ao Māori approaches to identity". We consider that the "people or groups outside the board" should instead be referred to as "tikanga experts who have knowledge of te ao Māori approaches to identity". We consider that this better reflects the level of expertise expected during consultation. We recommend that clause 20(1)(b) be amended accordingly.

DINZ Comment: DINZ fully supports this recommendation.

Reporting requirements for TF providers

Clause 41 would require TF providers to collect and keep required information about their activities, and give that information to the TF authority on request. The requirement is intended to assist the TF authority to carry out its functions. In practice, we think it would be helpful for there to be periodic reporting so that the TF authority has better oversight of the activities of TF providers. We recommend amending clause 41 to require TF providers to provide information periodically if required to do so, as well as at all reasonable times on request.

DINZ Comment: DINZ thinks what is meant is 'required information about their accredited services' activities'. It is another example of unhelpfully drafted text because it reinforces the incorrect inference that it is the TF provider that is the target of accreditation.

Trust Framework Board

Part 4 of the bill would establish the Trust Framework Board (TF board). Clause 42(1) provides that the Trust Framework Board is established to carry out the board's functions as set out in this legislation.

Commitment to principles of the Treaty of Waitangi/te Tiriti o Waitangi

As introduced, Clause 42(2) notes certain clauses applicable to Part 4 that provide a "practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi) for the governance and operation of the trust framework". The clauses referred to are clauses 20(1)(b), 46(2)(a) and (b), and 50 to 54.

Earlier in our report, we proposed that the bill include a standalone clause (new clause 8A) to list all the ways in which the bill must give effect to the principles of the Treaty of Waitangi/te Tiriti o Waitangi. In light of new clause 8A, clause 42(2) is duplication, and we recommend that it be deleted.

Functions of the Trust Framework Board

Clause 44 sets out the functions of the TF board. They include:

- recommending draft TF rules to the Minister, reviewing the rules, and recommending updates
- recommending regulations to the Minister
- educating and providing guidance to TF providers and the public
- monitoring the effectiveness of the trust framework
- carrying out other functions conferred on it by the bill or the Minister (to achieve the purpose of the bill)
- carrying out incidental functions.

We recommend including an express obligation on the board to engage with Māori in the manner provided for in new clause 52(4A) when performing its functions, in order to provide for Māori interests in the operation of the trust framework. We recommend inserting new clause 44(3) accordingly. We discuss new clause 52(4A) later in our commentary.

DINZ Comment: Regarding bullet #2, it should be appreciated that the job of the TF Board in this matter has become more difficult due to the targeted consultation model used at the outset not achieving the desired level of public understanding. The TF Board is likely to find itself 'behind zero' with entrenched negative views towards the draft legislation brought about by misinformation, which has filled the information vacuum in the absence of sufficient government-supported dissemination at the outset. Given that the TF Board will start from such a position, it is going to require much more than the efforts of the TF Board to achieve a successful outcome. The opportunity exists to partner with DINZ, the digital identity industry and the NGO sector more widely, to provide a broader base of education and guidance to make headway on turning the tide of public opinion in a positive direction. MBIE's approach to rolling out eInvoicing might be informative in this regard.

DINZ is supportive of the insertion of clause 44(3), while appreciating that 52(4A) is key to enabling 44(3) to operate optimally.

Appointment of Trust Framework Board members

Clause 46 sets out the process and requirements for appointing members to the TF board. Subclause (2) lists several areas of expertise that the chief executive must ensure are provided for when selecting the membership of the board. One of the factors listed is experience in engagement with Māori. However, as drafted, it could be interpreted that the experience in engaging with Māori must be in relation to technol- ogy and data management. We do not consider this to be the intent of the provision. We recommend redrafting clause 46(2) so that the board's membership must include people with experience in engaging with Māori in a more general sense.

DINZ Comment: DINZ disagrees with the SC's interpretation here. The TF Board must include both people with experience in engaging with Māori and people with experience in technology and data management. While supporting the SC's redrafting to include a wider scope, DINZ does not support the removal of the text pointing to specific expertise because it is the combination of understanding technology such as photography and biometrics, together with the identification processes arising from deploying these technologies and the experience of Te Ao Māori values and beliefs, that cuts to the intent of the provision. Redrafting in the manner recommended introduces a risk that the TF Board's decisions become technologically ill-informed with potentially disastrous consequences. Te Ao Māori values and beliefs must be fully accepted and DINZ is reminded of the inference it made in its submission: to encompass societal representation reflective of the community. With a population composed of almost 15% Asian cultures and 9% Pasifika , it is important to have their views represented also - not only for the optimisation of outcomes locally, but also for optimisation of interoperability with these jurisdictions when they undertake pre-agreement policy assessments.

Role of Māori Advisory Group

Clause 52 sets out the role of the Māori Advisory Group. Under clause 52(4), the board and the advisory group would be required to prepare an engagement policy setting out how they will work together. We think that the engagement policy should set out how and when the board and advisory group will consult with iwi and hapū to inform their decision-making and advice. We propose inserting new clause 52(4A) to make it clear that the engagement policy must include this information.

DINZ Comment: While DINZ is supportive of inserting new clause 52(4A) it believes it could go further so as to get to the heart of the issue with much of the Government's engagement with Māori - the issue being consultation after the fact rather than co-creation from the beginning. The clause as drafted does not make transparent the time of the engagement in comparison to the time of the development of the issue. Such specificity would make clear when the engagement took place in the context of what phase of development the issue was in.

Trust Framework Authority

Part 5 of the bill would establish the Trust Framework Authority (TF authority).

Functions of the TF authority

Clause 59 sets out the functions of the TF authority. The list of functions does not include reference to the intended role of the TF authority to undertake compliance monitoring of TF providers. We suggest this function be included in the list, and recommend inserting subclause (da) accordingly.

DINZ Comment: Since 'compliance monitoring' is not defined in Clause 5 Interpretation but merely inferred in 12(4) and other clauses, it is not clear to DINZ what the SC understands as the scope of activity that this encompasses. Is it really the intended role of the TF Board to actually do assessments themselves? DINZ appreciates that the TF Board has the responsibility and the oversight of the process but surely not to actually do the 'compliance monitoring' itself, if indeed the SC thinks that compliance monitoring equates to auditing/assessing.

Power to require information or documents

Clause 61 sets out the TF authority's power to require information or documents for the purposes listed in subclause (3). The purposes include assessing or investigating a complaint or investigating compliance. Later in our report, we propose giving the TF authority an express power to lift additional record-keeping and reporting requirements imposed under clause 82. So that it can assess whether those additional require ments should be lifted, we suggest that the TF authority should have a power to require information or documents for that purpose. We recommend inserting paragraph (ba) into clause 61(3) accordingly.

Clause 61(5) sets out the reasons why someone who receives a notice requiring information or documents may refuse to comply with it. The reasons include that the information or document would be privileged in court, or that disclosure would result in a breach of an obligation under another enactment (other than the Privacy Act 2020 or the Official Information Act 1982). We consider that the clause may create uncertainty about how the information-gathering power interacts with other statutory regimes covering the same information. We note that the clause is not intended to override other Acts that deal specifically with access to the information or documents. We recommend that clause 61(5) be amended to provide that a person can refuse to provide information or documents if another Act deals specifically with access to the information or documents.

Complaints, offences, and remedies

Part 6 of the bill sets out provisions that establish processes for dealing with complaints.

Principles for handling complaints under Part 6

Clause 67 sets out the principles that must guide the TF authority when dealing with complaints. One of the principles is having processes for complaints that are fair and accessible, and that have particular regard to tikanga Māori, if the complainant desires. We do not think the complainant should have to request that tikanga Māori be a part of complaints processes. We consider that tikanga should be incorporated into processes as a matter of course for all functions carried out by the TF authority. We recommend amending clause 67(b) accordingly.

How complaints are made

Clause 69 sets out the form and information requirements for a complaint to be made.

The bill as introduced would require a complaint to be made in writing. We acknowledge that this may be unnecessarily restrictive. We propose removing the requirement for a complaint to be in writing, and note that the TF authority would be required under the clause to provide reasonable assistance to a complainant to meet the form and information requirements for a complaint to be made. We recommend amending clause 69(1) accordingly.

DINZ Comment: DINZ notes that there is no explicit requirement that the complaint be recorded. It is not reasonable for a complaint to be made by the complainant verbally only, with no avenue available to record it in some form - video, audio or in writing. Having no recourse to a record of some kind could hinder the efforts of the TF authority and the accredited service's TF provider and may have implications for subsequent litigation. DINZ believes that the clause needs further amendment.

Clause 69(1)(c) requires that the complaint identify the relevant rule, regulation, term of use, or provision that is alleged to have been breached. We consider that this requirement is unnecessarily complex, restricting people's access to the complaints process. It should be sufficient for a complaint to describe the alleged breach and state why the complainant believes that a breach has occurred. Accordingly, we recommend that paragraph (c) be deleted.

DINZ Comment: DINZ is supportive of the deletion but notes that this puts more onus on the TF Board. It will have to be furnished with the requisite technical and legal capability to analyse the complaint to undertake this 'bridging' itself.

TF authority may decide not to consider complaint further

Clause 72 sets out the reasons why a TF authority might choose not to consider a complaint. We recommend amending the clause to make it clear that the TF authority could also choose to not consider part of a complaint, for the same reasons.

One of the reasons listed, in subclause (1)(e), is if the complainant knew of the breach or potential breach 6 months or more before they made the complaint. We acknowledge that this timeframe may be overly restrictive, especially given it is a new regulatory regime. We consider that the timing should be extended to 12 months, and recommend amending clause 72 accordingly.

DINZ Comment: DINZ does not support the recommended amendment for two reasons: first, because it becomes much easier for 'Trojan horse' tactics to be deployed whereby a complainant deliberately holds back on making a complaint to in essence 'bank' complaints so that if the complainant choses to publicly release the fact that a complaint has been made, the PR impact is that much greater if there is a suite of

complaints; and second, because if the complaint has a privacy or security risk implication insufficient for it to fall under the Privacy Act's purview, disclosing it increases the risk for all other users of that service in the meantime.

We also think that clause 72(1) should contain an additional reason why the TF authority may decide not to consider a complaint. The option to not consider a complaint, or part of a complaint, should be open to the TF authority if the complaint involves any of the matters set out in clause 75(2). They include:

- matters that may be dealt with under the Privacy Act
- employment disputes that may be dealt with under the Employment Relations Act 2000
- disputes relating to actions that may be prosecuted as offences under the Act
- disputes relating to the carrying out of a Minister's function
- a dispute of a kind prescribed by regulations.

We consider that these matters are best dealt with under the relevant regimes, whether statutory or otherwise prescribed. We recommend inserting clause 72(1)(aa) accordingly.

DINZ Comment: While DINZ is supportive of the recommendation, DINZ notes the mention by 72(1)c of ...'an alternative dispute resolution scheme or process available to resolve the complaint because of the TF provider's membership of a particular industry and the complainant has not made use of it;'. DINZ assumes that regimes like Financial Services are what was envisaged, but there is an opportunity for DINZ to operate a complaints resolution process for matters not naturally falling into such industry regimes, if the Government were to allow it to.

Referral of complaints to officeholders

Clause 70 sets out how complaints must be dealt with. Clause 71 would allow the TF authority to refer complaints, either in full or in part, to other officeholders if it considers it more appropriate that they deal with them. The other officeholders include the Ombudsman, the Privacy Commissioner, the Inspector-General of Intelligence and Security, or another office holder. If the TF authority refers part of a complaint, we think the bill should specify that the TF authority must continue to make a preliminary assessment of the part of the complaint it has retained, unless it has decided that it does not need to consider it further. We recommend inserting new clause 70(2) accordingly.

Dispute resolution

Clause 75 would enable the TF authority to recommend a dispute resolution service to the Minister. Clause 76 sets out that the Minister could approve a dispute resolution scheme if they were satisfied it provides a means of resolving complaints consistent with the principles set out in the bill, and that it meets regulatory requirements.

We acknowledge that expertise in dispute resolution may need to be sought from external parties. We think it beneficial that the bill make it clear that the chief executive could employ or engage third parties to provide dispute resolution services. We recommend adding clause 75(3), and making a consequential amendment to clause 105, accordingly.

DINZ Comment: DINZ is supportive of the recommendation for the reasons outlined in its comment immediately above.

Remedies following a finding of breach

Clause 82 sets out what actions the TF authority could take if it found a breach by a TF provider. The actions include issuing a warning or compliance order, suspending or cancelling an accreditation, or requiring additional record-keeping or reporting requirements.

Under clause 82(1)(b), additional record-keeping or reporting requirements could be set for either a specified period or indefinitely. Submitters suggested that, if additional requirements are imposed on a TF provider, the timeframe that they will apply for should be specified, along with the conditions that, if met, would mean the requirements no longer applied. We think that there could be circumstances where it was appropriate for additional reporting requirements to be imposed for a significant period, for example if there were serious or recidivist breaches.

However, we think the bill should expressly allow the TF authority to lift additional requirements earlier than specified if it considered that the requirements were no longer needed. Therefore, we recommend inserting new clause 83A to provide that the TF authority could impose additional record-keeping or reporting requirements for any period that it considered appropriate, but that it could lift those additional requirements earlier, if it considered they were no longer needed.

DINZ Comment: While DINZ is broadly supportive of the recommendation because it is an omission and one of many that will come to light once a period of operation has taken place, it offers a classic example of the consequence of not using established standards such as the ISO 17000 series that many 'accredited' (certified) international digital identity services are aligned with and where years of operational experience and multiple experts have worked hard to specify. As mentioned above with the use of the term 'accreditation', creating new/similar but not identical text to fill gaps actually adds friction and undermines the interoperability ambitions the Government wishes to see by trying to recreate parts of standards that are already in play.

Suspension or cancellation of accreditations

As introduced, the bill does not provide any consequences for a TF provider if they ignored a compliance order issued by the TF authority issued under clause 82(1)(c). We think that, in such a scenario, the TF authority should have the power to suspend or cancel the accreditation of the provider or the relevant service.

Similarly, if a TF provider did not notify the TF authority about its compliance with an order, the TF authority should have the same power. We recommend inserting clause 82(2) accordingly.

Clause 93 sets out other reasons why the TF authority could suspend or cancel accreditations of a provider or service, regardless of whether a breach of the trust framework had occurred. The reasons include matters such as bankruptcy, insolvency, convictions for offences under the Act, or behaviours that the TF authority considered a risk to the integrity or reputation of the framework.

DINZ Comment: DINZ's comment immediately above applies here too.

In practice, TF providers are likely to be incorporated entities. We think it is important that the TF authority have an ability to form a view about the suitability of those people involved in an entity, and not just the actions of the entity as a whole. Therefore, we recommend inserting clause 93(6) to make it clear that the reference to TF provider includes those involved in the management of, or employed or contracted by, the TF provider. This would mean that the actions of people involved with a TF provider would be relevant to a TF provider's accreditation status.

DINZ Comment: DINZ's comment 2nd above, applies here too.

Secrecy and immunities under the bill

As introduced, Part 7 of the bill includes provisions relating to obligations to maintain secrecy, and providing immunity to certain persons carrying out functions under the bill.

Removal of secrecy clause

Clause 101 provides that certain persons carrying out functions under the bill would be required to maintain secrecy in respect of all matters that came to their knowledge, unless exceptions were met. Submitters were clear that greater transparency would improve trust in the framework. We consider it unlikely that members of the TF board, the TF authority, or the advisory groups would have access to much sensitive information that would warrant a specific clause. We consider that the persons the clause applies to would be able to manage any sensitive information they handle in accordance with other statutory provisions that already exist, such as those contained in the Official Information Act 1982, the Privacy Act 1993, and the Public Records Act 2005. Therefore, we consider the secrecy provision in clause 101 unnecessary, and recommend it be deleted.

DINZ Comment: DINZ agrees in principle so as to avoid partial duplication and the patchwork of undertakings arising from seeking to comply with multiple pieces of legislation. However it is surprised that the Select Committee did not insert a clause, even of a general nature, to indicate the kinds of legislation that might apply. Transparency cuts both ways. By leaving this open it invites distrust from TF providers that consider their commercially sensitive information forwarded to persons carrying out functions under the bill, is not secure, thereby inhibiting the levels of adoption that both the Government and industry hope for.

Clarifying the immunity provision for people who are not public service employees

As introduced, clause 102 provides immunity in civil proceedings to members of the TF board, members of the TF authority, members of the Māori Advisory Group, members of any advisory committee, and staff of the board or the authority. The immunity only applies for good-faith actions or omissions when the person was carrying out or intending to carry out their function.

Clause 102 provides that the immunity applies whether those people are public service employees or not. However, public service employees already have immunity from civil proceedings under section 104 of the Public Service Act 2020. Therefore, parts of clause 102 are redundant as they duplicate the immunity already granted to public service employees. For simplicity, we suggest that the immunity granted to public service employees under the Public Service Act should also apply to those persons referred to earlier, but who are not public service employees. We recommend amending clause 102 accordingly.

DINZ Comment: DINZ is supportive of this recommendation.

Immunity for TF providers for actions of users

Clause 103 gives a TF provider immunity from civil liability in relation to harm or damage caused or suffered by a user of their accredited services. The intention is to protect a TF provider from liability as a result of the actions of others where it has acted in good faith. However, a TF provider would not be protected in relation to the alleged harm or damage if they had acted in a manner that constituted bad faith or gross negligence.

Submitters raised concerns that the immunity provisions in clause 103 lack avenues for compensation if a TF provider acted in a way that caused harm. We note that the immunity provided by clause 103(1) would be subject to the proviso in subclause (2) regarding bad faith or gross negligence. However, we acknowledge the point made in submissions that users may be more cautious in using TF providers if normal avenues of redress are unavailable. We consider that the immunity provision in clause 103 should not apply to any proceedings arising under the Privacy Act. We consider that this would give users greater confidence that their privacy rights are protected. We recommend amending clause 103(2) accordingly.

Review of the TF board's operation

Clause 104 requires that, after two years, a review of the TF board's operation be carried out by the responsible department. The clause sets out that the review must include an assessment of the effectiveness of the board in carrying out its functions, and the viability of other models for carrying out the board's functions. We acknowledge stakeholders' views about the effectiveness of governance provisions, privacy standards, and provision for te ao Māori. Therefore, we suggest that the two-year review include an assessment of how other models might better:

- ensure the privacy and security of user information (including Crown-held data) and protect it from unauthorised use
- provide opportunities for Māori engagement in the trust framework. We recommend amending clause 104 accordingly.

DINZ Comment: While DINZ is supportive of the recommendation in principle, the scope is not nearly broad enough. The scope of the review should be all-encompassing across the Act, and not limited to the current text and the new recommendation for this clause. Two years of operation of the Act will unearth a great many issues with the current text. Having the review restricted to the proposed scope risks important adoption-limiting shortcomings not being amended, with the consequence that adoption drops away and the effort is pronounced as a failure. Neither industry nor the government wants that. Allow the review the widest scope and flexibility to change whatever needs changing to ensure the Act's successful sustainability over time.

Review of the TF board's operation

Committee process

The Digital Identity Services Trust Framework Bill was referred to the committee on 19 October 2021. We invited the Minister for the Digital Economy and Communications, Hon Dr David Clark, to provide the first oral submission on the bill. He did so on 16 December 2021.
The closing date for submissions on the bill was 2 December 2021. We received and considered about 4,500 submissions from interested groups and individuals. We heard oral evidence from 28 submitters at hearings via videoconference.

We received advice on the bill from the Department of Internal Affairs. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting. The Regulations Review Committee reported to us on the powers contained in clauses 17 and 100.

Committee membership

Jamie Strange (Chairperson)
Glen Bennett
Naisi Chen
Hon Judith Collins
Melissa Lee

Appendix: DINZ's reflections on the Select Committee's Report commentary.

Our lives are being substantially reshaped by an increased reliance on digital forms of connection. With people, organisations and smart devices all connecting digitally, we need the DISTF legislation, its equitable governance and future operations, to build trust between ourselves and other people and the public & private sectors in the digital realm, to carry out safe, secure and trustworthy interactions. It must have a system-wide impact and be economically sustainable and interoperable in a digital economy for Aotearoa New Zealand and its current and future global trading partners.

In the context of the aforementioned, the DINZ DISTF WG participants reviewed the Reports' commentary with the following perspectives in mind as it progressively developed this Reflections document:

Definitive user-value - empowering people with trust, security and equitable access

Usability perspectives - system-wide impact to the benefit of all stakeholders

Equitable governance & authority in the operations of the DISTF - independent/non government entity participation to improve transparency, engagement and buy-in over the long term

Legal and policy perspectives - consideration of the perspectives of other jurisdictions, multilateral vs bilateral agreements with AU, Singapore and many more over time

Economic perspectives - growing a sustainable, trustworthy, high-velocity digital economy sustainable through industry collaboration and partnership over the long term, not a series of binary 1:1 provider:DIA RealMe relationships

Technical & interoperability perspectives - 'building out better' by giving due credit to the conformance work already done elsewhere with local profiles that in turn can be built out better by the global community.

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