



BRIEFING

Fair Pay Agreements: Bargaining representation for selected public sector employers

Date:	1 September 2021	Priority:	High
Security classification:	In Confidence	Tracking number:	2122-0637

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the recommendations about what the Bill at introduction should contain, and what further work to do. Inform affected Ministers.	2 September 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Tracy Mears	Manager, Employment Relations Policy team	04 901 8438	Privacy of Natural Persons ✓
Ellen Stairmand	Policy Advisor		

The following departments/agencies have been consulted
New Zealand Police, New Zealand Defence Force, Parliamentary Counsel Office, Office of the Auditor General, Reserve Bank, Office of the Clerk, Parliamentary Service, Office of the Ombudsmen, the Parliamentary Commissioner for the Environment, and the Public Service Commissioner.

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose

To provide advice on how Non-Public Service Departments and identified entities in the Legislature branch of Government interact with bargaining for Fair Pay Agreements (FPAs).

Executive summary

You have been authorised by Cabinet to make decisions regarding the form/structure and representativeness of employer bargaining representatives in FPA bargaining. Your decisions so far assume that public sector employers outside the Public Service could use the same representation model as the private sector. There are constitutional and practical reasons why it is not appropriate for the Public Service Commissioner to represent entities outside the Public Service.

However, we have since identified there are a subset of public sector employers which may not be able to effectively use the same representation approach as the private sector. Potential issues were identified for Non-Public Service Departments (Parliamentary Counsel Office (PCO), New Zealand Defence Force (NZDF) and New Zealand Police (Police)) and legislature entities (eg Office of the Clerk, Parliamentary Service). In particular, there are challenges for employers within the Crown in forming or joining incorporated societies. If they are unable to do so, they would only be able to participate indirectly, by submitting their views to the bargaining parties.

We have not been able to conduct a full analysis of this issue given the time constraints and affected agencies' inability to meaningfully engage, given their focus on the Covid response.

Based on information we have gathered to date, our view is that PCO, NZDF and Police will have fewer options than other employers for enabling effective representation in FPA bargaining under the status quo because the Crown is seen as a single legal entity for the purposes of joining incorporated societies. How significant this constraint would be in practice is unclear. If this constraint is significant it may be appropriate to consider other approaches for representation for those agencies.

We have considered the following options for how Non-Public Service Department employers (PCO, NZDF and Police) could interact with FPA bargaining:

- **Status Quo:** Apply the existing FPA employer bargaining representation arrangements to the identified entities – but recognise that they may only be able to indirectly participate.
- **Option 1:** Allow Police, NZDF and PCO to each represent themselves as a bargaining party.
- **Option 2:** Enable an independent third party to represent Police, NZDF and PCO.

Our initial view is that Option 2 is likely to be the best at ensuring those employers have appropriate representation options but it is also the option that would require work to scope out the practical impacts of the option. A decision to go with Option 2 now would mean the Bill could not be introduced this year.

As introduction this year is your priority, a decision is needed on what option should be incorporated into the Bill for introduction. That choice is only between the Status Quo and Option 1.

Then a decision is needed on whether further work should be undertaken on the size and significance of the issue and the risks and benefits of the options ahead of Select Committee. If further work could lead to a change at Select Committee, the choice between the Status Quo and Option 1 in the Bill for introduction will depend on judgements about the size and significance of the issue and whether the public would expect a say on such a change at Select Committee. Our initial view is that the Bill on introduction should retain the Status Quo for these agencies but that further work should be undertaken ahead of Select Committee.

We are not yet sure if similar constraints apply to legislature entities so we also recommend retaining the Status Quo for them, but doing further work ahead of Select Committee to establish whether similar constraints apply and assess options.

In exploring this issue, a broader risk was raised about the possibility for unintended consequences for emergency or other essential services if FPA terms limited the ability to perform their functions. This is described as Issue 2 in the body of the briefing. We seek your direction on whether further work should be done on this issue (and on what timeframe), or retain the status quo, which would rely on bargaining parties to prevent the risk from arising.

Recommended action

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

Issue 1: *Previous decisions regarding employer representation may not be appropriate for some public sector employers*

- a **Note** that previous decisions regarding employer representation may not be appropriate for some public sector employers who are outside the Public Service. Potential issues were identified for Non-Public Service Departments (PCO, NZDF and Police) and legislature entities (eg Office of the Clerk, Parliamentary Service).

Noted
- b **Note** we have not been able to conduct a full analysis due to time and consultation constraints but have provided an initial view and we seek decisions on next steps.

Noted
- c **Note** you have instructed us to aim to introduce the Bill this year, so we have constrained the options below in line with your instruction.

Noted
- d **Note** our initial view is that because PCO, NZDF and Police are part of the Crown, their ability to participate effectively in FPA bargaining may be compromised by the constraints on their ability to form or join an incorporated society.

Noted

- e **Note** there are three potential courses of action with respect to representation of Police, NZDF and PCO agencies in FPA bargaining:
- **Status Quo:** Apply the existing FPA employer bargaining representation arrangements to the identified entities.
 - **Option 1:** Allow Police, NZDF and PCO to each represent themselves as a bargaining party.
 - **Option 2:** Enable an independent third party to represent Police, NZDF and PCO. This could be an individual or an independent entity established or designated to represent those entities as a bargaining party.

Noted

- f **Note** our initial view is that Option 2 is likely to be the best at ensuring those employers have appropriate representation options but this option would require further policy work and would delay introduction of the Bill if it was to be incorporated into the Bill for introduction.

Noted

- g **Note** that the only viable options for the FPA Bill on introduction are either the Status Quo or Option 1 because of the time constraints on further policy work.

Noted

- h **Agree** that the Bill on introduction should reflect that the representation model for PCO, NZDF and Police should be either:

Status quo: Apply the existing FPA employer bargaining representation arrangements to the identified entities. (Recommended)	<i>Agree / Disagree</i>
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OR

Option 1: Allow Police, NZDF and PCO to each represent themselves at the bargaining table.	<i>Agree / Disagree</i>
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- i **Note** our initial view is that we have not yet seen firm evidence that would allow us to assess whether entities in the legislature branch are constrained in using the FPA representation mechanisms in the same way as PCO, NZDF and Police.

Noted

- j **Agree** that the Bill on introduction should reflect the status quo that entities in the legislature branch will be subject to the FPA representation requirements.

Agree / Disagree

- k **Agree** that further work is undertaken ahead of Select Committee to understand:

(All are recommended)

(i) The size and significance of the challenges that would be faced by PCO, NZDF and Police from the current FPA bargaining representation requirements.	<i>Agree / Disagree</i>
(ii) Whether there are any additional challenges that would be faced by legislature entities from the current FPA bargaining representation requirements.	<i>Agree / Disagree</i>
(iii) The risks and benefits of the options for addressing any challenges identified.	<i>Agree / Disagree</i>

Issue 2: FPA terms could result in unintended consequences for emergency services

l **Note** there is a risk that terms agreed by bargaining parties in an FPA could limit the ability to provide emergency services or similar essential services.

Noted

m **Note** that any policy change to address this issue in the Bill for introduction would delay introduction.

Noted

n **Agree** to one of the following options in relation to the risk in recommendation l:

(i)	Maintain the status quo.	<i>Agree / Disagree</i>
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OR

(ii)	Direct officials to do further work to assess the scope of this issue and prepare options, ahead of Select Committee. (Recommended)	<i>Agree / Disagree</i>
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Next steps

o **Note** officials intend to seek your guidance on how to prioritise among issues which might be addressed at Select Committee, including any you choose in this briefing.

Noted

p **Agree** to inform affected Ministers of the issues described in this briefing and your proposed approach at the next Ministerial Oversight Group on State Sector Employment Relations meeting.

Agree / Disagree



Tracy Mears
Manager, Employment Relations Policy,
Labour, Science and Enterprise, MBIE

01 / 09 / 2021

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

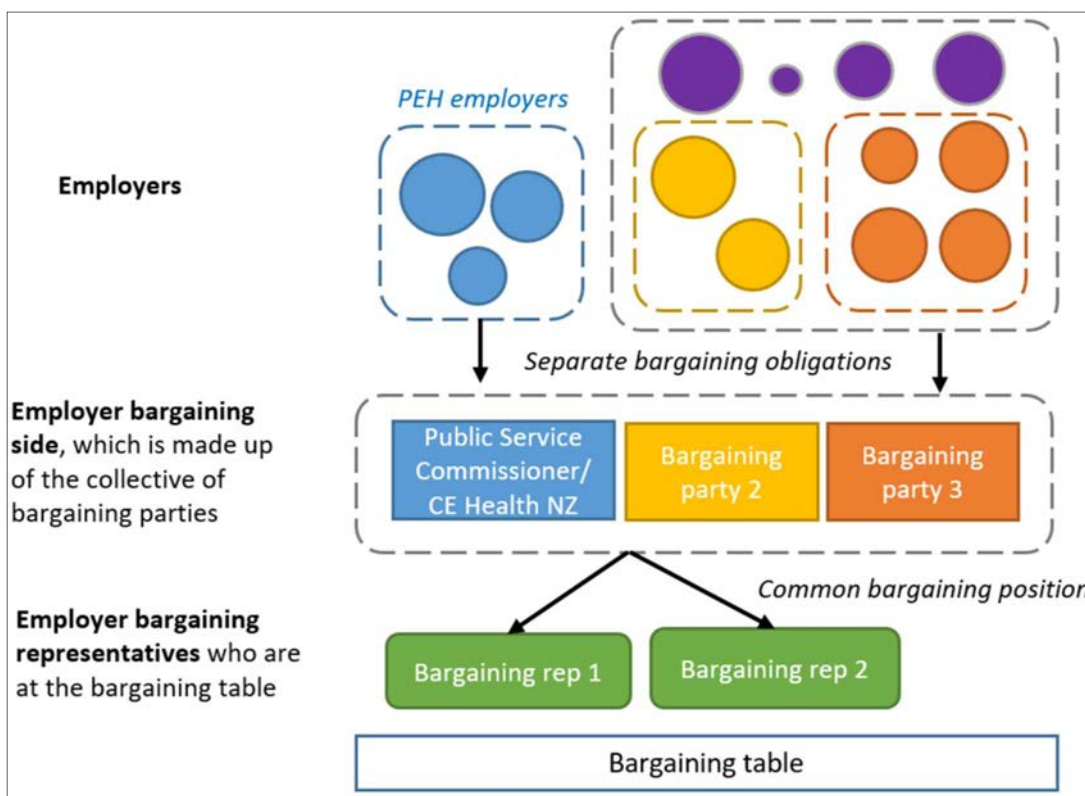
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Background

1. We are providing you with a series of briefings on outstanding issues in the FPA system.
2. On 13 August 2021, we advised a further issue had been identified in relation to employer representation in bargaining [Aide Memoire 2122-0562, para 12 refers]. There are some agencies that are part of the legal Crown (so would find it challenging to form an incorporated society since the legal Crown counts as one person), but are not part of the Public Service. There are other agencies that make up the remainder of the executive branch of government and form part of the legislature branch of government.
3. In addition to representation issues, there are some essential service entities where possible terms in an FPA may limit their ability to do crucial emergency functions.
4. This briefing provides an update on these issues and seeks your direction on next steps.

A number of decisions have been made regarding employer representation during FPA bargaining for both the public and private sectors

5. Cabinet has agreed to adopt the existing requirements in relation to Public Service and Education Service Bargaining [CAB-21-MIN-0126 refers], 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.
6. 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 regards to those contained within potential FPAs.
7. Cabinet also authorised you to make policy decisions in relation to the structure/form and representativeness of employer bargaining representatives [CAB-21-MIN-0126, para 18 refers].
8. You subsequently agreed that the Public Service, Education Service and District Health Board employers can be represented by a direct bargaining party, that is the Public Service Commissioner and the Chief Executive of Health NZ (once it is created) could become direct bargaining parties [briefing 2021-4436 refers]. The Public Service Commissioner and Chief Executive of Health NZ would not have any bargaining obligations to private sector employers, and likewise a private sector bargaining party would not have any bargaining obligations to represent public, education and health service employers.
9. You also agreed that each employer side bargaining party must be an employer association that has at least one member with an employee in proposed coverage, be an incorporated society and meet a set of specified requirements [briefing 2021-3525 refers]. These arrangements are summarised in the diagram on page 6.



Issue 1: previous decisions regarding employer representation may not be appropriate for some public sector employers

10. As discussed in aide memoire 2122-0562, the Public Service Commissioner's mandate to represent relates only to the Public Service. This means any other public sector (non-Public Service) employers are in the same position as private sector employers – they will be represented by bargaining parties that meet the form requirements eg are an incorporated society which can reflect the views of all non-Public Service covered employers. Employers will have the option of joining an existing incorporated society that registers as a bargaining party or joining together with other employers and creating their own incorporated society for the purpose of FPA bargaining. It is always an option for employers not to join a bargaining party. Because of the obligation for bargaining parties to represent all covered employers we expect that there will be opportunities for non-member employers to input their views to bargaining parties.
11. An issue that has arisen is that there may be other entities in the public sector but outside the Public Service which cannot easily use the alternative representation option, of joining or forming an incorporated society.
12. At this stage, we have identified the following entities for which the existing decisions regarding employer representation during FPA bargaining may not work, listed below. However, others may also emerge.

Executive Branch

New Zealand Police (Police)
 New Zealand Defence Force (NZDF)
 Parliamentary Counsel Office (PCO)

Legislative Branch

Office of the Clerk
 Parliamentary Service
 Office of the Ombudsman (Ombudsman)
 Office of the Auditor-General (OAG)
 The Parliamentary Commissioner for the Environment (PCE)

13. As denoted, these entities fall within the executive and legislative branch of government. Due to the constitutional difference between the two branches, we have considered them separately.

Some of the remaining entities in the executive branch do not fit into either representation arrangement

14. Previous decisions regarding employer representation for the Public Service do not cover other departments in the executive branch of government that are not part of the Public Service but are part of the Crown (non-public service departments), that is, the Police, the NZDF and PCO.

It is not appropriate for the Public Service Commissioner to represent these agencies

15. Under the existing collective bargaining system, the Public Service Commissioner has no mandate to bargain on behalf of these agencies and while they are required to consult with the Public Service Commissioner, they tend to represent themselves.
16. NZDF's and Police's separation from the Public Service Commissioner during collective bargaining reflects the need for these agencies to maintain operational independence from the government of the day in order to carry out their executive functions. This constitutional arrangement prevents certain interventions (especially political) in, or influence over, decision making.
17. PCO is constituted as a separate statutory office by the Legislation Act 2019 and is therefore not accountable to the Public Service Commissioner.
18. It would not be appropriate to apply the same representation requirements for Public Service agencies to these agencies given their constitutional arrangements.

These agencies face challenges participating in bargaining via an incorporated society

19. On the other hand, the agreed employer bargaining party requirements require participation via an incorporated society. The challenge this raises for these agencies is that the Crown is considered to be a single entity. If multiple agencies joined an incorporated society, they would technically only count as a single member. And if agencies considered that existing bargaining parties could not adequately represent their interests they would find it difficult to meet the threshold of 15 individuals or 5 organisations needed to register an incorporated society. The Crown could join or form an incorporated society with at least 14 other persons. Another barrier presented by this option is that each bargaining party must represent the interests of all non-Public Service employers. So if any agencies formed an incorporated society for the purposes of FPA bargaining, they could not just represent their own interests.
20. We have not had time to consult with Crown Law on this issue so are unsure of any reasons it is not appropriate/possible for the Crown to join an incorporated society.
21. We also have not had time to assess how representation for FPA bargaining would interact with the specific legislative requirements for some workforces within these employers eg Police.
22. These entities would be able to use the more indirect methods to influence FPA bargaining: they could provide feedback, input and views on the bargaining strategy to the employer bargaining parties, but could not formally be part of the bargaining side decision making. This is the method available to any other employer which does not wish to join a bargaining party's incorporated society.

It is not appropriate for legislature entities to be represented by Public Service entities, however it is not clear if they can join an incorporated society

It would be inappropriate for the Public Service Commissioner to represent the legislature branch during FPA bargaining

23. Like the non-public service departments entities, the Public Service Commissioner has no mandate during collective bargaining to bargain on behalf of entities which form the legislature arm of government. While some of the entities are required to consult the Public Service Commissioner, they all tend to represent themselves.
24. It would conflict with the constitutional separation of powers to require legislature entities to be represented by the Public Service Commissioner during FPA bargaining. It would be inappropriate for the Public Service Commissioner to represent these entities as they are functionally different from the Public Service and it could risk an intrusion into these functions.

We have not established any concrete reason why agencies within the legislative branch of government cannot join an incorporated society

25. We have briefly consulted with some of the agencies that make up the legislature arm of government. Conversations to date have been at short notice and time-constrained, and more time would be needed for the entities to understand the FPA system and how they might be able to participate in it.
26. We have heard from one entity that they do not have legal personhood, which may prevent them from joining an incorporated society, but we have not had time to confirm that information or identify whether similar barriers exist for others. It is possible that these entities could use the above-mentioned indirect input method.
27. Some of the agencies have indicated an initial preference to consider bespoke solutions for employer representation for their entities.

We reviewed the Modern Awards system in Australia but found the structure does not allow for a parallel comparison

28. Under Australia's Modern Awards system, most modern awards relate to particular industries or occupations. A small number of enterprise modern awards and State reference public sector modern awards cover specific employers and their employees only. For example, the Australia Federal Police has a modern enterprise award, and the Australian Government Industry Award 2016 (which includes the Australian Defence Force).
29. The Australian Fair Work Commission is responsible for making, varying and revoking Modern Awards. The role played by the Fair Work Commission is a fundamental difference from the FPA system. Therefore in terms of bargaining representation, the Modern Awards do not allow for a parallel comparison.

A number of constraints have impacted our advice

30. There were a number of constraints that impacted our ability to provide sufficient advice:
 - **Complexity:** there are a number of interdependencies related to this issue. For example, the array of bespoke legislative provisions that apply to each of these entities and how these interact with the employer representation arrangements for FPA bargaining.
 - **Timeframes:** In order to introduce the Bill to the House as early as possible, we have undertaken to provide final policy advice relating to the FPA system early this week. As this issue was only recently identified, we have not had enough time to consult with the affected agencies.

- **Covid response:** Both NZDF and Police are heavily involved in the Covid response and have not been able to dedicate time to this issue.
31. The complexity of the issue and insufficient consultation has impacted on our ability to analyse and recommend the most appropriate mechanism for bargaining representation for these agencies. However, given the timeframes and your priority to finalise the Bill as quickly as possible, we seek your direction about whether to continue investigating these issues and possible alternatives at this stage.

Based on the information gathered to date, there is value in exploring further options for some

32. The information we have gathered to date suggests the options available to the legislature entities may be the same as is available to other employers with respect to FPA bargaining. Our initial view is that there is not yet a compelling case for moving away from the status quo for these entities.
33. However, there are potential issues for the Non-Public Service Departments with current FPA representation structures. The significance of the issues are unclear.
34. In light of these potential issues, there are three options for the structure for representation for Non-Public Service Departments (NZDF, Police and PCO): the status quo and two bespoke bargaining representation options (set out in detail below).
35. Introducing another bespoke representation arrangement for more public sector employers (in addition to the change for the Public Service employers) risks a perception of special treatment for these employers. It may encourage others to seek a similar arrangement once the Bill is introduced if other employers (public or private) consider their needs require a similar approach. In order to mitigate this risk, it's important to ensure there is a clear rationale for why these agencies alone require specialised treatment during FPA bargaining.
36. Under the bespoke options, to maintain consistency with previous decisions, bargaining obligations to private sector and public service employers would not fall on the representative/s for Non-Public Sector Departments. Likewise, the private sector and Public Service bargaining parties would not have any bargaining obligations to represent Non-Public Service Department employers.

Criteria

37. In analysing these options we have considered the following criteria:
- **Effectiveness:** Ensure all Public Sector employers can effectively participate in FPA bargaining.
 - **Efficiency:** Enables effective representation at lowest cost (ie avoids unnecessary duplication).
 - **Fit for purpose:** Ensure requirements for bargaining parties are fit for purpose in terms of recognising the constitutional constraints on some public sector employers that are not faced by private sector employers.
 - **Consistency with FPA system:** Create equivalent requirements between bargaining parties, unless there is good reason for divergence.
 - **Workability:** Supports the smooth operation of the FPA system.

Status Quo – Continue to apply the existing employer representation arrangements to the selected public sector entities

38. Under this option, Non-Public Service Departments and legislature entities would need to either join an established employer association or participate as a non-member using the channels that bargaining sides are required to make available to receive input from non-members.
39. Some entities, particularly those who are not part of the Crown, are able to form an incorporated society so could create their own bargaining party. However, due to the timing constraints, we have not established what entities this is available to.
40. Non-Public Service Departments would not be able to create a dedicated bargaining party. As discussed, the Crown could join or form an incorporated society with at least 14 other persons, but this would risk diluting the effective representation of these entities in FPA bargaining.
41. We consider the benefits and risks of this option to be:
 - **Benefit:** Is consistent with the treatment of private sector employees. It maintains a clear distinction for the Public Service (including Health and Education), avoiding the risk of creating a floodgate effect by other employers who feel they require special consideration.
 - **Benefit:** This option requires no further work at this stage and therefore should not impact the timeframe for introducing the Bill.
 - **Risk:** Some public sector employers would not be able to easily form their own incorporated society, making equal representation more difficult. Indirect input methods (ie not being able to be a bargaining party) risks specific impacts from the proposed FPA terms on these agencies, may not be fully considered by the bargaining parties (either due to a diluted voice or lack of information).
 - **Risk:** The interaction between this representation model and the requirements in specific legislation for certain workforces such as Police is unclear and could either take time to work through or result in unintended consequences.
 - **Risk:** The agencies would have no way to fulfil their accountabilities for bargaining that is consistent with Government expectations around fiscal parameters.

Option 1: each agency may represent themselves at the bargaining table

42. Under this option, each entity has the opportunity to represent themselves directly at the bargaining table if at least one employee falls within the proposed coverage of an FPA.
43. This option acknowledges the unique nature of these three agencies, in that they are independent from the government and cannot be represented by the Public Service Commissioner, but are still part of the legal Crown so their accountabilities and responsibilities may not be the same as the private sector employers who are bound by the same FPA. The same consideration is applied for option two.
44. We consider the benefits and risks of this option to be:
 - **Benefit:** Meets the fit for purpose criterion. Ensures these agencies have a direct voice at the table which would likely mitigate any unintended consequences if an FPA impeded on the agency's ability to execute their functions.
 - **Risk:** This option is the least consistent with existing FPA employer representation arrangements. This emphasises the perception of special treatment for these agencies.

- **Risk:** This may be less efficient (even more so than option two) due to the potential for duplication. Where coverage includes either Private and Public Sector employees, or all three Non-Public Service Departments this option could result in multiple bargaining representatives regardless of the need for dedicated representatives.

Option 2: an independent representative is appointed to represent NZDF, Police and PCO as a bargaining party (could be an individual or entity)

45. Under this option, an entity or individual would need to be established or designated in law, or on an ad hoc basis, to represent NZDF, Police and PCO at the bargaining table. Further work would be required before drafting to determine the practical details of this option.
46. We consider the benefits and risks of this option to be:
 - **Benefit:** Meets the fit for purpose criterion. Ensures these agencies have a representative at the table, which will increase the likelihood that the other bargaining parties will consider the need to carry out their executive functions of each agency without diluting their voice.
 - **Benefit:** Meets consistency criterion. Is the most consistent with other representation arrangements in the FPA system in that individual employers are represented by an umbrella entity.
 - **Risk:** This may be less efficient due to the potential for duplication. Where coverage includes both Private and Public Sector employees, this option could result in multiple bargaining representatives regardless of the need for dedicated representatives.
 - **Risk:** This option is likely to be a workable solution. However, more work will be required to establish the best mechanism for enabling representation eg which entity is more appropriate to collectively represent the different agencies. This will risk delaying implementation of the Bill.
 - **Risk:** There will be costs involved to establish this arrangement. However, the extent of these costs are unclear.

Assessment

47. These options need to be assessed not only on whether they address the identified issue but also on the effect on the timing of the Bill given the aim to have the Bill introduced this year.
48. Our initial view is that Option 2 is likely to be the best at overcoming the identified challenge but it is also the option that would require work to scope out the practicalities of the option. A decision to go with Option 2 now would delay finalisation of the Bill so it could not be introduced this year.
49. As introduction this year is the priority, then a decision is needed on what option should be incorporated into the Bill on introduction. That choice is only between the Status Quo and Option 1.
50. Then a decision is needed on whether further work should be undertaken on the size and significance of the issue and the risks and benefits of all of the options ahead of Select Committee. If further work could lead to a change at Select Committee, the choice between the Status Quo and Option 1 in the introduction version of the Bill will depend on judgements about the size and significance of the issue and whether a change at Select Committee would be controversial if the public has not had an opportunity to have a say on it.
51. Our initial view is that the Bill on introduction should maintain the Status Quo for these agencies but that further work should be undertaken to assess the size and significance of the issues, and risks and benefits of all options, ahead of Select Committee.

52. We recommend the same for the legislature entities: retain the Status Quo for the introduction version of the Bill, but undertake further work ahead of Select Committee.

Issue 2: FPA terms could result in unintended consequences for emergency services

FPA terms could impact on emergency services' abilities to perform their functions

53. Our discussions on the representation issue above have uncovered a broader issue. There is a risk that decisions made by bargaining sides on terms in an FPA could have unintended consequences, in the form of limiting the ability to provide emergency services (or more broadly, other essential services).
54. This was raised in the context of Police's function in the maintenance of law and order, although it should be noted Police have not yet formed any formal view on the nature or extent of this issue. The risk arises where bargaining sides agree on terms in an FPA which may limit the ability to perform functions – for example, a term stating that employees must not be required to work between midnight and 6am, or on Christmas Day. If bound by such a term, Police could not perform its full function.
55. Police are already treated differently in the Employment Relations and Employment Standards system (the ERES system) – for example, in collective bargaining any fixing of terms is done via final offer arbitration,¹ and they are subject to a bespoke Code of Good Faith in relation to employment relationships. It is plausible that an FPA could override terms agreed using those special provisions in Police collective bargaining.
56. A similar argument about limiting abilities to perform functions could be made for ambulance, fire, health, aviation and a host of other critical functions (such as those specified in Schedule 1 of the ER Act), although those other occupations do not have the same special arrangements as Police.
57. The risk appears limited in relation to more predictable terms which raise thresholds on existing minimum standards, (ie a higher minimum wage) but appears more plausible if bargaining sides agree novel terms, without realising the effect of such terms.
58. The obligation on employer bargaining parties to consider input from any affected employers mitigates this risk somewhat: if affected employers realise they have employees in coverage and are informed of the types of terms being discussed, they can communicate what the effect would be on their functions. However, it is possible that affected employers do not realise the implications for their workforce, for example, a Police lawyer who is also a warranted officer could fall within scope of a lawyers FPA. If they do realise, it is possible their voice is overruled by other employers – particularly if the affected employers cannot provide their view directly to others on the bargaining side.
59. We do not believe the existing step where the Authority vets the legality of terms will identify any such issue – the vet of statutes outside of the ERES system is light touch, focussed on legality of the FPA and would not identify such operational constraints.

We have not been able to assess the scale of this issue

60. To get a sense of the scale of this risk, we would need more time to discuss with relevant agencies. As noted above this risk appears to apply to at least emergency services, but could be considered to extend to any critical infrastructure (using the equivalent example, an engineer for an electricity generation company unable to work between midnight and 6am) or beyond – there is no clear delineation point. For example, other stakeholders could argue

¹ Policing Act, section 67

that key export industries are similarly critical. The likelihood of the risk occurring is unknowable as we cannot predict the coverage of any FPAs nor what employment terms parties will discuss.

61. In any solution, there is a need to balance the risk to emergency services, with employees' rights who work in those services.

There are mitigants we could explore but it would take time

62. We have identified possible solutions or mitigants to this risk, but in the time available we haven't been able to assess their benefits and risks. We describe them here to illustrate what we would explore if you direct us to do further work on this issue. Potential options include:
 - **Status quo:** rely on existing representation mechanisms to ensure that affected employers will inform bargaining parties of potential impacts, and rely that those parties or the Authority will set terms which will not disrupt the operation of core services.
 - **Exemptions:** explore possibilities to allow for exemptions, where some terms of FPAs could not apply to some workers. This could be by naming or setting categories in law, or by giving a power to a decision maker to consider case by case. We could link to a pre-existing mechanism, for example the workforces in Schedule 1 of the ER Act who have to provide 14 days' notice of industrial action in recognition of their role in providing essential services.
 - **Increase scope of vetting:** explore an option to bolster the vetting step, to require the Authority to explicitly consider any consequences for emergency services. This would increase the resourcing and timeframes required for the vetting step.

We recommend you direct us to explore this issue further

63. We recommend you direct us to do further work to assess the scope of this issue and prepare options if our investigations confirm it is an issue that needs to be addressed. There are further choices about timing, explained in the next section.
64. Alternatively, if you consider the risks identified are low, then you could direct us not to take any further action. The status quo is a plausible choice if you choose to rely on existing representation arrangements as the way to raise and address any issues for emergency services in any given FPA.

If you want us to explore this issue further, you have choices about timing

65. We think any change to the existing blanket coverage settings in the FPA system, or broadening of the vetting function, would need a revised Cabinet decision. You would need to decide whether you were confident to seek those decisions as part of approval to introduce, or would need your colleagues' agreement before drafting. We note this would be a more substantial shift from government policy than the representation matters in Issue 1 above, and the argument for obtaining Cabinet decisions before drafting would be stronger here.
66. Even if you were confident to seek Cabinet approval on a solution as part of the approval to introduce the Bill, any further work now which results in policy changes will likely delay the Bill's introduction. Policy work, your decisions and then drafting instructions would be needed, then additional time for PCO to draft any changes.
67. Another option is to instruct us to begin work to investigate the scale and options for this issue, with the intention of making any changes to the Bill at Select Committee. That will not necessarily delay the introduction of the Bill, but it will take policy resource. It would also mean the public and stakeholders would not have an opportunity to comment on any

changes through the Select Committee process which may make it difficult to make substantive changes at that point.

Next steps

We'll seek your prioritisation on what to focus on for Select Committee

68. You have indicated that timing is a high priority for you, and you want to introduce the Bill in 2021 if at all possible. Our advice of late (including this briefing) has reflected this, by giving you options to direct us to prepare solutions to be incorporated into the Bill at Select Committee, rather than delay introduction. However, we won't have resources to explore all of those for Select Committee, as well as doing the fast work required to try to have the Bill ready for introduction in December.
69. We'll seek your guidance over the coming weeks as to which of the issues are your top priorities for resolution at Select Committee.

We suggest you notify affected Ministers of your decision

70. Whether you instruct us to do no further work at this stage, or to begin to investigate, we suggest you alert affected Ministers to the issues raised in this briefing and your proposed approach. That may include, for example, the Ministers of Police, Health, Emergency Management, and the Attorney General. We suggest an update at Ministerial Oversight Group on State Sector Employment Relations (MOGSSER) could be a good vehicle. The next MOGSSER meeting is scheduled for 4-5pm on 29 September.