



## BRIEFING

### Fair Pay Agreements: how the Public Service, Education Service, and District Health Boards should interact with bargaining

<b>Date:</b>	15 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4436

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	Agree to an option for how Public Service, Education Service, and District Health Board employers should interact with FPA bargaining.  Forward this briefing for information to the Minister for the Public Service, Minister of Education and the Minister of Health.	23 July 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
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The following departments/agencies have been consulted
Te Kawa Mataaho Public Service Commission, Ministry of Health, Ministry of Education, Health Transition Unit at the Department of the Prime Minister and Cabinet

**Minister's office to complete:**

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments**



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#### Purpose

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To provide advice on how the public, education and health services should interact with bargaining for Fair Pay Agreements (FPAs).

#### Executive summary

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The public sector has distinct delegation and consultation mechanisms for collective bargaining in the Public Service, Education Service and District Health Boards (DHBs) (for brevity we have shortened this grouping to “PEH employers”). Cabinet has agreed to maintain these delegation and consultation mechanisms for the purposes of bargaining in the FPA system. However, carrying across these existing processes will not be sufficient for the Public Service Commissioner or Director-General to directly influence FPA bargaining, and further decisions are required.

You have been authorised by Cabinet to make decisions regarding the form/structure and representativeness of employer bargaining representatives in FPA bargaining. You have made decisions on the form requirements for employer bargaining parties but we indicated that further work was required in relation to public sector employers.

If the existing approach to representation is applied to PEH employers, the employers would face difficulties forming an incorporated society to represent their views, and would either need to join an incorporated society or only participate indirectly, by submitting their views to the bargaining parties.

We have considered a number of options for how public services employers should interact with bargaining:

- **Option 1:** apply the existing form and function requirements, so in order to participate in bargaining public services employers must form an incorporated society, be a member of an existing employer organisation, or have only indirect involvement by providing views to the bargaining parties.
- **Option 2:** amend the form requirements only, so that the Public Service Commissioner and the Chief Executive of the new Health NZ body could be direct bargaining parties.
- **Option 3:** amend both form and function requirements, so that in addition to the above option, a PEH bargaining party would not have any bargaining obligations to private sector employers, and likewise the private sector bargaining party would not have any bargaining obligations to represent PEH employers.

We do not consider option 1 to be feasible. There are benefits and risks with both option 2 and 3 and no clear ‘best’ option. Nonetheless, we recommend you pursue option 3. All the government agencies we consulted supported this option.

Finally, Cabinet has agreed that where private sector employers provide public services with government funding, the employer bargaining side will have an obligation to keep government

agencies informed of the progress of bargaining. We consider whether further statutory processes are needed in relation the obligation, but we ultimately recommend that this can be addressed through non-statutory means.

## Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** you have been authorised by Cabinet to make policy decisions regarding the form/structure and representativeness of employer bargaining parties, and you have made decisions setting these form requirements (including a requirement to be an incorporated society [briefing 2021-3525 refers]).

*Noted*

- b **Note** at the time you made decisions on requirements to be an employer bargaining party, we indicated further work would be needed to understand whether existing public sector bargaining entities or agents have a legal form, constitution, and rules that could enable it (or could be suitably amended to enable it) to represent all affected parties (including any private employers).

*Noted*

- c **Note** if the existing approach to representation is applied to the Public Service, Education Service and District Health Boards (PEH employers), these employers would face difficulties forming an incorporated society to represent their views, and would either need to join an incorporated society or submit their views to the bargaining parties to be considered.

*Noted*

- d **Agree** that PEH employers should interact with FPA bargaining which includes their workers within coverage in the following way:

<u>Option 1</u> : apply the existing form and function requirements, so in order to participate in bargaining public services employers must form an incorporated society, be a member of an existing employer organisation, or provide views to the bargaining parties.	<i>Agree / Disagree</i>
<u>Option 2</u> : amend the form requirements only, so that the Public Service Commissioner and the Chief Executive of the new Health NZ organisation can be direct bargaining parties without having to form, or be members of, incorporated societies.	<i>Agree / Disagree</i>
<u>Option 3</u> : amend both form and function requirements, so that PEH employers can be represented by a direct bargaining party but would not have any bargaining obligations to private sector employers, and likewise the private sector bargaining party would not have any bargaining obligations to represent PEH employers ( <b>recommended by MBIE and consulted agencies</b> ).	<i>Agree / Disagree</i>

- e **Note** that Cabinet agreed that when an FPA covers private sector organisations that receive government funding for the delivery of public services, the employer bargaining side must inform the relevant government agency of the progress of the FPA bargaining.

*Noted*

f **Note** we have considered whether this obligation on the employer bargaining side should be supported by a statutory obligation on the government to inform the employer bargaining side of the funding relationships at the outset of bargaining, but we consider information can be provided to the employer bargaining side without a statutory requirement.

*Noted*

g **Forward** this briefing for information to the Minister for the Public Service, Minister of Education and the Minister of Health.

*Agree / Disagree*



Beth Goodwin  
**Acting Manager, Employment Relations  
Policy**  
Labour, Science and Enterprise, MBIE  
15 / 07 / 2021

Hon Michael Wood  
**Minister for Workplace Relations and  
Safety**

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## Background

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### **Cabinet has made high-level decisions to maintain the existing bargaining structures for the Public Service, Education Service and District Health Boards**

1. Cabinet has agreed to adopt the existing requirements in relation to Public Service and Education Service bargaining [CAB-21-MIN-0126], such that the Public Service Commissioner:
  - Is responsible for FPA bargaining that covers employees in the Public Service and Education Service as if the Public Service Commissioner (the Commissioner) were the employer.
  - Can choose whether to delegate these functions and powers to Public Service Chief Executives and the Secretary for Education, respectively, with conditions.
2. Cabinet noted that no changes were proposed to the role of the Director-General of Health, who would continue to be consulted on matters related to terms and conditions of employment, in this case with regard to those contained within potential FPAs.
3. As we discuss in more detail below, these decisions maintain the existing system for the Commissioner and Director-General having oversight of bargaining, through delegation or consultation, but they do not extend to decisions on how the Public Service would actually participate in bargaining for an FPA.
4. Cabinet also agreed that when an FPA covers private sector organisations that receive government funding for the delivery of public services, the employer bargaining side must inform the relevant government agency of the progress of the FPA bargaining. This is to ensure relevant government agencies are aware of the progress of bargaining in order to appropriately manage the potential implications for delivery of public services.
5. Cabinet also authorised you to make policy decisions regarding the eligibility requirements in relation to the structure/form and representativeness of employer bargaining representatives, and level of government oversight on the selection of employer bargaining representatives.

### **You have subsequently made delegated decisions on the requirements for employer representation**

6. MBIE has provided advice a number of times on employer representation (most recently briefing 2021-3525). You have agreed that in order for an entity to be a bargaining party on the employer side it must be an employer association that has at least one member who is an employer with an employee in proposed coverage, be an incorporated society, and meet the following the specified requirements:
  - The object – or an object – of the society enables it to promote affected parties collective work interests (including members and non-members) for the purposes of FPA bargaining; and
  - The society's rules are democratic, not unreasonable, not unfairly discriminatory or unfairly prejudicial, and not contrary to law; and
  - The society is independent of, and is constituted and operates at arm's length from any worker organisation.
7. We advised that further work would be needed to understand whether existing public sector bargaining entities or agents have a legal form, constitution, and rules that could enable it (or could be suitably amended to enable it) to represent all affected parties (including any private employers).
8. In summary, employer bargaining parties must meet the following form requirements, and take on the following obligations (or functions):

Form	Obligations / Functions
<p>Must be an incorporated society (with at least one member who is an employer with an employee in proposed coverage).</p> <p>The object or an object of the society enables it to promote affected parties collective work interests (including members and non-members) for the purposes of FPA bargaining.</p> <p>The society's rules are democratic, not unreasonable, not unfairly discriminatory or unfairly prejudicial, and not contrary to law.</p> <p>The society is independent of, and is constituted and operates at arm's length from any worker organisation.</p>	<p>Good faith requirements to:</p> <ul style="list-style-type: none"> <li>• Other employer bargaining parties</li> <li>• The other bargaining side (unions).</li> </ul> <p>Use best endeavours to represent affected employers coverage (including non-members) on their side by doing at least the following things:</p> <ul style="list-style-type: none"> <li>• Providing regular updates</li> <li>• Providing an avenue for feedback and take any feedback received into active consideration during bargaining (e.g. by incorporating views where feasible)</li> <li>• Informing those in coverage of the ratification vote</li> <li>• Considering whether there are particular population groups or interests (including those who may be at risk of being overlooked) within the FPA coverage that should be recognised and reflected during bargaining (e.g. Pacific peoples, small businesses).</li> </ul> <p>In recognition of the Crown's Te Tiriti o Waitangi obligations, ensure Māori are effectively represented by:</p> <ul style="list-style-type: none"> <li>• Using their best endeavours to seek, consider and reflect feedback from relevant Māori employer or employer representatives</li> <li>• Considering whether there should be a Māori representative in the bargaining side.</li> </ul> <p>To ensure relevant government agencies are aware of the progress of bargaining in order to appropriately manage the potential implications for delivery of public services:</p> <ul style="list-style-type: none"> <li>• When an FPA covers private sector organisations that receive government funding for the delivery of public services, inform the relevant government agency of the progress of the FPA bargaining.</li> </ul>

## How should the Public Service, Education Service and District Health Boards interact with FPA bargaining?

### Context

9. The Public Service, Education Service and District Health Boards (DHBs) have fundamentally different purposes and accountabilities compared to private sector employers. They are accountable to Parliament for the delivery of services to the public, consistent with Government priorities and fiscal context.
10. The unified Public Service is underpinned by the Public Service Act 2000 (the PS Act), which provides a Public Service purpose, principles and values. The PS Act provides unique employment provisions to support the Public Service to deliver on its purpose, principles and values. The Public Service Commissioner as Head of Service has a system leadership role for the Public Service in the PS Act, including on employment matters. Therefore the Commissioner has a role somewhat analogous to the proposed bargaining parties in the FPA system.
11. Public Service agencies and DHBs must give effect to Government expectations for employment relations in the public sector, and School Boards of Trustees must have regard to these expectations. All must operate within the Government's fiscal parameters.

12. The Public Service Commissioner is the employer for the purposes of collective bargaining in the Public Service and Education Service,<sup>1</sup> with the ability to delegate responsibility for collective bargaining (with conditions). The Director-General of Health also has a right to be consulted before DHBs finalise a collective agreement. These delegation and consultation mechanisms enable the Government to co-ordinate and monitor collective bargaining in these sectors for consistency with its expectations on employment relations.
13. In the rest of this briefing we refer to this Public Service, Education Service and District Health Boards (DHBs) as 'PEH' employers or services, for brevity.
14. We propose that the existing decisions above on employer representation apply to the wider public sector (excluding the Education Service and DHBs). Public sector agencies outside of the legal Crown are able to join or form incorporated societies as individual members. The Minister for the Public Service could approve a Government Workforce Policy Statement to promote the more effective management of employment relations, including on FPA bargaining that covers specific entities in the public sector, if required.
15. Another possible scenario is where the FPA includes funded workforces. There is a risk that the line between funded and PEH employers could become somewhat blurry in this situation, but nonetheless we consider funded workforces should fall within the private sector.

## Criteria

16. In analysing how PEH employers should interact with FPA bargaining we have considered the following criteria:
  - **Effectiveness:** Ensure PEH employers can effectively participate in FPA bargaining.
  - **Fit for purpose:** Ensure form and function requirements for bargaining parties are fit for purpose in terms of the fundamental differences in purpose and accountabilities between PEH employers and the private sector.
  - **Consistency:** Create equivalent form and function requirements between bargaining parties, unless there is a good reason for differences.

## Without further policy decisions, the Commissioner or Director-General of Health would have limited influence on FPA bargaining

17. To implement Cabinet's existing decisions without any further PEH-specific decisions, we consider that – at a minimum – consequential amendments will be required to both the Public Service Act 2020 and the New Zealand Health and Disability Act 2000 (or its successor).<sup>2</sup> These changes would empower the Commissioner to delegate to Public Service Chief Executives subject to conditions, or and the Director-General of Health to have a right of consultation as DHBs bargain for an FPA.
18. If the agreed employer bargaining party requirements were applied to PEH employers, they would only have an indirect role in FPA bargaining: like any other employer, they could provide input or feedback to the employer bargaining party/ies, but would not be part of the bargaining side decision making.
19. The overall policy intent for the employer bargaining parties is that there should be some separation between employers and FPA bargaining parties, particularly because each

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<sup>1</sup> The definition of the Public Service is all those agencies set out in Schedule 2 of the Public Service Act 2020, primarily constituting government departments. The Education Service is defined in the Education and Training Act 2020 as including service in the employment of a State school, a tertiary institution, and registered teachers in the employment of a free kindergarten association.

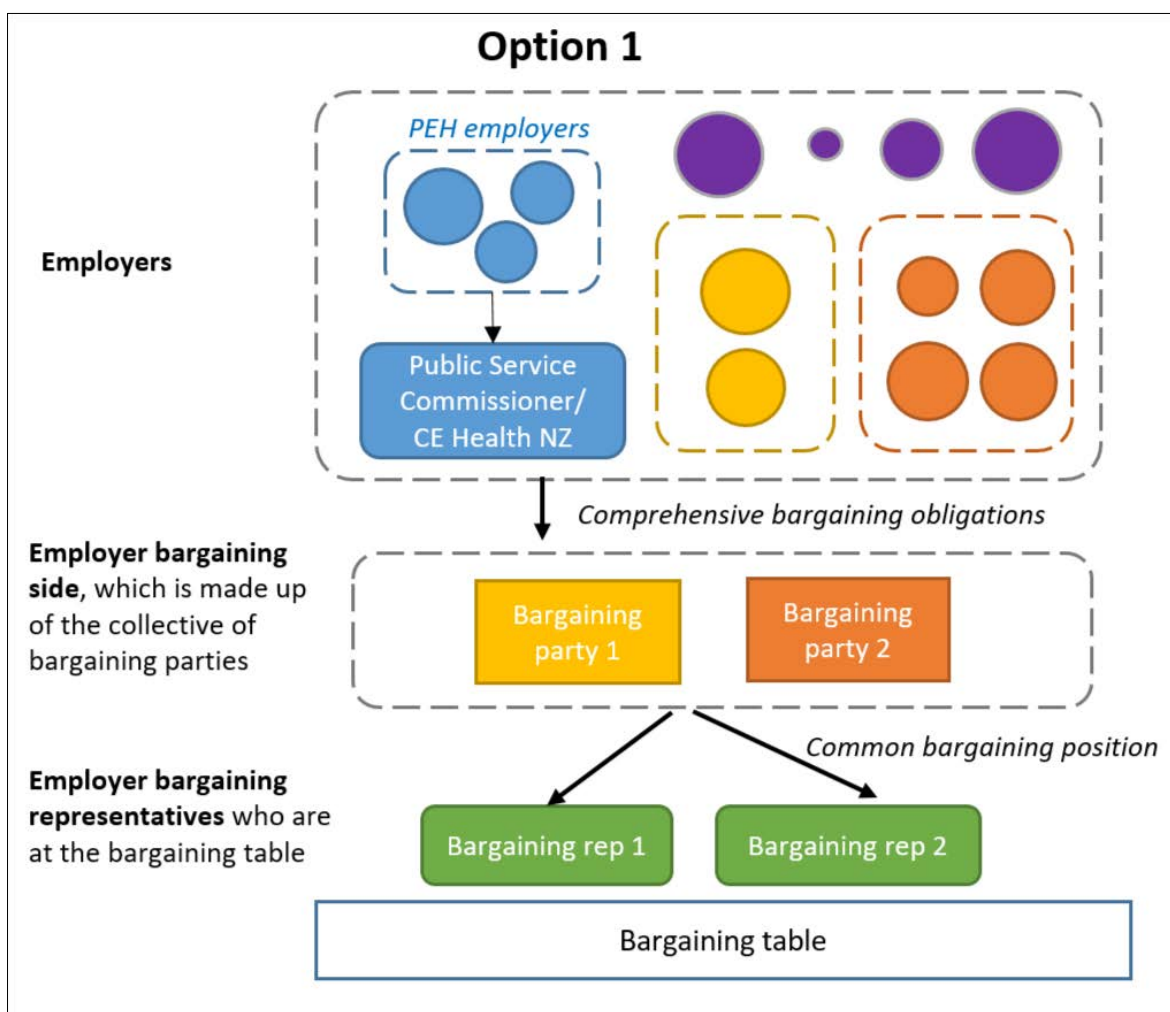
<sup>2</sup> As we discuss later in the briefing, the development of the FPA legislation will happen concurrently with the development of new health legislation. Therefore it will be necessary to design the respective pieces of legislation in concert.

employer side bargaining party will have an obligation to represent the views of all affected employers. Allowing employers to directly represent themselves during FPA bargaining could create a conflict of interest between the employer's duty to its shareholders and its duties to represent other employers (who may be its competitors).

20. We do not think this conflict of interest issue is relevant within PEH services as they already have a unified employment system and a mechanism for coordinating collective bargaining.
21. In the next section we explore whether PEH employers should be subject to different form and function requirements in relation to FPA bargaining.

**There are a number of options for how PEH employers should interact with FPA bargaining**

Option 1: apply the existing form and function requirements to PEH employers



22. Under this option, there would be no special allowance or role for the Commissioner or the Director-General of Health. PEH employers would need to either join an established employer organisation, create a new one, or participate as a non-member using the channels bargaining sides are required to make available to receive input from non-members.
23. We do not think PEH services employers would be able to meet the requirements to be bargaining parties for employers, or to create dedicated PEH bargaining parties.<sup>3</sup> Te Kawa Mataaho Public Service Commission (the Commission) has advised that as public service

<sup>3</sup> Technical Advisory Services (TAS), the current bargaining entity for DHBs, could meet some the requirements to be a bargaining party. However, we understand that TAS will cease to exist once the new Health NZ entity has been established.



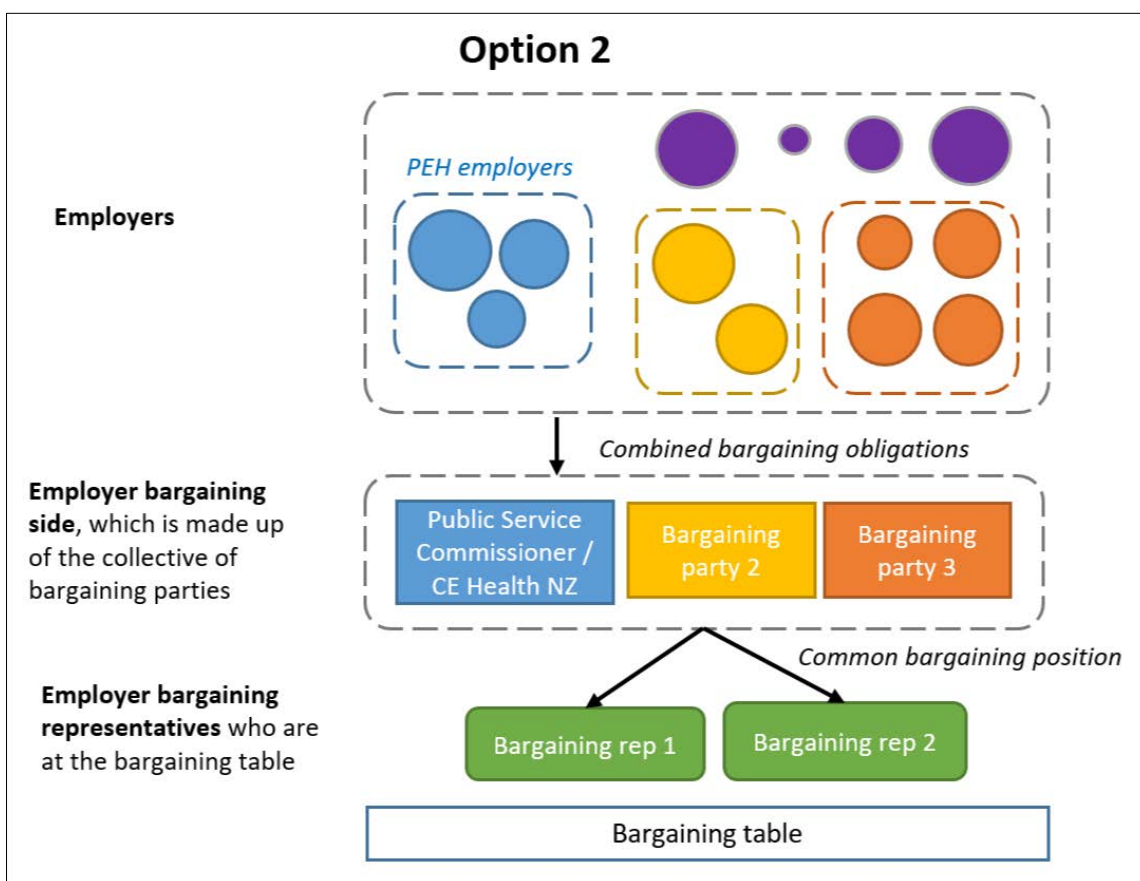
agencies are part of the same legal entity (the legal Crown), the Crown would constitute only one member of the required 15 members to form an incorporated society. The Crown could join or form an incorporated society with at least 14 other persons, but this would risk diluting the effective representation of PEH services in FPA bargaining.

24. We consider the benefits and risks of this option would be:

- **Benefit:** Meets consistency criterion. Would be consistent in the treatment of private sector employers and PEH employers.
- **Risk:** Effectiveness criterion not met. PEH employers would not be able to easily form their own incorporated society, making equal representation more difficult. Indirect methods of input (i.e. not being able to be a bargaining party) mean the particular impacts from the proposed FPA terms on PEH employers may not be fully considered by the bargaining parties.
- **Risk:** Does not meet the fit for purpose criterion. In light of the above risk, the Public Service Commissioner or Director-General of Health will have no way to fulfil their accountability for bargaining that is consistent with Government expectations on employment relations and fiscal parameters.

25. Overall, our view is that option 1 would create barriers preventing the effective representation of PEH employers in FPA bargaining. It would create consistency between PEH and private sector employers, but at the expense of recognition of their different purposes and accountabilities.

Option 2: amend the form requirements only



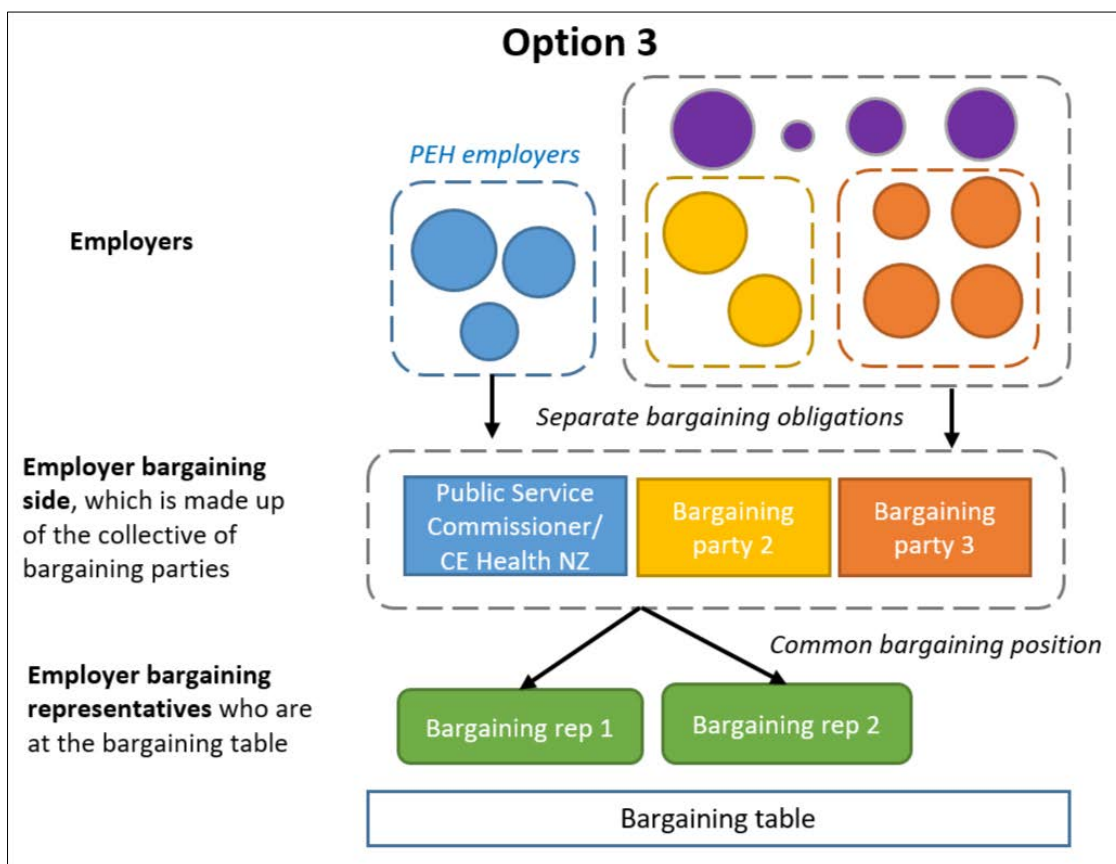
26. Under this option, the FPA framework would enable the Commissioner to be a bargaining party directly without having to form an incorporated society. The Commissioner could choose whether to delegate these functions and powers to Public Service chief executives and the Secretary for Education, respectively, with conditions. The government bargaining

parties would still have to work with other private sector bargaining parties to form the employer bargaining side and agree a common bargaining position.

27. In relation to the DHBs' workforce, it is not yet clear how employment relations will be structured in the reformed health system. The Health Transition Unit in the Department of the Prime Minister and Cabinet (DPMC) has not yet advised the Minister of Health on the detailed roles and responsibilities of different agencies with respect to employment relations. Prior to decisions being made on these responsibilities, we suggest this option should provisionally designate the ability to be bargaining party to the Chief Executive of Health NZ.
28. Under this option, there is a small risk that for an FPA which encompasses both PEH employers and a small number of private employers, the private sector could decline to engage in bargaining and the Commissioner could be left as the only bargaining party at the table, or vice versa (a free rider effect). For example, if there was an Occupational FPA initiated for admin and clerical workers, and there was no other employer organisation willing or able to represent these workers, the Commissioner may be the only representative. In this scenario, the Commissioner would therefore have an obligation to receive and take into account the views of private sector employers, despite having a limited understanding of the drivers, accountabilities and stakeholders of private sector employers. In practice, we do not think this situation is likely as private sector employers would likely be uncomfortable with a government bargaining party being their representative.
29. A different perspective on this implication is that it is a benefit: it avoids an unnecessary duplication of bargaining parties in FPA bargaining. If PEH employers or private sector employers only have a small number of employees affected they could choose to be represented by the main bargaining party.
30. Where there is a mix of PEH and private sector bargaining parties at the table, PEH bargaining parties would still be required to take the views of all affected parties into account, as would private sector bargaining parties. In other words, because the obligations to represent all affected employers would be attached to each bargaining party (rather than the bargaining side collectively), the PEH bargaining parties could not wholly rely on the private sector bargaining parties to discharge these obligations to the private sector and vice versa. Both BusinessNZ and the Commission suggest that private sector and PEH bargaining parties would not be well placed to represent each other's particular interests or needs. That said, the bargaining parties could discuss these obligations and codify responsibilities to communicate with groups of wider affected employers in the bargaining side agreement.
31. We consider the benefits and risks of these options are:
  - **Benefit:** Meets effectiveness criterion. The form requirements would reflect different structures between PEH employers and the private sector, and would give PEH employers a direct voice in the bargaining side.
  - **Benefit:** Avoids unnecessary duplication of bargaining parties. Where PEH or private sector employers have a small number of employees within coverage they could choose to rely on main bargaining party to represent them.
  - **Risk:** Does not meet consistency criterion. This would create a perception of different rules between PEH and private sector employers.
  - **Risk:** May be difficult for PEH bargaining parties to fulfil obligations to the private sector and vice versa.
  - **Risk:** Meets fit for purpose criteria only to some extent. Although the Commissioner and the Chief Executive of Health NZ would be able to be bargaining parties, the requirement to take into account wider views means they will have a limited ability to

fulfil their accountability for bargaining that is consistent with Government expectations on employment relations and fiscal parameters.<sup>4</sup>

Option 3: amend form and function requirements



32. Under this option, there would be a separation in the representation of the PEH and private sector employers during FPA bargaining. The Commissioner and the Chief Executive of Health NZ could become direct bargaining parties, and would not be required to seek or take into account the views of non-PEH employers. Likewise, the private sector bargaining representatives would not be required to seek or take into account the views of PEH services employers. However, all bargaining parties would still be required to enter into a bargaining side agreement, agree on a lead advocate, and come to a common bargaining position.
33. The Commissioner could choose whether to delegate these functions and powers to Public Service chief executives and the Secretary for Education, respectively, with conditions. The Director-General of Health would be required to be consulted before the Chief Executive of Health NZ entered into an FPA.
34. As noted above, PEH and private sector employers have fundamentally different purposes and accountabilities, and are likely to have a limited understanding of each others' context and how employment relations are structured in the other sector. Therefore this option would differentiate the bargaining obligations so that each part of the bargaining side focussed on representing employers within their domain of experience.
35. The following table illustrates how this option would operate in three different scenarios:

<sup>4</sup> This same issue would also apply to private sector bargaining parties, as an employer association's ability to represent its members could come into conflict with its obligations to represent the views of non-member employers.

<b>Scenario 1: PEH employers only within coverage</b>	Commissioner/CE of Health NZ (or delegated parties) are the only bargaining parties.
<b>Scenario 2: Both PEH and private sector employers within coverage</b>	Commissioner/CE of Health NZ (or delegated parties) are bargaining parties for the purposes of PEH employers only. Separate private sector bargaining party(ies) required, and if no party willing or able then BusinessNZ is the default private sector bargaining party. PEH employers and private sector bargaining parties will have an obligation to enter into a bargaining side agreement, and must still come to a common bargaining position.
<b>Scenario 3: Private sector employers only within coverage</b>	Private sector bargaining parties only.

36. One implication of this option is that a PEH bargaining party would effectively be required in every FPA bargaining situation where the services were within coverage, even if the number of PEH employees in coverage is miniscule. This is because the private sector bargaining party would have no ability or obligation to take the views of PEH employers into account when forming a bargaining position.
37. Mirroring the situation above, another implication is that a private sector bargaining party would always be required if any private sector employees were within coverage. This would therefore expand the backstop role of BusinessNZ where there is no willing or suitable private sector bargaining party.<sup>5</sup>
38. We consider the risks and benefits of this option are:
- **Benefit:** Meets effectiveness criterion. Would give both PEH and private sector bargaining parties direct voices in the bargaining side. It would clearly differentiate the responsibilities for the PEH services and private sector bargaining parties where they are both present in FPA bargaining, while still requiring them to come to a common bargaining position.
  - **Benefit:** The most fit for purpose option. The Commissioner/Chief Executive of Health NZ would be enabled to fulfil their accountability for bargaining that is consistent with Government expectations on employment relations and fiscal parameters (although the actual outcomes may not meet these expectations and parameters).
  - **Risk:** Scores lower on consistency criterion than other options. It could create a perception of different rules for PEH employers (even more so than option 2), although the obligations on private sector bargaining parties would also shrink accordingly.
  - **Risk:** Less efficient due to the potential for duplication. Where coverage includes both PEH employers and the private sector, this option would require a bargaining party from both groups regardless of the need for dedicated representatives.

#### Stakeholder and agency views on the options

39. **BusinessNZ** did not express a preference between options 2 and 3, but recognised the same benefits and risks for each as we have outlined above. It noted that this was a complex issue with no parallel in the old awards system, which had separate legal mechanisms for establishing the pay of public sector and private sector and an informal consultation

<sup>5</sup> BusinessNZ is concerned that it would be forced to be the backstop bargaining party where there was an established employer organisation in the sector or occupation which was *unwilling* to bargain (as opposed to unable). In this situation it suggests the established employer organisation should be required to be a bargaining party. This concern has wider relevance to their role as the backstop bargaining party.

arrangement between the systems. For example, the difference in funding arrangements between the public and private sectors could mean that different cost impacts could create significant potential for disputes when the sectors must work together.

40. BusinessNZ did raise concerns that it would be able to (or even required to) bargain on behalf of public sector employers and effectively be able to bind the government with whatever was agreed with unions (subject to the ratification process). It suggests this would create an uncomfortable perception that BusinessNZ was doing bargaining work on behalf of the government, which would be hard to justify to its members.
41. The **Ministry of Education** supports option 3, but notes it will be critical for the private and PEH employers to work in partnership. This partnership should involve collaboration and getting a range of employers to work together in order to provide the employer bargaining representatives and the lead advocate with a clear brief. It notes that it will be challenging to facilitate a collaborate relationship among all the affected employers – who are likely to be competitors in the private sector – but that this will be critical to ensure it is not just the loudest or largest employers who determine the bargaining position.
42. The provisional view of the **Health Transition Unit** in DPMC is that it supports option 3, with the ability for the head of the new Health NZ entity to be a bargaining party. It suggests enabling Health NZ to be a bargaining party would enable direct participation in bargaining for a very large employer rather than operating through an intermediary. This would also avoid a situation in which Health NZ would need to represent organisations with which it may have an arms-length funding agreement. As noted above, it has not yet advised the Minister of Health on how employment relations should operate in practice in the future health system, so this view is subject to that advice and the Minister of Health’s decisions (expected in August).
43. The **Public Service Commission** supports different form requirements for private sector and PEH employers, to reflect the existing employment relations framework for PEH employers. It believes that once the PEH and private sector bargaining parties come together to form a bargaining side they would likely be able to agree a common bargaining position.
44. Having considered all the options, the Commissioner prefers option 3 because:
  - It reflects and supports the different bargaining structures in the PEH services and private sector. The Commissioner as Head of Service has a system leadership role for the Public Service, including on employment matters, and so has an existing role analogous to the bargaining parties.
  - It best supports the Commissioner to fulfil his/her accountability for bargaining that is consistent with Government expectations on employment relations in the public sector and within fiscal parameters.
  - Each bargaining party can focus on representing employers within their domain of experience which enables effective representation, balanced with the obligation to agree a common bargaining position across bargaining parties. This supports the policy intent that employer bargaining representatives advocate for the collective interests of employers, rather than for the specific interests of individual employers.

On balance MBIE recommends option 3

45. Option 2 would enable PEH employers to participate effectively in bargaining through direct representation, while still retaining consistency in the bargaining parties’ obligations to all affected employers. PEH employers would need to agree a common bargaining position with private sector employers. An obligation to represent all affected parties through some procedural obligations does not have any current precedent, and could lead to situations where PEH employers need to seek, and take into account, the views of private sector employers (and vice versa) without necessarily having a proper understanding of the different contexts in each sector. In practice, we think bargaining side agreements will enable

the PEH employers and the private sector employers to agree how they will engage with affected employers and divide these responsibilities up, even if they are all ultimately individually accountable for performing the obligations.

46. Option 2 would avoid the automatic need for both PEH and private sector representation even where the employers within coverage skew strongly one way or the other. However, in practice, we think it is likely that where an FPA covers both PEH employers and the private sector, both sets of employers would want to participate.
47. In comparison, option 3 would represent a more significant departure in terms of the representation obligations you have agreed so far. Where there were both PEH employers and private sector employers within coverage, they would only have bargaining obligations (e.g. to provide updates and provide an avenue for feedback) to their respective subset of employers. We think this option could support PEH employers and private sector employers to work in partnership where there is common coverage.
48. We consider that both options 2 and 3 have benefits and risks and there is no clear best option. Nonetheless given the agencies we consulted all preferred option 3, we recommend this option too.
49. Under the different options, the PEH employers will have varying degrees of influence in bargaining for an FPA where they employ workers within coverage. However, we note that while PEH bargaining parties – like any other bargaining parties – will be able influence bargaining, they will not have decision-making abilities. There is no assurance that the ultimate bargaining position reached between private sector bargaining parties and PEH bargaining parties, or the ultimate agreement reached with the employee bargaining side, will be in accordance with fiscal parameters. Likewise, if bargaining for an FPA results in a determination fixing terms by the Employment Relations Authority, the Employment Relations Authority may not produce an outcome which is fiscally acceptable to the Government.

*Would options 2 and 3 require new Cabinet decisions?*

50. We have considered whether options 2 and 3 are consistent with existing Cabinet decisions. For option 2, we consider the answer is yes. The authorisation you received from Cabinet to decide on the structure/form requirements and representativeness of employer bargaining representatives clearly enables you to make decisions as to whether the Commissioner and the Chief Executive of Health NZ can be direct bargaining parties.
51. Whether option 3 is consistent with Cabinet decisions is less clear-cut. While the obligations on bargaining sides were agreed by Cabinet, it is arguable whether creating a separation in the obligations between PEH employers and private sector employers is consistent with the overall policy framework in the Cabinet paper and therefore within your delegation.
52. The Cabinet Manual states that: “As a general rule, Ministers should put before their colleagues the sorts of issues on which they would themselves wish to be consulted. Ministers should keep their colleagues informed about matters of public interest, importance or controversy.”<sup>6</sup>
53. It is ultimately your decision whether you are prepared to proceed with the drafting of these changes. You would need to be confident that the policies would eventually receive support at Cabinet. If Cabinet did not approve the changes in future at the Legislation Cabinet Committee then this would delay the FPA Bill as the changes would need to be unwound and redrafted.

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<sup>6</sup> Cabinet Office, “Cabinet Manual”, 2017, para 5.11

## **We have considered whether the obligation for the bargaining sides to inform funders of public services needs a statutory basis**

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54. As noted above, the employer bargaining side will have a legislative obligation to inform relevant government agencies of the progress of FPA bargaining when they receive government funding for the delivery of public services. During the preparation of the drafting instructions we have suggested this should occur at the minimum at the following stages:
- when an FPA has been successfully initiated
  - when a ratification vote is imminent (i.e. a date has been set)
  - when the FPA is finalised (i.e. made into secondary legislation).
55. It will be important for the employer bargaining sides to know whether there is a relevant government agency to keep informed.

### **Government agencies had mixed views on whether funded employers will have the knowledge to fulfil this obligation**

56. Funders of public services and have mixed views on whether funded employers would follow through on the obligation to inform government agencies without further support. Some agencies were confident that funded employers would have sufficient information and knowledge about funding relationships to meet their obligations.
57. However, other agencies noted that funded employers may not know exactly which agency to inform, or may assume that agencies were already aware of the progress of bargaining.
58. Another complication that agencies identified is that funding provided to employers is not transparent and is often based on historical funding arrangements. Therefore, there is not a clear link between funding and wage rates. This has created difficulties in relation to pay equity negotiations, where it is difficult to analyse the impact of a settlement on funding needs without first requesting detailed wage data from funded employers. This data can then be used to identify how much funding they needed to 'top up' in order for the employers to meet a settlement.

### **We do not consider further statutory obligations are required**

59. We have considered whether there needs to be a statutory process for a government agency (i.e. MBIE) to inform the bargaining sides at the beginning of bargaining of their obligation to keep a funder informed and who they should contact. Such a requirement may in turn require the funders of government services to inform MBIE of funding relationships, or for MBIE to notify all government agencies at the time any FPA is initiated.
60. Our view is that it is not necessary to have any further notification processes established in legislation. It would create further complexity in the system. We consider that the employer bargaining side will likely be informed by the employers it represents of existing funding relationships. This is because employers will be incentivised to do so, as those employers could be exposed to higher costs through the terms of the FPA. Without further statutory obligations, MBIE could still work with other government agencies and the bargaining sides to ensure they meet their obligations.

## **Next steps**

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61. Once we have your decisions on this briefing we will instruct Parliamentary Counsel Office to draft the FPA legislation to reflect your decisions.