NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Finance and Expenditure Committee

on the

State Sector and Public Finance Reform Bill

P O Box 6645
Wellington
7 February 2013

1. Summary of recommendations

General

1.1. The CTU supports greater cohesion in the State services and endorses proposals within the Bill intended to strengthen this such as imposing a duty of collaboration on Crown Entities and requiring chief executives to exercise stewardship and be responsive to the wider interests of government.

1.2. The CTU recommends that restructuring in the public service be independently evaluated before progressing. Any restructuring proposal should be required to have a State Services Commission report containing this assessment.

1.3. We also recommend that, to deliver the most effective gain from the Better Public Services programme, the Government places a temporary moratorium on new restructuring in the core public service. This gives the collaborative model the best chance of success.

State Sector Act 1988

1.4. The proposed redundancy compensation scheme is contrary to the common law presumption against taking without compensation and New Zealand's international obligations under ILO Convention 98. The proposed scheme will lead to perverse incentives and a significant increase in litigation. The CTU recommends that the existing redundancy compensation scheme (restricting compensation for technical redundancy only) remains intact.

1.5. The proposal to implement binding Government Workforce Policy Orders without consulting unions or employees is likely to breach the State Services Commissioner's obligation of good faith, the consultation provisions of relevant collective agreements and rights of freedom of association. Given the serious nature of the problems with Government Workforce Policy Orders the CTU recommends that the proposed part 5 subpart 1 is not enacted. If Government Workforce Policy Orders proceed, then the CTU recommends that in order to address the more serious issues:

- Section 55B is amended to oblige the Commissioner to consult with affected employees and their unions before submitting workforce policy to the Minister (and if the policy is altered before it is submitted to the Executive Council). Such consultation should be done in good faith and in accordance with relevant policies and contractual terms.

- Section 55B should also be amended to prohibit the implementation of Government Workforce Policy Orders relating to terms and conditions of the collective agreement or bargaining matters while a collective agreement is being negotiated for an affected agency.

1.6. Delegation of core government functions and powers to contractors and private companies with minimal process or oversight obligations on the delegation creates a significant risk of these functions being delivered less efficiently and effectively. This creates significant reputational, litigation and fiscal risk for the Government, the Public Service and the contractor. Where the Government wishes to delegate functions out of the core public service this should be done by way of specific legislation to facilitate parliamentary oversight and detailed consideration of accountability mechanisms. The CTU recommends therefore that proposed sections 41(2A)-(2C) are deleted to remove the ability to delegate functions or powers outside of the Public Service.

1.7. Given the current fragmentation of the public service and the tangle of proposed reporting lines, the CTU believes that the case has not been made for the introduction of departmental agencies. The CTU recommends that the proposed introduction of departmental agencies does not proceed and that the enabling amendments are not made to the State Sector Act 1988 and Public Finance Act 1989.

1.8. If the introduction of departmental agencies proceeds then the chief executives of departmental agencies ought to have a responsibility, where appropriate, for the settling of disputes regarding the interpretation, application or operation of collective agreements. As the proposed legislation stands there is a risk of creating a cumbersome and technical

two-track process for dispute resolution in some cases. We recommend that section 69(b) of the State Sector Act 1988 is amended to allow chief executives of departmental agencies to be consulted or act as the employer where appropriate.

1.9. The proposed definition of ministerial staff appears to give overly wide latitude to appointment of ministerial staff outside of ministers' offices. We do not believe this was the intent and recommend that it is amended to clarify this as follows (our suggested addition is in italics):

> **Ministerial staff** means employees (including acting, temporary or casual employees) of a department who are employed on events-based employment agreements to work directly for a Minister *based in the Minister's office* rather than in that department.

1.10. The State Service Commissioner's code of conduct could be amended to provide the necessary independence for state servants required to hold two roles rather than creating an unnecessary power of exemption or variance. The CTU therefore recommends that this amendment does not proceed.

Public Finance Act 1989

1.11. The power to amend Schedule 4A of the Public Finance Act 1989 (proposed section 3AB) contains a loophole which could be used to sell off stakes in significant state assets such as Radio New Zealand or Television New Zealand without specific amending legislation. The loophole is undemocratic and should be closed. The CTU recommends that a new section 3AB(3) is added as follows to close it:

> (3) The Minister must not make a recommendation for the purpose of **subsection (1)(a)** if—
>
> (a) the company is a Crown entity; or
>
> (b) the company is a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986.

1.12. Given the significance of end-of-year performance information to parliamentary scrutiny of the executive branch the proposed exemptions from provision of this information are too widely drafted (particularly in relation to

non-departmental expenses). The CTU recommends that proposed section 15B is not enacted.

1.13. Restatement of comparative supporting information relating to Votes where the Vote has been restructured makes between year comparisons of Vote expenditure significantly harder. The CTU recommends that the supporting information should include a statement of both the original and restated comparative information.

1.14. Non-departmental expenditure and capital expenditure ought to be subject to audit given the potential for abuses and the extremely wide proposed latitude given to departments to contract out duties and functions. We recommend therefore that section 45D of the Public Finance Act 1989 is amended to subject non-departmental expenses and capital expenditure to audit.

1.15. The CTU recommends that the requirement for joint Ministerial approval (between the responsible Minister and the Minister of Finance) for transfers above a certain percentage of output class or dollar value between multi-class output appropriations or the new multi-category appropriations is enshrined in legislation along with a requirement to note these transfers in the end-of-year performance information.

2. Table of Contents

3. Introduction

3.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 350,000 members, the CTU is the one of the largest democratic organisations in New Zealand.

3.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

3.3. The majority of the CTU's members work in the wider State sector in all main occupational groups. In preparing this submission we have consulted closely with our affiliate unions representing the core Public Service and wider State Sector (particularly health and education).

3.4. We note that representatives of the State Services Commission have undertaken some dialogue with the New Zealand Public Service Association on the changes contained in this Bill. We welcome this dialogue but note that consultation with the CTU and the wider State Sector union group has been limited to one meeting in 2012. This is disappointing given the effect of the changes on union members throughout the State Sector.

The New Zealand State sector

3.5. An effective, world-leading State sector in New Zealand is important to all New Zealanders and to the functioning of our democracy. The State sector in New Zealand performs exceptionally well in several areas. For example:

- New Zealand ranked above the 96th percentile on all of the World Bank's 2011 Worldwide Governance Indicators.[1] New Zealand also ranked in the 99.5th percentile on the regulatory quality and control of corruption. The World Bank also ranked New Zealand's government

[1] Available at http://info.worldbank.org/governance/wgi/sc_chart.asp

effectiveness as the fifth highest in the OECD in 2009 (after Denmark, Finland, Sweden and Switzerland).[2]

- The New Zealand public service was again ranked as number one (perceived as least corrupt in the world) according to Transparency International's 2012 Corruption Perceptions Index.[3]

3.6. Mark Prebble has noted that the Transparency International figures are largely based on the World Bank's indicators and that these may be flawed. He comments that "The World Bank report… on New Zealand is itself based on inputs from just 40 people over half of whom are lawyers and a quarter public servants …; this may not be an unbiased source, and certainly cannot claim to be a representative sample."[4]

3.7. Prebble prefers the recent, more rigorous, World Justice Project Rule of Law Index (which has included New Zealand since 2011). New Zealand scores in the top ten countries in relation to all factors except order and security where we rank twelfth. Worryingly, our ranking fell on every factor between 2011 and 2012 by an average of 3.5 places with the largest falls in regulatory environment, absence of corruption and civil justice.[5]

3.8. Notwithstanding the recent drop in the Rule of Law rankings, New Zealand's public sector does many things as well or better than anywhere in the world. It is crucial to protect the best aspects of our public sector in undertaking reform.

3.9. The CTU supports several proposals in the Bill but we believe that many others will be detrimental to the public service, the public purse and our democracy.

[2] Ministry of Economic Development '2011 Economic Development Indicators' p 124
[3] Available at http://cpi.transparency.org/cpi2012/results/
[4] Prebble, M (2012) 'Which reform is most important? Some evidence from New Zealand' Working Paper 12/03 Victoria University Institutes for Governance and Policy Studies p 8
[5] World Justice Project (2011, 2012) Rule of Law Index. Some of these falls may be attributable to the greater number of countries included in the 2012-2013 Index (97) compared to the previous year (66)

4. Collaboration, amalgamation and restructuring

Collaboration

4.1. Overall, the CTU supports the drive towards greater collaboration within the State sector. A move towards shared services, joint procurement and economies of scale, handled carefully, has the potential to make real savings without compromising service.

4.2. The existing State Sector framework of individually accountable chief executives does not promote cross-agency collaboration or whole-of-government thinking.

4.3. We therefore agree with several of the proposals within the Better Public Services reforms geared toward this end. In particular, we support:

- The introduction of a broad obligation of medium- and long-term stewardship on State Sector chief executives.
- The introduction of an obligation on chief executives to be responsive to the collective interests of government.
- The requirement on boards of statutory entities to collaborate with other public entities (within the meaning of that term in the Public Audit Act 2001) where practicable.[6]
- While not mooted as a specific legislative change, we support in principle the concept behind specific purpose boards as a vehicle towards greater departmental collaboration.

4.4. The drive towards greater collaboration is not a new one. The 2001 'Review of the Centre' recommended greater collaboration and integrated service

[6] An odd consequence of the proposed provision is the Public Audit Act 2001 definition of public entities includes several entity types not covered by the Crown Entities Act 2004 such as port companies, state enterprises and mixed ownership model companies. These entities would not be under a reciprocal duty to collaborate. We would recommend amendment of their legislation to include a duty to collaborate where practicable or narrowing the category in the Crown Entities Act 2004.

delivery between departments and agencies along with less fragmentation and improved alignment of services.

4.5. The Government's proposals in this area are inconsistent insofar as widespread use of departmental agencies would result in more government agencies and may lessen collaboration and appears to go against the overall thrust of the reform.

Amalgamation

4.6. We note the focus of the Better Public Services project on amalgamation of government ministries and departments where possible. We acknowledge that New Zealand has the largest number of government ministries and departments in the OECD (currently 29) and that some benefits may flow from careful amalgamation.

4.7. However the CTU is concerned that merging of Government departments risks the loss of focus and accountability. We note, for example, the comments of the Royal Commission on the Pike River Coal Mine Tragedy in relation to the Department of Labour (DOL) health and safety jurisdiction:[7]

> DOL has been ineffective as the regulator of health and safety in the underground coal mining industry and its strategic approach to health and safety in general provides cause for concern. The reasons include… insufficient departmental focus and expertise regarding health and safety, especially at the senior management levels, caused by its multiple functions, its organisational structures and management groups, gaps in its multi-year strategies and planning, poor performance measures and infrequent self-review.

4.8. This type of problem is likely to be exacerbated by the integration of DOL, the Ministry of Economic Development, the Ministry of Science and Innovation and the Department of Building and Housing into the Ministry of Business, Innovation & Employment (though not necessarily in relation to the health and safety function if the Royal Commission's recommendations are followed).

[7] Royal Commission on the Pike River Coal Mine Tragedy (2012) chapter 24 para 53

Restructuring

4.9. A recent study by Norman and Gill[8] is sharply critical of the restructuring culture adopted in the New Zealand state sector. They surveyed a wide cohort of state sector chief executives, human resources managers, union delegates and union organisers. They conclude that:[9]

> Restructuring has become almost an addiction, reinforced by short, fixed term contracts for chief executives and a belief by those chief executives that their employer, the State Services Commission, expects them to be seen as 'taking charge.' Restructuring is a symbol and sometimes and [sic] substitute for action. It treats organisations as though they are mechanical objects with interchangeable parts rather than as living systems of people who have choices about the extent to which they will commit to their work. Organisational change receives considerably less scrutiny than funding proposals for major capital works. We advocate that restructuring should be subject to such scrutiny and chief executives need to act more like stewards of their organisations and less like owners.

4.10. A notable feature of the Norman and Gill study was the viewpoint of the HR group surveyed regarding restructuring:[10]

> [T]he HR focus group was strongly sceptical about restructuring. The statement 'I have yet to see a well-executed restructure in the public service' summed up the concerns. Instead, thee [sic] views were that restructures tend to create 'nervous, wary staff,' a 'loss of engagement', 'inertia' and 'reduced work outputs.' A restructuring can paralyse an organisation for a year and distract from on-going business. Too often CEs are forced into restructuring not because it was the right thing to do. Ironically, in the view of the HR group, the real 'dead wood' seldom is restructured out - 'because dead wood is smart in hiding.' Overall, restructuring 'costs a lot and promises more than it actually delivers.'

4.11. As Norman and Gill point out, frequent restructuring may also inhibit collaboration; "inter-agency working is going to be increasingly common but that working in this way takes sustained effort to build the shared commitment and responsibility required to work effectively across boundaries. Research on working across government agencies has

[8] Norman, R and Gill, D (2011) 'Restructuring- an over-used lever for change in New Zealand's state sector?'' Working Paper 11/06 Victoria University Institutes for Governance and Policy Studies
[9] Ibid. p 2
[10] Ibid. p 12

identified frequent restructuring as one of the major systemic barriers to more effective interagency working."[11]

4.12. As we note in part 3 of our submission above, the CTU supports the introduction of an explicit duty of stewardship for departmental chief executives.

4.13. The CTU endorses Norman and Gill's recommendation that restructuring in the public service be required to have an institutional 'check and balance' before progressing. They propose that "[j]ust as any spending proposal for Cabinet is required to have a Treasury report, any restructuring proposal should be required to have [a State Services Commission] report and should include the requirement for independent evaluation."[12]

4.14. We also recommend that, to deliver the most effective gain from the Better Public Services programme, the Government places a temporary moratorium on new restructuring in the core public service. This gives the collaborative model the best chance of success.

4.15. We discuss proposed changes to the redundancy compensation framework and specific issues relating to department agencies in greater detail in parts 5 and 8 of our submission below.

[11] Norman, R and Gill, D (2011) 'Restructuring- an over-used lever for change in New Zealand's state sector?' Working Paper 11/06 Victoria University Institutes for Governance and Policy p 15
[12] Ibid. p 16

5. Redundancy compensation

The effect of the proposed changes

5.1. Under the current legislative framework an employee within the core public service's entitlement to redundancy compensation will be restricted if they are offered substantially the same position on no less favourable terms and conditions (so-called 'technical redundancy') in accordance with section 30E of the State Sector Act 1988.

5.2. Under the proposed changes an employee who is made redundant and either accepts any other position in the State services (including the core Public Service and Crown Entities) or is offered another position in the State services which has comparable duties and responsibilities, is within reasonable commuting distance and on terms and conditions of employment that are no less favourable overall before the end of their employment and declines to accept will not receive any redundancy compensation.

5.3. This change is not restricted to the Public Service. The use of the term 'State services' in proposed section 61A of the State Sector Act 1988 suggests that it consequently applies (based on the definition of that term in section 2 of that Act) to all instruments of the Crown in respect of the Government of New Zealand, whether departments, corporations, agencies, or other instruments (including schools, Crown Research Institutes and District Health Boards but not State enterprises or tertiary education providers). It is a massive expansion of the Public Service redundancy framework.

5.4. Acceptance of <u>any</u> position within the State services during the notice period vitiates an employee's entitlement to redundancy payment. Redundancy payment is not defined in the State Sector Act 1988. However redundancy payment is defined in section 80B of the Social Security Act 1964 as follows:

redundancy payment means a payment (before the deduction of income tax) made in relation to the termination of a person's employment if—

(a) the main reason for the termination is that the person's position is or will be superfluous to the employer's needs, and the person is not a seasonal worker; or

(b) the person's usual seasonal employment is not made available by the employer mainly because the person's position, or usual position, is or will be superfluous to the employer's needs;

but does not include—

(c) a payment solely because of a seasonal lay-off; or

(d) a payment that depends on the completion of—

(i) a fixed-term engagement; or

(ii) an engagement to complete work specified in a contract; or

(e) a payment instead of notice terminating the employment; or

(f) any payment (including holiday pay) if the chief executive considers that, but for the termination of the employment, it would have been paid as monetary remuneration of the person; or

(g) any payment made by a company to a director of the company…

5.5. It appears likely that an equalisation payment or allowance (common in State services agreements) to compensate a redundant employee for taking a lower-paid job would be caught by the definition of redundancy payment unless this is further defined. For example, clause 24.3.7(a) of the District Health Boards and New Zealand Nurses Organisation Nursing and Midwifery Multi-Employer Collective Agreement 1 March 2012 – 28 February 2015 states:

(a) Where the new job [following redeployment within a DHB] is at a lower salary, an equalisation allowance will be paid to preserve the salary of the employee at the rate paid at the old job at the time of redeployment. The salary can be preserved in the following ways:

(i) A lump sum to make up for the loss of basic pay for the next two years (this is not abated by any subsequent salary increases); or

(ii) An ongoing allowance for two years equivalent to the difference between the present salary and the new salary (this is abated by any subsequent salary increases).

Legislative taking

5.6. The effect of the provision is to substantially lessen the value of existing redundancy compensation clauses in collective agreements across the public sector. It is arguable that this constitutes legislative taking of the 'property' of the affected employees. The Legislative Advisory Committee Guidelines ask law makers to consider whether vested property rights are affected by proposed legislation. They note (at para 3.2.2 on p 54):

> In various situations the presumption has been advanced that title to property or full enjoyment of its possession may not be compulsorily acquired without compensation unless such an acquisition was clearly the intention of Parliament. (See, for example, *Cross "Statutory Interpretation"* 1995, pp 178-179 and *O. Hood Philips' "Constitutional and Administrative Law"* 7ed 1987, p 530.)
>
> The strength of the presumption is illustrated by the decision in *Burmah Oil Company (Burma Trading) Ltd v Lord Advocate* [1965] AC 75. Lord Reid observed that, "even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it." (p 102).
>
> The presumption applies in New Zealand although there is no protection of property rights equivalent to that in the US Fifth Amendment. The latter protects the taking of property without due process. Chapter 29 of Magna Carta which protects the "right to justice" and the right not to be disseised of freehold is, however, part of New Zealand law.
>
> The presumption requires the drafter to consider whether the proposed legislation is a "taking" of "property". There is a vast range of American authority on this point. If property is involved and if what is proposed is a taking, consideration will need to be given as to whether or not compensation should be provided. In these circumstances, if compensation is not to be paid the legislation should make quite clear this intention.
>
> The development of this presumption reflects the fact that "the protection of property is generally regarded as one of the fundamental values of a liberal society." (*Cross*, p 179). Legislation which affects such values, for example, legislation taking away a property right and providing that no compensation is to be paid, may also raise issues about the acceptability of the legislation. As Baragwanath J observed in *Cooper v Attorney-General* [1996] 3 NZLR 480 at 485, "Disregard of convention" will "bring pressure" upon the legitimacy of decisions made by elected representatives "in the sense of unchallenged public acceptance of the constitutionality of legislation, …".

5.7. In some circumstances, we consider interference with private property rights justified in service of the common good (such as restrictions on certain land uses to protect the environment). In this instance however, we consider that the proposal constitutes an unreasonable intrusion on the provisions of the State services collective agreements given that these must be renegotiated at least every three years.

5.8. The de facto amendment of the public sector collective agreements may render the agreements themselves voidable if the parties do not choose to affirm the variation. The Laws of New Zealand, *Statutes* states at para 99:

> 99. **Effect of statutes subsequently passed**. In the absence of a clear indication to the contrary, a statute that declares a particular type of contract void, or that prohibits it, will be taken to apply only to contracts entered into after the statute's commencement. This rule follows from the presumption that enactments relating to matters of substance are not intended to operate retrospectively. The prohibition of a particular act by statute may, however, have the effect of making the performance of an existing contract illegal. In that event, or in the event of performance becoming impossible because of a supervening statute, the contract will be discharged unless the parties intended to create an absolute obligation.

International obligations

5.9. Since the Crown is also acting as the employer in this instance, it might be argued the Government is attempting to gain by fiat what it cannot negotiate through collective bargaining. This is contrary to the Government's international obligations regarding freedom of association. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO[13] contains many statements of principle confirming these obligations. For example:

> **941.** Collective bargaining implies both a give-and-take process and a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members. If these rights, for which concessions on other points have been made,

[13] Fifth (revised) Ed, International Labour Office, Geneva

can be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements.

1008. The suspension or derogation by decree- without the agreement of the parties- of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established by Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be bought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force.

5.10. The CTU is the designated Workers Organisation for New Zealand at the ILO and in that role we are concerned with the observation of ratified ILO Conventions by New Zealand. If changes to redundancy compensation are made as proposed we will need to consider making a representation to the ILO Governing Body for their consideration and possible action.

The proposed definition of 'alternative position'

5.11. The elements of the proposed definition of alternative position also bear comment.

- *Comparable duties and responsibilities*: The concept of 'comparable duties and responsibilities' is wider than the current test of 'substantially the same duties.' This begs the questions of what method of comparison is used and what is the acceptable level of difference. Since payment of often substantial severance hinges on this question of fact, litigation is likely to be the default strategy by dismissed workers who have also been denied compensation. These cases would be particularly attractive to contingency fee advocates because of the high levels of compensation for successful claimants.

- *Terms and conditions that are no less favourable overall*: It appears clear that a 'package' approach to terms and conditions will be taken in weighing them up. This is likely to be subject to significant litigation also. Evaluating rates of pay is straightforward but assessing the value of

occasional or one-off entitlements or non-monetary conditions may pose significant difficulties.

- *Treat service in the State services as continuous service*: Contractual service-based entitlements tend to employ a whole range of different definitions of service for various entitlements. An arguable meaning of the proposed clause is that all types of service must be treated as continuous (including, for example, transfer of placement on the salary scale and existing anniversary dates for salary progression).

5.12. The proposed framework introduces perverse incentives for employees and employers to 'game' the system. For example, employees may deliberately perform poorly in job interviews for roles they are well suited to because of the negative financial consequences. Others may go on stress leave for the remainder of their notice period. Rather than facilitating redeployment between services this proposal is likely to thwart it.

5.13. The proposed redundancy compensation scheme violates the common law presumption against taking without compensation and New Zealand's international obligations under ILO Convention 98. The proposed scheme will lead to perverse incentives and a significant increase in litigation. The CTU recommends that the existing redundancy compensation scheme (restricting compensation for technical redundancy) remains intact.

6. Workforce Policy Orders

6.1. Proposed section 55B sets out the process for the State Services Commissioner to generate workforce policy (which may then become binding Workforce Policy Orders by Order in Council):

> **55B Government workforce policy**
>
> (1) The Commissioner may draft government workforce policy and, after consulting with the affected agencies, submit it to the Minister for his or her consideration.
>
> (2) Government workforce policy must relate to workforce (including employment and workplace) matters from a State sector system perspective, and may, without limitation, address (in relation to the agency or agencies to which it applies)—
>
> (a) principles relating to pay or conditions:
>
> (b) the development of workforce strategy.
>
> (3) Government workforce policy must specify the agency or agencies to which it applies, which may be any or all of the following:
>
> (a) a department or departments:
>
> (b) a Crown agent or Crown agents:
>
> (c) an autonomous Crown entity or autonomous Crown entities.
>
> (4) The Governor-General may, by Order in Council made on the recommendation of the Minister, approve government workforce policy as a Government Workforce Policy Order.
>
> (5) A Government Workforce Policy Order is not a regulation for the purposes of the Regulations (Disallowance) Act 1989 or the Acts and Regulations Publication Act 1989.

6.2. Particularly as framed, workforce policy is likely to concern issues either directly addressed by collective agreements (such as principles relating to pay or conditions) for which the collective agreement provides a mechanism for consultation (such as the development of workforce strategy).

Consultation and good faith

6.3. It is extremely concerning that proposed section 55B(1) provides a consultation process that only encompasses "the affected agencies." It is clear from proposed section 55B(3) that 'agency' encompasses only the departments, Crown agents or Crown entities. There is no mechanism for consultation with employees or unions as their representatives.

6.4. The creation of binding recommendations as to workforce policy without consultation of unions or employees is likely to impinge upon consultation

obligations or variation clauses contained in public service collective agreements.

6.5. Implementing workforce policy without consulting unions and their representatives is also likely to breach the State Services Commissioner's duty of good faith (applicable through his status as employer in relation to collective disputes under section 69(b) of the State Sector Act 1988). Section 4 of the Employment Relations Act 2000 states, *inter alia*:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; …
>
> (4) The duty of good faith in subsection (1) applies to the following matters:
>
> (a) bargaining for a collective agreement or for a variation of a collective agreement, including matters relating to the initiation of the bargaining:
>
> (b) any matter arising under or in relation to a collective agreement while the agreement is in force:
>
> (ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:
>
> (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:
>
> (c) consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business

6.6. A Government Workforce Policy Order made during bargaining about matters relating to bargaining would be even more likely to breach the State Services Commissioner's duty of good faith under the more stringent good faith requirements of section 32 of the Employment Relations Act 2000 particularly those around undermining of bargaining.

6.7. Similarly to the proposed restriction of redundancy compensation, workforce policy orders may contravene ILO Conventions 87 and 98. Freedom of

Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO[14] notes:

> **1005.** Where intervention by the public authorities is essentially for the purpose of ensuring that the negotiating parties subordinate their interests to the national economic policy pursued by the government, irrespective of whether they agree with that policy or not, this is not compatible with the principles that workers' and employees' organizations should enjoy the right freely to organise their activities and to formulate their programmes, that the public authorities should refrain from any interference which would restrict this right or impede the law exercise thereof, and that the law of the land should not be such as to impair or be so applied as to impair the enjoyment of such right.

6.8. Given these issues, the effect of proposed clause 55C(4) "a Government Workforce Policy Order does not override existing employment and other legal protections" is a critical matter. The explanatory note to the Bill states that it "means, for example, that a Government Workforce Policy Order cannot override a Public Service chief executive's obligations to be a good employer." This may also mean that obligations such as good faith, trust and confidence, fair dealing along with express contractual obligations (such as consultation) may prevent chief executives from implementing Government Workforce Policy Orders. Alternatively, certain Government Workforce Policy Orders may be legally challengeable (for example by judicial review).

6.9. Perhaps most importantly, workforce policy implemented without proper consultation is likely to be the worse for the lack of input. As the full bench of the Employment Court noted succinctly in *Vice-Chancellor of Massey University v Wrigley and Kelly* [2009] ERNZ 185 at [56]:

> Power does not confer insight and wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers.

6.10. In light of the serious nature of the problems with Government Workforce Policy Orders the CTU recommends that the proposed part 5 subpart 1 is not enacted.

[14] Fifth (revised) Ed, International Labour Office, Geneva

6.11. If Government Workforce Policy Orders proceed, then the CTU recommends that in order to address the more serious issues:

- Section 55B is amended to oblige the Commissioner to consult with affected employees and their unions before submitting workforce policy to the Minister (and if the policy is altered before it is submitted to the Executive Council). Such consultation should be done in good faith and in accordance with relevant policies and contractual terms.

- Section 55B should also be amended to prohibit the implementation of Government Workforce Policy Orders relating to terms and conditions of the collective agreement or bargaining matters while a collective agreement is being negotiated for an affected agency.

7. Delegation of functions and powers to persons outside of the public service

7.1. Existing section 41 of the State Sector Act 1988 permits a departmental chief executive to delegate their powers or functions to another chief executive or an employee of the department (subsection 41(1)).

7.2. The proposed amendments would allow chief executives to delegate any of their functions or powers[15] to contractors within the public service (new section 41(1A)(c)) or, with ministerial approval, to a person outside of the public service including a corporation (new section 41(2A)). The delegation need not be in writing.[16]

7.3. Delegation outside of the public service must be noted in the Department's annual report along with an indication of "how effectively delegated functions or powers were performed or exercised" (proposed section 41(2B)). Performance of these functions is subject to the same statutory obligations as a person within the public service.

[15] Except those given by a Minister or the State Services Commissioner unless those parties give written consent under section 41(1)
[16] See *Maroroa v Attorney-General* [2000] 1 ERNZ 511

7.4. Subjecting a person outside of the Public Service to the same obligations as a person within the Public Service is important to maintain accountability. However, it may pose significant logistical and practical challenges to have private companies and individuals become subject to scrutiny from the Ombudsman, Auditor-General and their decisions subject to judicial review.

7.5. Many of the chief executives' rights in the State Sector Act 1988 apply specifically to employees and may therefore not apply to contractors and private companies. For example, section 83 of the State Sector Act 1988 provides that the chief executive may from time to time issue instructions that shall be observed by all employees of the department.

7.6. Persons outside of the Public Service do not gain the same rights as employees within the public service (so for example they are not immune from liability in civil proceedings by virtue of section 86 of the State Sector Act 1988). This may constitute a significant unintended consequence of the contracting out of core public service responsibilities.

7.7. There is a question as to what extent individuals employed by private companies that are delegated functions or powers are bound by the State Services Commission Code of Conduct. The proposed amendment to section 57A (clause 45 of the Bill) extends a requirement to comply with minimum standards (including codes of conduct) to "secondees, and individuals working as contractors in relation to a function, duty or power of the agency." This language mirrors that of proposed section 57A(1A)(c) but not that of proposed section 57A(2A) "a person outside of the public service."

7.8. Delegation of core government functions and powers to contractors and private companies with minimal process or oversight obligations on the delegation creates a significant risk of these functions being delivered less efficiently and effectively. This creates significant reputational, litigation and fiscal risk for the Government, the Public Service and the contractor.

7.9. Where the Government wishes to delegate functions out of the core public service this should be done by way of specific legislation to facilitate parliamentary oversight and detailed consideration of accountability

mechanisms. The CTU recommends therefore that proposed sections 41(2A)-(2C) are deleted to remove the ability to delegate functions or power out of the Public Service.

8. Departmental agencies

The UK executive agency model

8.1. Departmental agencies are specifically primarily based on the United Kingdom's executive agency model. Lessons can be drawn from the UK experience.

8.2. Executive Agencies were set up following the publication of the Efficiency Unit's 'Next Steps' report in 1988 as part of a drive to reform Whitehall culture. The agencies were "set up as separate delivery organisations headed by personally-accountable chief executives charged with efficient and effective service delivery. Agency responsibilities and delegations would be laid out in tailored framework documents', with a presumption in favour of significant management autonomy within the prescribed policy and budgetary framework."[17]

8.3. There was a rapid growth in the establishment of agencies during the 1990s to a height of 138 agencies in the last days of the Major Government in 1997. Under subsequent governments the number of agencies began to contract; down to 84 in 2010. More than 60% of UK civil servants still worked within agencies in 2010.

8.4. According to Elston the main driver of the re-assimilation of the agencies was the problem with a notional policy-delivery split. As he notes:

> [E]xisting research has highlighted how, in practice, achieving this functional separation proved difficult. Greer (1994: 78), for instance, writes that "the first lesson from Next Steps is that public administration theory was right and that it is not easy to separate 'policy' and 'operational' issues. Moreover an official review found that "half

[17] Much of the background is taken from Thomas Elston's conference paper 'Developments in UK executive agencies: re-examining the 'disaggregation-reaggragation' hypothesis' retrieved from http://soc.kuleuven.be/io/egpa/org/2011Roem/papers/Paper%20Elston.pdf and since published in Public Policy and Administration March 2012.

of agencies have policy functions either resulting from their framework document or de-facto." (Trosa, 1994: 3, 40-41).

8.5. Moseley, Pertrovsky and Boyne reviewed the effectiveness of UK Executive Agencies.[18] They found mixed outcomes. Agencies generated improvements in real terms administrative costs but only for agencies that were non-trading (did not raise revenues directly from clients). Trading agencies raised their real terms administrative costs. The authors suggest that agencies which could add to their budgets through charges did so and as effective monopoly providers they were able to pass such costs on to consumers.

8.6. Most agencies were successful at meeting their targets but customer satisfaction remained a problem along with disconnection between the agencies and their host departments. An official review noted that many agencies had a 'silo mentality' resulting in missed opportunities for joint working and shared services. Administrative costs for central government to administer the agencies are difficult to measure but Moseley, Petrovsky and Boyne speculate that the whole of government costs of the agencies may mitigate or outweigh the benefits.

8.7. As noted above in section 3, the introduction of departmental agencies is likely to lead to greater fragmentation of accountability, service delivery and policy setting. The establishment of significant numbers of departmental agencies runs counter to and may nullify gains from departmental and agency consolidation.

Reporting and dispute resolution channels

8.8. The accountability issue is exacerbated by the reporting arrangements between host departments and their departmental agencies. Departmental agencies costs will be met by their host departments (proposed section 34(2) of the Public Finance Act 1989) but the two will have wholly separate annual reports (proposed section 45 as modified by clause 89 on 1 July 2013 and

[18] Draft chapter 'Agentification in the United Kingdom' in Verhoest, K., van Theil, S., Bouckart, G., and Laegried, P (eds) (2011) Government Agencies in Europe and Beyond: Practice and Lessons from 30 Countries

clause 138 on 1 July 2014). It will be difficult to assess the performance of a departmental agency without understanding the financial costs.

8.9. Given the existing fragmentation of the public service and the tangled proposed reporting lines, the CTU believes that the case has not been made for the introduction of departmental agencies. The CTU recommends that the proposed introduction of departmental agencies does not proceed and that the enabling amendments are not made to the State Sector Act 1988 and Public Finance Act 1989.

8.10. If it is decided to proceed with the introduction of departmental agencies then an element of the 'deemed delegation' of employer responsibilities from the chief executive of the host department to the chief executive of the departmental agency in proposed section 59A(2) requires comment.

8.11. New clause 59(2)(a)(i) proposes that the chief executive of the departmental agency gains responsibility for dealing with personal grievances (section 69(a)) and other employment relationship problems (section 69(c)) but not disputes about the interpretation, application or operation of any collective agreement (section 69(b)). Responsibility for these disputes remains with the chief executive of the host department along with or in consultation with the State Services Commissioner.

8.12. This split may necessitate a two-stage dispute resolution process in some circumstances where an employee or union must raise a dispute regarding the meaning of the collective agreement with the chief executive of the host department and, at the same time or subsequently, raise a personal grievance for unjustified action by the employer causing disadvantage or breach of contract claim with the chief executive of the departmental agency. It would be confusing, technical and cumbersome.

8.13. We recommend amendment of section 69(b) to ensure that the chief executive of the departmental agency is either joined as the employer party or consulted about the dispute.

9. Ministerial advisors

9.1. The Bill proposes a new category of public servant called 'ministerial staff' employed directly by a minister and exempts their appointments (by way of proposed section 66) from the requirements to appoint on the basis of merit, notify vacancies and appointments or provide an appeal process.

9.2. Better Public Services Cabinet Paper 6: Amendments to the State Sector Act states:[19]

> We propose that certain mandatory employment processes should not be binding in relation to "Core Ministerial Office Staff". This term covers the quasi-political appointees recruited to support Ministers.… They are employed to work in Ministers' offices on events based employment agreements by the chief executive of the Department of Internal Affairs.… The nature of some tasks performed by Core Ministerial Office Staff is of an undeniably political character….

9.3. The proposed definition of 'ministerial staff' under section 2 of the Act is:

> **Ministerial staff** means employees (including acting, temporary or casual employees) of a department who are employed on events-based employment agreements to work directly for a Minister rather than in that department.

9.4. This provision is clumsily worded and appears to permit ministerial staff to be appointed to work directly for a minister outside of ministerial offices. They could arguably be deployed in departments or crown agencies (apart from their host department). This does not appear to have been the intent of the provision and we recommend that the definition is amended as follows (our suggested addition is in italics:

> **Ministerial staff** means employees (including acting, temporary or casual employees) of a department who are employed on events-based employment agreements to work directly for a Minister *based in the Minister's office* rather than in that department.

[19] At paragraphs 48 and 49

10. Varying the code of conduct for specific groups or individuals

10.1. The Cabinet Paper Better Public Services Paper 6: Amendments to the State Sector Act 1988 explains the rationale for the changes as follows:

> 78. There are times when it might not be appropriate for a code of conduct in its entirety to apply to a Public Service department or those undertaking particular functions in a department. Examples may include a person seconded to a role or having secondary employment where that person should be able to criticise Government Policy or not follow government policy as when a person undertakes part time lecturing at the Victoria University School of Government or secondment to the New Zealand Productivity Commission. In such cases their roles and responsibilities are such that they cannot always be expected to act in a politically neutral way. The exception would only relate to the additional activity and not when acting in the person or groups substantive role.

10.2. The issue is a reasonable one to address. However there are three problems with the proposed solution. First, it appears to deal with a problem that is adequately addressed by the current State Services Commission Code of Conduct and associated guidance. The State Services Commission's 'Understanding the Code of Conduct: Guidance for State servants' makes detailed commentary particularly under the section entitled 'We must respect the authority of the government of the day' at pp 15-17. It holds that public servants may comment on issues in a personal capacity. The guidance sets out the limitations on this comment at p 15:

> It is generally unacceptable for us in our personal capacity to comment on matters of government policy if we:
>
> - use or reveal any information gained in the course of our work where this is not already known by, or readily available to, the general public
> - purport to express or imply an organisational view
> - act in a way that constitutes a personal attack on a Minister, work colleagues or other State servants
> - criticise in such strong or persistent terms that our ability to give full effect to the executive government responsibilities of our organisations in an impartial way is called into question.

10.3. These restrictions make sense in relation to the examples given in the Cabinet Paper and it is difficult to see why the State Services Commissioner would wish to vary them for certain staff or groups of staff when it is intended that “the exception would only relate to the additional activity and not when acting in the person or groups substantive role.”

10.4. As spokespeople for unions or professional associations, state servants “will not be under the same constraints when making comments that are critical of the Government or the management of [their] organisation when such comments are clearly on behalf of that union or association” (p 17). This exemption could be extended to (using the examples cited in the Cabinet paper above) academic comment or comment in a statutory role (such as the Productivity Commission) by simply varying the Code of Conduct.

10.5. Second, the power as drafted is extremely widely framed. If the sole goal is to allow criticism of the government by persons acting in a private capacity it is difficult to see why it would be useful to vary their obligations as to fairness, responsibility and trustworthiness.

10.6. Third, the process for varying the application of the applicable codes is opaque. It is not clear whether any publicly available record would be made of exemptions and variations and, in the absence of this record, members of the public (and other public servants) may see partiality (or unfairness, irresponsibility or untrustworthiness) as reflective of the Public Service.

10.7. A legislative sledgehammer should not be used to crack a regulatory nut. The CTU recommends that the Code of Conduct should be amended to provide the necessary independence rather than creating an unnecessary power of exemption.

11. New Part 4A of the Public Finance Act 1989

11.1. We note the proposal to create a new schedule 4A to the Public Finance Act 1989 that initially comprises seven companies transferred from the existing schedule 4 of that Act.[20] The Treasury report, Governance Regime Applying to PFA Companies, notes at para 8:

> Schedule 4 of the PFA was created as a 'parking lot' for a range of very small public bodies such as Reserve Boards for whom the CEA was judged inapplicable. It was never intended to be used as a separate, specific organisational form so there is little specification of the governance regime that should apply. For example, the Minister's powers of direction using the SOI and the whole of government direction provisions of the CEA do not apply to Schedule 4 entities. These are the provisions that underpin achievement of the Better Public Service goals.

11.2. The Bill inserts a new Part 5AA of the Public Finance Act 1989 setting out the proposed governance regime for the Schedule 4A companies. A Schedule 4A company must have a constitution and present it to the House of Representatives (sections 81 and 82 of the Crown Entities Act 2004); Unlike a standard company registered solely under the Companies Act 1993 a Schedule 4A company may also act in the best interests of shareholders (not solely the best interests of the company). Technical provisions in sections 83 and 84 allow Ministers to hold shares and to appoint representatives. Usual restrictions apply to governance arrangements for subsidiary companies (sections 96, 97, 99, 100 and 102 of the Crown Entities Act 2004). Schedule 4A companies must also meet good employer obligations (section 118 of the Crown Entities Act 2004).

11.3. Schedule 4A companies are subject to the same reporting obligations, review and information provision obligations under sections 132 to 134 and 136 to 157 of the Crown Entities Act 2004.

11.4. Responsible Ministers cannot direct Schedule 4A companies, their members or office holders (sections 103-106 of the Crown Entities Act 2004 do not

[20] Crown Asset Management Ltd, Crown Fibre Holdings Ltd, Dispute Resolution Services Ltd, Health Benefits Ltd, Learning State Ltd, Research and Education Advanced Network New Zealand Ltd, and Southern Response Earthquake Services Ltd.

apply). The Minister of State Services and the Minister of Finance may make whole of government directions under section 107 of the Crown Entities Act 2004.

11.5. Schedule 4A companies are not required to consult with the State Services Commissioner on the terms and conditions in collective agreements (section 116 of the Crown Entities Act 2004) or the appointment of a chief executive (section 117 of the Crown Entities Act 2004).

11.6. Significantly, Ministers may sell shares in any Schedule 4A companies without specific legislation or even Order in Council (section 80 of the Crown Entities Act 2004 does not apply). This may be characterised as 'fast track' imposition of partial privatisation without requiring legislative (or even Cabinet approval). The shares may not be listed on the NZX or other registered markets as this would trigger a Ministerial recommendation to remove the company from Schedule 4A (proposed section 3AB(2)(a)).

11.7. Proposed section 3AB(1)(a) of the Public Finance Act 1989 (clause 79 of the Bill) states that companies may be added to Schedule 4A by Order in Council (based on Ministerial recommendation) if Ministers hold more than 50% of shares and no shares are currently listed on a registered market.

11.8. Proposed section 3AB(2) states that the Minister must make a recommendation to remove a company from Schedule 4A if the Crown's shareholding falls below 50%, the shares are listed on a registered market, the company is a Crown entity or a State enterprise.

11.9. According to section 1.19 of the Cabinet Manual, the advice and consent of the Executive Council is needed before the Governor General will make an Order in Council on a Minister's recommendation. The Executive Council may ignore the recommendation of the Minister and place a Crown entity company (the Crown Research Institutes, the New Zealand Venture

Investment Fund, Radio New Zealand or Television New Zealand) on Schedule 4A.[21]

11.10. A loophole which could be used to sell off stakes in significant state assets such as Radio New Zealand or Television New Zealand without specific enabling legislation is undemocratic and should be closed. The CTU recommends that new section 3AB(3) is added as follows to close it:

> (3) The Minister must not make a recommendation for the purpose of **subsection (1)(a)** if—
>
> (a) the company is a Crown entity; or
>
> (b) the company is a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986."

12. Reporting and audit concerns

12.1. The cumulative consequence of the package of reforms to the Public Finance Act 1989[22] is to significantly reduce Parliamentary scrutiny of appropriations (particularly retrospective scrutiny).

12.2. The changes to reporting on appropriations make the end-of-year performance information details outlined in proposed section 19C of the Public Finance Act 1989 of crucial importance to maintain Parliamentary accountability.

12.3. There are, however, at least three ways in which the end-of-year performance information requirements appear to be watered down (particularly in relation to non-departmental expenses).

12.4. First, proposed section 15B of the Public Finance Act 1989 allows the Minister a broad discretion to waive the requirement to provide end-of-year performance information. The Minister can waive the requirement where a department's output expenses relate solely to an output supplied to one or more other departments under proposed section 15B(1). The Minister can also waive the requirement for reporting on non-departmental expenses or

[21] There is a question as to whether a State enterprise may also be moved in this fashion. State enterprises fall within the definition of company in the Public Finance Act 1989 but section 10A of the State-Owned Enterprises Act 1986 only permits the addition of companies to Schedules 1 and 2 of that Act not the deletion.

[22] Along with relaxation of other requirements outside of legislation; see part 13 below

capital expenditure where the information will otherwise be readily available, where the information is not likely to be informative or the amount is less than $5 million for expenses or $15 million for capital expenditure.

12.5. It is difficult to see how these exemptions are justifiable given the importance of end-of-year performance information and the potentially contentious nature of non-departmental expenditure (particularly when coupled with the ability to move spending between output classes within multi-class output appropriations (MCOAs) and the new multi-category appropriations (MPAs). Parliamentary scrutiny is important. The CTU therefore recommends that proposed section 15B is not enacted.

12.6. Second, proposed section 15(2) allows the restatement of comparators in relation to supporting information for Votes. It states "if the Vote has been restructured 1 or more times since the beginning of the period in respect of which supporting information is required… then the comparative information required under that subsection must, to the extent practicable, be prepared as if the restructuring had occurred before the beginning of that period." While this is common accounting practice it makes comparison of supporting information on votes between years potentially very difficult. The CTU recommends that the comparative information should include a statement of both the original and restated comparative information.

12.7. Third, we are concerned by the proposed exemptions from the audit requirement for end-of-year performance information. The explanatory note to the Bill states at p 28:

> End-of year performance information on most appropriations must be audited under section 45D. The information is not audited if it is in respect of an appropriation for non-departmental expenses, or non-departmental capital expenditure, from which resources will be provided to a person or entity other than a department, an Office of Parliament, or a Crown entity.

12.8. This information is exactly the sort that should be audited given the potential for abuses and the extremely wide proposed latitude given to departments to contract out duties and functions. Given that audit is dependent on the end-

of-year performance information, it seems likely that an exemption granted under proposed section 15B (discussed above) would also exempt that output from audit. We recommend therefore that section 45D of the Public Finance Act 1989 is amended to subject non-departmental expenses and capital expenditure to audit.

13. Multi-category appropriations

13.1. Although a Cabinet-level decision rather than a legislative change, the relaxation of joint ministerial approval for transfer of output class within MCOAs (and presumably MPAs when the Bill is enacted) is concerning.[23] The potential exists for significant in-year transfers of output spending (for example from departmental outputs to non-departmental outputs or capital expenditure). We are concerned that there should be a minimum level of accountability and transparency where these transfers are so significant as to change the character of the appropriation.

13.2. The CTU recommends that the requirement for joint Ministerial approval (between the responsible Minister and the Minister of Finance) for transfers above a certain percentage of output class or dollar amount between MCOA and MCAs is enshrined in legislation along with a requirement to note these transfers in the end-of-year performance information.

14. Conclusion

14.1. The CTU supports several proposals in the Bill but we believe that many others will be detrimental to the Public Service, the public purse and our democracy. We recommend that the Bill proceeds with the substantive amendments that we have proposed.

[23] The rescinding of requirements set out in EXG Min (07) 1/1