



## **NZCTU public sector pay adjustment proposal – further advice on legal and implementation risks and mitigations**

**Date:** 22 September 2022      **Security Level:** IN CONFIDENCE  
**Report No:** 2022/0214  
**Contact:** Sarah Borrell, Chief Advisor Employment Relations  
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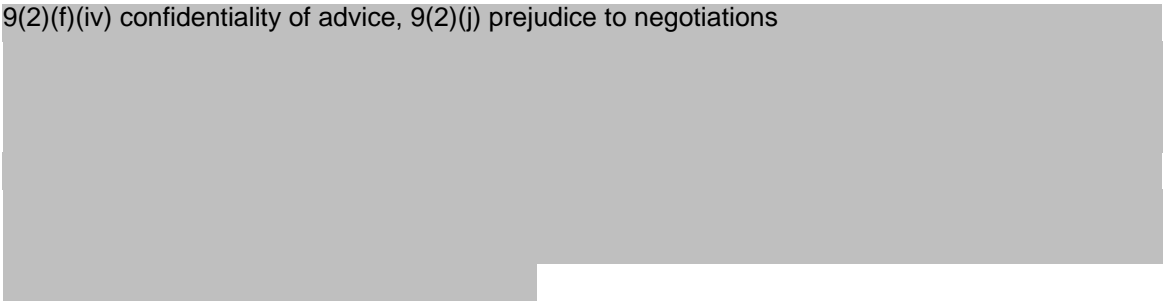
	<b>Actions Sought</b>	<b>Due Date</b>
<b>Hon Chris Hipkins, Minister for the Public Service</b>	<b>Provide feedback</b>	<b>26 September 2022</b>
<b>Hon Grant Robertson, Minister of Finance</b>	<b>For information and consideration</b>	<b>26 September 2022</b>

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Enclosure: No

## Executive Summary

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- 1 Discussions between officials and the New Zealand Council of Trade Unions (NZCTU) about its proposal for a public sector pay adjustment (the proposal) have progressed to the point where a formal mandate is required from Cabinet before any further engagement can be undertaken. To assist Ministers' decisions on whether to seek a mandate, this briefing provides information about the legal, and implementation risks and mitigations that sit around the proposal.
- 2 This report should be read alongside advice from Treasury on the fiscal and macro-economic implications of the proposal.
- 3 9(2)(f)(iv) confidentiality of advice, 9(2)(j) prejudice to negotiations  

- 4 A further risk arises in the treatment of the funded and contracted sector. Consistent with your letter responding to the NZCTU (in June), and subsequent direction to officials, our view remains that the contracted and funded sector should be out of scope. In response, the NZCTU is seeking a parallel negotiation for this sector. We do not consider that this will be feasible as there is no central leverage to make an agreement stick, is unlikely to be affordable at present, and would be difficult to resource concurrently.
- 5 If Ministers wish to proceed and achieve settlement in time for any adjustment to begin to flow by February 2023, Cabinet will need to provide a negotiating mandate at its meeting on 10 October 2022. Timing is extremely tight to meet this deadline and feedback is sought as quickly as possible.

## Recommended Action

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We recommend that you:

- a **Discuss** the attached advice with the Minister of Finance.
- b **Note** we are working with Simpson Grierson and Crown Law on the legal framework for the proposal and will advise you as soon as possible next week on whether and how the proposal can proceed under current legislative settings.
- c **Note** there are bargaining risks arising from the possibility that, in some negotiations, the proposal will become a basis for negotiation (starting point) rather than an outcome.
- d **Note** the Treasury is providing separate advice on fiscal and macroeconomic considerations (T2022/2112, T2022/2102 refer).
- e **Note** a Cabinet mandate will be required to proceed to formal engagement with the NZCTU and that you could seek that mandate on 10 October 2022.

f **Note** that, while extremely tight, current timeframes are still longer than sought by the NZCTU and its affiliates.

g **Agree** that Te Kawa Mataaho release this briefing in full once any bargaining process has been concluded.

*Agree/disagree.*

Hon Chris Hipkins  
**Minister for the Public Service**

## **Te Kawa Mataaho Report: NZCTU public sector pay adjustment proposal – further advice on legal and implementation risks and mitigations**

### **Purpose of Report**

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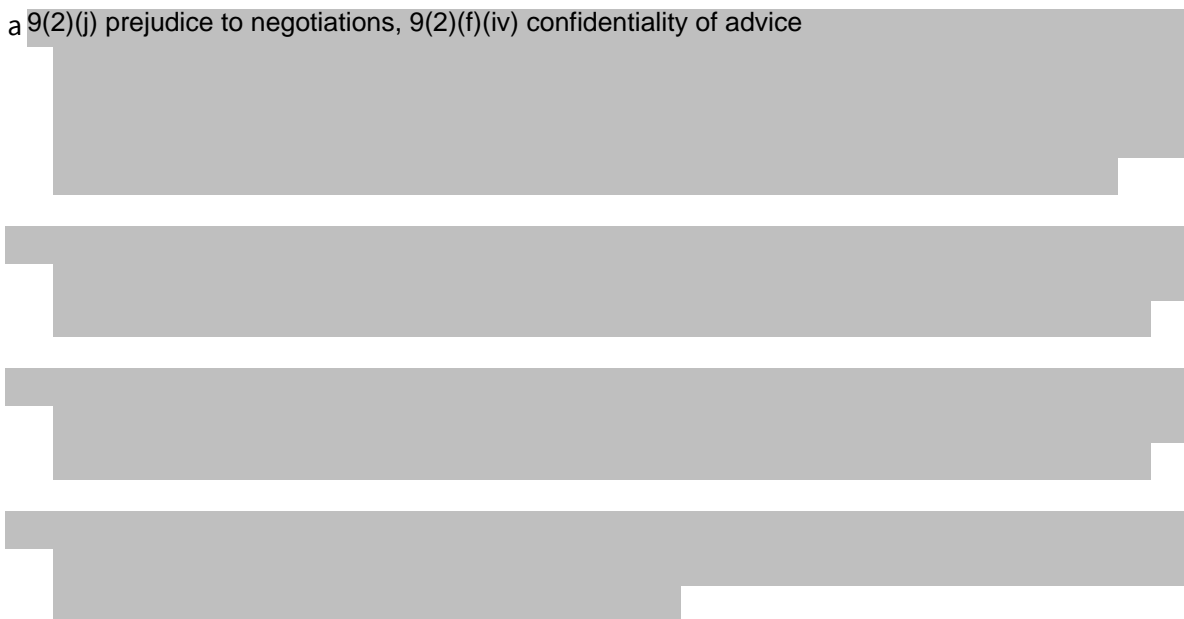
- 6 The purposes of this report are to:
- a. Provide the further information requested on the legal and implementation risks and mitigations of the NZCTU proposal for a public sector pay adjustment (refer 2022/0198 dated 9 September 2022)
  - b. Advise on the timeline for seeking the necessary mandate from Cabinet
  - c. Advise on the timeframe for any settlement being rolled out
- 7 This report should be read alongside advice from Treasury on the financial and macroeconomic impacts of the proposal.

### **Context: the relationship with the NZCTU is positive, but expectations are high, and pressure is building**

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- 8 Officials have been engaging weekly on a formal basis with the NZCTU, including with 12 of its affiliate unions. Health and education sector representatives have also been present. Discussions have ranged over the scope, implementation, fiscal and economic context, potential size of an adjustment, equity, and other matters. The relationship is positive, but discussions now need to become more concrete, and it is clear the NZCTU's expectations for the size of a settlement and timeframe for delivery are high.
- 9 We are currently working with the NZCTU on a *Summary of discussions* (the summary) document that sets out what has been discussed so far. The summary is to be agreed as a record of discussions and views. It will not bind parties but will inform any further discussions should these proceed. From discussions to date, we observe that the NZCTU:

a 9(2)(j) prejudice to negotiations, 9(2)(f)(iv) confidentiality of advice



## Further information: implementation and legal risks, and potential mitigations

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10 Following the advice to you and the Minister of Finance on 9 September (2022/0198 refers), this report describes three key areas of risk with the proposal and potential mitigations:

a. 9(2)(h) legal privilege

### Legal issues

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11 We have obtained a legal opinion from Simpson Grierson (SG) on the NZCTU's proposal. Their opinion is in draft at this stage. It is currently being reviewed by us and by Crown Law and should be finalised by early next week.

12 This is a novel proposal, and we are acutely mindful of the importance of any formal engagement proceeding on a sound legal footing. The core legal issues are how the proposal and our proposed process for formal engagement fit within the collective bargaining settings of the ERA and specifically its requirements for:

9(2)(h) legal privilege

### The proposal seeks a centrally-negotiated pay adjustment in an environment where decision-making is devolved

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13 The ability to bargain in the public service sits with the Public Service Commissioner (the Commissioner) under the Public Service Act 2020. In practice, it is delegated by the Commissioner to the various chief executives. Outside of departments, department agencies and the compulsory school and kindergarten sector, each employer is responsible for their own bargaining. The Employment Relations Act 2000 provides the legal framework for bargaining. Many of the agencies in the wider state services are subject to the Government Workforce Policy Statement which aims to foster a consistent, efficient, and effective approach to employment and workplace matters across the agencies it applies to. Importantly, the Government Workforce Policy Statement cannot determine pay or conditions.


14 These policy settings aim to balance the gains of consistent approaches across sectors with the need to tailor pay and conditions to the dynamics of individual sectors and to reflect chief executives' responsibilities under the Public Service and Public Finance Acts. They also ensure that Ministers are not inappropriately drawn into bargaining processes.

15 The proposal will be challenging for these existing employment relations settings. Our view is that Cabinet should carefully consider of leverage, mandate, scope, and ability to pay in deciding whether to proceed to formal engagement or not.

## Leverage


- 16 The processes around any agreed pay adjustment arising from the proposal will need to ensure that the centrally-agreed adjustment achieves the intended effect within individual sectors and agencies. Under current settings there is a risk that the adjustment is open to further negotiation by individual unions (or employers) and in particular that it becomes a floor for further negotiation and drives remuneration growth.
- 17 To be consistent with good faith obligations the proposal will not be able to operate as a direction or requirement but will need to be a more flexible expectation. In this context the proposal would be a statement from government and the Commissioner as to the desirable outcomes to be achieved in subsequent bargaining between employers and unions. The expectation would be subject to the good faith obligation and other requirements of the ERA.
- 18 The expectation would be backed up by the normal processes for aligning employment relations processes. Central agencies exercise a high level of influence over public service departments: the Commissioner by setting conditions when delegating responsibility for bargaining and the Treasury in respect of financial controls. A level of influence operates in respect of the Crown entity sector where there is autonomy of agencies governed by statutory boards.
- 19 However, there will be uncertainty about the extent to which the proposal would 'stick' in terms of actual collective employment agreement outcomes. The proposal could not constitute a 'direction' in either the public service or Crown entity sectors. In some negotiations there will be pressure for the proposal to be a starting point, rather than an outcome. That risks the integrity and legitimacy of the process in the eyes of those unions who do agree to be bound to the level of the proposal.

20 9(2)(f)(iv) confidentiality of advice



21 Pending further legal advice, our view at this point is there are limitations and risks concerning the degree of central leverage that could be relied upon to achieve the proposal's core objective.

22 9(2)(f)(iv) confidentiality of advice



## Mandate

23 Negotiators will need a clear mandate. For the public service this would be obtained from Cabinet. NZCTU and unions represented in the discussions would presumably have a mandate to recommend the proposal to the NZCTU affiliates. It should be noted that such a recommendation does not bind affiliates to recommend the proposal to their members, or their members to ratify a settlement based on it.

## Scope

- 24 In report 2022/0198 we advised on the range of agencies that could be within scope of the proposal. The relevant table is reattached here for reference (Appendix 1). We have proposed that departments, departmental agencies, employees of Health NZ and the Māori Health Authority, funded school boards, compulsory schooling employees, kindergarten teachers, and Crown agents be in-scope. However, in view of the subsequent analysis on leverage (summarised above) we think Ministers may want to consider a narrower scope, possibly as narrow as the core public service and schools sector.
- 25 As previously advised (and not supported by the NZCTU to date) we recommend funded and contracted employees be excluded from scope. The employers in these cases are not public sector organisations and we do not have leverage over them. We consider these employees can be addressed via existing collective employment negotiation processes and through changes to the procurement settings run in the health, education, and social sectors.
- 26 The NZCTU is still seeking for the funded and contracted sector to be included in the process. In response to this, the NZCTU proposes a concurrent process for this sector with the intention that benefits are commensurate with those agreed for public sector agencies. Our view is that it would be difficult to resource and manage concurrently, and this option would significantly increase costs.
- 27 9(2)(j) prejudice to negotiations

## Ability to pay

- 28 The fiscal implications of the proposal are canvassed in the Treasury's companion advice (T2022/2112, T2022/2102 refer). In short, to engage in good faith, negotiators will need certainty that all employers within the scope of the agreement will be able to pay the adjustment from either their existing funding, or from additional funding.
- 29 The proposal will need to sit alongside other agreements and employees currently in place across the public sector employment relations system.

## **Any settlement would begin to be paid out in February 2023 and time is tight to achieve this**

- 30 Appendix 2 sets out an indicative timeline for the process from here. It envisages Cabinet providing a mandate to bargain on 10 October 2022 and any payments beginning to flow by the end of February 2023. The timeline is ambitious. Officials do not consider it is possible to truncate the timeline further for those on collective agreements. We also note there are practical constraints caused by the payroll systems in health and education which are likely to mean a longer timeframe for implementation in those sectors. Other agencies may also experience challenges particular to their respective operating contexts, given the timeline in Appendix 2 has not been socialised with agencies that may be called upon to deliver terms of settlement arising from the proposal.
- 31 To facilitate the stages following a Cabinet mandate for bargaining, we recommend Cabinet delegate decision-making on subsequent details to you and the Minister of Finance working jointly, and consulting Ministers in key affected portfolios.

## Next Steps

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- 32 Once you have received the legal advice next week, if you wish to proceed officials will prepare advice for Cabinet to consider on 10 October 2022. The usual Cabinet process will need to be truncated significantly. Notably, there is not time available (for a 10 October deadline) for the paper to be considered by a Cabinet Committee prior to proceeding to Cabinet:
  - a. Monday 3 October 2022 – draft Cabinet paper provided to joint Ministers for feedback (and concurrently provided to key agencies).
  - b. Wednesday 5 October 2022 – feedback provided by Ministers and key agencies.
  - c. Thursday 6 October 2022 – Cabinet paper finalised and lodged with the Cabinet Office.
  - d. Monday 10 October 2022 – Cabinet considers paper, determines whether or not to provide a mandate for further engagement on the proposal.
- 33 While very tight, this timeframe is still later than the NZCTU and its affiliates are seeking and we will discuss with your office how you wish to manage their expectations and mounting system pressure, including the risk of industrial action.



**Appendix 1: Agencies proposed to be in and out of scope (from report 2022/0198)**

Name	Description	#'s of org
Depts and Dept. Agencies	Public Service Departments and Departmental Agencies.	37
Health sector	Health New Zealand employees (public hospital workers and HealthNZ's corporate areas) plus the Māori Health Authority.	1
Education sector	Funded school boards; compulsory schooling employees and kindergarten teachers.	2500+
Non-Public Service Depts	Non-Public Service Departments - NZ Defence Force, NZ Police, and Parliamentary Council Office.	3
Crown agents	Crown agents, excluding Health New Zealand. Examples are ACC, CAA, FENZ, Maritime NZ, NZQA, TEC, Worksafe, NZTA, NZTE, Real Estates Agents Authority, Sport and Rec NZ.	27
ACEs and ICEs	Eg Te Papa, Māori Language Commission, Public Trust, Heritage NZ, Law Commission; Electoral Commission, Productivity Commission.	36
Crown entity companies	Eg CRI's, Radio NZ and TVNZ.	11
Crown entity subsidiaries		150
Tertiary sector	Universities, Wananga, and Te Pūkenga.	13
Public Finance Act Organisations and Reserve Bank	A range of organisations including Fish and Game councils, Lottery Grants Board, Education Payroll, Predator Free 2050, Network for Learning.	59
SOEs; Mixed Ownership Model Companies		15

9(2)(f)(iv) confidentiality of advice, 9(2)(j) prejudice to negotiations

Legislative branch	Office of the Clerk; Parliamentary Service; Office of the Ombudsmen; OAG; Parliamentary Commissioner for the Environment.	5 plus Judiciary
Funded sector	Employers funded (partly or fully) to provide public services.	Unknown
Contracted sector	Employers contracted to provide services to the public sector.	Unknown

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