Resolution Services: Focus for the Future change proposal

PSA submission

January 2016

For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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Introduction

Who we are

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 62,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

The PSA is both the union of those working at MBIE (including in Resolution Services) and, as New Zealand's largest trade union, a significant user of employment mediation services in every region of the country. This submission responds to the proposal from both of these perspectives. Part 1 is from the perspective of PSA members working in Resolution Services. Part 2 is from the perspective of the PSA as a user of employment mediation services. This section also contains our recommendations to mitigate risks of the proposal and provide some stability and certainty to stakeholders and staff.

In preparing this submission the views of PSA members working in resolution services were sought and information was gathered from PSA legal and organising staff about the PSA's use of employment mediation services.

Part 1 - From the perspective of PSA members working in Resolution Services

This section of our submission is structured in the following way:

1. An analysis of employment relations in New Zealand, the employment dispute resolution system in New Zealand and the principles on which a fair employment dispute resolution system should be based.

2. The work that employment mediators actually do.

3. A summary of the restructuring of the employment mediation service by the Department of Labour and MBIE.

4. An analysis of the MartinJenkins report – ***Employment Dispute Resolution Services***[1] - on which the change proposal is based.

5. An analysis of ***Focus for the Future*** and its proposals for changes to the way employment mediation will be delivered in the future

6. An analysis of the risks that ***Focus for the Future*** will create for MBIE, stakeholders and Resolution Services staff.

1. Employment Relations and the Employment Dispute Resolution System

Labour is not a commodity

In the famous words of the Declaration of Philadelphia[2], 'labour is not a commodity' and it follows that the labour market is not like other markets. With the exception of the short period of the Employment Contracts Act (ECA) – 1991 to 2000 – this philosophy has been the basis of employment relations in New Zealand and employment law and informs the current statute.

The Employment Relations Act[3] (ERA) says its objects are to promote observance in New Zealand of ILO Conventions 87 and 98 [ERA s.3(b)] and, in s.3(a):

[1] Employment Dispute Resolution Services, Final Report, MartinJenkins, 8 October 2015.

[2] The Declaration of Philadelphia was the work of the 1944 International Labour Conference, chaired by the Hon. Walter Nash, NZ's Minister of Finance, which re-established the International Labour Organisation. The conference was one of a number held to establish post-world war institutions culminating in the San Francisco Conference in 1945 which set up the United Nations.

[3] Employment Relations Act 2000, reprint as at 6 March 2015.

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
(iii) by promoting collective bargaining; and
(iv) by protecting the integrity of individual choice; and
(v) by promoting mediation as the primary problem-solving mechanism; and
(vi) by reducing the need for judicial intervention.

The employment dispute resolution system under the Employment Relations Act

The ERA says that if parties to employment relationships cannot resolve differences by themselves, then mediation is *the primary problem-solving mechanism*. Matters not settled at mediation can be taken to the Employment Relations Authority – which was intended to be a low-level tribunal. If a party is unhappy with an authority determination, they can take their case *de novo* to the Employment Court.

Judgments of the Court can be appealed, on points of law, to the Court of Appeal and ultimately to the Supreme Court. Both the Authority and the Court must consider referring a case to mediation before they decide it. While mediation is voluntary under the ERA, parties cannot bypass it and go straight to the Authority. If they attempt to do so, the Authority will direct them to attend mediation. This means that, in practice, mediation can be compulsory.

Mediation is not limited to legal disputes and mediators are able, with the agreement of the parties, to mediate workplace disputes that are not employment disputes, e.g. between principals and contractors. While personal grievances are the main type of matter handled by employment mediation services, there are a wide range of other matters including conflicts between employees, disputes over the interpretation of collective and individual agreements, large group conflicts and collective bargaining.

Under s.149 of the ERA, settlements reached in mediation, or signed by an authorised mediator, are legally final, binding and enforceable. This is a key principle of the employment dispute resolution system and is one of the powerful incentives for parties to resolve matters at mediation.

The employment relations system in New Zealand is a dynamic one in which there are thousands of interactions between employers and employees, between

employers and unions and between representatives[4] of employers and employees. Their interactions take place under the framework of the ERA and the hundreds of judgments of the Employment Court, Court of Appeal and Supreme Court which put flesh on the ERA's bones. As one example, these judgments provide valuable guidance to employers, employees, unions and representatives on the good faith principles of the act set out in s.4 of the ERA.

Principles of a fair employment dispute resolution system

The MartinJenkins report argues Resolution Services must ensure it is

> 'meeting actual, rather than perceived, client demand in the most efficient and cost effective way possible, while ensuring a high quality of service delivery. There is a need to balance customer focus with the wider interests of tax payers (who are all potential customers of the service) to ensure the most efficient and cost effective running of the service.'[5]

This may be consistent with the design principles which underpinned the Building a High Performing MBIE review of early 2015, as MartinJenkins assert. However they are not consistent with the object and principles of the ERA. Nor are they consistent with New Zealanders' notions of justice, the interests of employers, employees and unions and a high performing economy.

There has been a lot of international debate in recent years about the principles underlying employment dispute resolution systems in developed countries. Efficiency has been a driver for several governments in changing these systems. In an article in a leading academic journal in 2008[6], the US scholars John W. Budd and Alexander J.S. Colvin argued that evaluations of different employment dispute resolutions systems have been limited because they have focused on speed (how long it takes to resolve disputes) and satisfaction (of the participants in the process and outcome).

Budd and Colvin proposed three measures for evaluation: efficiency, equity and voice. *Efficiency* is a standard of business performance which conserves scarce resources, especially time and money, and promotes productive employment. Dispute resolution systems that are slow and costly are inefficient.

Equity is a standard of fairness. Equitable systems provide unbiased decision making, effective remedies when rights are violated and similar outcomes for similar circumstances. They have widespread coverage and are accessible to all.

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[4] In this submission, *representatives* include all those who may represent employers and employees in any situation, e.g. HR professionals, officials of employer organisations, HR consultants, union delegates and officials, lawyers, advocates and others (such as family or friends).

[5] Op. cit., p. 7.

[6] John W. Budd and Alexander J.S. Colvin, 'Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity and Voice', ***Industrial Relations,*** 47(3) July 2008 460:478.

Voice is a standard of participation including individual input into the construction of the dispute resolution system and into specific resolutions. This dimension covers due process: having a hearing, presenting evidence, being represented by an advocate and having the right to appeal. Voice focuses on participation in the dispute resolution process while equity focuses on outcomes.[7] (Budd and Colvin 2008: 463-4)

Budd and Colvin used these three measures to evaluate different employment dispute resolution systems, mainly in the United States. New Zealand's system of employment dispute resolution can be usefully analysed in terms of their criteria. *Efficiency*, their standard of business performance, was an important reason for the changes introduced by the ERA. The tribunal was seen as being too legalistic and too slow.[8] By 1999, parties had to wait a long time for mediation and adjudication in the tribunal. In provincial centres, waiting times were eight to 16 months for mediation and 11 to 22 months for adjudication.[9]

When the ERA was introduced, there was wide support for its emphasis on mediation (which had been the main form of dispute resolution before 1991). Hon. Margaret Wilson, the Minister of Labour and architect of the ERA, said mediation services would be 'free, fast and fair'.[10]

Over a decade after the ERA became law, the New Zealand system rates well in terms of *efficiency*. In the year to 30 June 2011, there were 5,500 mediations, 4,000 of which were settled. 96 per cent of all mediation cases were resolved without referral to the authority or the court. (Department of Labour 2011: 22-30) In the same period, the authority completed 1,002 determinations and the court disposed of 237 cases. (Ministry of Justice 2011: 53).

Mediation is effective and efficient in resolving most cases. In the five years between 2008 and 2012 between 76 per cent and 81 per cent of cases were settled at mediation.[11] The service's disposal rate (i.e. settlements plus unresolved matters that never go to the Authority) has been estimated at as high as 96 per cent.[12]

The dispute resolution system as a whole is open to criticism on *efficiency* grounds. While parties typically wait between two to four weeks for mediation, it may take a further three to four months before an unsettled case is heard by the authority.

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[7] Op. cit., 463-4.
[8] Department of Labour, *Employment Relations Bill – Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee*, Wellington: Department of Labour, 2000, p. 146.
[9] Department of Labour, *1999 Briefing to Ministers*, 154.
[10] 'Free, fast and fair – a new Mediation Service for New Zealand businesses and employees', media release, 13 July 2000.
[1111] Karen Radich with Peter Franks, ***Employment Mediation***, 2nd Edition, Thomson Reuters, 2013, 25.
[12] Department of Labour. (2011) *Report of the Department of Labour for the year ended 30 June 2011*, AJHR G.1.

Another *efficiency* (and *equity*) concern is that the costs of litigation are disproportionately high in relation to the outcomes. In ***Employment Mediation*** (2nd edition), the leading legal text on the subject, Radich and Franks published their research on costs in the authority.[13] In their paper with Andrew Horn to the 2015 Resolution Institute *'Kon gres*, they presented the results of their analysis of 531 authority costs determinations between 2011 and 2014. This compared the authority's costs awards with the actual costs of the successful party.

Their analysis showed that:

- Taking a case to the authority is expensive: 28 per cent of employers' actual costs were over $20,000 and 15 per cent of employees' actual costs were over $20,000.
- The median costs award to employees was $3071.56. Median actual costs for employees was $8129.50. Therefore employees were awarded *40 per cent of their actual costs*.
- The median costs award to employers was $3000. Median actual costs for employers was $11500. Therefore employers were awarded *29 per cent of their actual costs*.[14]

The high level of actual costs in the authority compared to parties' actual costs is a powerful incentive for employers, employees and unions to settle cases in mediation. It also means that for many employers (particularly SMEs) and employees, being represented at an authority hearing is not a real option.

Equity, Budd and Colvin's standard of fairness, has been a central concern of the New Zealand employment dispute resolution system since its inception in 1894. The New Zealand system is highly equitable in terms of coverage, accessibility and unbiased decision making. The ERA gives the dispute resolution agencies exclusive jurisdiction over employment disputes. All employees (from casual workers to chief executives) are covered by the ERA and can exercise their rights under it.

Mediation is free and can be accessed by a phone call to MBIE's free phone line. Mediators are impartial and neutral. Although they are MBIE employees, the ERA protects their independence in dealing with any matter. The authority and the court are independent judicial agencies and the ERA provides that they must act 'as in equity and good conscience' they think fit. Authority decisions can be challenged, *de novo*, at the court whose judgments can be appealed, by leave and on grounds of law, to the Court of Appeal and the Supreme Court. The courts' judgments provide a comprehensive and complex body of case law to guide employers, workers and their representatives.

[13] Op. cit., Chapter 20.
[14] What about the costs? The impact of litigation costs on mediation, https://www.resolution.institute/kon-gres/presenters/peter-franks-andrew-horne-and-karen-radich

Voice, Budd and Colvin's standard of participation, has become a more important feature of the New Zealand system in recent years. The introduction of personal grievances in 1970 gave rights to individual workers, although only those covered by collective bargaining. The major change in terms of voice came in 1991 when the ECA expanded the employment jurisdiction (and grievance rights) to all employees.

The importance of *voice* can be seen at different levels of the dispute resolution system. Workers and employers are directly involved in shaping settlements reached at mediation. If they don't want to settle, they can go to the authority for arbitration and have the right to appeal to the court. Parties to mediations can be represented by whoever they choose, for example a friend or family member, an advocate (often a 'no win, no fee' one), a lawyer or an organiser from a trade union or employers' association.

In summary, the PSA believes that Budd and Colvin's measures of *efficiency, equity* and *voice* are the appropriate framework for measuring the value of employment mediation services to employers, employees and unions because these measures encompass the needs and interests of all those who participate in the system, not just those of the government agency which provides mediation services.

2. The work that employment mediators actually do

The confidentiality of mediation means that it is difficult for outsiders to know what happens in the mediation room. Although the subject is covered extensively in ***Employment Mediation*** (2nd edition), the audience for this text is parties to mediation and their representatives.

Mediation Styles used in NZ Employment Disputes

The publication of comprehensive research into employment mediation by Dr. Grant Morris of the Law Faculty, Victoria University of Wellington, is timely. His study[15] addresses a central theoretical debate in mediation circles: which *style* of mediation is desirable and whether they can be mixed.

Between late 2013 and early 2014, Morris conducted a survey of employment mediators about their mediation styles and carried out in-depth interviews with four mediators. His research was done with MBIE's co-operation. He found that employment mediators use different styles, including in the same mediation, and that, to be able to meet stakeholders' needs, they have to be competent in both *facilitative* and *evaluative* mediation, styles that require different skill sets, an

[15] Grant Morris, 'Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes', *Conflict Resolution Quarterly*, 33(2), Winter 2015, 203-227.

understanding of a number of disciplines, including employment law, and experience in mediating.

Although mixing styles is offensive to some theorists, Morris concluded:

> "*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 … Thus Margaret Wilson's initial aim of promoting social change through the promotion of mediation has been moderately successful. 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 … It also acts as a model for other mediators and statutory regimes … the MBIE employment team is the top mediation unit in New Zealand*."[16]

Of course, Morris is not alone in his positive evaluation of employment mediators. In her speech at a function celebrating 100 years of employment mediation in 2009, Hon. Kate Wilkinson, Minister of Labour, said:

> "*In the past 100 years, mediation processes have helped resolve workplace disputes by bringing common sense, goodwill and professionalism to the fore, as well as providing a safe environment for emotions to be expressed … Tonight is an opportunity to celebrate the integrity and professionalism of the mediators and conciliators who have contributed to this success … Mediation is an evolving discipline [and] … the history of this evolution … is something that our mediators have the right to feel justifiably proud about.*"[17]

3. Restructuring without end?

The ERA came into force on 1 September 2000 and the new mediation service began the same day. The leadership of the Department of Labour at that time pulled out all the stops to ensure the service was a success. It set out to recruit a mix of mediators who would look different from the grey-haired middle-aged men who had predominated in the past. It engaged CDR Associates, a leading international mediation firm from Boulder, Colorado, to train 40 mediators (and provided a lot of training subsequently). Learning from past mistakes, it carefully managed the transition from the tribunal regime to the new one. At the start, the mediation service was led by a professional manager. In 2002, Alison Taylor[18]

[16] Ibid., 223-224.
[17] Speech at a function in Parliament, 30 June 2009, http://beehive.govt.nz/speech/100-years-mediation
[18] Alison Taylor, ERS Strategic Organisational Alignment Review (SOAR) Report, Department of Labour, 2002.

recommended a professional leadership model of management and the manager was replaced by a Chief Mediator (the practice between 1972 and 1991).

After the appointment of a new Secretary of Labour in 2003, the approach to supporting the service changed. The new Secretary restructured the DOL into some new and some renamed divisions and tried to wipe out the well established brands of Immigration (which became Workforce) and OSH (which became Workplace). The mediation service and labour inspectorate were amalgamated into Workplace with OSH. Reliable internet-based case management systems were discontinued because they created 'silos' and vast amounts spent on a new system, Insite, which was meant to be not just a case management system but a tool to diagnose levels of conflict, accidents, minimum code breaches etc. by firm and industry. As MBIE is well aware, it was a white elephant.

On the theory that health and safety inspectors, labour inspectors and mediators were all doing much the same jobs, Workplace Professional Services (into which they were unhappily lumped) introduced regional management. The different 'disciplines' were discouraged from having a separate existence. Over time, professional development was discouraged and the Chief Mediator's position abolished. Not surprisingly, different employment mediation offices adopted different practices particularly in case management.

The DOL adopted light-handed or 'modern regulation' as its guiding philosophy and the guru of this approach, Professor Malcolm K. Sparrow of Harvard University paid a number of trips to New Zealand to run seminars. The DOL would brook no criticism of the new way; mediators who objected that their jobs were fundamentally different from those of inspectors who enforce the law were told that, at a high level, they *were* regulators because they operated under a statute which was regulation.

In the wake of the tragedy of Pike River, 'modern regulation' disappeared and, after an extensive review by practitioners, experts in OSH and the social partners, Worksafe New Zealand was established with a mandate to enforce new health and safety laws. The DOL was a casualty of Pike River and MBIE was established in July 2012.

MBIE broke up the employment relations functions of the DOL into several different areas. Employment mediation was placed in the Resolution Services Branch of Market Services as was the tenancy mediation service of the Department of Building and Housing. It became clear that the intention of the new managers was to have mediators who would work across both the tenancy 'space' and the employment 'space'. The fundamental differences between the two types of mediation, and the desires of mediators, meant that this hasn't happened – yet. Resolution Services embarked on a five year service transformation project and in December 2014 the Foundation for the Future Review saw an attempt to

amalgamate the two services by splitting them into a mediator line of management and a case co-ordinator line of management. Arguments that this flew in the face of successful practice in employment mediation services since the 1970s were ignored.

This sorry history shows that, since 2003, the employment mediation service has been poorly served by constant restructuring and the different approaches of new sets of managers, usually managers without operational experience and a deep knowledge of employment relations. It raises a fundamental question about how the employment mediation service should best be managed in the future and we return to that in the PSA's proposals.

4. The MartinJenkins Report

In contrast to the positive evaluations of employment mediation cited earlier, the MartinJenkins report paints a false picture of a failing service with staff who only work 42 per cent of the time.

Surprisingly, the report does not consider employment mediation in the context of employment relations, the ERA and the employment dispute resolution system. As noted earlier, there is a narrow focus on efficiency and whether MBIE is 'in the right business.' The report says Resolution Services should meet 'actual, rather than perceived, client demand' and there is 'a need to balance customer focus with the wider interests of taxpayers …'[19] So much for the government's desire, as part of Better Public Services, for a customer-centric and citizen-centred approach to the delivery of public services.[20]

A deliberate lack of transparency

The MartinJenkins report is heavily focused on numbers: the number of cases mediators do, the different numbers between offices, the way requests for mediation are handled and the claim that mediators spend only 42 per cent of their time actually mediating. The final report was redacted so that staff could not see, or work out, the number of cases handled by each office. This was questioned on the grounds that staff could hardly make informed submissions if they did not have all the information. Requests for the full information to be provided were rejected. Those offices who asked for their own data were provided with it. However this didn't help much. It has been argued that to provide numbers for each office might raise questions about individual performance and breach privacy.

[19] Op. cit., p. 7.
[20] Hon. Paula Bennett, Minister of State Services, Address to IPANZ members, 26 March 2015, http://beehive.govt.nz/speech/address-ipanz-members

The report says the number of mediation cases has fallen. This is not new[21] and the PSA accepts that there has been a drop in demand. The PSA does not accept that the statistics on which the report relies are accurate. They come from Insite which is a deeply flawed case management system.

Mediator 'down time'

The report discusses the work employment mediators do when they are not actually mediating. This section is misleading, to say the least. According to MartinJenkins, mediators prepare for or follow up on mediations, sign off records of settlement, deliver education to groups, do admin and attend team meetings, engage in continuing professional development and undertake project work from time to time.

This analysis omits two crucial areas. First, mediators spend time discussing and analysing their cases and seeking advice and second opinions from colleagues. This is the collegial support and encouragement that all professionals engage in. Second, mediators spend a lot of time researching and discussing information across the range of disciplines with which mediators must be familiar. For example, a mediator in one office might study and advise colleagues on developments in neuroscience (an emerging field in mediation theory), another may be expert in cross-cultural issues, a third might be a keen student of mediation theory who scans a wide range of journals, a fourth an expert on employment relations and New Zealand's system and a fifth someone who carefully monitors the trends in authority determinations and court judgments.

All mediators study authority determinations and court decisions and debate their significance together. MartinJenkins could have spent more time asking mediators what they actually do rather than asking management what they think mediators do. MartinJenkins could also have asked stakeholders for their views. Perhaps that wasn't part of their brief.

The report does not adequately canvas solutions to scheduling issues. There are many State sector organisations that MBIE could learn from to increase mediation productivity through improvements to scheduling. The PSA is aware that District Health Boards have some expertise in this area.

The report says there are six 'key operational issues, specific to employment dispute resolution services …'[22] These are listed in bullet point order. Curiously, only five of these are then discussed in detail.[23] The other one is the ungrammatical statement: 'overly responsiveness to specific customer interests.'[24] There is no discussion of this in the rest of the report. Perhaps it was decided to delete this

[21] Radich with Franks, ***Employment Mediation***, op. cit., 25.
[22] Ibid, 33.
[23] Ibid, 33-39.
[24] Ibid, 33, second bullet point under key operational issues.

'key issue' from the final report and the person responsible for completing it forgot to delete a bullet point.

Whatever 'overly responsiveness to specific customer interests' means to MartinJenkins, it is a perhaps counterintuitive comment to make about a public service that deals with customers and stakeholders. In the real world, businesses who provide services to customers strive to be 'overly responsive' to meet the demands of customers, keep them happy and stop them moving to the competition. Being 'overly responsive' should be a badge of honour for any service-related business and the mediation service, not a stick to beat it with.

The MartinJenkins report complains about a lack of intelligence gathering and feedback loops about those who are seeking employment mediation and why.[25] It says that information on location, industry and sector etc. has not been reported on in the past because of confidentiality. This is not correct. When the mediation service was established in 2000, there was an internet-based filing system which did produce some of this data. It was dumped in favour of Insite which was *meant* to provide detailed industry and demographic information on the demand for health and safety, mediation and labour inspectorate services. Insite failed to deliver and the blame for this belongs to the senior managers (long since departed) who commissioned the system.

The report also complains about a lack of clear business performance objectives and the lack of performance targets based on outcomes.[26] This is because Resolution Services management decided to ditch them, for example, educational activities. The report criticises the different practices for scheduling mediations in the various mediation offices.[27] There are different practices and they are a direct result of the management decision, under the DOL, to attempt to obliterate national links between these offices and to run 'workplace services' along regional lines.

While MartinJenkins did discuss the possible use of contractor mediators,[28] this was not a big feature of their report. It is curious that the report on which ***Focus for the Future*** is apparently based contains no research about the availability of, and the market for, contract employment mediators given the radical plans in the change proposal.

[25] Ibid, 34.
[26] Ibid, 34.
[27] Ibid, 35.
[28] Ibid., 36.

5. Focus for the Future, Change Proposal

Summary of key features

The main proposals for change[29] are:

- A national case management system for employment mediation.
- Cutting the number of employment mediation offices from seven to four by closing Napier, Palmerston North and Dunedin.
- A 35 per cent reduction in the number of FTE employment mediators from 28 to 18.
- Hiring up to 35 contract mediations to do almost all mediations outside Auckland, Hamilton, Wellington and Christchurch.
- Creating more positions at Stout Street, e.g. a new contracts manager and advisor and a second principal employment mediator.

National case management system

The PSA is very concerned that clients of the service will lose the responsive and speedy service that many currently enjoy. Managers (without practical experience) will come up with rules around 'triage' of mediation cases, customers may have to prove they meet these criteria and be required to lodge the confidential details of cases so it can be decided where they will be in the queue.

This proposal runs the risk of making complex something that is simple. For decades, case co-ordination staff and registries in the former conciliation service, the mediation service, the Employment Tribunal, the mediation service and the Employment Relations Authority have worked with customers to set down mediations and hearings without much management oversight or bureaucratic rules.

Cutting the number of mediation offices

The PSA strongly opposes the proposal to close mediation offices in Napier, Palmerston North and Dunedin. Local opposition is growing because customers in these centres and surrounding locations value the service they get from skilled mediators.

35 per cent reduction in the number of FTE employment mediators from 28 to 18

For all stated intention of extending mediation services to the provinces and rural areas, the proposal's main objective is to reduce 'the overall cost of providing national employment mediation services.'[30] It proposes to sack 35 per cent of its FTE mediator workforce. Each office will have a reduction in mediators who will have to apply for their jobs with new job descriptions.

The redundancy costs will be substantial. The mediators hired when the service was established in 2000 were employed on agreements which gave them a redundancy entitlement of one month's pay for each year of service with a cap of

12 years, i.e. a year's pay plus notice. Around half the present workforce have this length of service and, at an average annual salary of $100,000 ten redundancies would cost MBIE $1 million.

In our view, such a drastic reduction will devastate the service. A cynic would say that this is but the first stage in full contracting out of employment mediation. It was an interesting coincidence that the crown company Fairway launched its workplace resolution service the same day that Resolution Services cancelled at the last minute the announcement of Focus for the Future to staff. There have been persistent rumours in Wellington that Fairway has been lobbying Ministers to take over employment mediation.

As we will show later, MBIE's proposals are penny-wise but pound-foolish.

Creating a panel of up to 35 contract mediators to provide mediation outside Auckland, Hamilton, Wellington and Christchurch

The proposal says that a panel of up to 35 contract mediators will provide employment mediation 'in provincial centres and smaller towns' outside Auckland, Hamilton, Wellington and Christchurch.[31] It claims that market research conducted by the Government Centre for Dispute Resolution 'suggested there is reasonable coverage of mediators with employment expertise ….'[32]

The PSA believes this claim is not substantiated. The GCDR survey asked respondents to indicate the areas of mediation they were engaged in. It was a superficial, write-in survey and the bland results available on the MBIE website provide no information about where these mediators 'with employment expertise' are or what their 'expertise is'. The PSA has requested all the results of the survey so the proposal's assertions can be subject to proper analysis.

The PSA has no doubt that there are plenty of people who have completed the Resolution Institute (formerly LEADR) five day mediation course who would tell a government agency they are interested in working in employment mediation. After all, the course – a worthwhile introductory course – produces vastly more 'graduates' than the demand for mediators. However this does not provide a robust basis on which MBIE can take a decision to sack 35 per cent of an experienced, highly valued workforce and replace it with contractors.

[29] Focus for the Future,19-23.
[30] Ibid, 22.
[31] Ibid, 21.
[32] Ibid, 22.

A number of questions arise:

- Where will the 35 contractors be drawn from? Will they be local lawyers and if so, how will conflicts of interest, a larger potential interest in a small town than in Auckland – be managed.

- Will the 35 contractors be HR professionals? If so, will employers want to go to mediation with a contractor who provides HR advice to Sealord one week and receives confidential information about Sanford in a mediation the next week.

- What will the 35 contractors be paid? To achieve cost savings, MBIE will have to hold down their hourly rate. It is unlikely that either lawyers or HR professionals will be interested if the fee is less than they can earn from providing legal services.

- Will the 35 contractors be drawn from the ranks of enthusiasts who have done the Resolution Institute course and are desperate for work as mediators? They may accept a low fee. However they are unlikely to provide the service that employers, employees and their unions and other representatives have come to expect. The research by Dr. Grant Morris discussed earlier shows that employment mediators must be able to use a range of mediation styles and in particular must be competent in facilitative and evaluative mediation as well as having subject knowledge in employment relations and employment law. The Resolution Institute course teaches facilitative mediation only.

- Will the contractors be genuine contractors for services or will they be casuals who are subject to the same management control as employee mediators, are paid a pittance and can be dismissed at will by terminating their contracts?

- Will Resolution Services' resources and expertise in professional development, which have been built up over 15 years, be diverted to upskilling the contractors and denied to new mediators who would benefit from the coaching and mentoring of more experienced colleagues?

- Why should employers, employees and their unions and other representatives in provincial New Zealand be content with potentially second-class mediators in comparison to the main centres? Will the lawyers who represent clients across urban and provincial New Zealand be happy with different levels of professionalism and expertise?

There is a shallow market for employment mediators

Based on our collective knowledge and our deep understanding of employment relations, the PSA believes there is actually a shallow market for employment mediators. The PSA is opposed to contracting out at all. We acknowledge that mediation services have always been contestable under the ERA but in our experience there are only a handful of experienced private employment mediators, most of whom have other jobs.

MBIE says the supply of contractors needs to be further tested.[33] When and how will this be done – after 35 per cent of current staff are sacked or before? How will the testing be done? By another once-over-lightly GCDR survey or by people who understand mediation? Who will evaluate the results and how transparent will they be?

Services in provincial cities and towns

The proposal and the MartinJenkins report complain about the inflexibility of Resolution Services' current practices of circuiting mediators to areas outside the seven mediation offices. There are issues here which are entirely of MBIE's making. Circuits have become inflexible and tiring for mediators because of MBIE's policy of trying to restrict travel costs. Requirements that senior managers must approve travel, particularly changes to flights, have made travel a bureaucratic nightmare for staff. New Zealand is a long, sparsely populated country and people travel all the time on business. It seems however that MBIE would rather have an inexperienced contractor providing mediation in, say, Nelson and Blenheim than pay the cost of an experienced mediator taking a 20-30 minute return flight across Cook Strait.

6. Risk analysis

The proposal says there are risks in the new model that 'need to be carefully managed.'[34] The PSA says there are major risks which have been ignored in the proposal:

- A drop in the quality of mediators will lead to a fall in settlement rates and more cases going to the authority. Some lawyers will like this because they will earn more money from employment cases. The proposal says one-third of cases are in the provinces so the potential increase in authority hearings will be large. One of the *efficiency* gains of mediation is that it is cheaper to the state than authority adjudication. Cost cutting of mediation services will simply push fiscal costs elsewhere and will increase them.

- An increase in authority cases will jam up the system and there is a risk that the unacceptable waiting times of the 1990s will reappear.

- The UK Advisory Conciliation and Arbitration Service conducted research which showed that mediation saved the economy nearly eight hundred million pounds a year.[35] For employers, resolving disputes at mediation means big savings in management time while employees benefit from avoiding losses of earnings.

- The transition from the present model to the brave new world of the 35 contractors will raise difficult issues around implementation. When poorly handled, as in 1991/1992, the transition to a new system can quickly lead to a big backlog of cases.

- Stakeholders will be angry if they receive a lower-quality service outside the four urban areas. Employment mediation is effectively compulsory under the ERA and the state has an obligation to provide a high quality service.

- There will be significant reputational risks to MBIE – which has had to strongly manage public perceptions about spending on Stout Street – if the new model fails and becomes a political hot spot for the government.

[33] Resolution Services Focus of the Future, External Questions & Answers, 1 December 2015, 2.
[34] Ibid, 22.
[35] Hon. Kate Wilkinson speech, op. cit.

Part two – from the perspective of the PSA as a significant user of employment mediation services

It is very important to the PSA as an organisation, and to its members, that MBIE gets "Focus on the Future" right. As New Zealand's largest trade union we are a significant user of employment mediation services and have members and staff living and working in all regions of the country.

If MBIE proceeds with the current proposals, the PSA has grave concerns about the future quality of the currently excellent services we receive from employment mediation services.

The PSA has a longstanding and deeply held commitment to constructive and high-functioning employment relations arrangements and also to strong public and community services. The employment mediation service is a key part of ensuring that New Zealand's workplaces are fair and high-performing and that all New Zealanders enjoy a good quality of working experience.

The PSA has worked and is working alongside a number of central and local government agencies to deliver sustained improvements to work systems. We would be pleased to discuss this with MBIE as an alternative to the current proposals.

The PSA also has extensive experience in restructuring in the State services. In our view these proposals seek to address perceived productivity and efficiency issues through changes to employment arrangements rather than by addressing the management and systems issues that cause them. This kind of approach is not uncommon but is our experience that it does not deliver sustained improvements.

Recommendations

Focus for the Future is fundamentally flawed and should be withdrawn. As discussed earlier, the employment mediation service has been subject to seemingly endless, often contradictory, restructurings. Employment mediation should be made a truly independent service, aligned with the Authority and placed under the leadership of the Chief of the Authority. This could be achieved, in the interim, with little administrative cost or change to office locations.

Where to begin?

The PSA recognises that MBIE is unlikely to embrace the above recommendation without considerable pressure. Instead of slashing staff numbers, closing offices and introducing a bureaucratic approach to case management, Resolution Services should:

- Maximise choice for affected staff by calling for voluntary redundancies so it can ascertain how many and which staff members would like to go.

- Encourage those mediators who would like to work part-time to make proposals for flexible work arrangements.

- Provide genuine and full opportunities for affected staff and stakeholders to contribute ideas about how to strengthen employment mediation services.

- Adequately fund circuit travel to meet both customer demand and work/life balance for mediators.

- Enhance professional development targeted at recent recruits by using internal resources (e.g. experienced and senior mediators with an interest in professional development) to devise and run intensive courses aimed at meeting skill gaps for employment mediators as a whole.

- Address the management and systems issues currently reducing productivity, including by actively seeking to improve scheduling efficiency through drawing on the experiences of Resolution Services staff and learning from the expertise of other State sector agencies.