REGULATORY IMPACT STATEMENT

AMENDMENTS TO THE EMPLOYMENT RELATIONS ACT 2000

Agency disclosure statement

The Department of Labour (the Department) prepared this Regulatory Impact Statement.

The Regulatory Impact Statement (RIS) provides an analysis of options to improve the operation of five aspects of the Employment Relations Act 2000 (the Act):

a the personal grievance system (Part 9)

b the system for resolving employment relationship problems (Part 10)

c the role and enforcement powers of Labour Inspectors

d union access to workplaces, and

e communications during collective bargaining.

The various reviews that have informed the range of proposals were undertaken to investigate particular areas of concern identified by the Government (for example, personal grievances, employment institutions, and several matters in relation to unions or collective bargaining). With the exception of the work around the labour inspectorate, the reviews focused on whether the balance of interest ('fairness') in each case is correct and whether the various systems are working efficiently without creating undue compliance costs or impeding productivity gains for firms. These were not 'first principles' reviews, but rather investigations as to where improvements might be made. The objective of the review of the role of Labour Inspectors was to ascertain how the inspectorate could better work with businesses to improve levels of compliance (and, hence, levels of fairness for firms that are already compliant); and what is needed to support this activity.

The policy options for Parts 9 and 10 of the Act were informed by qualitative and quantitative research and previous Departmental policy work in these areas. In addition, the options for Part 9 were informed in part by an analysis of public submissions received in response to a discussion document released by the Department on the matter. There is limited robust or relevant data available in respect of these two parts of the Act. In respect of the review on the role of the Department's Labour Inspectors, the Department has anecdotal evidence to support the analysis of policy options.

The analysis of the policy options under consideration in respect of Part 9 and communications during collective bargaining have been constrained by the limited timeframe in which these proposals have been developed. Similarly, the analysis of policy options in relation to the role of Labour Inspectors may not have been fully realised and/or captured due to the limited timeframes. The analysis of policy options in respect of Part 10 is limited by a lack of objective evidence of

problems in this area. The Department may undertake further work in these areas following Cabinet decisions on the matters.

The National Party's 2008 policy statement signalled a change in union access to workplaces. Officials understand that the intent is to address the process and not the reasons for access. The Department conducted a review in 2009 on union access to workplaces, particularly around the issue of consent. The Department considers that the analysis of options in respect to union access to workplaces has been well-informed through a consultation process with social partners and by qualitative and quantitative research.

Policy options in relation to communication during collective bargaining have also been explored but no review or research has been conducted in this area because of the timeframes involved.

Any changes to the Act will directly affect all employers and employees to differing degrees, depending on the issue under consideration.

The Department considers that there will be no, or very limited, increased direct costs for employers (or employees) as a result of implementing of any of the preferred options. The broad intention is that the options will improve the functioning of the Act. Providing more clarity and guidance in some areas, additional assistance to resolve employment relationship problems at an early stage and reducing delays in processes ought to reduce direct and indirect costs for parties. Some options are likely to have a greater impact than others.

The Department of Labour considers that the options are either fully or largely consistent with the primary objects of the Act and with the objects of each individual part.

Lesley Haines
Deputy Secretary, Workplace Group (Acting)
for Secretary of Labour

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REGULATORY IMPACT STATEMENT

AMENDMENTS TO THE EMPLOYMENT RELATIONS ACT 2000

This regulatory impact statement was finalised on 18 June 2010 and was considered by Cabinet on 5 July 2010

OVERVIEW

The options in this paper result from work streams that began in 2009 and have involved investigating areas of policy concern. In most cases, these areas were signalled in the National Party's 2008 policy statement; including aspects of the operation of the employment institutions, union access to workplaces, and opening collective bargaining to non-union groups (this last area is not being progressed as part of this suite of amendments to the Act).

Several of the work streams also form part of the Government's regulatory reform work programme.

The Department has provided advice to the Minister of Labour on these matters within timeframes agreed with her, and on subsequent matters as requested by the Minister (including a review of the personal grievance system and options to clarify what communications are permissible between employers and employees during bargaining for a collective employment agreement).

In addition to areas specified by the Minister, the Department, with the agreement of the Minister, has undertaken work and provided advice around steps to enhance compliance with minimum standards across all workplaces by enhancing the role and powers of Labour Inspectors.

Having considered the Department's advice, the Minister has recently indicated to the Department which of the options developed, as a result of the various work streams, she wants to progress through an Employment Relations amendment bill.

These proposals relate to the Employment Relations Authority (the Authority), the Employment Court (the Court), the personal grievance system, the role and powers of Labour Inspectors, union access to workplaces and communications during bargaining.

A. The personal grievance system

Status quo

Part 9 of the Act provides procedures and mechanisms for resolving personal grievances and employment relationship problems between employers and employees, and the principles and assumptions underpinning the employment relationship problem resolution system.

A personal grievance is a specific type of employment relationship problem as defined in the legislation. The "personal grievance system" refers to the system

outlined in the legislation for resolving a personal grievance (including through the employment institutions).

All employees are entitled to raise a personal grievance against their employer. The only exception is employees who have been dismissed during a trial period. Such employees are entitled, however, to raise a personal grievance on the grounds of sexual harassment or racial or other forms of discrimination or disadvantage. Independent contractors are not protected by the personal grievance provisions of the Act as they are not employees.

Problem definition

The Department considers that the system for resolving personal grievances is generally meeting the objects under the Act. Improvements can be made in terms of ensuring that personal grievances are resolved quickly, employers have greater confidence that cases that lack merit can be identified and filtered out at an early stage, and that there are effective deterrents against behaviour that causes costs to escalate unnecessarily. Submissions indicate that there is an on-going role for the Department in terms of providing targeted and detailed information and guidance around disciplinary and dismissal processes and the operation of the employment institutions. There is a low level of understanding and perceptions of bias among employers and employees about the employment institutions and the problem resolution processes generally. These perceptions are important to counter as they influence parties' responses in the management of employment relationship problems.

Available evidence on the operation of the personal grievance system

The review of the personal grievance system was informed by:

a a public submissions process (219 submissions were received following the release of a discussion paper on 2 March 2010)

b research carried out by the Department, including a review of New Zealand literature; a scan of international arrangements; feedback from mediators; interviews with employers and employees; an analysis of Authority determinations during July 2009; an analysis of other Departmental data, and

c other relevant research undertaken by the Department in recent years.

Research findings

The research found that, when confronted with a personal grievance, employers and employees tend to seek advice and learn from the experience of others including colleagues, friends and family, and social media (e.g. blogging and message boards). This can lead to a perpetuation of misleading information, unnecessary escalation of employment issues and ill-informed perceptions about the system. Media reporting influences understanding of the system and can drive people's perceptions and choices. For example, there is low awareness that the Authority takes account of employee conduct when determining remedies.

The research suggests that more could be done to raise awareness about rights, obligations and the problem resolution processes to help increase understanding and knowledge, and dispel commonly held myths about the system.

Overview of submissions

Of the 219 submissions received, 63 percent were from employers or employer representatives, and 10 percent were from employees or employee representatives. The remainder were from law firms, employment advocates, academics, friends and family of employees who have made a personal grievance and interested members of the public. The submissions show a divergence of views between employers and employer representatives and most other groups (although there was consensus on some issues across groups and differences within groups). The submissions overall paint a picture of a system that is generally thought to be fair and responsive.

Improvements can be made in terms of levels of understanding about the approach of the Authority and Employment Court (the Court); levels of confidence about 'fair and reasonable' disciplinary and dismissal procedures; the need to reduce unnecessary delays and costs in the system; and concerns about the behaviour of some employment representatives.

The submissions (and other research) indicate that many employers hold strong negative views about the fairness and operation of the system, and that these views influence their decisions when responding to a personal grievance claim (including whether to participate in formal processes or not).

B. The system for resolving employment relationship problems

Status quo

The Act provides for the establishment of the key employment relations institutions, including the Authority and the Court.

The Authority and the Court are part of an integrated employment relationship problem resolution system set up under the Act, which promotes resolution by the parties themselves and expert problem solving support through mediation.

The system focuses on building productive employment relationships through the promotion of good faith and, where possible, preserving employment relationships. To achieve this, the system emphasises low level, informal and accessible resolution of problems to minimise delays, costs and unnecessary judicial intervention.

The overall system has been set up so that each institution focuses on resolving the employment relationship problem before it, and does not get sidetracked by examining how any lower institution (including mediation services) has previously handled the issue.

Problem definition

Overall, the Department considers that the problem resolution system is working effectively. However, there are specific issues that can be addressed to improve the system and its acceptance by employees and employers. These issues involve:

a the interface between the constituent parts of the system

b specific aspects of the operation of the Authority, and

c technical problems arising from the Act.

The options outlined in the RIS address these issues by clarifying the operation and powers of the Authority, recommending specific changes to the Act to improve the quality of, and interaction between, constituent parts of the system, and recommending particular enhancements to the Court's power.

Available evidence

The Department's review found that while the problem resolution system is working effectively overall, there are specific issues that can be addressed that would improve its performance. These issues centred on the powers and operation of the Authority and the interface between the Authority and the Court.

To require the Authority to act more judicially would change a critical feature of the problem resolution system (the Authority provides a relatively low-cost, deliberately informal and investigative approach to problem resolution); would be likely to increase costs for the parties (and for Government); and risks adding delays into the system (delaying the resolution of problems and access to justice).

C. Role of the Labour Inspectors

Status quo

The Act establishes statutory powers of enforcement for Labour Inspectors in three areas: an assessment of non-compliance; the ability to "demand" compliance after an assessment; and, penalties for non-compliance through the judicial process of the Authority.

Minimum standards investigations are growing in number each year, increasing the pressure on current government resources. In addition, evidence of increasing levels of non-compliance suggests that many employers are being disadvantaged by the anti-competitive practices of those who are not meeting the minimum legal standards.

A Departmental practice development programme is in place to extend the skills and non-statutory levers available to Labour Inspectors. Within this context, a wider range of statutory enforcement tools would support greater responsiveness to businesses and a more flexible and efficient use of inspection resources.

Problem definition

The current legislative framework for labour inspectors falls short of responsive regulation fit for purpose in a modern environment, which

d enables greater proportionality so the appropriate intervention is made for the circumstances

e greater transparency in approach

f heightened accountability for the decisions made

g makes a range of tools available for targeted and flexible enforcement

In a diverse and changing industrial relations environment there is a need for responsive employment relations legislation that delivers high levels of

compliance at the lowest possible cost to the state and business. The proposals are designed to generate compliance with minimum standards rather than focus on enforcement and litigation. They create a new focus on working with businesses to change non compliant practices rather than the current singular emphasis on the investigation of employee complaints. A range of tools incentivise compliance at the lower end of the enforcement spectrum, avoiding lengthy and costly legal processes that currently deliver mixed results.

Available evidence

Problems in the current system of Labour inspection are evidenced in the following statistics (see appendix 1)

a an increase of 52% of complaints to the DoL between 2007 and 2009

b a decrease of 33% in the average time to complete the matter over the same period

c a low number of demand notices issued by inspectors, taking more than three times as long to complete

d a low number and level of penalties awarded for non-compliance.

A review of enforcement powers was informed by:

a research conducted by the Department into complaints received between 2007 and 2009 that indicate Labour Inspectors are conducting a growing number of investigations into complaints received by the parties to an employment relationship. The Department recorded 1,816 minimum standards investigations by Labour Inspectors in 2007. This rose to 2,307 in 2008 and 2,769 in 2009.

b an assessment of current statutory levers that has exposed deficiencies in the current mechanisms for remedies and sanctions in the event of non-compliance.

c an internal practice development programme for Labour Inspectors that has been designed to embed a multi-facetted approach to regulation, drawing on a range of statutory tools and non-statutory levers, such as the provision of information, advice and education.

D. Union access to workplaces

Context

The National Party's 2008 policy statement signalled a change in relation to union access to workplaces. The change signalled around union access is to introduce a requirement that access to workplaces is contingent on employer consent but that this consent cannot be unreasonably withheld. Officials understand that the intent is to address the process and not the reasons for access.

Status quo

Under the current legislation, union representatives are entitled to enter workplaces for purposes related to the employment of its members and/or purposes related to the union's business. Both of these purposes are further defined in sections 19-25 of the Act. Currently, employers must allow union

representatives to come into their workplaces, and union officials must exercise access in a reasonable way.

The Department notes that any future policy work on opening collective bargaining to non-union groups could have implications for union access to workplaces in general.

Problem definition

Employers have a fundamental right (and responsibility) to determine and be aware of all people who come onto a workplace at any time. This is necessary for a range of business reasons, including concerns about interrupting the operation of a business at the 'wrong' time (reducing productivity), compliance with health and safety regulations, commercial sensitivity and security. While the rules around union access to a workplace generally work well in practice, and have been well-clarified by case law, there are benefits to standardising the practice of ensuring that the permission of the employer has been granted before access is gained.

Available evidence on the operation of current arrangements

The Department conducted a review relating to union access to workplaces, particularly around the issue of employer consent. This review's purpose was to identify and scope any issues around current arrangements that govern union access to workplaces and consider whether there is an appropriate balance in terms of fairness to all parties (employers, employees and unions) under the current arrangements.

There does not appear to be widespread evidence of union representatives exercising their current rights to enter workplaces in an inappropriate way, resulting in disruption for business operations or adversely impacting on the employment relationship between employer and union members.

The current practice widely followed by union representatives is that they voluntarily notify the employer (although practice varies from no notice to a range of notice practices depending on the circumstances) before entering the workplace and they also often volunteer information on the purpose of their visit.

There is some case law in this area – these cases tend to consider what "reasonable" access is. Access is restricted to reasonable times in reasonable ways, having regard to normal business operations and complying with existing health and safety requirements and security procedures. The Department has no evidence to suggest that unions are not, in general, meeting this requirement, or that employers are dissatisfied with current arrangements and practices.

Comparatively, New Zealand's current provisions appear to be the least restrictive (for unions) amongst countries researched (Australia, Canada, the UK, the USA, Ireland and Sweden). However, the practice of how union access is gained may differ in reality from the formal legislative requirements of that country, that is, in practice it may be less formal.

There are two relevant International Labour Organisation (ILO) Conventions regarding union access to workplaces - Convention 87 (Freedom of Association and Protection of the Right to Organise) and Convention 98 (Collective

Bargaining). This proposal to require the consent of the employer to be gained before a union official may access a workplace (and that such consent may not be unreasonably withheld) is considered to be consistent with New Zealand's international obligations in this regard.

E. Communication during collective bargaining

Status quo

The Department's view of the policy intent of the law is that communication during bargaining is governed by the principles of good faith. This view is consistent with that of the courts. Direct communications related to the bargaining, during bargaining, may be permitted, providing such communications do not:

a directly or indirectly mislead or deceive, or be likely to mislead or deceive, the party that receives them

b constitute direct or indirect bargaining

c undermine the bargaining itself, and

d undermine the authority of any representative involved in the bargaining (s32(1)(d)).

The law also provides that the parties may agree on the nature of communications at such time. Case law emphasises the desirability of having an agreed, fair and workable bargaining arrangement in place – otherwise what is permissible 'defaults' to the statutory provisions of the Act. If employers and unions wish to agree to something other than what is provided for in the Act, the onus is on them to enter into a bargaining arrangement that sets out the nature and scope of communications that may be permitted, and when and how communications should occur. For example, communications may be permitted following comment from the other party, or that agreed communications on the progress of bargaining may be issued.

Problem definition

Section 4(1) of the Act provides a general obligation that parties to an employment relationship (employers, employees, and unions) must deal with each other in good faith. Section 32 sets out what, in the specific context of bargaining, the duty of good faith requires. Amongst other things, the union and employer must:

a recognise the role and authority of any person chosen by each to be its representative or advocate

b not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise, and

c must not undermine or do anything that is likely to undermine the bargaining or the authority of the other party in the bargaining.

Anecdotally, many employers believe that the Act (and/or how it has been interpreted by the Court) prohibits any direct communications occurring between an employer and his or her employees while bargaining is underway (including communications about the bargaining). This is not the case. The purpose of the amendment would be to make it clear that such communications are possible (provided they are consistent with the duties of good faith as set out in the legislation).

OBJECTIVES

Overall, the objectives of the reviews aimed to:

a increase choice and flexibility for employers and employees

b ensure the balance of fairness in the legislation is appropriate for all parties

c reduce direct and indirect costs and unnecessary regulation (and support improvements in workplace productivity)

d improve the operation, efficiency and effectiveness of the legislation, and

e improve employers' confidence in the system by addressing some perceptions about its operation.

The work completed by the Department indicates that some changes are desirable within the employment relations framework. These changes are consistent with the objects of the Act.

These objectives broadly aim to improve the balance of interest in the legislation. They aim to ensure employers have the discretion to make (and quickly give effect to) decisions about their business and workplace arrangements that are properly theirs to make and so allow them to focus on growing the business.

Any proposal considered in respect of union access (or opening up collective bargaining to non-union groups) should also ensure that relevant International Labour Organisation (ILO) Conventions are not breached in the implementation of the policy option.

REGULATORY IMPACT ANALYSIS

Options assessment

There is a lack of data to quantify the potential impacts of the policy options considered in the time available for each of the policy work streams. The Department's assessment is based on what is known including anecdotal evidence.

Table 1 contains the assessment for the range of policy options proposed. The respective reviews have also identified issues that can be directly addressed by the Department (for example, better or more detailed guidance around problem resolution). The Department will progress and implement these improvements as appropriate. The costs of these non-legislative options will be met within the Department's baseline funding.

Criteria for regulatory impact assessment

The options set out in Table 1 (for each policy work stream) have been assessed on the degree of overall regulatory impact that each will have on employers, businesses or employees:

a Low level of regulatory impact: these proposals have been assessed as having a minor or marginal impact on employers and/or employees. These proposals are unlikely to increase direct compliance costs for either party.

b Medium level of regulatory impact: these proposals have been assessed as potentially having some impact on employers and/or employees, either in terms of compliance costs, or in effecting a change in behaviour. The benefits from the change are considered, however, to outweigh these impacts.

c High level of regulatory impact: proposals in this category have been assessed as potentially having a higher level of impact on employers and/or employees. This means the proposal could impose a direct cost on a party, or require a change in business operations, or individual behaviours. These proposals may also constrain productivity.

Compliance costs for employers and employees have also been identified, along with the intended benefits and the risks of each proposal. The majority of the proposals in the table are the Minister of Labour's preferred options.

In a small number of cases options are identified that are not the Minister of Labour's preferred options and are not being progressed by her (and are identified accordingly).

Any additional costs for the Department (including the labour inspectorate and mediation services) are not identified in the table.

Table one: Regulatory Impact Assessment

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
Personal grievances (Part 9)				
1. Amend and clarify the test of justification	Expands range of what might be considered to be a fair and reasonable action(s). Improves employer confidence. Reduces uncertainty. Improves clarity. There may be unintended consequences depending on how the employment institutions and the Court interpret the change in the law. Codification of case law could lead to a 'tick box' approach to dismissal / disciplinary processes by employers (rather than a focus on preserving a productive employment relationship).	There may be some compliance costs as employers come up to speed with the change in the law. Overall, intended to reduce compliance costs for employers by improving choice and understanding of fair and disciplinary / dismissal reasonable processes. There will be legal costs for parties who wish to test the new law.	No	Medium (for employees) Low (for employers)
2. Code of employment practice around disciplinary and dismissal procedures (non-legislative change)	Improves employer confidence. Reduces uncertainty. Improves clarity for employers. Codification of case law could	Codes of employment practice may be taken into consideration by the Authority or the Employment Court. There may be some compliance costs for employers informing themselves of the guidance in	No	Low

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
	lead to a 'tick box' approach to dismissal / disciplinary processes by employers (rather than a focus on preserving a productive employment relationship).	the code. It is expected that such compliance would be offset by the greater degrees of understanding and certainty gained through the code.		
3. Early assistance from a mediator without representation	Early intervention, speedy and expeditious resolution of employment problem. No risks identified.	No new or additional compliance costs when compared to current mediation services practice. Intended to reduce compliance costs for all parties by resolving a problem quickly without costs of representation.	No	Low
4. Encouraging the use of mediation services by ensuring that the problems not settled at mediation are prioritised by the Authority	Reduces costs to the parties. Speedy settlement of employment relationship problems. Likely to reduce delays in the system caused by parties seeking to circumvent mediation services. Some parties may already be entrenched in their positions and feel compelled to participate in mediation. This could be seen by parties as adding more processes to the resolution of the employment problem. No risks identified (the Authority retains its ability to determine its operation and	No new or additional compliance costs when compared to current mediation services practice. Parties will need to inform themselves of the new rule with respect to access to the Authority (mediation first). While this mediation is voluntary, it may create compliance costs for those whose case is not amenable to mediation either due to the nature of the dispute or the relationship between the parties (if they feel they need to go through a mediated event unnecessarily to get quick access to the Authority).	No	Low

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
	ability to prioritise overall).			
5. Allow mediators / the Authority to make reviewable recommendation	Encourages speedy decision-making. Can be used to discourage vexatious/frivolous claims / vexatious defense of claims. No risks identified.	Compliance costs for this option relate to the effort that will be required for parties to inform themselves of this new option at mediation or in the Authority.	No	Low
6. Authority to filter out vexatious or frivolous cases	Reduces costs of personal grievances for employers where a case has no or little merit. This option may raise expectations for employers that are unlikely to be met as there is a low incidence of genuinely vexatious or frivolous claims. Some employees may disagree that their case is frivolous and may feel they have been denied access to justice (however, the Authority's decision may be reviewed by the Court).	Marginal. Compliance costs will be reduced for employers who would otherwise need to defend such cases.	No	Medium (high benefit for employers, but likely low incidence)
This option is not a preferred option and is not being progressed 7. Penalties for delaying	Encourages speedy resolution. Reduces costs. Discourages poor behaviour by parties and/or their representatives.	There will be compliance costs for parties who otherwise would not have turned up for a scheduled mediation event or Authority investigation (this is the policy intent).	Yes, where a penalty is awarded	Medium

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
behaviour in mediation or at the Authority	No risks identified.	Compliance costs will be reduced for the parties who did turn up, but whose scheduled event would otherwise have needed to be re-scheduled.		
This option is not a preferred option and is not being progressed 8. Penalties for employment relationship representatives that encourage the taking of a case that lacks merit	Discourages the taking of a meritless case. Improves employer confidence that the system does not encourage a 'gravy train'. May reduce access to justice for some groups. May not be consistent with duty of representatives to take a case at the request of a client.	Would be likely to require interpretation through case law. Would create compliance costs for firms whose business it is to represent parties in employment relationship disputes, particularly where clients instruct their representative to take a case, in spite of advice that the case lacks merit.	Yes, where a penalty is awarded	High (for representatives) Medium (for parties)
This option is not a preferred option and is not being progressed 9. Change limitation period of raising or lodging a personal grievance	Provides certainty for employers as it reduces the likelihood of problems that occurred some time ago being raised as a personal grievance. Some employees may feel they are denied access to justice as they may have good reasons for raising or lodging a personal grievance within a longer timeframe.	If an employee feels there is a personal grievance, they will need to address the problem quickly.	No	Medium
10. Extend trial periods	For all options: increases	Reduces compliance costs for employers	No	Low (employer)

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
a) extend to firms with fewer than 50 employees [preferred option] b) extend to all firms c) extend duration of trial period beyond 90 days	labour market flexibility for employers The preferred option meets the objectives of the reviews. The other options remain viable for future consideration. There are social and opportunity costs for employees who are dismissed without an explanation. There is anecdotal evidence that an employee dismissed while on a trial period can find it difficult to get a new job.	around hiring practices, performance management and dismissal. Will extend compliance costs for a larger proportion of employees. These costs are in relation to efforts made to demonstrate suitability for the job (potentially without the benefit of feedback on performance). A trial period must be agreed to in a written employment agreement (a marginal cost).		High (employee)
11. Retain reinstatement as remedy, but it will no longer be the primary remedy	Reflects current practice (broad support for this option from employers). This option may be opposed by some groups (e.g. unions) on grounds of principle.	No	No	Low
12. Historic cases filed at the Authority to be treated as withdrawn after a period of three years since the last formal action on the matter	Improves fairness to employees and employers. Encourages resolution of cases. No risks identified.	If a party wishes to progress a case once filed at the Authority, there will be a timeframe within which they must do so, or 'forfeit' the case.	No	Low
13. Standards / Code of Ethics for advocates (non-	Improves quality of representation.	There will be voluntary compliance for those employment representatives who	No	Low

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
legislative change)	Improve employer and employee confidence. Improves system's credibility. This proposal may have little effect on the behaviours of advocates who do not choose to adhere to professional standards.	are not currently covered by any such code of professional standards or ethics. An improvement in the overall professional standards of employment relationship representatives will offset this cost.		
System for resolving employment relationship problems (Part 10)				
14. The Chief of the Authority is provided with further powers to oversee the operation of the Authority	Addresses concerns about the Authority's approach and perceptions of inconsistency. Reduces uncertainty / improves transparency around Authority's approach. No risks identified.	No	No	Low for employers and employees Medium for the Authority
15. Clarify the Authority's powers for issuing search and freezing orders, so that these powers remain the preserve of the Court	Settle boundary issue between the Authority and the Court. No risks identified.	Parties will need to inform themselves of this boundary clarification between the Authority and the Court. There may be reduced costs because it will be clear which institution parties need to go to.	Yes – for those now requiring a search or freezing order from the Court	Medium (but will affect relatively few parties)
16. The Authority is empowered to remove cases to the Court at its discretion (after hearing from the parties)	Ensures problems are resolved by the appropriate legal body. Reduces delays. The Court may disagree with the decision of the Authority	No	There may be some direct costs for parties who expected the claim to be investigated by	Low

Proposal	Regulatory Impact Assessment			
	Benefits and risks	Compliance costs on employers and employees and/or their representatives	Direct costs	Overall Regulatory impact
	and refer the matter back to it.		the Authority	
17. The Authority is to actively consider the appropriateness of referring demand notices to mediation services	Ensures minimum employment entitlements are not traded away at mediation. Ensures matter at issue is considered by appropriate body. No risks identified.	Will reduce compliance costs associated with unnecessary (inappropriate) mediation.	No	Low
18. Technical changes to schedule 3 of the Act regarding: a) the withdrawal of proceedings b) extending the application of pre-proceeding discovery	Technical 'fix' to improve the operation of the system. No risks identified.	No	No	Low
19. Mediators are enabled to sign full, final and binding records of settlement that relate to the employment of minors	Reduces delays. The Ministry of Justice advises this proposal may deprive minors of adequate protections, as provided for in the Minors Contracts Act 1969 (this option equates to an exemption from the Minors Contracts Act).	No	No	Medium (but low incidence)

Union matters

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
20. Unions may access workplaces with the permission of the employer (which may not be unreasonably withheld)	Improves ability of employers to determine who enters business premises and when. Litigation is likely to occur as parties test the new law.	Will create a compliance cost for employers and union officials as employers' consent will be required before access may be gained. This is considered to be marginal and in line with general practice now. There will be legal costs for parties who wish to 'test' the law change.	No	Low
21. Amend the legislation to specify that communication during bargaining may be permitted (as per case law) a) simple 'avoidance of doubt' clause [Minister's preferred option] b) set out case law in legislation c) augment guidance in current code of employment practice on collective bargaining [Department's preferred option].	Improves clarity and certainty. The Department's preferred option was recommended as avoiding risk of potential unintended consequences of legal interpretation of law change.	Parties will need to be informed of the clarification (marginal). There will be legal costs where parties wish to 'test' the new law. Will reduce compliance costs for those acting on an inaccurate interpretation of the current law (abiding by a prohibition that does not exist).	No	Medium

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
Role of Labour Inspectors				
22. Introduce a statutory definition for the role of Labour Inspectors	Increases the effectiveness of Labour Inspectors to support employers and employees in complying with minimum standards. Improves employment relationships between employers and employees. No risks identified.	Employers and employees will need to inform themselves of the widened role of the Labour inspectorate. This widened role will be likely to mean some employers spend more time with a Labour Inspector than currently. This time should be seen as an investment, and so avoiding future (more serious or litigious) and time-consuming interactions down the track.	No	Low
23. Allow Labour Inspectors to enter into an enforceable undertaking with employers	Improves resolution of non-compliance of minimum standards by employers. Improves fairness for employers who are complying with minimum standards and discourages non-compliance. No risks identified.	As an enforceable undertaking is a new tool, there will be new compliance costs created for employers in negotiating an undertaking and acting on such an undertaking (Labour inspectors will draw up the document). The intention is that such undertakings avoid the need for more time-consuming and litigious action down the track. There will be compliance costs for employers associated with any enforcement of such an undertaking.	Yes, if enforcement is required	Low
24. Allow Labour Inspectors to issue an improvement notice in relation to	Improves resolution of non-compliance with minimum standards relating to systems	No introduction of new compliance costs: no new duty: just a new enforcement tool to improve effectiveness of existing	No	Medium (where improvement notices are given and acted

Proposal	Regulatory Impact Assessment			
	Benefits and risks	Compliance costs on employers and employees and/or their representatives	Direct costs	Overall Regulatory impact
employers' systems and processes	and processes. Improves business systems, processes and productivity. There will be no costs for employers who comply with minimum standards Reduces time in, and cost of, litigation. No risks identified.	regulation Will result in reduction in employment relationship problems down the track resulting from poor systems or processes and in the cost of the current legal processes.		on)
25. Provide a penalty interest for failure to comply with a demand notice	Ensure compliance with demand notices Improves fairness for employers who are complying with minimum standards and discourage non-compliance. No risks identified.	No introduction of new compliance costs: no new duty: just a new enforcement tool to improve effectiveness of existing regulation There will be no costs for employers who comply with minimum standards.	Yes (if in breach)	Low
26. Widen the power of Labour Inspectors to bring penalties in relation to employment agreements	Improves fairness for employers who are complying with minimum standards and discourage non-compliance. Both parties to the employment relationship are clear about agreed terms and conditions of employment. Reduces incidence of employment relationship	The absence of written employment agreements (and agreements that meet minimum standards) is recognised by the Authority and the Court as being at the heart of a very high proportion of employment relationship disputes that come before them. This option will reduce compliance costs in relation to disputes arising from an absence of a written employment agreement.	Yes (if in breach)	Medium

Proposal	Regulatory Impact Assessment			
	Benefits and risks	**Compliance costs on employers and employees and/or their representatives**	**Direct costs**	**Overall Regulatory impact**
	problems. Widening Labour inspectors powers may be opposed by some groups (e.g. employers).	There will be compliance costs for employers and employees in negotiating and agreeing terms and conditions of employment (in writing) where such actions would not otherwise have occurred (this is not a new compliance cost and is consistent with the policy intent of this proposal).		
27. Allow Labour Inspectors to bring a penalty action where an employer has failed to continually provide a copy of an agreement	Ensures employment agreements are in place during the employment relationship. Improves fairness for employers who are complying with minimum standards and discourages non-compliance. No risks identified.	No introduction of new compliance costs: no new duty: just a new enforcement tool to improve effectiveness of existing regulation There will be no costs for employers who comply with minimum standards.	Yes (if in breach)	Low
28. Increase penalty amounts for breaches of the Act	Improves fairness for employers who are complying with minimum standards and discourages non-compliance. No risks identified.	No new compliance costs; such penalties already exist, so compliance costs will only increase for employers where the desire to avoid an increased penalty results in actions that would not otherwise have occurred.	Yes (if in breach)	Low

CONSULTATION

The Treasury, State Services Commission, Te Puni Kōkiri, Ministries of Economic Development, Social Development, Education, Health, Justice, Women's Affairs, Pacific Island Affairs, the Departments of Corrections and Prime Minister and Cabinet and Inland Revenue have been consulted on in the development of the Cabinet paper related to the proposals outlined in this RIS. The Office of the Privacy Commissioner has also been consulted.

The Ministry of Justice have raised concerns with respect to the proposal affecting minors aged 16-18 years of age that would remove them from the protections provided by the Minors Contracts Act. This concern is set out in table 1.

Social partners' views

The Department consulted with the social partners during the development of the proposals related to union access to workplaces.

The Department has not consulted on the other proposals outlined in this RIS with any external parties including Business New Zealand and the New Zealand Council of Trade Unions (social partners).

Other stakeholder views

The Department sought submissions on the review of the personal grievance system from employers, employees, and their representative organisations; human resource and employment relations advisors; academics; interested members of the public; and government agencies including Department of Labour staff with operational experience of Part 9.

The personal grievance review discussion paper received 219 written public submissions. Business New Zealand and the New Zealand Council of Trade Unions (social partners) were among the submitters. The Department heard oral submissions from the Small Business Advisory Group and from the Chief of the Authority on issues and potential areas for improvement on the operation of the personal grievance system.

The Department consulted with the Chair of the Authority on the proposals relating to the review of the employment relationship problem resolution system.

CONCLUSIONS AND RECOMMENDATIONS

A. The personal grievance system

The Department of Labour's preferred proposals for the areas reviewed are:

a clarify the test of justification (section 103A)

b develop a Code of Employment Practice around disciplinary and dismissal procedures

c amend the Act to provide a mechanism to enable the Authority to identify and 'filter out' vexations or time-wasting (frivolous) claims at an early stage

d retain reinstatement as a remedy where practicable and reasonable, but remove it as the primary remedy

e provide new powers to enable mediators and the Authority to make recommendations to the parties around remedies

f provide for mediators and the Authority to award a monetary penalty ('fine') against a party that does not attend a scheduled mediation event or Authority investigation and when a claim is filed late at the Authority (without good reason)

g Department officials to work with the industry to develop standards or a code of ethic to improve levels of professionalism among employment advocates (not already so governed)

h to encourage the use of mediation, and

i for mediators to provide assistance to parties to a personal grievance claim at an early stage.

The preferred options will address the most pertinent issues raised by the reviews. While some changes will provide greater choice, others will make it easier for both employers and employees to understand and comply with the legislation. Where appropriate, changes to the legislation are accompanied by some limitations on both employees and on employers. The proposed changes are unlikely to significantly increase compliance costs and complexity for employers and employees.

In particular, the first two options (the test of justification and the code of practice) in the list of preferred proposals would address many of the strongly held views of employers in regards to the balance of fairness. These two options support a reasonable balance of employers' and employees' interests and address the main areas of concern with the legislation.

The remaining proposals will enhance and improve the operation of the current system by creating incentives for low cost and timely problem resolution.

B. The system for resolving employment relationship problems

Overall, the Department considers that there are specific issues to address that could improve the employment relationship problem resolution system. These issues comprise the interface between the system's constituent parts, specific aspects of the Authority's operation, and particular technical problems in the Act. These have been ongoing public concerns. The proposals identified serve to form a coherent package that deal with these issues.

The Department recommends that the Act be amended so that:

a the Chief of the Authority is provided with further powers to oversee the Authority's operation

b clarify the Authority's powers for issuing search and freezing orders so that these powers remain the preserve of the Court

c the Authority be empowered to remove cases to the Court at its discretion, without the parties having to apply, but after hearing from parties

d the Authority to actively consider the appropriateness of referring demand notice cases to mediation

e technical changes are made regarding the withdrawal of proceedings

f the application of pre-proceeding discovery is extended, and

g mediators are enabled to sign full, final and binding records of settlement that relate to the employment of minors.

C. Role of Labour Inspectors

Overall, the proposed amendments to the Act seek to improve fairness for employers who already comply with the requirements of the legislation by strengthening the role and enforcement powers of Labour Inspectors so that overall compliance is improved.

The Department supports all of the proposals outlined for improving the enforcement powers of Labour Inspectors.

D. Union access to workplaces

Overall, current policy settings around union access to workplaces are working well for both employers and employees. Current arrangements provide an appropriate balance of fairness to employers, employees and unions.

Introducing an arrangement by explicit consent could be introduced in a way that does not breach ILO conventions. An introduction of a "consent" arrangement is not out of step with other countries. It would, however, introduce a compliance requirement for both parties that does not currently exist.

However, the Department notes that any future policy work on opening collective bargaining to non-union groups could have implications for union access to workplaces in general.

E. Communication during collective bargaining

This proposal is aimed at amending the Act to clarify that an employer is able to communicate directly with his or her employees while bargaining for a collective employment agreement. The amendment will reflect what case law has established on this matter.

There are three options for progressing this proposal: firstly, the Act could be amended to include a clarifying clause which provides that, for the avoidance of doubt, nothing prevents a party from communicating (while bargaining is underway) with employees, including those who are members of a union that is a party to the bargaining, as long as every such communication is consistent with the duty of good faith. The second option is to provide more guidance around permissible communications. The third option is to set out the case law in legislation.

The Department considers that the problem in this case is one of perception. This perception is not borne out in the case law. Accordingly, it is the Department's view that guidance around the application of provisions in the Act should be provided through communications with employers rather than by legislative amendment. It is the Department's view that the best method for doing this would be through updating the code of good faith in relation to collective bargaining. While a code does not have the status or enforceability of legislation,

it removes the risks of confusing rather than clarifying the law or generating potential unintended consequences through judicial interpretation. If legislative change is the preferred option, the Department considers that a simple 'avoidance of doubt' statement carries less risk than an attempt to set out the case law in legislation.

IMPLEMENTATION

The Department recommends implementing any legislative changes to the Act on 1 July 2011, or six months after the enactment of the bill. This is to allow sufficient time for employers and employees to become familiar with the new requirements. An effective date of 1 July 2011 would align with the proposed date any changes to the Holidays Act 2003 are to take effect.

The Minister of Labour intends to make a media statement following Cabinet confirmation of the policy decisions.

The Regulatory Impact Statement will be published on the Department of Labour's website, subject to any appropriate withholding of information that may be permitted under the Official Information Act 1982.

Before any changes to the Act come into force, the Department will undertake an awareness raising campaign targeting employers and employees. The aim of the campaign will be to inform employers and employees of the changes and how they may be affected and to prompt employers and employees to be prepared before the changes come into effect.

The awareness raising campaign is likely to include print and internet advertising and articles in targeted media. We will use existing stakeholder networks to target specific groups. We will also work with the social partners to identify potential information needs and explore how they can assist with informing their members.

On an ongoing basis, the Department will provide information for employers and employees through its website, contact centre and other customer services.

The awareness raising campaign and ongoing information provision will be undertaken within the Department's existing baseline funding. The Department may need to reprioritise funding if the Employment Agreement Builder online tool needs to be updated.

We expect that there may be an increase in calls to the Department's contact centre and possible complaints to Labour Inspectors when changes to the legislation first come into effect. It is uncertain whether complaints to Labour Inspectors will increase or decrease from existing levels once the initial implementation period is over. The changes, if enacted, are also likely to increase demand for mediation services, and will affect the operation of the Authority and the Court.

MONITORING, EVALUATION AND REVIEW

The Department will provide the Minister of Labour with advice on the monitoring and evaluation of the impact of any changes to the Act.

As well as a potential formal review of any amendments, the Department will undertake informal monitoring of the changes to the Act through media reports, research and contacts with the Department's contact centre, Labour Inspectors, mediation services, the Authority and the Court.