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

to the

Ministry of Business, Innovation and Employment

on the

Employment Mediation Services Change Proposal

P O Box 6645
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1. Introduction

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. 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.

1.3. The CTU is recognised as the most representative body of workers in New Zealand by the New Zealand Government and the International Labour Organisation.

1.4. Our affiliated unions are some of the most frequent users of the employment mediation service. Many of the most complex and high stakes employment disputes relate to collective bargaining and interpretation. Organisers and union officials have extensive experience in representing members in dispute resolution processes (both informal and formal).

1.5. The CTU has met with officials from the Ministry of Business, Innovation and Employment ('MBIE') who have provided us with a summary document regarding the proposal and answered our questions.

1.6. Based on this information and further research, we are deeply worried by the scope and justification for the change proposal. It is a leap into the unknown without a safety net. We urge MBIE reconsider.

1.7. The CTU submission is in five parts:

- First, we discuss the value of the employment mediation service in New Zealand including the trust and confidence of participants and the social and economic value of early, effective dispute resolution.
- Second, we outline our understanding of the change proposal.
- Third, we discuss our understanding of the reasons for the proposed change.
- Fourth, we outline issues and potential pitfalls. These relate primarily to the ability of the private sector to deliver high quality and effective mediation services, apparent errors in the summary document, and risks to the mediation service's culture. We also note the legal risk inherent in converting employees to contractors.
- Fifth, we suggest a way to ameliorate some of the biggest concerns and risks. Further research is needed. There is no way to put the genie back in the bottle: Before rolling out a contract panel model, the viability of such a model should be established. We recommend that MBIE trial the viability of the model regionally before attempting to roll it out nationally.

2. The value of the Employment Mediation Services

2.1. Access to high quality mediation is a cornerstone of the Employment Relations Act 2000. Section 3(a)(v) of the Employment Relations Act 2000 states that "[t]he object of this Act is to build productive employment relationships…by promoting mediation as the primary problem-solving mechanism".

2.2. The work of the Employment Mediation Service is strongly supported by all participants in the industrial landscape including workers, unions, employers, lawyers and other advocates. This is evident from the widespread concern regarding the change proposal.

2.3. The Employment Mediation Service has built a reputation for effective, quality services over the past 24 years (the previous 14 as the Employment Mediation Service and the 10 before that as the Employment Tribunal). This reputation is hard won and invaluable.

2.4. Grant Morris (2015) sums up the importance of the Employment Mediation Service's work and their success:[1]

> The MBIE approach to mediation has been continuously developed and refined since 2000. The eclectic, responsive style is generally well received by parties… Mediation under the ERA has contributed to a less adversarial approach in New Zealand employment disputes when compared to the more litigious, directive culture that existed under the Employment Contracts Act (1991-2000)…. A group of expert mediators is facilitating the resolution of disputes in place of acrimonious litigation. The MBIE employment mediation style is at the forefront of making New Zealand a more collaborative culture, although adversarial approaches are still prevalent in many areas of our legal system. It also acts as a model for other mediators and statutory regimes.

2.5. The provision of effective, high-quality mediation has many benefits to employers, workers and the economy as a whole. MBIE (2014) notes that:[2]

> In 2007, the former Department of Labour commissioned research on the cost of employment relationship problems (ERPs). The research found that the cost of ERPs was $214 million (0.6% of private sector wages and salaries for the year). Using the Labour Cost Index (LCI) to adjust to present day values, this becomes $242 million (in 2013 dollars). This equates to 0.4% of private sector wages and salaries for the year. This calculation is the present day value of the 2007 estimate. An estimate of the cost of more recent ERPs, also incorporating indirect costs such loss of productivity, morale and personal relationship issues resulting from the dispute, would provide a truer picture of the current cost of ERPs to the New Zealand economy.

2.6. We agree with MBIE that the research[3] significantly understates of the cost of employment relationship problems. Many of these costs are difficult or impossible to quantify. There are direct health effects such as depression, anxiety and post-traumatic stress disorder (PTSD) that may be partial quantifiable but it is impossible to put a cost on emotional distress and human suffering (including the costs on affected families and workplaces).

2.7. Employment relationship problems often have long term economic consequences. For many workers, dismissals or resignations lead to periods of unemployment, de-skilling and damage to career earning potential. Protracted disputes have significant opportunity costs for all parties. Some of these costs will be passed on to taxpayers through increased use of the benefit system and lower tax take.

2.8. It is not only the fact but also the quality of settlement reached that matters. A fair resolution, a repaired relationship or a change in the parties' attitudes and practices make it easier for parties to move on rebuild their lives and avoid repeated bad

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[1] Morris, G. (2015) Eclecticism versus purity: mediation styles used in New Zealand employment law disputes. *Conflict Resolution Quarterly* 33(2) Winter 2014, 203-227 at 273

[2] MBIE (2014) Dispute Resolution Best Practice Report 2 of 2 to Joint Ministers at 22.

[3] The research referred to is Woodhams, B. (2007) Employment relationship problems: costs, benefits and choices.

behaviours. These have enormous flow-on value (much of it difficult to place a dollar value upon).

2.9. Legal costs are easier to quantify. The Employers and Manufacturers Association Northern ('the EMA') publishes figures on the average cost of disputes for employers and workers. The latest publically available figures are from 2012.[4] The EMA found that the average legal cost to take a personal grievance to the Authority was $7,843. The average legal costs to defend a personal grievance claim was $12,445.[5]

2.10. The EMA's analysis is self-serving.[6] However, their figures for legal costs are credible. The significant majority of these legal costs (two-thirds or more) are usually incurred in preparation for and attendance at an Authority hearing.

2.11. Employment relationship problems that proceed to adjudication are also a significant expense. As MBIE (2013) notes:[7]

> [T]here are also significant systems savings to be made through resolving employment disputes before they become intractable and more formal and expensive dispute resolution processes may be needed. The MoJ has calculated that the total cost of running the Employment Court in 2010 was $3.3 million. This equates to an average of $13,070 per case. The average application fee paid was $155 (GST exclusive). The total revenue collected by the Employment Court in 2010/11 was $49,052, representing just 1.5% of the Court's total running cost.

2.12. The significant cost of the upkeep of the Employment Relations Authority should also be factored in. Not all disputes are susceptible to mediation and many go to adjudication for good reason. Nonetheless, the mediation service filters out many cases that would otherwise end up in the courts.

2.13. A mediated settlement rate of four-fifths of cases is a huge boon to society. It is artificial to place a dollar value on this service but safe to say that this contribution dwarfs the $5.8 million cost of the Employment Mediation Service.

2.14. While it is incumbent on MBIE to spend public money wisely and effectively, we suggest that further investment in the mediation service would pay dividends to New Zealand.

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[4] Employers and Manufacturers Association- Northern (2013) *Business Plus* 104: June 2013 at 8-9. https://www.ema.co.nz/resources/EMA%20Newsletters/Business%20Plus/2013/BusinessPlusJune2013.pdf

[5] This is legal costs for each side before costs are awarded. Costs awards shift the balance of payment but not the overall quantum.

[6] The Personal Grievances Award analysis appears to be aimed at intimidating Authority Members with a high ratio of awards to workers and touting for business for EMA Legal.

[7] Citation at n 1.

3. The change proposal

3.1. In this section, we outline our understanding of the change proposal. This is intended to check our assumptions and to explain the proposal to our affiliated unions and others.

3.2. Our comments are focussed on the employment mediators as they are subject to the largest proposed cuts. However, we note that case manager position are intended to reduce from 18 FTE establishment (including unfilled vacancies) to 13 FTE. This is a cut of 28%.

3.3. The most significant cuts are to the employment mediators. Their current establishment is 38 FTE (including 8.5 FTE current vacancies). The proposal is to reduce the cadre of employed mediators to 20. This constitutes a cut of 47%.

3.4. Every office of the Employment Mediation Service will lose employed mediators. Hamilton will have its complement halved (from 4 to 2 FTE). The Napier, Dunedin, Palmerston North and Tauranga offices are to close.

3.5. It is intended that this significant reduction in employed mediator numbers would be met by the engagement of a number of contracted mediators. The proposed number of contracted mediators is mysterious based on the information provided to us.

3.6. As part of the summary document provided to us, we have seen a map of New Zealand with a proposed future state including purple circles to represent numbers of employed staff and green circles to represent numbers of contracted mediators.

3.7. The number of contracted mediators does not appear to add up. The numbers in the green circles add up to 57 mediators but the accompanying text states:

> Proposed new contractor panels aimed to be in 18 regional centres plus in the five larger centres giving possible access to a further 26 mediators which means the potential for 13 new regions where we will have a direct presence.

3.8. As we discuss in part 5 below, MBIE acknowledges in the summary document that the quality and supply of contractors is a significant unknown. However, they state that:

> [O]ur research to date has shown that there are skilled locally based practitioners that may be interested in delivering employment mediation services. MBIE will also be establishing a contract management system to hold contractors to the same standards as employees.

4. Reasons for change

4.1. We understand that there are a number of drivers for the proposed change.

4.2. First, a report commissioned by MartinJenkins found that mediators spent on average 42% of their time in mediation (assessed on the basis of half day slots). There was significant variance between offices reflecting regional variances. However no office achieved a target considered appropriate by Martin Jenkins: 60% utilisation or six half day equivalents per week.

4.3. It is hoped that a new case management system currently being rolled out will lift mediation utilisation rates closer to 60%. We do not have sufficient information on mediator's other duties or the merits of the new system to comment on whether this is a realistic hope.

4.4. One of the drivers of the current utilisation rate is the practice of mediators travelling to places where there is no permanent mediation office. This results in travel time for mediators and may result in delays to the provision of mediation where a mediator may not be available for a number of weeks.

4.5. The new contract panels are intended to allow a nominally significantly increased presence in the regions through local contract mediators and remove or reduce the need for mediators to travel.

4.6. Two further unstated reasons appear to be part of the rationale for the change. First, it is intended that the new structure would save $350,000 per annum. However, these savings appear speculative for two reasons. They rely upon MBIE's ability to agree contracts with contracted mediators for a particular sum and as MBIE (2014) noted "[a]t present it would be unlikely that the private market would be able to provide mediation services at a lower hourly rate than the government (commercial hourly rates including profit would be higher than internal hourly rates)."[8] Also the mooted savings do not take into account redundancy costs of existing mediators. Many of these mediators have been in post for decades and are likely to be entitled to significant payments.

4.7. Second, there is a clear direction in MBIE's Dispute Resolution Best Practice Reports to attempt to develop the private sector provision of alternative dispute resolution services to increase competition. The general difficulty of measuring

[8] MBIE (2014) Dispute Resolution Best Practice Report 1 of 2 to Joint Ministers at 19.

quality of mediation services and outcomes makes this problematic since competition must be based on what can be measured (such as cost and settlement rates) and may be at the expense of important intangibles.

4.8. Of the mooted benefits of the change proposal, we think that two are particularly important.

4.9. We agree that there is a significant issue with waiting times for mediation in some centres. Delay in the provision of dispute resolution services is often time where a worker is not at work. This may be causing them significant distress and is unproductive time. Another unfortunate consequence may be the hardening of positions between the parties. Dispute resolution is most effective when undertaken as early as possible. We therefore support initiatives to ensure that mediation services are undertaken in as timely a fashion as possible.

4.10. Mediators' time is valuable. As discussed above, a good mediator can facilitate an outcome that may transform a workers life and employment relationship. Any solution which maximises a mediator's ability to undertake their role as effectively as possible (including by the elimination of 'dead time' such as travel) is welcomed.

5. Costs, risks and potential drawbacks of the proposal

5.1. Our most pressing concern with the proposal is that it is unlikely that contracted mediators will be able to deliver the same quality of mediation services. The Employment Mediation Service employs many of New Zealand's most experienced mediators.

5.2. Apart from simple metrics (such as settlement rates) many of the most important outcomes of mediation are difficult to measure (such as relationship rebuilding, emotional healing and the overall robustness of the settlement), precluded from examination by the strict confidentiality provisions of the Employment Relations Act 2000 relating to mediation process and outcomes, or both. Nonetheless, for the participants these are the factors which matter most.

5.3. Employment mediations are more complex than many other types of mediation. They often involve diverse and challenging legal issues, high emotion and significant stakes. The parties are usually represented by lawyers or union officials.

5.4. The private market for mediators with the skills and experience necessary to undertake employment mediations is very shallow. MBIE's research to date in this

area ‘Independent Dispute Resolution Providers in New Zealand: A Snapshot’ (‘the Snapshot’) is not credible to base firm conclusions upon.[9]

5.5. The Snapshot is a basic twenty question survey. 117 people responded. While the Snapshot pointed to a reasonable number of respondents with professional memberships (AMINZ, LEADR, NZLS), it failed to ask some fundamental questions as to experience. For example, the survey failed to ask participants how many mediations they had performed as mediators and particularly how many employment mediations they had performed.

5.6. A recently accredited member of LEADR (having done the week long course) who had practiced some employment law as part of a generalist practice for 10+ years would appear in the Snapshot as extremely experienced without necessarily ever having performed a mediation.

5.7. Better analysis is needed. . MBIE should conduct a much deeper survey of mediators (perhaps through AMINZ and LEADR) to determine who has significant experience providing mediation and understanding of employment law. To prevent negative outcomes this work should be done before restructuring.

5.8. A significant issue with part-time mediators is the work they undertake outside of the provision of mediation services. A core tenet of mediation is the need for mediator impartiality and neutrality. This goes well beyond actual or apparent conflict of interest and into perceived bias. This requirement is codified in s 153(1) of the Employment Relations Act 2000:

> The chief executive [of MBIE] must ensure that any person employed or engaged to provide mediation services…
> (a) is, in deciding how to handle or deal with any particular problem or aspect of it, able to act independently; and
> (b) is independent of any of the parties to whom mediation services are being provided in a particular case.

5.9. This risk is much more acute in small centres where a contract mediator undertakes employment mediation as an adjunct to an existing practice. Many contract mediators are likely to be lawyers and more closely tied to employers in their communities (workers have access to unions). We suspect in many of the smaller communities these obstacles may prove insurmountable to the provision of independent mediation services.

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[9] MBIE (2015) Independent dispute resolution providers in New Zealand: a 2015 snapshot. Retrieved from: http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution/independent-dispute-resolution-providers-in-NZ-2015-snapshot

5.10. A specific legal risk is important to note. The summary document states "MBIE will also be establishing a contract management system to hold contractors to the same standards as employees". It also suggests strongly that MBIE employed mediators may provide practice leadership and supervision to the contracted mediators. There is a risk that, having regard to the real nature of the relationship between the parties, a Court may consider the level of control and integration (in particular) that MBIE exercises over the erstwhile contractors sufficient that they are, in fact, employees.

5.11. In sum, we do not consider that the risks of this proposal have been adequately thought through or mitigated. One does not leap into water without checking the depth first.

5.12. Change of this magnitude runs a high risk of jeopardising the culture of the mediation service and thereby undoing decades of good work. Many of the most experienced mediators may leave.

5.13. Each of these risks is likely to diminish the service provided to parties. It is likely that this proposal will result in loss of trust in the mediation service and an impoverished employment landscape.

6. Suggested course of action

6.1. The most significant risk is that contracted mediators will deliver significantly worse mediation outcomes than the current mediators. This is a likely outcome given that the proposal is to replace what Grant Morris has called "the top mediation unit in New Zealand"[10] with much less experienced mediators.

6.2. As noted above, more research is needed on the availability of suitably experienced private providers to undertake this work. We do not believe they exist.

6.3. Given this, we recommend that the change proposal does not proceed.

6.4. If MBIE still wishes to test these dangerous waters, we recommend a pilot of the contractor mediation approach in one or two regional centres (such as Nelson and Invercargill). A thorough evaluation could be undertaken including surveys of the parties to mediation and their representatives (both immediately and sometime after mediation), review of settlement outcomes and rates. A pilot would also inform the financial viability of the intended contracting model.

[10] Citation n 1 at 274

6.5. The Employment Mediation Service is of central importance to New Zealand's industrial relations landscape. The change proposal has significant unaddressed risks. MBIE must act with care and caution.