



# Review of the employment relationship problem resolution system

▸ CABINET ECONOMIC DEVELOPMENT COMMITTEE



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## **REVIEW OF THE EMPLOYMENT RELATIONSHIP PROBLEM RESOLUTION SYSTEM**

### **Purpose**

- 1 This report responds to Cabinet's invitation to me as Minister of Labour to report to the Cabinet Economic Development Committee on options to improve the functioning of the employment relationship problem resolution system [CAB Min (07) 14/6 refers].
- 2 This paper proposes that the Department of Labour be directed to undertake further work on six options to achieve this outcome, and that I would report to Cabinet Economic Development Committee on this further work by July 2008. The further work associated with four of these options involves possible fiscal implications and if work on these is agreed to, Budget bids will be developed for Budget 2009, if the further work undertaken supports this. This paper also proposes work to start now to develop a code of employment practice around employment relationship problem resolution.

### **Background**

- 3 This paper responds to:
  - a Cabinet's invitation to me (described above) which arose from Cabinet's consideration of the second milestone report of the Quality Regulation Review on 30 July 2007;
  - b the Department of Labour's ("the Department") work programme to identify the scope of the issues around personal grievances and the role of employment relations consultants in encouraging personal grievance claims. (noted by Cabinet Business Committee in July 2006 [CBC Min (06) 12/6 refers]);
  - c concerns about representation fees and "no win, no fee" representation arrangements; and
  - d the Small Business Advisory Group's February 2006 proposal of an "alternative dispute resolution process" which the Government committed to examine [CBC (06) 245 and CBC Min (06) 17/23 refers].
- 4 This paper does not consider the adequacy of remedies for employment relationship problems, or a "personal grievance free period".

### **Executive Summary**

- 5 This paper assesses how the employment relationship problem resolution system is currently functioning when measured against its objects through: the use of

Department of Labour service delivery experience, Department of Labour analysis and research, how the system is seen to be working, and consultation with Business New Zealand, the New Zealand Council of Trade Unions and the Small Business Advisory Group.

- 6 The overall assessment is that the employment relationship problem resolution system is meeting its objectives, but could be doing better. This paper examines the following issues:
  - a Representation fees and “no win, no fee” arrangements;
  - b Perceived bias in the system;
  - c The cost of problem resolution;
  - d Ensuring access to justice;
  - e Negative impact of delays; and
  - f Employment relationship problems appear to impact disproportionately on small or medium enterprises.
  
- 7 After assessing a range of options to improve the functioning of the employment relationship problem resolution system against high-level objectives and criteria, I recommend the following combination of options to better support the functioning of the system, while preserving its integrity as a whole:
  - The development of a Code of Employment Practice (which could have a specific focus for small businesses) relating to employment relationship problem resolution
  - Further work to scope and progress the following:
    - Increasing educational resources and support for employees, employers and their representatives;
    - Improving Department of Labour guidance for employers and employees on employment relationship problem resolution and termination of employment;
    - Exploring the extent to which the quality of paid representation by employment advocates (excluding practising barristers and solicitors) could be better assured. This work would include exploring how to ensure that representation by these advocates is high quality by *either*:
      - requiring that these advocates belong to a relevant membership organisation, union or employers’ association; *or*
      - by promoting to the public the use of these advocates who belong to a relevant membership organisation, union, or employers’ association with professional standards and/or code of ethics;

- Assessing whether provisions in the Employment Relations Act for reducing remedies to reflect substantive justification and contributory conduct are effective;
  - Assessing how the provisions relating to a “[mediator] decision by authority of the parties” (section 150 ERA) could be strengthened to encourage its use in cases where an agreement cannot be reached and to discourage the unreasonable withholding of consent by either party;
  - Increasing the capacity of the Department of Labour to deliver mediation services and improve the capability of its mediators to respond to improve services, as identified in the Department’s Mediation Practice Development Project (strengthening mediation practice);
  - Exploring options to reduce the time taken in the investigation and determination of cases in the Employment Relations Authority, including by considering changes to Authority processes.
- 8 The cumulative effect of these options would be to enhance the professionalism of advocates; better inform employees and employers (and their representatives); better manage employment relationship problems at a firm level and increase confidence in and use of informal resolution processes; and reduce the cost of and length of time taken to resolve employment relationship problems using formal processes.
- 9 I have also examined the Small Business Advisory Group’s proposed “Employment Facilitation Process” option and consider that it should not be pursued in light of the work outlined above.

### **Objectives of the employment relationship problem resolution system under the Employment Relations Act 2000**

- 10 The overall object of the Employment Relations Act 2000 (“the Act”) is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship, by (amongst other things):
- a recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a requirement for good faith behaviour;
  - b acknowledging and addressing the inherent inequality of power in employment relationships;
  - c promoting mediation as the primary problem-solving mechanism; and
  - d reducing the need for judicial intervention.
- 11 Part 9 of the Act provides the procedures and mechanisms for resolving personal grievances and disputes between employers and employees, and the principles and assumptions underpinning the employment relationship problem resolution system (“the system”) thus established. An employment relationship problem includes a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.
- 12 The object of Part 9 of the Act is to:

- a recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures;
  - b recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship;
  - c continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers;
  - d recognise the importance of reinstatement as a remedy; and
  - e ensure that the role of the Employment Relations Authority ("the Authority") and the Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment.
- 13 In 2004 the Act was amended to strengthen the system by:
- a ensuring any settlements in mediation are paid directly to the parties rather than to their representative (as was previous common practice), although this does not prevent a payment being made to the other party's solicitor;
  - b allowing mediators to talk to parties without their representatives present, and to express their views on the substance of a claim or the process being followed; and
  - c providing access to dispute resolution services for parties in work-related relationships that are not employment relationships, for example contractors.

### **How the system is performing against its objectives**

- 14 My assessment as to how the system is currently functioning when measured against its objects is based on four sources of 'evidence':
- a Department of Labour service delivery experience;
  - b Department of Labour analysis and research;
  - c how the system is seen to be working (experience and perception); and
  - d consultation with Business New Zealand, the New Zealand Council of Trade Unions and the Small Business Advisory Group, as detailed in paragraph 23.

#### **A) Department of Labour service delivery experience**

- 15 The Department provides mediation services to help people resolve employment relationship problems quickly and effectively. The Department's first priority is to prevent employment relationship problems occurring in the first place by providing information and guidance to help employers and employees develop and maintain productive employment relationships. If there are problems that employers and employees are unable to resolve themselves, they can approach the Department for assistance. This can be provided in a range of ways including the provision of further information (e.g. the Contact Centre), facilitation, educational events and programmes, or mediation.

- 16 If the parties reach agreement (whether with the help of a mediator or not), they can ask a mediator to sign the agreement. The mediator will explain to the parties that, once signed, the agreement becomes final and binding and cannot be challenged. Such an agreement is enforceable in the Authority or the Employment Court, and there are penalties for breaching it.
- 17 The parties may also agree, in writing, to the mediator making a final and binding decision under section 150 of the Act. The mediator will explain to the parties that once a decision is made, that decision is enforceable and cannot be challenged.
- 18 If a problem is not resolved at mediation, the parties can go to the Authority which will investigate and make a determination for the parties. The Authority operates in an informal way and makes a decision based on the merits of the case, not on legal technicalities. If either party is unhappy with an Authority determination, the matter can be heard in the Employment Court.
- 19 This service delivery experience, particularly at mediation, has given the Department valuable insights into issues around the operation of the system. The Department receives around 9,000 applications for mediation services and around 2,000 applications for the Authority each year.

## B) Department of Labour analysis and research

- 20 The Department has examined the area of employment relationship problem resolution and identified issues. This paper draws on the following (considered in more detail in Appendix 1):
  - a a survey of 852 private sector employers, of whom 130 had experienced employment relationship problems during the previous 12 months;
  - b focus group project involving employers;
  - c case study project of 14 employers and employees;
  - d a survey of mediations carried out over a five week period in 2006; and
  - e a review of 33 determinations in the Authority over the same period.

## C) Perception and anecdote

- 21 During the Department's analysis and research employers raised various issues, including views that the system favours employees. The Transport and Industrial Relations Committee, in the context of the Employment Relations (Probationary Employment) Amendment Bill, noted that "no win, no fee" representation for personal grievance claims has complicated this area of employment relations. Employers and employer organisations have also frequently raised their concern about the system with me directly.
- 22 These perceptions, even if they tell only a part of the story, undermine the credibility of the overall system and may act to discourage people from participating in it. Accordingly, I have taken these perceptions seriously, and they form one of the sources of evidence informing my review of how the system is functioning.

## D) Consultation with Business New Zealand, the New Zealand Council of Trade Unions and the Small Business Advisory Group

- 23 In order to inform this review, the Department sought the views of Business New Zealand, the New Zealand Council of Trade Unions and the Small Business Advisory Group about the functioning of the employment relationship problem resolution system generally and more specifically about:
- a the availability of information;
  - b whether a Code of Employment Practice should be developed;
  - c the professionalism of representatives, the costs of representation and access to justice issues; and
  - d the impact of "no win, no fee" representation arrangements.
- 24 Feedback from these organisations has been reflected in the development of the options assessed in this paper. A summary of feedback from these organisations is attached at Appendix 4.

### **Overall Assessment: The system is meeting its objectives ... but it could be doing better ...**

- 25 The following issues have emerged as a result of this work (and are discussed in more detail in Appendix 2):

#### *Representation fees and "no win, no fee" arrangements*

- a concerns about the use of different fee arrangements, their possible positive impact on access to justice and whether this has increased the number of employment relationship problems

#### *Perceived bias in the system*

- b both employers and employees tend to believe that the employment relationship problem resolution system is biased against them

#### *The cost of problem resolution*

- c employers tend to believe that it is expensive to resolve employment relationship problems

#### *Ensuring access to justice*

- d concerns about ensuring that advice or representation to assist with resolving an employment relationship problem is affordable (including the types of fees used and availability of legal aid)

#### *Negative impact of delays*

- e there can be negative impacts for parties if delays are experienced between the time it takes from when an employment relationship problem first comes to an employer's attention until it is resolved, and once parties have accessed the more formal resolution options of mediation or the Authority

*Employment relationship problems appear to impact disproportionately on small or medium enterprises (SMEs)*

f resolving employment relationship problems appears to have a greater proportional effect on SMEs than it does on larger employers, including in terms of resources dedicated to resolving the problem, reduced productivity and impact on other staff.

26 These issues are not always clear cut, and in some cases it is difficult to balance the trade-offs they represent, for instance, the use of “no win, no fee” representatives can give access to justice to people who may otherwise not access it, but, on the other hand, this usage is considered by others to have created dubious incentives.

### **Improvements needed to better support the functioning of the system, while preserving its integrity as a whole**

27 Issues raised (including as evidenced through public perception) have been to do with the functioning of the system, but not with the core principles that underpin it. I consider it critical that in making any changes to the functioning of the system these principles, and the integrity of the system as a whole, are preserved.

28 To better support the functioning of the employment relationship problem resolution system established in the Act, I consider we need to:

- a reduce the vulnerability of the system to negative criticism (including but not limited to perception/anecdote);
- b improve the effectiveness of the system in meeting its objectives; and
- c work to preserve the integrity of the system as a whole.

29 In addition to these high-level objectives, I have also identified the following criteria against which I have assessed a range of options to improve the functioning of the system. These are:

- a will the option enhance the credibility and perceptions of fairness of the system?
- b will the option enhance the system’s effectiveness, including providing the parties with an enhanced understanding of the system?
- c does the option address the inherent imbalance of power between parties?
- d does the option preserve the right of access to justice?

### **Options**

30 I have assessed 14 options (being options proposed by officials and an option proposed by the Small Business Advisory Group) against the criteria listed above, and in the context of the framework described above. The option proposed by SBAG is discussed below. The options proposed by officials are analysed in Appendix 3.

## “Employment Facilitation Process”: An alternative dispute resolution process, proposed by Small Business Advisory Group

- 31 In response to the issues faced by SMEs in resolving employment relationship problems, the Small Business Advisory Group (“SBAG”) suggested an alternative dispute resolution system which they call the Employment Facilitation Process (EFP). In response, the government committed to examining SBAG’s suggestions on options for streamlining grievance procedures and the degree to which they can deliver the certainty, in terms of process and outcome, that employers are seeking, while not removing rights and protections from employees. [CBC (06) 245 and CBC Min (06) 17/23 refers].
- 32 The EFP was intended to make it easier for employers to take on new staff in the knowledge that they can be released if unsuitable, to lessen disputes arising from new employment situations, to lessen costs associated with a class of disputes, and to bring some degree of parity with most OECD countries which have grievance free probationary periods. The EFP would allow the parties to agree (in the employment agreement) to a probation period of up to 12 months during which the EFP process would apply instead of the provisions under the Act. Briefly, this process involves the parties exchanging written statements of their points of dispute, meeting to discuss these, and if unable to reach resolution, submitting their case in writing to a Department of Labour mediator. The mediator would then call a meeting with the parties and would seek to mediate a settlement. If a settlement could not be reached, the mediator would be empowered to make a binding decision.
- 33 The EFP process would exclude representatives from the mediated meeting (although they can give prior advice). Cash settlements would be restricted to the equivalent of twice the termination period in the employment agreement, and in the event the parties did not settle at mediation, and the mediator had to make a decision, a maximum amount of \$250 may be added to the settlement amount to recognise costs incurred. Limited rights of appeal to the District Court would apply if the mediator conducted the proceedings in a way that prejudiced the outcome.

### *Consultation on the proposal*

- 34 Business New Zealand raised concerns that employee agreement would be required and may not be forthcoming in sufficient numbers to justify the set-up costs; allowing mediators to ignore normal legal rules is not consistent with the concepts of natural justice; mediators are selected for their facilitatory skills and are not trained to be arbitrators; and the process would be resource-intensive and would result in converging skill sets for mediators and Authority members.
- 35 The New Zealand Council of Trade Unions (NZCTU) raised concerns that contracting out of the dispute resolution process into a process with more limited remedies would reduce employee rights and access to justice; many employees would not be able to effectively participate in dispute resolution without proper advice and representation; facilitated mediation differs fundamentally from the imposed decision-making of arbitration; there is no principled basis to use an arbitrary formula which would deny an employee money due to them; and there is an absence of principled parameters for arbitrated decisions.
- 36 The NZCTU commented that if the parties agree, a mediator may already be empowered to determine disputes under section 150 of the Act. The NZCTU believes that if this power was more widely promoted and used it could allow for minor matters to be dealt with in a timelier and less expensive way. This paper proposes further work to assess the use in mediation of section 150 (“[mediator]

decision by authority of parties”) in appropriate cases, and whether this provision is useful and effective in mediation and, if so, how its use can be improved.

#### *Comment*

- 37 The Department considers that the EFP would create a “two-tier” problem resolution system with differing processes for probationary and other employees. The EFP would remove access to rights conferred by the existing employment relationship problem resolution system, and does not address the inherent power inequality in employment relationships as recognised under the Act. It also emphasises written statements which may disadvantage parties with low literacy and increase reliance on representatives. Research from Britain, where a broadly similar system operates, is that such a prescribed process may create incentives to escalate cases rather than encouraging problem resolution. The Department is also concerned that the EFP significantly limits the current rights of appeal. In addition, the Department considers that the EFP will disadvantage vulnerable workers, cap remedies and not provide for compensation for hurt and humiliation. Nonetheless two of the options analysed in Appendix 3 specifically consider elements of the EFP, namely restricting the right to be represented in mediation, and placing limits on available settlement amounts. These two options have not been recommended as preferred options.
- 38 Given the concerns raised by social partners and the Department, and in light of other work outlined above, I recommend that the Employment Facilitation Process not be pursued.

#### Preferred options

- 39 My assessment of the options against the criteria and in the context of the framework described in paragraphs 28 and 29, leads me to recommend the following combination of options to better support the functioning of the employment relationship problem resolution system (the assessment of these options, and other options proposed by officials, is set out in Appendix 3) :
- a Option 2: increase educational resources and support for productive employment relationships and the management of employment relationship problems, in order to improve workplace productivity, firm capability and decrease the incidence of employment relationship problems or their impacts. This will include improvement of the Department of Labour’s guidance for employers and employees on employment relationship problem resolution and termination of employment;
  - b Option 3(b) or Option 4: Exploring the extent to which the quality of paid representation by employment advocates (excluding practising barristers and solicitors) could be better assured. This work would include exploring how to ensure that representation by advocates is high quality by *either*;
    - i requiring that these advocates belong to a relevant membership organisation, union or employers’ association; *or*
    - ii by promoting to the public the use of these advocates who belong to a relevant membership organisation, union, or employers’ association with professional standards and/or code of ethics;
  - c Option 6A: assess whether provisions in the Act for reducing remedies to reflect substantive justification and contributory conduct are effective, in order to reduce the vulnerability of the system to criticism, maintain its credibility and preserve its integrity;

- d Option 7: develop a Code of Employment Practice (which could have a specific focus for small businesses) relating to employment relationship problem resolution to provide guidance on the application of the Act, in order to preserve the integrity of the system and improve its effectiveness in meeting its objectives. The purpose of a code under the Act is to provide guidance on the application of the Act, either generally or in relation to particular types of situations, or in relation to particular parts or areas of the employment environment. The effect of such a code in this context would be to minimise the escalation of employment relationship problems to formal institutions;
  - e Option 8: Assess how the provisions relating to a “[mediator] decision by authority of the parties” (section 150 ERA) could be strengthened to encourage its use in cases where an agreement cannot be reached and to discourage the unreasonable withholding of consent by either party;
  - f Option 9: Increasing the capacity of the Department of Labour to deliver mediation services and improve the capability of its mediators to respond to improve services, as identified in the Department’s Mediation Practice Development Project (strengthening mediation practice); and
  - g Option 10: explore options to reduce the time taken in the investigation and determination of cases in the Authority, including by considering changes to Authority processes, in order to expedite employment relationship problem resolution and improve the effectiveness of the system in meeting its objectives.
- 40 The cumulative effect of my preferred options will be to:
- a enhance the professionalism of advocates;
  - b better inform employees and employers (and their representatives);
  - c better manage employment relationship problems at a firm level and increase confidence in and use of informal resolution processes; and
  - d reduce the cost of and length of time taken to resolve employment relationship problems using formal processes.
- 41 With the exception of option 7 (develop a code of employment practice), which I would like officials to start working on immediately, I am proposing that further work is done before agreeing to progressing the options. This further work would include scoping the options in detail (including problem definition), cost benefit analysis, determining how they may be delivered and by whom (e.g. education and training activities under option 2 could be delivered by the Department, employer’s organisations, unions, or other organisations), and the level of change or increase that would be optimal. It would also include further analysis of administrative data to identify where improvements could best be made.
- 42 In addition, the further work arising from options 2, 9 and 10 have (or may have) fiscal implications, and would require additional funding. If the further work supports the implementation of these options, I would develop Budget bids for options 2, 9 and 10 that would be considered in the context of Budget 2009 (and other related bids). If the Department is directed to do further work on options 3(b) or 4, I will include the quantification of any fiscal costs as part of my proposed July 2008 report back. This may result in the development of a Budget bid that would be considered in the context of Budget 2009 (and other related bids).

## Consultation

- 43 The following government agencies were consulted during the preparation of this paper and their views taken into account: Ministry of Youth Development, Te Puni Kokiri, Ministry of Pacific Island Affairs, Ministry of Economic Development, Ministry of Social Development, Treasury, Ministry of Women's Affairs, State Services Commission and Ministry of Justice. The Department of Prime Minister and Cabinet was informed of the paper.
- 44 In addition, officials received comments on the key issues raised in this paper from the New Zealand Council of Trade Unions, Small Business Advisory Group and Business New Zealand. A summary of comments is attached at Appendix 4.

## Fiscal implications

- 45 There are no direct fiscal implications arising from this paper. The further work on options 2, 3(b), 4, 9 and 10 may have fiscal implications. If the Department is directed to do further work on options 2, 9 or 10, and if that work requires additional funding, I would develop Budget bids for these options that would be considered in the context of Budget 2009 (and other related bids). If the Department is directed to do further work on options 3(b) or 4, I will include the quantification of any fiscal costs as part of my proposed July 2008 report back. This may result in the development of a Budget bid that would be considered in the context of Budget 2009 (and other related bids).

## Human rights

- 46 The proposals contained in this Cabinet Paper appear to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. However, one of the options for improving the functioning of the employment relationship problem resolution system involves exploring the extent to which the quality of paid representation by employment advocates (excluding practising barristers and solicitors) could be better assured. This work would include exploring how to ensure that representation by these advocates is high quality by *either* requiring that these advocates belong to a relevant membership organisation, union or employers' association (option 3(b)); *or* by promoting to the public the use of these advocates who belong to a relevant membership organisation, union, or employers' association with professional standards and/or code of ethics (option 4). This might limit the freedom of association of advocates. Therefore, officials from the Ministry of Justice and the Department of Labour will work together on this issue to ensure consistency with section 17 (freedom of association) of the New Zealand Bill of Rights Act 1990.

## Legislative implications

- 47 Four of the options recommended in this paper may have future legislative implications. These may arise from options 3(b), 6A, 8, 9 and 10 depending on the outcome of the further work for these options.
- 48 Three of the options which are not recommended in this paper would require legislative amendments to implement. These options are Option 3(a), 5 and 6.

## Regulatory Impact Analysis

- 49 A Regulatory Impact Statement and Business Cost Compliance Statement has not been prepared as there are no regulatory impacts arising from the recommendations in this paper. A Regulatory Impact Statement will be developed when the Code, if progressed, is submitted to Cabinet for noting of my intention to

approve it. A Regulatory Impact Statement will also be required if any legislative implications arise out of further work on the options.

## Gender implications

50 There are no gender implications associated with the recommendations in this paper.

## Recommendations

51 I recommend that the Cabinet Economic Development Committee:

- 1 **Note** that this work is part of the Quality Regulations Review workstream [CAB Min (07) 14/6 refers]
- 2 **Note** that the government committed to examining the Small Business Advisory Group's suggestions on options for streamlining grievance procedures and the degree to which they can deliver the certainty, in terms of process and outcome, that employers are seeking, while not removing rights and protections from employees. [CBC (06) 245 and CBC Min (06) 17/23 refers]
- 3 **Note** that information is not available to confirm or dismiss the suggestion that "no win, no fee" employment advocates increase the number of personal grievances.
- 4 **Note** that the incidence of employment relationship problems is higher amongst small or medium enterprises (SMEs), and that SME employers appear to find that the employment relationship problem resolution system involves unknown costs and time commitments that tend to lead them to "pay an employee out" instead of accessing processes or mechanisms provided for in the Employment Relations Act
- 5 **Note** that this paper identifies the following issues:
  - 5.1 overall, the employment relationship problem resolution system is meeting its objectives, but there are improvements that could be made to better support how it functions. In making any changes, we would need to ensure that the integrity of the system as a whole is preserved
  - 5.2 employment relationship problems appear to impact heavily on SMEs. The main issues faced by SMEs in relation to the employment relationship problem resolution system seem to be a lack of information about employment relationship problem resolution, a lack of awareness of the options available, and the financial and time-commitment uncertainties associated with the formal process
  - 5.3 employees on low incomes or without the ready funds to engage representation paid for on an hourly basis tend to face a range of barriers (including insufficient information on available options and perceptions of the high cost of representation) to access justice when they want to resolve an employment relationship problem
- 6 **Agree** that the Small Business Advisory Group's proposed "Employment Facilitation Process" not be pursued, in the light of the work being undertaken under recommendations 7 and 8.
- 7 **Direct** the Department of Labour to start work to develop a Code of Employment Practice (which could have a specific focus for small businesses) relating to employment relationship problem resolution. Further consultation with such

persons and organisations as I think appropriate, including relevant employer and employee interests, will be undertaken in this work.

- 8 **Direct** the Department of Labour to undertake further work on six options for improving the functioning of the employment relationship problem resolution system, including quantifying any fiscal costs of these options
  - 8.1 Increasing educational resources and support for employees, employers and their representatives, including improving Department of Labour guidance for employers and employees on employment relationship problem resolution and termination of employment;
  - 8.2 Exploring the extent to which the quality of paid representation by employment advocates (excluding practising barristers and solicitors) could be better assured;
  - 8.3 Assessing whether provisions in the Employment Relations Act for reducing remedies to reflect substantive justification and contributory conduct are effective;
  - 8.4 Assessing how the provisions relating to a “[mediator] decision by authority of the parties” (section 150 ERA) could be strengthened to encourage its use in cases where an agreement cannot be reached and to discourage the unreasonable withholding of consent by either party;
  - 8.5 Increasing the capacity of the Department of Labour to deliver mediation services and improve the capability of its mediators to respond to improve services, as identified in the Department’s Mediation Practice Development Project (strengthening mediation practice);
  - 8.6 Exploring options to reduce the time taken in the investigation and determination of cases in the Employment Relations Authority, including by considering changes to Authority processes.
- 9 **Note** that I will report back to the Cabinet Economic Development Committee by July 2008 on the results of the Department’s further work outlined in recommendations 7 and 8.
- 10 **Note** the further work associated with the options outlined in recommendations 8.1, 8.5 and 8.6 may have fiscal implications that would require the development of Budget bids that would be considered in the context of Budget 2009 (and other related bids). These Budget bids would only proceed if the Department of Labour is directed to do that further work, and if the further work undertaken supported seeking additional funding.
- 11 **Note** the further work associated with the options outlined in recommendation 8.2 may have fiscal implications. If the Department is directed to do further work on either of these options, I will include the quantification of any fiscal costs as part of my proposed July 2008 report back. This may result in the development of a Budget bid that would be considered in the context of Budget 2009 (and other related bids).

Hon Ruth Dyson  
Minister of Labour

## **APPENDIX 1: DEPARTMENT OF LABOUR ANALYSIS AND RESEARCH**

1 This appendix describes the Department's examination in the area of employment relationship problem resolution and identifies issues that emerge from that analysis. This paper draws on the following:

- a survey of 852 private sector employers, of whom 130 had experienced employment relationship problems during the previous 12 months;
- focus group project involving employers;
- case study project of 14 employers and employees;
- a survey of mediations carried out over a five week period in 2006; and
- a review of 33 determinations in the Authority over the same period.

### **Employment relationship problem resolution issues**

2 The case study project involved interviews with six employers (two of which were SMEs) and eight employees. The findings from this small sample suggested that:

- small businesses are more concerned about employment relationship problem resolution than larger ones
- nearly every case began with an attempt at internal resolution
- it takes only one party to escalate the problem to an external or formal process
- both parties believe "the system" favours the other:
  - employers tend to believe employees can take advantage of employers' difficulties in complying with the dismissal process
  - employees tend to believe that the employer knows the process, has more resources and holds all the cards
- problem resolution involves considerable social and emotional costs for both parties
- smaller businesses may pay out larger amounts in "private" settlements than larger employers because smaller businesses are inexperienced, not aware of the options and less likely to have problem resolution systems in place
- employers prefer in-house resolution
- employees prefer a process that will allow them to be heard
- both parties want timely resolution.

3 An email survey in May 2007 of private sector employers' experiences with employment relationship problems in the last year yielded 852 responses. Findings were that:

- the incidence of employment relationship problems per year per 100 employees were 2.9 for small businesses (1-9 FTEs), decreasing to 1.2 for large businesses (100+ FTEs)
  - the most common means of problem resolution<sup>1</sup> were (in descending order): in-house resolution without other parties, the involvement of external parties, and Department of Labour mediation services
  - in resolving an employment relationship problem:
    - employees were more likely to involve advocates than lawyers
    - employers were more likely to involve lawyers than advocates
  - the estimated median direct cost to employers of resolving an employment relationship problem was \$5000. This figure includes a median settlement of \$2,800, with the remainder made up of legal and investigation costs, and costs of any temporary replacement staff. It excludes time spent resolving the problem and any other productivity losses. Direct financial costs to employees were researched during the case studies but there were insufficient numbers for meaningful statistical analysis. (In comparison, the most common amounts both in settlement at mediation and in awards by the Authority<sup>2</sup> were between \$2,000 and \$5,000.)
  - the median length of time from when the problem first came to the respondent's attention until it was resolved was three months for SMEs and two months for larger businesses.
- 4 Survey data showed that the quickest settlement was obtained via in-house resolution (median of one month), followed by use of external parties (two months). Resolution via Department of Labour mediation took a median five months. The time to mediation could be reduced if parties sought mediation as soon as an employment relationship problem became evident, assuming the mediation service is well resourced.
- 5 Qualitative observations from case studies were that large businesses tend to be more familiar with the law and know what aspects of it are the most important. In deciding whether to settle early or defend a claim, SMEs in particular take into consideration any direct costs (including legal costs), indirect costs (such as time and opportunity cost) and the risk of losing in the Authority or in Court. SMEs were more highly stressed by the problem and tended not be aware of options such as Department of Labour mediation services. As a result some made decisions that were more expensive than necessary.

## How employment relationship problems are resolved

- 6 The Act allows for the establishment of a number of mechanisms for the prevention or resolution of problems such as:
- mediation services;

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<sup>1</sup> Respondents were asked to state both the initial and final means of resolution used. The same results emerged for both initial and final means of resolution. This ranking remained unchanged when respondents were asked which method they would have primarily chosen if they had a chance to resolve the problem again.

<sup>2</sup> Before any reduction in settlements for contributory conduct

- the Authority; and
  - the Employment Court.
- 12 Consistent with the Act, low-level problem resolution tends to take place 'internally' in the workplace, with or without the use of representatives. The Act emphasises the need to act in good faith and talk about problems early. The Department's analysis and research suggests that more than half of all employment relationship problems are resolved internally.
- 13 Union membership may provide access to effective means of internal problem resolution if union delegates act as informal mediators in the workplace. This can effectively reduce the number of problems that progress to becoming a personal grievance. This includes cases where union delegates may support employers in cases of justified dismissal where, as an example, an employee in a safety-critical environment has breached health and safety regulations by violating the company's drug and alcohol policy. However, union membership tends to be less prevalent in SMEs. Many employment relationship problems arise where the employee is not a union member nor is a union active in the workplace.
- 14 The Act requires that individual and collective employment agreements include plain language information about the services available for the resolution of employment relationship problems. Despite this, there appears to be little common knowledge of the processes available to assist parties in resolving such problems. This may be related to a reported tendency among SMEs to not put in place written employment agreements.
- 15 Early experience-based advice for employers may be available via professional networks, but the Department's case studies project suggests the advice coming from these networks is not always accurate. The Department produces information and guidance material for employers and employees on preventing problems or resolving them early.
- 16 The Department's email survey of employers also found that the incidence of employment relationship problems per 100 employees generally fell as businesses increased in size:
- from around 2.9 problems per 100 employees for businesses with 1-9 employees; to
  - around 1.2 for larger businesses.
- 17 Overall, there were about 1.5 employment relationship problems per 100 FTEs in the last year. The reasons for the higher incidence among SMEs may be related to SMEs' lower likelihood of having in place employment agreements and staff processes and procedures, and SME owners tending to be less experienced. The greater use of processes and procedures by larger businesses may help prevent problems arising or assist with diffusing potential problems.
- 18 The email survey of employers found that the cash costs (legal, compensation and replacement staff) of resolving employment relationship problems rose steadily with the number of employees in a business, from a median of \$3,000 for businesses with 1-9 employees, to \$9,700 for businesses with more than 100 employees. This may be because larger businesses have more staff with higher pay/salary levels (since compensation or settlement often includes lost wages).

- 19 From the email survey of employers, cash-costs (legal, compensation, investigative and any replacement staff) of problem resolution for employers varied according to the method resulting in resolution.

Method of resolution	Median duration of problem (months)	Median cash costs
In-house	1	\$300
External parties	2	\$5,800
Department of Labour mediation	5	\$7,275

- Costs to employers for Authority and Court resolutions were higher still, but are not included in the table because there were insufficient numbers of cases in the sample to provide reliable representative results.

- 20 The average costs of awards for compensation under section 123(c)(i) of the Act for humiliation, loss of dignity and injury to feelings of the employee at the Authority from 2002 to 2005 are shown in the table below. (These are adjusted for inflation and do not include any awards for costs or lost wages). Insufficient years are available to obtain a clear trend beyond an apparent moderate increase over these three years of between five and 15%.

Year	Number of Awards	Average Awarded (in 2002 dollars)
2002	164	\$4,700
2003	149	\$5,220
2004	152	\$4,790
2005	236	\$5,390

- 21 The Department's email survey of employers asked how satisfied employers were with the process and outcomes of the most recent employment relationship problem they had resolved in their organisation. Overall, employers were satisfied with both the process and outcome of the resolution method they had used. Results are shown in the table below. The numbers dissatisfied are the remainder making up 100% (ie if 63% were satisfied, 37% were dissatisfied). Other resolution methods (other mediation, the Authority, and court system) are not reported because small numbers of cases were involved, but in general, satisfaction with non-reported methods appeared to be low.
- 22 Large employers were the most satisfied, and employers with 10-19 employees the least satisfied, with both process and outcome. Employers found in-house resolution the most satisfying in terms of both process and outcome. The next most satisfying method was Department of Labour mediation, followed by in-house resolution involving external parties (for example lawyers or advocates), though satisfaction with the outcomes from these latter two methods was about the same.

Employers	Process	Outcome
Overall employer satisfaction with the resolution method used	63%	66%
Most satisfied employers	100+ employees 79%	100+ employees 78%
Least satisfied employers	10-19 employees 57%	10-19 employees 62%
Satisfaction with resolution method	Process	Outcome
In-house	79%	100%
Department of Labour mediation	70%	55%
External parties	40%	56%

## Use of representatives

- 23 At all stages of employment relationship problem resolution either or both parties may engage a representative to assist or advise them. A representative may be a lawyer, union representative, employment advocate, or other party such as an employers' association, church or professional association representative, industrial psychologist or industry specialist. An advocate does not need to have any legal training. If an advocate does have legal training, for example a LLB, they will not be a practising barrister and solicitor. A practising barrister and solicitor (often referred to as a lawyer) has a LLB, is admitted to the Bar and is bound by the Rules of Professional Conduct. Such practising barristers and solicitors are regulated (currently under the Law Practitioners Act 1982) but there is no mandatory regulation of other representatives in this context.
- 24 Of 312 Department of Labour mediations conducted over five weeks in 2006, 89% of applicants and 61% of respondents used a representative, most commonly a lawyer. Employment advocates were used by 20% of applicants and 16% of respondents.
- 25 The Department understands that there are approximately 200 employment advocates nationwide, and estimates that approximately 30 of them are "no win, no fee" advocates. The Department's focus group project raised issues of professionalism among these advocates. Anecdotal information from the mediation service suggested that any issues are confined to a small number of these advocates, but that the situation has improved since the 2004 amendments. Other "no win, no fee" advocates are reportedly providing a valuable and professional service.

## Costs

- 26 Research carried out in 2006 by the Legal Services Agency (a national telephone survey of 7200 randomly selected people) showed that 27% of people with legal problems considered that the fear of cost had stopped them approaching a lawyer for help or attempting to seek legal aid. Five percent of people had employment-related problems in the last 12 months, most commonly unfavourable changes to terms and conditions, harassment, discrimination and being sacked or made redundant (in that order, as reported by respondents). For 22% of people with employment-related problems, cost stopped them approaching a lawyer.
- 27 Where an advocate is used, they may charge on a "no win, no fee" (contingency, meaning percentage of winnings) basis. One "no win, no fee" company's fees are reportedly one third of the settlement plus \$300 plus GST, plus GST on the whole amount. One employment lawyer claims that for seven actual cases, his fees (charged on a normal hourly rate) would on average have been 45% of those charged by one "no win, no fee" company.
- 28 In the course of discussions around low pay with a community group, forum members commented that "no win, no fee" arrangements may provide increased access to justice for those who cannot otherwise afford representation, in that they provide a means of resolving an employment relationship problem that would otherwise remain unaddressed and unresolved.
- 29 Part of the likely increased access to justice achieved by the existence of "no win, no fee" advocates may result from them having higher visibility than other representatives and being easier to locate and contact. For example one "no win, no fee" company uses television advertising and an 0800 number.

- 30 Lawyers generally charge an hourly rate plus any disbursements made. The Lawyers and Conveyancers Act 2006 (intended to come into force 1 July 2008) will change the law on conditional fee arrangements (sections 333-5). Conditional fee arrangements, where the lawyer is paid only if the claim succeeds, are currently legal only if the fee charged is a normal one. They are not legal if the fee payable on success includes a premium. Therefore lawyers currently have little incentive to enter into conditional fee arrangements.
- 31 The Lawyers and Conveyancers Act 2006 will allow lawyers to make conditional fee arrangements where the fee payable is the normal fee or the normal fee plus a premium to compensate the lawyer for not being paid until the case is concluded, and for the risk of not being paid at all. Note that some cases, such as Family Court and criminal proceedings, will be excluded. Under the new legislation, lawyers cannot charge a fee that is calculated as a proportion of the amount recovered by their client.
- 32 In 2001 the New Zealand Law Society commented that:
- It seems that many lawyers are uncertain about whether they can properly enter and enforce contingency fee arrangements in litigation matters. There are no guidelines for, nor uniform practice, on the detail of those arrangements. Nevertheless, while they are not apparently commonplace, it seems that conditional fee arrangements and, less so, contingency fee arrangements are being used to finance a variety of cases [including employment cases].<sup>3</sup>
- 33 Lawyers' tendency to not offer conditional fee arrangements may incentivise some advocates to offer "no win, no fee" arrangements that in some circumstances (particularly straightforward cases or where settlements are large) may cost more for the same work than a lawyer would have charged. For more complex cases lawyers' fees may correspond more closely to those of "no win, no fee" advocates, or be higher.
- 34 If lawyers offered conditional fee arrangements, or if there was no difference in fees between lawyers and other representatives, it is not clear that people would access a lawyer in preference to another kind of representative. Anecdotal information from the mediation service suggested that some clients relate more easily to advocates than lawyers.

## Legal Aid

- 35 Legal Aid is a government programme which pays a lawyer's fees if the client cannot afford a lawyer to represent them. It is available for mediation (up to six hours Aid for standard cases) and for employment relationship problems that reach the Authority (up to 16 hours Aid for standard cases). The client may be required to pay back some or all of the aid. Eligibility is tested against financial eligibility, eligible proceedings and the merits of the application.
- 36 Legal Aid eligibility was significantly widened as at 1 March 2007.<sup>4</sup> A media campaign was conducted in March to publicise the changes. The Legal Services

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<sup>3</sup> New Zealand Law Society. Submission on "Subsiding Litigation" (Law Commission Discussion Paper – Preliminary Paper 43). 15 March 2001, page 2

<sup>4</sup> The population eligible for legal aid increased from 765,000 New Zealanders to an estimated 1.2 million New Zealanders. For example, a single person with annual income less than \$19,741 (up from \$9,841) will now be eligible, as will a person with a partner and one child with annual income less than \$31,225 (up from \$16,540).

Agency expects the number of people eligible for Aid to increase, particularly where an applicant is on a low income.

- 37 The Department's focus group project suggested that vulnerable clients were not aware that legal aid may be available to them, and participants called for more education about it. Anecdotal information from the mediation service suggested that few people use legal aid for mediation, and that some use "no win, no fee" advocates because they are not aware of their likely eligibility for legal aid.
- 38 There have been media reports about problems in accessing Legal Aid lawyers, as lawyers feel the payment they receive doesn't adequately compensate them for their time or costs. Similar comments were raised in the 2005/2006 Financial Review of the Legal Services Agency by the Justice and Electoral Committee. However, there is no empirical evidence to indicate a nationwide shortage of providers. The Legal Services Agency is currently undertaking a review of the remuneration rates as required by the Legal Services Amendment Act 2006.
- 39 Legal Aid is available for representation by employment advocates. This is the only area of litigation where Legal Aid is available for representation by someone other than a lawyer. For a client to be eligible, they must use an employment advocate approved by the Legal Services Agency.<sup>5</sup>

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<sup>5</sup> To become approved, an advocate must belong to the Employment Law Institute. There are 15 such approved advocates nationwide. It is unlikely that any of these are "no win, no fee" advocates.

## **APPENDIX 2: FURTHER DETAIL ON ISSUES**

### Issues previously raised by government

#### **Representation fees**

1. When the Lawyers and Conveyancers Act 2006 comes into force, lawyers will be able to charge conditional fees (conditional on a successful outcome) that include a premium to compensate for not being paid until resolution of the case or for not being paid at all. Where employment advocates charge on a "no win, no fee" basis, in some circumstances (particularly straightforward cases or where settlements are large) their fees may be higher for the same work than a lawyer would have charged. The reverse can also apply, in that lawyers' fees can be higher. Further, for more complex cases lawyers' fees may correspond more closely to those of "no win, no fee" advocates, or be higher. More detail on this is provided in Appendix 1.
2. As representation costs, from both advocates and lawyers, can be high, option 2 in Appendix 3 suggests the provision of educational material that includes information on likely representation costs throughout the employment relationship problem resolution process.
3. The Department understands that there are approximately 200 employment advocates nationwide, and estimates that approximately 30 of them are "no win, no fee" advocates. The regulation of advocates and their fees is addressed as an option in Appendix 3.

#### **"No win, no fee" arrangements**

4. The Transport and Industrial Relations Committee noted in its 27 October 2006 report on the Employment Relations (Probationary Employment) Amendment Bill that it would welcome research into whether "no win, no fee" representation arrangements have caused an increase in personal grievance claims, and effects of these arrangements on the type of resolutions being achieved.
5. The Department's analysis and research found there were about 1.5 employment relationship problems per 100 FTEs in the last year. While there are no previous comparable surveys, a survey of employees in 2002 found that about nine percent had experienced such a problem over the previous 12 months. Given different methods and definitions, the results are not strictly comparable but do not suggest an increase in employment relationship problems.
6. There was no evidence that "no win, no fee" advocates have dramatically changed the landscape or encouraged meritless claims. Numbers of applications for mediation since 2000 have remained reasonably static and do not show evidence of a changing trend. The Department is considering further research and regular surveys, e.g. three yearly, on the incidence, costs and benefits of resolving employment relationship problems.
7. The Department's survey of mediations showed that there is no correlation between whether the applicant used a representative, or the type of representative used, and the likelihood of reaching a settlement.

## Issues previously raised by employers

### **Employers tend to believe the employment relationship problem resolution system is biased against them**

8. The case study and focus group projects suggest that both employers and employees tend to focus on the obstacles they experience in resolving an employment relationship problem. Both parties believe "the system" favours the other:
  - employers tend to believe employees can take advantage of employers' difficulties in complying with the dismissal process and that inadequate processes would expose them to large liabilities
  - employees tend to believe that the employer knows the process, has more resources and holds all the cards.
9. Employers sometimes assert that process can be considered to be more important than substance. The analysis and research in Appendix 1 does not address this issue. However, matters of process and substance are often related. For example, if an employee "wins" because the Authority finds the employer failed to investigate alleged misconduct, the employer may interpret this as "process over substance", whereas the employee may believe their claim on the substance prevailed. In some cases the procedure can be so flawed that it makes it difficult to substantively justify the decision.
10. The Authority can reduce remedies to be provided to an employee. In the Department's review of 33 determinations in the Authority over a five week period, the Authority found in two determinations that the dismissals were unjustified in terms of process, but made no award to the employees because of their contributory behaviour. The Authority reduced remedies on this basis in 24% of the determinations reviewed (being 8 determinations).
11. The Authority and the Employment Court can take the size of the employer into account when examining all the circumstances of the case. A small employer is not expected to have the same set of procedures as a public sector employer or larger private sector employer.<sup>6</sup>

### **Employers tend to believe it is expensive to resolve employment relationship problems**

12. While employment relationship problems can be resolved without the use of representatives, if one party decides to involve a representative, the other party is incentivised to do the same to avoid perceived disadvantage.
13. The focus group and the case study projects indicated that there is a prevailing belief that employment issues that lead to personal grievance claims are expensive to settle. One estimate mentioned by some respondents in the case study project was \$40,000 (including legal costs and settlement values). The focus groups suggested that the amount to settle an employment relationship problem privately (ie. outside of the Department of Labour mediation services and the Authority) was expected to be closer to \$5000. Perceptions that problems are expensive if not settled internally

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<sup>6</sup> Comments made by Employment Court Judge Coral Shaw and Peter Kiely (partner in the law firm Kiely, Thompson, Caisley; and Adjunct Professor of Employment Law, Victoria University of Wellington) during the Victoria University of Wellington: Industrial Relations Centre seminar on "Employment Agreements: Bargaining Trends & Employment Law Update 2006/2007" on 15 August 2007

provide powerful incentives for employers to seek quick settlement outside the Department of Labour mediation services and the Authority.

14. The median cost of all employment relationship problems in the Department's email survey of employers, including those relating to litigation, was \$5000, of which \$2800 represented payouts to employees. The residual comprised legal fees, costs of investigations and of temporary replacement staff if any.
15. The cash costs (legal fees, compensation and replacement staff) of resolving problems rose steadily with the number of employees in a business, from a median of \$3,000 for businesses with 1-9 employees, to \$9,700 for businesses with more than 100 employees. The reasons for this may be related to larger businesses having more staff with higher remuneration (since settlement often includes lost wages). Authority awards for compensation under section 123(c)(i) of the Act for humiliation, loss of dignity and injury to feelings of the employee rose moderately by about five to 15% over the three years 2002 to 2005 after adjusting for inflation.
16. Qualitative findings from the small number of case studies indicated that SMEs in particular tend to rely on their networks for information such as the size of informal settlements. There were examples of SMEs making expensive payout decisions based on flawed information from their informal business networks.
17. Please see Appendix 4 for comments from Business New Zealand and SBAG on this issue.

## Issues emerging from the Department's analysis and research

### **Access to justice**

18. In this paper "access to justice" refers to the affordability of advice or representation to assist with resolving an employment relationship problem. If someone with an employment relationship problem would like to get advice from or instruct a representative but cannot afford to, their access to justice is considered to be impaired. Accessing justice need not involve representation. However, it seems that for many employees, particularly vulnerable or low income employees, an inability to afford representation means efforts to resolve an employment relationship problem are abandoned.
19. Legal Services Agency research in 2006 shows that actual or perceived fears of cost stopped 22% of people with an employment relationship problem from engaging a lawyer. Perceptions (rather than the reality) of costs may deter some employees from efforts at resolution.
20. Greater access to justice may be achieved if lawyers more often offered conditional fee arrangements. Current law offers little incentive for lawyers to enter into such arrangements, but the Lawyers and Conveyancers Act 2006, intended to come into effect on 1 July 2008, will expressly allow lawyers to use certain conditional fee arrangements. This may increase the use of conditional fee arrangements by lawyers and increase the range of options available to low income or cash-strapped employees in resolving employment relationship problems, thereby increasing access to justice for these groups.
21. Legal aid, which pays a "listed provider's" fees (ie a lawyer or employment advocate approved by the Legal Services Agency), is available for Department of Labour mediation and at the Authority. Legal aid will be granted if the client is financially eligible and his or her case satisfies the "merits" criteria in the Legal Services Act 2000. Significantly more people became eligible under the new legal aid financial eligibility thresholds on 1 March 2007. Further detail on Legal aid can be found in

Appendix 1. The availability of “no win, no fee” arrangements may increase access to justice for those who do not qualify for legal aid.

22. As with any legal processes, costs awarded by the Authority or the Courts do not cover the full costs incurred.

23. Please see Appendix 4 for comments from Business New Zealand, the New Zealand Council of Trade Unions and SBAG on this issue.

### **Impact of delays**

24. The Department’s analysis and research showed that the median length of time from when a problem first comes to the respondent’s attention until it was resolved was three months for SMEs and two months for larger businesses. The survey data showed that the quickest settlement was obtained via in-house resolution (median of one month), followed by use of external parties (two months). Resolution via Department of Labour mediation took a median five months (which includes any time spent trying to resolve the problem before contacting the Department’s mediators).

25. The time to mediation could be reduced if parties sought mediation as soon as it becomes evident that an employment relationship problem cannot be resolved in-house, assuming the mediation service is well resourced. Delays in going to mediation may have costs implications (in terms of lost wages, legal fees and social costs) on the parties and may increase the risk of the parties becoming entrenched in their positions. SBAG commented that other costs caused by delays include low productivity in the workplace, good staff leaving in the interim and issues arising from other employees trying to deal with the situation themselves.

26. Members of the Authority currently deliver determinations between two weeks and some months after the hearing. These delays may have cost implications (in terms of lost wages, legal fees, and social costs) on the parties.

### **Impact of employment relationship problems on SMEs**

27. The Department’s email survey of employers found that SMEs with 1- 9 employees experienced 2.9 cases per 100 employees while large employers experienced 1.2 cases. However, because small businesses employ fewer staff, they were much less likely to have actually experienced a problem in the previous year (6%) than large businesses (53%). SMEs by their nature tend to be pragmatic, and have fewer formal processes. The burden of resolving a problem is likely to be much heavier for a SME given their comparative lack of:

- experience in responding to employment relationship problems, since only 6% of small businesses had experienced an employment relationship problem in the preceding year;
- having employment processes and procedures in place;
- information about employment relationship problem resolution processes;
- awareness of the resolution options available; and
- certainty about the financial and time commitment associated with the formal process.

28. For these reasons SMEs may find it harder to comply with the procedural requirements in addressing employment relationship problems, which in turn is likely to count against them if the problem reaches the Authority or the Courts. A longer

median time until problem resolution found in SMEs may reflect a lack of experience and resources.

29. To summarise, quantitative and qualitative findings suggest that employment relationship problems appear to impact more heavily on SMEs than on larger businesses.
30. Please see Appendix 4 for comments from the Small Business Advisory Group on this issue.

### APPENDIX 3: OPTIONS ANALYSIS

Option	Description	Advantages	Disadvantages
Option 1. Do nothing	Should the issues identified in this paper be considered minor or inconsequential, there would be no necessity to take further action.		Does not address the issues raised
Option 2. Increase educational resources and support, including the possibility of the Department funding advice services and improvement of the Department of Labour's guidance for employers and employees on employment relationship problem resolution and termination of employment;	<p>There is a need for educational materials about the employment relationship problem resolution system, including representation options and likely representation costs, which are well targeted to employees and employers (particularly SMEs). (Additional information on this option is provided below)</p> <p>This option is likely to have fiscal implications.</p>	<p>This would be an effective tool for increasing access to justice, enabling all parties to be better informed and better able to effectively resolve problems.</p> <p>This option would help address the issues raised in relation to SMEs, by providing them with targeted information about the system and their options.</p>	Effectiveness depends on take-up of information, quality of materials and effectiveness of delivery.
Option 3.	These options would involve setting		These options may be

Option	Description	Advantages	Disadvantages
<p>Exploring the extent to which the quality of paid representation by employment advocates (excluding practising barristers and solicitors) could be better assured. This would include exploring how to ensure that representation by advocates is high quality by requiring that advocates;</p>	<p>enforceable standards to protect and promote the interests of their clients.  <b>Note:</b> These options would not apply to practising barristers and solicitors as they are already highly regulated. These options would also not apply to advocates who act in an unpaid capacity (for example, family, friends or church contacts who are not paid for their assistance)</p>		<p>unnecessary given that any problems with employment advocates are probably confined to a few individuals.</p>
<p>a) be regulated;</p>	<p>a) Options for regulation vary from disclosure, or registration, or certification and licensing tasks to licensing.<sup>7</sup></p> <p>This option would need to consider whether those who give informal employment advice without charging a fee would be</p>	<p>a) Regulation of advocates that included regulating fees would be consistent with the Law Commission’s suggestion for provision for fee review (together with provision around allowable conditional fee arrangements) for</p>	<p>a) Any compulsory regulation is probably an excessive response to a limited problem.</p>

<sup>7</sup> This could involve more formal regulation within The Policy Framework for Occupational Regulation, which sets out a continuum of options for regulation from Disclosure, Registration, Certification and Licensing tasks to Licensing (refer: Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations (available at [www.med.govt.nz](http://www.med.govt.nz)). The licensing of immigration advisers via the Immigration Advisers Licensing Act 2007 may provide a useful model administered by the Department if it is considered to be necessary to regulate at the top end of the regulation continuum.

<sup>8</sup> Applicants for membership have their credentials or relevant qualifications checked and references and/or referees contacted. Applicants must be nominated by an existing member.

Option	Description	Advantages	Disadvantages
	covered by regulation	lay advocates similar to that in the Lawyers and Conveyancers Act for lawyers. <sup>9</sup>	
b) belong to a relevant membership organisation, union or employers association	Options (b) and (c) Employment advocates may belong to a membership organisation such as the Employment Law Institute, <sup>8</sup> which has a code of conduct. Membership is currently voluntary and employment advocates can be members, although the majority of members are practising barristers and solicitors. Employment advocates may also be employed by a union or employers association.	b) compulsory membership of one of these organisations may improve the professional standards of advocates. Employers and employees who use such an advocate would be able to contact these organisations if they had concerns about the ability or professionalism of their advocate.	b) this raises an issue of <i>prima facie</i> inconsistency with section 17 (freedom of association) of the New Zealand Bill of Rights Act 1990. If this option was pursued it would be necessary to assess whether such a limitation could be justified under section 5 of the New Zealand Bill of Rights Act.
c) disclose they belong to a relevant membership organisation, union, or employers association, if requested by a prospective client	<p>Option (b) would restrict the right to represent people on employment matters to practising barristers and solicitors, paid advocates who belong to a relevant membership organisation or are employed by a union or employers association, or an unpaid advocate.</p> <p>Further work is likely to be needed to explore whether the Employment Law Institute would be a sufficient and appropriate body for all advocates who charge fees to join, or whether a new membership organisation for advocates</p>	c) this requirement could encourage advocates to join a relevant membership organisation.	c) there is no evidence that advocates do not already disclose such details. Those who use advocates from a union or employers associations would most likely have contacted their advocate through that organisation. Those who use other advocates may not be aware of the relevant membership organisations, or think to spontaneously ask this question. This requirement

<sup>9</sup> Any regulation of fees could consider giving the Authority or the Employment Court the power to review fees

Option	Description	Advantages	Disadvantages
	<p>should be established as another option. Establishing a new membership organisation is likely to incur costs, some of which may be fiscal.</p>		<p>would need legislative amendment.</p>
<p>Option 4 Exploring the extent to which the quality of representation by advocates (i.e. excluding practising barristers and solicitors) could be better assured by promoting to the public the use of advocates who belong to a relevant membership organisation, union, or employers' association with professional standards and/or codes of ethics</p>	<p>Further work would explore options on how to effectively promote the use of such advocates. This would involve engagement with the Employment Law Institute, unions and employers associations.</p> <p>As per option 3(b) and (c), further work is likely to be needed to explore whether the Employment Law Institute would be a sufficient and appropriate body for all advocates who charge fees to join, or whether a new membership organisation for advocates should be established as another option. Establishing a new membership organisation is likely to incur costs, some of which may be fiscal. The further work could also explore ways to encourage more advocates to join these organisations.</p> <p><b>Note:</b> This option would not apply to practising barristers and solicitors, as they are already highly regulated. It would also not apply to advocates who act in an unpaid capacity (for example, family, friends or church contacts who are not paid for their assistance)</p>	<p>Promoting the use of such advocates would have the same advantages as Options 3(b) and 3(c) above.</p>	<p>There is a risk that the government would be considered to be endorsing certain groups, who are not bound by any form of regulatory standard.</p> <p>The effects on the freedom of association as affirmed in section 17 of the New Zealand Bill of Rights Act should be taken into account when exploring how to promote the use of advocates who belong to a relevant membership organisation or association.</p>

<b>Option</b>	<b>Description</b>	<b>Advantages</b>	<b>Disadvantages</b>
<p>Option 5.</p> <p>Limit the right to be represented in mediation <sup>10</sup></p> <p><i>(This option is an element of the Employment Facilitation Process proposed by SBAG)</i></p>	<p>There is a spectrum of possibilities for limiting the right to be represented in mediation. Restricting, barring or regulating the presence of representatives in mediation may address concerns that representatives may unnecessarily escalate problems. Available information does not support or disprove this suggestion.</p> <p>Depending on the level of restriction placed on representative attendance, this option could have considerable operational implications. These would arise if the restriction was conditional or discretionary.</p>	<p>Restricting the right to be represented in mediation may in some situations prevent problems escalating and could result in a less adversarial approach to resolving problems.</p>	<p>The mediator's role in mediation was strengthened by the Employment Relations Amendment Act (No 2) 2004. Mediators now have statutory support to assist in controlling the process and can address any power imbalances. It is likely that some parties on both sides would hesitate to use mediation if they could not be represented. Representatives can enhance mediation and/or prevent an employment relationship problem from escalating. This option would not address any issues associated with a representative's activities outside mediation.</p>
<p>Option 6.</p> <p>Limit, restrict or regulate costs and remedies available in mediation and litigation</p> <p><i>(This option is an element of the Employment Facilitation Process)</i></p>	<p>This option may encourage the participants to focus on the substance of the issue and may mean a shift in focus to seeking more non-financial remedies (such as reinstatement, an apology, a reference or an agreement not to speak badly of each other).</p> <p>The limiting of remedies may be appropriate where a case rests on procedural flaws.</p>	<p>This option would discourage meritless and vexatious claims, and may focus proceedings on resolving and remedying the cause of the problem, possibly encouraging the preservation of the employment relationship.</p> <p>Restricting remedies may discourage the involvement of any unprofessional representatives.</p>	<p>Restricting costs and remedies may increase injustice, as claimants may not receive a settlement that fairly reflects the wrong suffered. The limiting of remedies where a case rests on procedural flaws may raise considerable definitional issues. In practice it can be very difficult to separate procedural from substantial</p>

<sup>10</sup> This occurs in some dispute resolution processes, such as the Disputes Tribunal and Tenancy mediation.

<b>Option</b>	<b>Description</b>	<b>Advantages</b>	<b>Disadvantages</b>
<i>proposed by SBAG)</i>			issues. A 'one size fits all' approach may not be appropriate given the diversity of employment relationship problems.
Option 6A Assess whether provisions in the Act for reducing remedies to reflect substantive justification and contributory conduct are effective.	If this option is considered, the work would need to include a review of the relevant provisions of the Act.	Depending on the outcome of this further work, it may address employer concerns that cases are decided on minor process flaws rather than substantive issues.	As outlined in option 5 above this option is likely raise considerable definitional issues.  Note that under the Act it is already possible for remedies to be reduced if the actions of the employee contributed towards the situation that gave rise to the personal grievance (section 124)
Option 7. Develop of a Code of Employment Practice relating to employment relationship problem resolution	The Act allows for codes of employment practice. Cabinet has noted suggestions for the approval process of such codes but the matter has not progressed. A Code of Employment Practice could codify 'best practice' employment practices and raise the profile of these for employers, representatives and employees.  A Code would provide elaboration and guidance for the parties on their legal requirements, but would not provide a "safe harbour" in the sense that unjustifiable decisions can still be challenged on substantial grounds.  A Code could have a specific focus for small businesses.	A Code of Employment Practice would support educational initiatives and establish standard practices in the employment relationship problem advice area. It may help address access to justice issues and costs of representation. Development of a Code would support other initiatives such as increased provision of education and support resources.	A Code may be perceived as mandatory instead of providing guidance.  There may be a perception that a Code will increase focus on procedure rather than substantive issues.

Option	Description	Advantages	Disadvantages
	<p>The Authority may have regard to any Code developed.</p> <p>(Additional detail on how a Code would be developed is provided below)</p>		
<p>Option 8.</p> <p>Assess how the provisions relating to a “[mediator] decision by authority of the parties” (section 150 ERA) could be strengthened to encourage its use in cases where an agreement cannot be reached and to discourage the unreasonable withholding of consent by either party</p>	<p>The NZCTU believes this provision that if section 150 was more widely promoted and used it could allow for minor matters to be dealt with in a timelier and less expensive way.</p> <p>Further work would give the Department better understanding of the issues surrounding the use of section 150 and would allow for options around section 150 to be developed</p> <p>This further work could include a consideration of whether it would be appropriate for the Authority to have the power to conduct binding mediation/arbitration between parties, as an alternative or supplementary approach to section 150.</p>	<p>Greater use of this provision would allow minor matters to be resolved quickly and cheaply.</p>	<p>No disadvantages identified</p>
<p>Option 9.</p> <p>Increasing the capacity of the Department of Labour to deliver mediation services and improve the capability of its mediators to respond to improve</p>	<p>This option would provide additional mediation services of a higher quality. Delays of several weeks before reaching mediation are common. The Department’s analysis and research shows the median time to settlement is five months (which includes any time spent trying to resolve the problem before contacting the Department’s mediators). 70% of employers reported being satisfied with the</p>	<p>This option would reduce delays in reaching Departmental mediation. More timely access to the Department’s mediation service may contribute to lower settlement costs at mediation (due to lower levels of lost wages), and higher levels of satisfaction. It may also prevent employment relationships deteriorating further or positions</p>	<p>No disadvantages identified</p>

<b>Option</b>	<b>Description</b>	<b>Advantages</b>	<b>Disadvantages</b>
services, as identified in the Department's Mediation Practice Development Project (strengthening mediation practice)	<p>process in the Department's mediation service, and 55% with the outcome.</p> <p>Research shows both parties seek early resolution.</p> <p>This option will have fiscal implications.</p>	<p>becoming entrenched due to delays in resolution. A shorter time to mediation may contribute to lower legal fees for parties.</p> <p>Early resolution would reduce the social costs of resolving the problem.</p>	
<p>Option 10.</p> <p>Explore options to reduce the time taken in the investigation and determination of cases in the Employment Relations Authority, including by considering changes to Authority processes to expedite employment relationship problem resolution and improve the effectiveness of the system in meeting its objectives</p>	<p>Members of the Authority currently deliver determinations between two weeks and some months after the hearing. Delays are attributable to workload, delays in receiving submissions and responses from the parties and so on. Options for reducing the time taken in investigation and determination could involve Members reaching oral determinations on the day of the hearing, the establishment of a short finite time frame for written determinations, or the possibility of the Authority conducting binding mediation/arbitration between parties, as an alternative or supplementary approach to section 150. Legislative amendment may be necessary depending on the degree and nature of the options.</p> <p>Research shows both parties seek early resolution.</p>	<p>If feasible options are identified this may led to: likely lower settlement costs due to reduced levels of lost wages and likely lower legal fees for both parties.</p> <p>Early resolution would reduce social costs.</p>	<p>If feasible options are identified this would have operational workload implications for the Authority in the short term, and possible implications for the workload balance between the Department's mediation services and the Authority.</p>

## **Additional information for Option 2: Increase educational resources and support**

- 1 The Department's mediation services provide mediation to help people resolve their employment relationship problems quickly and effectively. The Department's Contact Centre (0800 20 90 20) provides free information about all employment matters including employment relationship problem resolution. Where the parties are unable to resolve a problem themselves, they can approach the mediation service for assistance in the form of information, facilitation, educational events or mediation. Mediation is free of charge. Anecdotal information from the mediation service suggests that both employers and employees are not sufficiently aware of the availability of mediation, the range of mediation services, and that they can approach mediation directly without representation.
- 2 There is potential for the mediation services to extend its educational activities in the area of effective conflict and problem resolution in the form of systemic intervention with businesses or sectors with evidence of a high level of employment relationship problems. This could include assisting businesses, umbrella organisations or sectors to establish problem resolution processes, as the mediation service has done with voluntary organisations and the education sector.
- 3 Community Law Centres provide free legal advice to the public on a range of matters, including employment relationship problems. However, advisors at Community Law Centres are not necessarily specialists in employment law.
- 4 The Department could provide educational material on likely representation costs throughout the employment relationship problem resolution process for employers and employees.
- 5 The Department could also improve its guidance for employers and employees on employment relationship problem resolution and termination of employment.
- 6 Anecdotal information from the mediation services suggest there is a need for plain English educational material on employment relationship problem resolution for employees, as existing material is not well targeted. Educational material for employees could take the form of a plain language brochure setting out the options for resolving a problem. It should emphasise that employees do not need to be represented at mediation (that is, they can attend alone and put their own case) and that options are available for representation. It should also give indicative information about fees for each option and explain about Legal Aid eligibility. This plain language information should be provided in a range of languages, including the various Pacific languages. This could be provided by the Department via print media and/or a DVD. Consideration should be given to the translation of any other materials on preventing and resolving employment relationship problems into a range of languages, including the various Pacific languages.
- 7 Other forms of information provision could include the promotion of case studies on how to effectively deal with problems, and improved accessibility and information about Authority determinations including, for example, enhanced statistical information. The Department could also identify opportunities to promote "good news" stories about employment relationship problem resolution.

- 8 Additional resources could be provided to mediators, Contact Centre and Small Business Information Unit to work in partnership with Community Law Centres, other lawyers (in particular legal aid lawyers), Citizens Advice Bureaux, unions and via many other avenues relevant to employers, employees and representatives. Resources targeted to representatives could aim to educate them about how to optimise their role, including how to assist and enhance the mediation process.
- 9 Resources targeted to SMEs could be developed for promotion via the Department's Small Business Information Unit, and through New Zealand Trade and Enterprise (NZTE) services including Business Mentors, [www.business.govt.nz](http://www.business.govt.nz) and the Biz Information service, and Enterprise Training. A number of workshops on employment issues are currently delivered each year through the Enterprise Training Programme. However, there is not currently sufficient funding in the programme to deliver workshops on this subject on a regular basis nationally. Other existing services include the Employment Relations Education fund which has directed specific funding towards identification and resolution processes for workplace problems. In the 2004/2005, 2005/2006 and 2006/2007 funding years approximately \$68,700 has been allocated to projects dealing with conflict resolution and management, grievance handling, dealing with disciplinary issues, and bullying.
- 10 The Department could further fund additional and/or enhanced services to deliver a greater focus on preventing and resolving employment relationship problems. This would require additional resourcing. Such services will need to complement or augment existing services, such as those funded through NZTE and the Employment Relations Education fund (outlined above). Further work would be required to identify appropriate means of funding and delivery, and the exact services to be funded.
- 11 In addition to information about preventing and resolving employment relationship problems, the Department could further promote the routine use of written employment agreements, particularly among SMEs.
- 12 The Act requires that a copy of any collective agreement be provided to new staff covered by it, but compliance is reportedly not high. The Department could further promote compliance with this requirement, and with the requirement to have a written employment agreement, as ways to bring employment relationship problem resolution information to the attention of both employers and employees.

#### **Additional information for Option 7: How a Code would be developed**

- 13 Part 8A of the Employment Relations Act allows for me to approve codes of employment practice, by notice in the *Gazette*. Before such approval, I must be satisfied that there has been consultation, with such persons and organisations as I think appropriate, including relevant employer and employee interests.
- 14 The purpose of a code is to provide guidance on the application of the Act either generally, or in relation to particular types of situations, or in relation to particular parts or areas of the employment environment. Once a code has been developed, the Authority or Court may, in determining any matter within its jurisdiction, have regard to the code.

- 15 The development of a code of employment practices relating to employment relationship problem resolution would include specific objectives for the code and appropriate consultation (which may involve consultation with a tripartite advisory group, with SBAG to ensure that the code provides practical guidance for employers, and with other stakeholders).

## **APPENDIX 4: COMMENTS FROM BUSINESS NEW ZEALAND, NEW ZEALAND COUNCIL OF TRADE UNIONS, SMALL BUSINESS ADVISORY GROUP AND THE QUALITY REGULATION REVIEW**

Business New Zealand, New Zealand Council of Trade Unions and the Small Business Advisory Group (SBAG)

### **Representation**

1. Two main issues were discussed during the consultation: how a lack of regulation impacts on the behaviour of employment advocates; and how “no win, no fee” arrangements affect dispute (i.e. employment relationship problem) resolution.

#### *Lack of regulation*

2. SBAG, Business New Zealand and New Zealand Council of Trade Unions all noted that advocates are not subject to the same rules as lawyers. Business New Zealand expressed concern about regulating advocates because to do so would unduly limit types of representation available, i.e. by friends, and a blanket prohibition of advocates could prevent employer organisations from acting.
3. SBAG, Business New Zealand and New Zealand Council of Trade Unions did not submit that the lack of regulation was a substantial problem with the dispute resolution system.

#### *“No win, no fee” arrangements*

4. Business New Zealand noted the general perception that these fee arrangements increase claims but highlighted that information is largely anecdotal. Business New Zealand emphasised that such fee arrangements focus on money rather than settlement so are at odds with the Act’s objectives. New Zealand Council of Trade Unions does not consider that such fee arrangements have increased the number of personal grievance claims. SBAG considers that these fee arrangements increase the number of ‘vexatious’ claims and claims based on procedural errors.

### **Fairness**

5. The issues raised were: that many employers consider there is more emphasis on procedural rather than substantive fairness in dispute resolution; and that access to justice is an issue for everyone – employees need to have adequate, affordable representation when they need it, and so do employers.

#### *Procedure versus substance*

6. Business New Zealand and SBAG note that many employers consider that the system does not work in their favour. SBAG proposes introducing a provision stating that if an employer has acted in a substantively fair way, any small procedural error should be overlooked i.e. section 18(6) of the Disputes Tribunals Act 1988. Business New Zealand considered that notions of fairness depend who is affected and the system is probably ‘as fair as it can be’. New Zealand Council of Trade Union submits that the current system is fairer than SBAG’s alternative dispute resolution proposal.

#### *Access to justice and representation*

7. SBAG and Business New Zealand were concerned that an employee has access to legal aid to reduce the costs of taking a personal grievance while an employer has to

shoulder legal costs themselves. SBAG and Business New Zealand emphasise that any proposal needs to ensure that both employers and employees can adequately represent themselves without having to pay enormous fees.

8. Business New Zealand commented anecdotally that many, especially smaller, employers settle against a background of lacking expert advice of their own and being unable to make a proper judgement as to the merits of the case. This means small employers can be vulnerable to the tactics of experienced employee advocates – particularly the less scrupulous.
9. New Zealand Council of Trade Unions commented that there are many employees who cannot afford adequate representation, and others who are forced as a result of poverty to engage incompetent representation.

### **Developing a Code of Employment Practice**

10. Business New Zealand does not support a Code because it would: need to be interpreted; increase the amount of process; and further limit the discretion of a decision-maker by requiring strict adherence to the Code. An alternative is to provide more information about the type of steps to be taken when dismissing an employee. Business New Zealand considers that a Code would exacerbate the focus on process over substance.
11. SBAG was undecided. It supports the creation of a 'safe harbour' for employers that it is simple and effective but support for a Code would depend on who develops it, who buys in to it and what status it has.
12. Business New Zealand and SBAG's comments were dependent on the type and shape of the Code to be developed.
13. NZCTU supports a Code and considers that disciplinary inquiries, temporary and probationary employment could be covered, in addition to other areas.

### **Defining and quantifying the problem**

14. Submissions noted that there is little information about the current cost of dispute resolution (even how much lawyers and advocates are charging) and how that impacts on businesses.
15. SBAG emphasised that small businesses are hit hard when disputes occur because disputes cause financial losses and psychological stress. Costs are higher for a small business as one under-performing employee may make up a large percentage of the workforce. Costs include the time spent away from the business, other staff being unsettled, trying to cover for or recruit a replacement for the employee involved in the dispute, and stress in personal, family and work relationships. These are all powerful disincentives to be involved in a formal process. SBAG submits that these considerations result in SMEs settling to make the problem go away rather than defending their actions, particularly when they are concerned about the (unknown) costs of legal representation and may think that they cannot afford legal advice.
16. SBAG notes that SMEs in general lack specialist advice about recruitment, performance management and dismissal procedures, and that SME owners may be technical experts but lack skills in dealing with people.

## Quality Regulation Review – Sector Studies

17. There was support for added flexibility to dismiss staff in probationary periods. Interviewees in the retail and hospitality sector considered that disputes processes are biased in favour of employees, but this remains anecdotal and has not been substantiated in the analysis and research the Department of Labour has undertaken.