New Zealand Nurses Organisation

Submission

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations Law Reform Bill

27 February 2004

1. INTRODUCTION

1.1 The New Zealand Nurses Organisation (NZNO) represents over 34,000 nurses, midwives, students nurses, allied health workers and health assistants and is the country's largest health union and democratic organisation of nurses and health care workers.

1.2 NZNO works with members to promote their industrial and professional interests.

1.3 NZNO is one of the largest affiliates of the New Zealand Council of Trade Unions and a member of the International Council of Nurses (ICN) - a federation of nurse associations representing millions of nurses worldwide.

1.4 Approximately two thirds of NZNO members work in the public health system and the remaining third in the private and not for profit sectors. Employment legislation can affects these two groups in quite different ways.

1.5 While in the public sector NZNO has been able to take advantage of the opportunities provided by the Employment Relations Act to successfully negotiate multi employment collective agreements (MECAs), we continue to face challenges in achieving many of our goals, among them equal pay for work of equal value for our mainly women membership. Although rarely used, the right to take effective strike action is viewed as fundamental by our organisation and its members.

1.6 In the private sector the struggle is characterised by employees with little negotiating power in sectors which are often under funded (such as aged care). This results in low wages and even greater devaluing of our members' skills than in the public sector. Employers are less willing to negotiate collective agreements or multi employer collectives, and workers are more vulnerable to business sales and transfers of ownership.

2. THE EMPLOYMENT RELATIONS LAW REFORM BILL

2.1 NZNO welcomes a review of New Zealand's employment relations legislation.

2.2 In summary the key issues our submission addresses are:

- The scope of the good faith requirement.
- Effective collective bargaining especially of multi employer collective agreements and new collective agreements
- Facilitation and determination
- Rights of access
- Protection for workers when businesses change hands
- The right to strike in the health sector
- The Equal Pay Act and the right to make claims for equal pay for work of equal value.

2.3 While NZNO welcomes provisions in the Bill which strengthen collective bargaining and give greater protection to vulnerable workers, we are very concerned about provisions relating to industrial action in the health sector and the absence of pay equity provisions. The next section of the submission details NZNO's concerns and makes specific recommendations for change.

3. SPECIFIC CLAUSES OF THE BILL

Please note that unless otherwise noted NZNO supports the amendments to the Bill as proposed in the submission of the Council of Trade Unions. Further note that the changes suggested in this submission for particular clauses of the Bill are set out in italics.

Clause 5 - Object of this Act

The amendments to the objectives of the legislation are welcomed as better according with the spirit and intent of the principal Act.

NZNO supports the view that the statutory requirement for 'good faith behaviour' introduced under the principal Act by definition requires that the behaviours exhibited by parties to employment relationship must satisfy a higher threshold than simple compliance with the pre-existing common law implied obligations of mutual trust and confidence, as now confirmed by subclauses 5(1) and (2).

The amendment set out at subclause 5(3) is particularly important in order to ensure that the necessary objective of acknowledging and addressing the inherent inequality of power in employment relationships is not solely limited to periods during which the parties to an employment relationship are involved in bargaining for either collective or individual employment agreements. As the inequality of power as between employment relationship parties can manifest itself at any time and especially during the final stages of employment relationship, it is important that the objective of the principal Act is not artificially constrained to apply only for the duration of any bargaining as may take place between the parties to the employment relationship..

Clause 6 - Parties to employment relationship to deal with each other in good faith

Amend subclause 6(1A)(c) to read:

> "without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the employment of his or her employees to provide to the employees *and any union representative as may represent the employees concerned* –
>
> (i) access to relevant information about the decision; and
> (ii) a *reasonable* opportunity to comment on the information to their employer before the decision is made."

Discussion

While the new subsections (1A)(a) and (b) will assist in ensuring that good faith is defined in accordance with the spirit and intent of the principal Act, potential difficulties arise in terms of giving practical effect to subsection (1A)(c) especially where collective bargaining is either underway or where a collective employment agreement is in force.

Often the commercial or operational context in which an employer proposes to make any decision likely to have an adverse affect on employees employment is one in which for logistical/operational reasons an employer party may believe itself to be under a duty to act expeditiously. If it is accepted that (1A)(c) properly provides for consultation with employees in such circumstances then submit that it would facilitate the operation of the subclause to extend the ambit of subsection (1A)(c) to include any union as may represent the employees concerned. From a practical perspective this would greatly facilitate any consultation process and obviate potential delays that would arise should employers be required to consult with individual employees notwithstanding any union representation as may apply. Such amendment would also accord with the intent of s.4(4)(c) and (d) of the principal Act.

For the provision to have any practical value then the opportunity for comment must be a real, as opposed to nominal, ability to respond to the information before any decision is made.

Either Delete subclause 6(1B)

Or: Amend subclause 6(1B) to read:

> "Subsection (1A)(c) does not require an employer to provide access to confidential information if, *viewed objectively, there are significant and compelling reasons* to maintain the confidentiality of the information. *In any event no information may be withheld under this clause where the relevant information may be provided in such a form as to safeguard such confidentiality as, viewed objectively, there are significant and compelling reasons to maintain."*

Discussion

NZNO is concerned that subclause (1B) unnecessarily restricts existing common law rules relating to the supply of confidential information and therefore supports the CTU recommendation that the clause be deleted. In the alternative, amendments are proposed as discussed below.

Subclause (1B) as currently drafted militates against the access to information otherwise afforded by (1A)(c), due to the low threshold to which an employer is held should they wish not to provide relevant information about the proposed decision. The subclause suggests that it may be left to an employer's subjective judgment as to whether or not "there is good reason to maintain the confidentiality of the information". To ensure that the practical effect of subclause (1A)(c) is not negated by subclause (1B) propose amendment as set out above.

Amend subclause 6(3) to read:

Section 4 of the principal Act is amended by adding the following subsections:

"(6) It is a breach of subsection (1) for an employer to advise, *induce or otherwise seek to influence* an employee –

(a) not to be involved in bargaining for a collective agreement; or

(b) not to be covered by a collective agreement.

(7) A party to an employment relationship who fails to comply with the duty of good faith in subsection (1) is liable to a penalty under this Act if –

(a) the failure is serious *or* sustained; or

(b) (the failure was intended to undermine) *or has undermined* –

(i) …

(ii) …

(iii) …

Discussion

The present ambit of subclause 6(3) is too limited in scope to provide real assistance in meeting the objective of promoting collective bargaining, given the fact that there are a range of behaviours which may be adopted by an employer seeking to prevent or otherwise limit an individual employee's involvement in collective bargaining. It is therefore important that the proposed section 6(4) recognises that such behaviours will and do extend beyond mere 'advice' to the employee/s.

Concerns have been expressed under the principal Act that there are insufficient remedies available for those subjected to 'bad faith' behaviour and while the proposed s.4(7) is an attempt to address such concerns the threshold set by proposed s.4(7)(A) is too high to provide any practical deterrent against such behaviours.

To require a failure to be both serious *and* sustained is to condone serious bad faith behaviour where serious breaches of good faith may occur on a number of occasions yet not occur over a prolonged period of time; or alternatively, to condone bad faith behaviour that may be both sustained and prolonged yet fall short of the requisite 'seriousness'. It is difficult to see how this accords with the

primary policy objective of promoting good faith behaviour in employment relationships.

The second threshold as stated at proposed s.4(7)(b) requires an aggrieved party to establish 'bad faith' intent on the part of the other party to bargaining. This raises the threshold of proof required by the existing provision. We doubt that was government's intention. This effectively requires proof of a party's mental state at the time that the breach occurs and, as the provision is a penalty, such mental state must be proved beyond reasonable doubt. Such proof is unlikely to be available in the absence of a clear statement of intent on the part of the party breaching good faith, and such statement being made available to the aggrieved party. An air of unreality attaches to such a scenario, and any test should properly be directed to the actual effect on bargaining rather than the mental state of a party failing to comply with the duty of good faith. However, should the wording as regards intent remain, the words "has undermined" have been added in order that at least equal emphasis is given to the effect of a good faith breach.

Clause 7 - Interpretation

Amend subclause 7(1) to read:

Section 5 of the principal Act is amended by repealing the definition of coverage clause and substituting the following definition:

"(a) in relation to a collective agreement, means a provision in the agreement that specifies the work that the agreement covers, whether by reference to *the work or type of work or types of employees.*

(b) in relation to a notice initiating bargaining for a collective agreement, means a provision in the notice specifying the work that the agreement is intended to cover, whether by reference to *the work or type of work or types of employees*."

Discussion

Clause 7(1) serves to perpetuate the existing difficulties that arise where employers insist that any coverage clause as contained in a collective employment agreement refers only to named employees. The consequential problems are twofold: such a coverage clause negates the principle of 'join the union – join the collective' (by denying coverage to existing or new employees who join the union) and defeats the operation of the '30 day rule' as provided under section 63 of the principal Act (which affords protection to the terms and conditions of new employees who don't have the benefit of union representation).

While these difficulties are addressed to some extent by Clauses 21 and 23 of the Bill, the situation of existing employees who subsequently join the union remains unaddressed and the overall effect is one of uncertainty and lack of clarity. This can best be addressed by simply removing the words "or employees" from the existing definition as provided under the definitions at (a) and (b) with consequential amendments to clauses 21 and 23 of the Bill. The issue of such current collective employment agreements with coverage clauses consisting of named employees as are in force at the date of enactment of the Bill could be properly addressed under the transitional provisions of the Bill.

Clause 9 – Access to Workplaces

Amend to read:

> Section 20 of the principal Act is amended by adding the following subsections:
>
> "(4) A discussion in a workplace between an employee *or employees* and a representative of a union…"

Discussion

While the amendment provides useful clarification of the interrelationship as between ss.20, 21 and 26 of the principal Act the present reference to "employee" potentially derogates from existing entitlements. Under *Foodstuffs (Auckland) Ltd v NDU* [1995] 1 ERNZ 110 the Court of Appeal held that the right of access by a

union representative extended to a right to meet with groups of employees subject of course to the criteria of reasonableness. Given that the access provisions as provided under ss.20 and 21 have been interpreted by the Courts as a code (*Carter Holt Harvey v National Distribution Union* [2002] 1 ERNZ 239) it is appropriate for the right of the union representative to meet with groups of employees to be made express. Such an entitlement is especially important in the context of access for purposes related to participation in bargaining for a collective agreement.

Clause 10 – Object of this Part

Amend to read:

> Section 31 of the principal Act is amended by inserting, after paragraph (a), the following paragraph:
>
> "(aa) to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement.

Discussion

The words "unless there is a genuine reason not to" have been deleted. That the presumption that parties to collective bargaining will conclude a collective agreement may be rebutted by a "genuine reason not to" raises the concern that a 'genuine reason' may be interpreted on a subjective basis – for example, an employer's personal philosophical preference for individual bargaining over collective bargaining. Indeed, recent statements by the Hon Margaret Wilson in Parliament suggest that the intent of such a phrase is merely to ensure that "reasons (for not entering into a collective agreement) are given and that the employees request is not dismissed out of hand" (Brookers Legal News 19 February 2004). If the statutory intent of promoting collective bargaining is to be significantly advanced then there needs to be a clear statutory presumption in favour of the parties to such bargaining concluding the collective agreement.

Alternatively, if the intent of the Bill is to provide good faith grounds for not concluding a collective agreement then there needs to be greater clarity as what those grounds may be bearing in mind the objectives of the principal Act.

Clause 12 – Good Faith Requires Parties to Conclude Collective Agreement

Amend to read:

The principal Act is amended by repealing section 33 and substituting the following section:

33(1) The duty of good faith in section 4 requires *the parties* bargaining for a collective agreement to conclude a collective agreement *on the basis of the proposed coverage clause in the initiation notice.*

Discussion

Reference is made to "the parties" to ensure consistency with the language in clause 10 and to accord with the intention that such provision should also apply to bargaining as between more than one union or employer. Again the words "unless there is a genuine reason not to" have been deleted. See also discussion above under Clause 10.

New Clause 12(A)

To read:

Section 40 of the principal Act is amended by adding the following subsection:

"(3) For the purposes of this section and of sections 42 and 43, the initiation of collective bargaining shall be deemed to include the notification of a proposal that an employer or a union become a subsequent party to an existing collective agreement pursuant to section 56(A).

Discussion

Following provision at Clause 56(A) of the Bill for a process whereby subsequent parties may join existing collective agreements, a consequential amendment is required in order to provide for that process as regards the initiation of bargaining.

Clause 14 – First Meeting of Multi-Party Bargaining for a Collective Agreement

Amend to read:

The principal Act is amended by inserting, after section 48, the following section:

"*48A Multi Party Bargaining for a Collective Agreement*

(1) …

(a) …

(b) …

(2) Without limiting the application of s.32(1) each union and each employer party to multi party bargaining shall take all practicable steps to advance the bargaining in an orderly manner including but not limited to attending such meetings as reasonably required for the purpose of the bargaining.

(3) For the duration of such bargaining as referred at subsection (1) no employer party shall initiate further bargaining with one or more union(s) as may be party to the bargaining."

Discussion

If the legislation is to promote all collective bargaining then it is appropriate that specific provisions are included to support multi-party bargaining as provided under the principal Act. The current provisions of the Bill with the emphasis on a 'first meeting' for multi-party bargaining risks establishing a different set of rules for such

bargaining in contradistinction to the 'ongoing' duties set out at s.32 of the principal Act.

NZNO favours a clause which reflects the 'ongoing' obligations imposed under s.32 in the specific context of multi-party bargaining and further limits the potential for employer initiation for single party bargaining in order to unreasonably fetter progress towards a multi-employer collective agreement.

Clause 15 – Facilitating Bargaining

Amend proposed new section 50(C)(1) to read:

> "The Authority *may* accept a reference for facilitation - if satisfied that one or more of the following grounds exist…"

Discussion

The current wording - "the Authority must not accept a reference for facilitation" suggests a presumption against the Authority accepting a reference for facilitation, when the exercise of such jurisdiction is clearly intended to be a discretionary matter for the Authority.

Amend proposed new section 50(C)(1)(a)(ii) to read:

> "(ii) the failure –
>
> (A) was serious *or* sustained; and
>
> (B) has undermined the bargaining *or is likely to undermine the bargaining*."

Discussion

The current twofold test as stated at (A) and (B) would likely negate the prospect of any referrals for facilitation under clause 50(C)(1).

To require a failure to act in good faith to be both "serious and sustained" under (ii)(A) would be to condone sustained 'lower-level' breaches of good faith the

cumulative impact of which may be equally disadvantageous as any serious breach.

The additional requirement at (ii)(B) that the failure must have undermined the bargaining raises further issues. Under present wording by the time facilitation is available to an aggrieved party their bargaining position must already have been undermined. Therefore, relief for the aggrieved party is only available once the damage from a failure to act in good faith has been sustained.

This fails to accord with the objective of promoting good faith in collective bargaining and is inconsistent with the pre-existing threshold for good faith in collective bargaining as set out at s.32(1)(d)(iii) of the principal Act.

Delete proposed new sections 50(C)(1)(c), 50(C)(1)(d) and 50(C)(2) and substitute new 50(C)(1)(c) and 50(C)(1)(d) to read:

"50(C)(1)(c) In the course of bargaining one of the parties has breached good faith and the proposed coverage clause will cover work (in whole or part) that has not been covered by another collective agreement to which the employer(s) has been or is party.

50(C)(1)(d) That the parties have agreed for the bargaining to be referred for facilitation".

Discussion

For the facilitation process to operate effectively, it is necessary that the institution which has jurisdiction to deal with such matters – that is, the Employment Relations Authority – also has sufficient resources to adequately address the matters so referred. The proposed 50(C)(1)(c), 50(C)(1)(d) and 50(C)(2) are phrased in such broad terms as to potentially cover either a significant proportion of bargaining during which strikes occur – (given that the threshold is only one strike and that most strikes are by definition acrimonious) – or most of the collective bargaining as currently takes place in the public sector – (given that any strike in the public sector

is likely to affect the public interest and that a proposal of strike action is a not uncommon occurrence during the course of the collective bargaining process). This would place an untenable strain on the resourcing of one of the key institutions entrusted with administering and overseeing the operation of the principal Act.

As public interest concerns in the public sector are currently addressed in part by provisions relating to notification of strikes/lockouts in essential services, any benefit as may arise from the operation of proposed 50(C)(1)(d) would be outweighed by the associated costs. Public interest concerns might be better addressed by giving the parties the ability to agree to referral for facilitation. (Refer amended 50(C)(1)(d) above).

NZNO further believes that due cognisance needs be taken of the difficulties in establishing collective agreements in 'greenfield' sites and the significant impact 'lower-level' good faith breaches can have in such context. (Refer amended 50(C)(1)(c) above).

Amend proposed new section 50(E)(2) to read:

> "During facilitation, the collective bargaining that the facilitation relates to continues subject to the process determined by the Authority *and further subject to the provisions of Part 8 of the principal Act*."

Discussion

In order that the facilitation process does not derogate from any rights or entitlements as regards industrial action such fact needs to be made express given the important role that the right to strike plays in ensuring an open, free and democratic society.

Determining Collective Agreement if Breach of Good Faith

Delete proposed new section 50(J)(2).

Discussion

The remedy of determination is clearly stated to be a discretionary one. Given the stringent criteria that must first be satisfied in subsection (3) before the Authority may invoke it's jurisdiction to fix terms and conditions, the additional 'rider' as contained at 50(J)(2)(b) is arguably inequitable as it enables the Authority to decline relief even though the grounds in subsection (3) have been made out.

Amend proposed new section 50(J)(3) to read:

"(*2*) *The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that –*

(a) …

(i) …

(ii) was sufficiently serious *or* sustained as to significantly undermine the bargaining,

(iii) *in the course of bargaining one of the parties has breached good faith and the proposed coverage clause will cover work (in whole or part) that has not been covered by another collective agreement to which the employer(s) has been or is party.*

The first amendment at (3) is consequential upon the deletion of 50(J)(2) as proposed above. The second amendment at 50(J)(3)(a)(ii) is sought on the grounds that the current proposed threshold is too high in light of the corrosive impact sustained (albeit lower level) good faith breaches may have - as referred at the discussion under clause 6(3) above. The third amendment is consistent with the earlier discussion under clause 15 that additional statutory 'support' is appropriate in the case of "greenfield' sites.

Clause 16 – Ratification of Collective Agreement

Delete proposed clause 16.

Discussion

It is unclear what the ill is to be addressed by clause 16. Existing requirements as to ratification provide an important part of the 'checks and balances' that are both necessary for and instrumental to the successful operation of collective bargaining. Further, existing requirements are an important element in supporting the maintenance of good faith relations as between a union and its members. The operation of 16(3) may serve to undermine this.

Clause 19 – Undermining Collective Bargaining/Agreement ('pass-on')

Amend proposed new section 59(A)(1) to read:

> "It is a breach of the duty of good faith in section 4 for an employer to either *propose or provide that* a term or condition of employment of an employee who is not bound by a collective agreement *shall* be the same or substantially the same as a term or condition in a collective agreement that binds the employer if –
>
> (a) the effect of the employer doing so is to undermine the collective agreement *or*
> (b) *the effect of the employer doing so is likely to undermine the collective agreement.*

Discussion

The present clause provides for a breach where the employer 'agrees' to pass on terms and conditions. Agreement is likely to be interpreted in accordance with standard legal contractual notions of 'offer' and 'acceptance' as between the employer and those employees who are not covered by the collective bargaining. Such terminology will fail to capture the situation where an employer holds out the prospect of a 'pass-on' during collective bargaining and effects such 'pass-on' at the time bargaining is concluded. As such a situation is a frequent occurrence where an employer is otherwise resistant to the promotion of collective bargaining, the intent of Clause 19 is likely to be defeated in the absence of the words "either

propose or provide…". The consequential amendment substituting 'shall' for "should" follows.

The test at Clause 59(A)(1)(a) – "the employer does so with the intention of undermining the collective agreement" - should be deleted on the grounds that it introduces the notion of proving employer intent into the employment law jurisdiction. The requirement to prove intent is, of course, prevalent in the criminal law jurisdiction. But due cognisance needs be taken of the fact that – while problematic even in the criminal law jurisdiction – the Crown has considerable resources at its disposal in order to establish mental intent (or 'mens rea') on the part of those charged with criminal offences. Unions have no such resources available to them, and the likely difficulties in establishing proof of such intent may well result in the provision being inoperable. The proposed amendment therefore deletes the existing subclause (a) and inserts the existing subclause (b) in its place.

The new subclause (b) is put forward in order to avoid the situation whereby a union must first establish the fact of having been undermined before relief is available under the clause. Given that the act of undermining is by definition insidious in its nature again problems of proof may arise. Collating the necessary evidence to support such a claim may require some considerable time, during which period the unions bargaining position may continue to be incrementally weakened. Enabling the unions to take appropriate remedial action where the effect is likely to undermine the bargaining better accords with the statutory intent of the principal Act to promote collective bargaining.

<u>Delete proposed new subsections 59(A)(4) and 59(A)(5)</u>.

The stated criteria at proposed subsection 59(A)(4)(a) is superfluous in consequence of the amendment proposed to clause 59(A)(1) above. The remaining criteria as referred at subsections 4(b) – (e) are of questionable value in terms of assessing whether the actions of an employer in passing on terms and conditions is in fact a breach of good faith. For example, it is uncertain as to why an employer's action in consulting the union of its intentions to pass on terms

considered to remedy the ill that clause 19 is seeking to address. Consequential deletion of 59(A)(5) follows.

Delete proposed new section 59(B).

Discussion

The primary 'ill' to be remedied under clause 59 is the frequent problem of employers notifying employees that they will enjoy the same benefits, terms and conditions as those employees covered by collective bargaining regardless of whether or not the employee chooses to be on an individual as opposed to collective agreement. By seeking to prohibit an employer from passing on agreed collective agreement provisions to any other collective bargaining/agreement the section may militate against the promotion of collective bargaining where an employer is negotiating with several unions for separate collective agreements.

Clause 21 -

Delete proposed new subsection 21(2).

Discussion

Consequential deletion following amendment as proposed for clause 7.

Clause 23 -

Delete proposed new subsection 63(A)(6).

Discussion

Consequential deletion following amendment as proposed for clause 7.

Clause 25 -

Delete.

Discussion

Consequential deletion following amendment as proposed for clause 7.

Clause 26 – Deduction of Union Fees

Discussion

NZNO records its whole-hearted support for the proposed requirement that union fees for those union members on individual employment agreements be deducted by the employer in the absence of any agreement between the employer/employee to the contrary.

Clause 30 – New Part 6A (Continuity of Employment if Employer's Business Restructured)

NZNO's primary position is that the protection provided under Schedule 1A should be afforded to all workers and that, in consequence, new section 69(C)(a) and 'Subpart 2 – Other Employees' (ss.69J – 69N) should be deleted. In the alternative, NZNO supports the proposal that caregivers be added to the list of employees as provided under Schedule 1A and further supports the recommended amendments as put forward by the Council of Trade Unions concerning Clause 30 and Clause 66 (Amendments to Schedule 1A).

New Clause 34A – Performance of Duties of Striking or Locked Out Employees

Amend s.99 to read:

> Section 97 of the principal Act is amended by inserting, after paragraph (3)(a), the following paragraph:
>
> *"(aa) Where the employer operates more than one workplace, is employed in a workplace in which the coverage clause set out*

in the notice initiating the collective bargaining, if adopted, would have effect; and"

Section 97 of the principal Act is further amended by inserting, after subsection (4), the following subsection:

"(4A) For the purposes of this section, a person is employed or engaged to perform the work of a striking or locked out employee if that person performs the work of another employee who then performs the work of a striking or locked out employee."

Discussion

NZNO is proposing an amendment to Section 97 of the principal Act. This section, the purpose of which is to ameliorate the inherent imbalance of bargaining power, has a number of deficiencies which make it largely ineffective in achieving that purpose in certain circumstances.

In particular, a large employer with widely spread operations (ie, the type of employer where the imbalance of power is greatest) is at present able to completely undermine a strike (or to bolster a lockout) by bringing in employees from other divisions or sites. Contrarily, employees in those other divisions or sites are prevented from taking any sympathy action. The imbalance of power is increased, not reduced.

This deficiency would be remedied by limiting the area from which the employer could bring in replacement labour to that delineated by the claimed coverage clause. That already draws the boundaries for lawful employee action. There is no good reason why the employer should not be similarly restricted.

The key wording of the present section – "to perform the work of a striking or locked out employee" – is unsatisfactory. It appears to permit the situation where A is employed or engaged to do the work of B (an employee who is not on strike or

locked out) so that B is freed up to perform the work of C (an employee who is on strike or locked out).

The effectiveness of the provision would be improved by making it clear that this kind of “bump” replacement is not permitted.

Clause 35 – Codes of Employment Practice

Amend to insert “Voluntary” before “Codes of Employment Practice” in all cases.

Delete proposed 100A(3) and replace with:

> *“Before the Minister approves a voluntary code of employment practice, the Minister must be satisfied that a broadly representative group of employer and unions have reached agreement on such a code.*

Discussion

NZNO’s primary position is that there is no requirement for codes of employment practice, given that the principal Act already provides for the promulgation of codes of good faith which address as far as necessary any of the concerns that arise.

However in the alternative we believe that provision for codes of employment practice should be voluntary in order to ensure genuine participation and that a broadly representative group of employers and unions reach agreement on such a code before it is approved.

100D -Codes of Employment Practice as relating to the Health Sector

Delete amendment inserting new s100D

Discussion

NZNO is opposed to the inclusion of a new s100D as proposed in the Bill. We do not believe the grounds have been made out for the further regulation of strikes and lockouts in the health sector. We view with particular concern:

- The rationale for s100D given that in all other essential services the requirement to give 14 days notice and the practice of mediation during that time acts effectively acts to limit risks to health and safety during industrial action

- The breadth of the Ministerial power contained within s100D, which is not specific to life preserving services but could apply to any health service, given that all health services "relate to health and safety"

- The breadth of the sector to which the proposed code would be applied: the "health sector" includes many services which are not covered by the essential services provisions of the principal act

- The political nature of the intervention, which gives virtually unrestrained authority to a Minister on behalf of the government to regulate industrial action in the health sector, 75 per cent of which has government employers

- The potential for a breach of a code of practice to impact on the lawfulness of the action – which we understand not to be the intention.

During much of 2003, CTU health unions and DHBNZ representatives have been meeting under the independent chair of Peter Chemis to develop a code of good faith for unions and DHB employers. The code addresses, among other things, a process to ensure that life-preserving services continue during industrial action.

NZNO was comfortable with this approach because it reflected best practice in relation to the management of these issues. The code is limited to clearly defined life preserving cover and works from the premise that the onus is on health service managers (employers) to manage the risk to life, with requests for union members to provide cover viewed very much as a last, rather than preferred option. The draft code provides for third party determinations in the event of disagreement. It is our view that with some further work to clarify the draft code it will meet the objectives of government, employers and the CTU in this area.

We therefore submit that the proposed s100D be deleted and that the process of developing and gazetting the code of good faith under the current provisions of the ERA continues.

Clause 37 – Test for Justification

Delete proposed s.103(A)(2)

Discussion

The recent experience of NZNO in representing its members before the institutions provided under the principal Act has been one whereby the test for justification is effectively interpreted as being a subjective assessment on the part of the employer, largely in consequence of the judgement as given by the Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. However such an interpretation does not appear to accord with the spirit and intent of the principal Act.

Deletion of proposed s.103(A)(2) would help ensure that the legislative intent behind Clause 37 is not frustrated by judicial interpretation.

Clause 40 – Remedies

Delete proposed new section 123(2)

Discussion

While the proposed section is purportedly put forward in the interests of flexibility, it should be noted that the median range of remedies under this section (and its predecessor under the Employment Contracts Act 1991) has not increased for the last ten years.

While this state of affairs is a matter of ongoing and considerable concern, the fact that there has been no increase may be attributed in part to the fact that the institutions have no 'flexibility' when it comes to matters of contribution. The

provisions relating to contribution are mandatory and consistently result in the remedies that would otherwise be awarded reduced significantly – sometimes by up to 100 percent.

Given such a situation it appears at best iniquitous for such remedies as are awarded to be paid by way of installment in the name of flexibility as viewed from the perspective of the employer, while the mandatory contribution provisions have resulted in such remedies remaining artificially low.

Policy initiatives providing for payments by way of installment further reduce the real value to an aggrieved party of any relief as may be ordered in their favour.

Clause 41 – Arrears

Delete proposed subsection 131(1A)

Discussion

Such a subsection would make the resolution of issues by way of mediation less likely. Where an employer has genuine financial difficulties a claimant has to recognize that 'drip feed' payment may be the only realistic way to recover money owed. Frequently this is a feature of mediation, where there is an incentive for an employer to agree to a 'drip feed' settlement rather than face the possibility of a 'unitary' award in the Authority or Court. This proposal would largely erode that incentive.

Clause 42 – Recovery of Penalties

Delete proposed subsection 135(4A)

Discussion

Refer closing comments under discussion on Clause 40 above.

Clause 44 – Further Provisions Relating to Compliance Order by Authority

Delete proposed subsection 138(4A)

Discussion

Refer closing comments under discussion on Clause 40 above.

Clause 48 – Procedure in Relation to Mediation Services

Delete proposed subsection 147(3)

Discussion

The proposed subsection would appear to be at odds with the tenor of other parts of the principal Act – for example Part 6 of the principal Act seeks to emphasise and enforce the right of the individual employee to seek independent advice during the formation/initial negotiation stage of the employment relationship/agreement.

If the principal Act emphasizes the right to representation at such stage of the employment relationship, it appears illogical to 'undercut' the importance of representation at what is arguably an equally important stage of the employment relationship.

Clause 51 – Payment on Resolution of Problem

Amend by adding new subsection 150A(4):

> *"Subsection (1) does not apply if the party is a member of a union and the party has been represented by the union."*

Discussion

Such an exception is justified given that the member – union relationship is already governed by a statutory duty of good faith which regulates the type of behaviour at which this provision is aimed.

Clause 54 – Procedure

Delete Clause 54

Discussion

Except in the case of a non-appearance at the Investigation Meeting, there should be, in our view, no occasion when the Authority member speaks to one party separate from the other. This amendment gives the Authority members wide powers to have telephone conversations, chambers meetings etc with one party only. This would be inconsistent with principles of natural justice under which the Authority is required to operate (s.173(1) of the principal Act) and may cause parties to question the impartiality of the Authority.

Clause 58 – New Sections 179A and 179B Inserted

Amend by deleting proposed new section 179A and replacing it with a new section which incorporates the ability to file a cross-challenge as part of a statement of defence, as set out in the Practice Notes of the Chief Judge dated 18 July 2003.

Discussion

As the Chief Judge noted in his Practice Note of 18 July 2003, a challenge is frequently filed right at the end of the stipulated period. This leaves the respondent party, which may also have been dissatisfied with an aspect of the Authority's determination but had been prepared to abide by it if the other party did also, in the position of having to seek special leave to raise its cross-challenge out of time. The practice adopted by the Chief Judge of accepting a cross-challenge as part of and within the time allowed for a statement of defence appears sensible and practical.

Clause 66 – New Section 237(A)

Delete proposed subsections 237A(3)(a) and (c).

Discussion

The criteria for amendments to Schedule 1A are too restrictive. Vulnerability in respect of restructuring is not confined to those workers who are low paid. There is also likely to be confusion over the interpretation of the word “frequently”. There needs only to be one criterion in relation to the tendency of undermining employment conditions.

Part 2 - Equal Pay

Pay equity is a fundamentally important issue for nurses, of whom 92% are women. In 1990 with the introduction of the Employment Equity Act, nurses were among the first in line for pay equity determinations.

While there is a range of factors which cause gender pay differences, there is no doubt that a significant portion of the pay gap results from the historical under-valuing of mainly-women’s jobs. This is thus a significant contributor to the gender pay gap in the health sector, where the gap is much larger than in education or the public service, and where 75% of all employees are female.

In its submission to the Ministry of Women’s Affairs ‘Next Steps Towards Pay Equity’ discussion document, NZNO commented on pay equity mechanisms and legislative requirements stating that:

- *If the development of mechanisms presents difficulties in a relatively fragmented bargaining environment, then there must be a willingness to make the environment less fragmented. In this context specific pay equity legislation will be required*.

The NZNO submission identified that such mechanisms would need to:

- *Be based on collective and not only individual claims*
- *Allow claims to be made across a whole occupational group*

- *Result in determinations that are capable of being extended to all those employed in the occupational group*
- *Be based on an implementation principle that results in acceptable internal relativities within the organisations affected.*

NZNO wants to contribute to a more detailed discussion of a legislative framework for making pay equity determinations and implementing them.

With a major report due on these issues from the state sector Pay and Employment Equity Taskforce, we believe that Part 2 of the Bill is premature.

Equal Pay Investigations

NZNO has two primary objections to the proposed provisions. First, that they will expressly rule out any equal pay for work of equal value claim under the Equal Pay Act; second, that whether limited to equal pay for the same work, or extending to work of similar value, the processes are themselves ineffective.

NZNO supports the concerns outlined in the CTU submission and the submission of the Coalition for Equal Value Equal Pay (CEVEP) and is concerned that any equal pay process should provide:

- For determinations based on equal pay for work of equal value
- The ability for unions to initiate claims
- An identifiable role for the worker / union in the process
- A transparent process for equal pay claims
- Full access to information for the person/ union taking the claim
- The ability to compare across employers
- Suitably skilled persons to investigate equal pay claims
- A right of appeal

NZNO believes that Part 2 of the ERLR Bill needs substantial amendment and requires provisions to include equal pay for work of equal value claims.