ASMS

ASSOCIATION OF SALARIED MEDICAL SPECIALISTS

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Submission to the Education and Workforce Select Committee on the Employment Relations Amendment Bill 2018

28 March 2018

1. Background

1.1. The Association of Salaried Medical Specialists (ASMS) is a union and professional association of salaried senior doctors and dentists employed throughout New Zealand. We were formed in April 1989 to advocate and promote the common industrial and professional interests of our members and we now represent nearly 4800 members. These are mostly employed by District Health Boards (DHBs) as medical and dental specialists, including physicians, surgeons, anaesthetists, psychiatrists, oncologists, radiologists, pathologists and paediatricians. About 90% of all senior doctors and dentists employed in public hospitals in New Zealand who are eligible to join the Association are in fact members of the Association.

1.2. Although most members work in secondary and tertiary care (either as specialists or as non-vocationally registered doctors or dentists) in the public sector, a small but significant number work in primary care and outside DHBs. These may be employed by the New Zealand Family Planning Association, ACC, hospices, community trusts, Iwi health authorities, General Practice, union health centres or the New Zealand Blood Service.

1.3. The Association promotes the effective and efficient delivery of better health care for all New Zealanders and recognition of the important role our members play in that delivery due to their professional skill and training. We are committed to the establishment and maintenance of a high quality, professionally-led public health system throughout New Zealand.

1.4. The Association has negotiated three national multi-employer collective agreements: the first, with 20 district health boards, covers over 4500 senior doctors and dentists; the second, with 14 hospices, covers 53 members, and the third covers GPs across four Wellington union health centres. In addition, the Association negotiates 16 collective agreements that cover between 2 and 33 doctors in small medical practices around the country. These include a number of collective agreements for salaried general practitioners. We also have a small number of members who are not covered by a collective agreement and are employed on individual employment agreements. The Association is familiar with, and has experience of, the operation of the Employment Relations Act in a wide range of workplaces, including large unionised workplaces and smaller workplaces where our members are employed under small collective agreements or individual agreements.

1.5. The Association is an affiliate of the New Zealand Council of Trade Unions, and supports the more detailed submission on the Bill made by the CTU. The Association's submission does not address all the changes proposed under the Bill but concentrates on particular issues likely to affect our members and consequently on New Zealand's health system, which is already dealing with a medical workforce crisis.

1.6. The Association supports the general intention to restore key minimum standards and protections for employees and to promote and strengthen collective bargaining and trade union rights in the workplace. Improved wages and employment conditions have been associated with improvements in the social determinants of health such as housing, poverty (including child poverty), hospital admissions, etc.

1.7. The Association wishes to appear before the Education and Workforce Select Committee to speak to this submission.

1.8. The submission that follows is on a clause by clause basis.

2. Recognition and operation of unions

2.1. Clause 4 – Union Delegates entitled to paid time to represent employees - Insert New Section 18A

2.2. Union delegates are central to the good faith relationship between employers and employees at the workplace. Having reasonable time available to support members strengthens workplace relationships and prevents the escalation of problems. In many workplaces, including DHBs, union representatives and/or delegates already have time for union business formally through their employment agreements or informally through other arrangements. However, most workplaces do not have this, and the Association considers the new proposal will benefit employers and employees in good faith relationships. We are concerned that there may be issues with some employers about defining what constitutes 'reasonable time'. The CTU has commented on this issue in its separate submission, and the Association agrees with the concerns raised. We accept that the time provided should be such that it does not disrupt the employer's business or the delegates' performance otherwise.

- **The Association supports this amendment**

2.3. Clauses 5, 6, 7 and 8 – Access to workplaces- Repeal section 20A and amend section 21 and 25

2.4. The 2011 introduction of constraints with regard to a representative of the union accessing the workplace was unnecessary and, in many cases, was ignored. However, where an employer used section 20A, it is the Association's view that this was done to constrain industrial democracy and to weaken workers' rights. Consequently, we support repeal of 20A as well as the amendments to section 21 and 25. These changes are necessary to restore balance in the relationship between employers, workers and their unions.

- **The Association supports this amendment**

3. Collective bargaining

3.1. Clauses 9, 11, 14 and 15 inclusive – Duty of good faith requires bargaining to be concluded

3.2. The Association has experience of negotiating smaller collective agreements with a variety of small employers, some of whom have major constraints on their income and/or funding. Due to the status of our members within such organisations we have seldom had issues of breaches of good faith or with a refusal to conclude bargaining but it has happened. The current Act, through the changes made by the previous Government, allows for, if not encourages, employers to act badly. This is at odds with the Employment Relations Act otherwise being underpinned by the obligations of good faith.

3.3. Furthermore, the changes in 2015 created the perception that collective bargaining was not valued or was unimportant. This is contrary to research and common sense. Indeed, it is common for employers to be relieved at having conditions of employment that cover the group of workers in question and enhances workplace harmony.

3.4. We strongly support all of the changes to section 31, 32, and 33 that overturn these previous restraints on good faith bargaining and relationships overall. We note that the duty to conclude bargaining is fundamental to fair negotiations and places responsibilities on both parties to work hard towards this end. Section 33 will still allow for the failure to conclude bargaining for genuine reasons on reasonable grounds. We see this as only possibly occurring in extraordinary situations.

3.5. We have concerns however that it is not clear that the requirement to conclude bargaining does not specifically relate to the bargaining that was originally initiated for. By this we mean that where the inhiation of bargaining was for a MECA then the duty to conclude should also be for a MECA. We propose therefore that clause 9 and 11 should be enacted with suitable

amendments to ensure that the duty to conclude relates to the type of bargaining in the initiation letter.

- **The Association supports this amendment with changes**

3.6. Clause 12– Amendments to Section 41 – Initiation of Bargaining

3.7. Prior to the amendments of 2015 the Act had allowed for unions to initiate bargaining twenty days before the employers. This was particularly important to prevent the risks of cross initiation (initiation on the same day) where the union was initiating for a MECA and the employer might initiate for a SECA. Such cross initiation created disputes prior to bargaining getting underway and could create an avenue for employers to avoid or at the least postpone bargaining. The 2015 removal of early initiation for unions did not advantage unions but could advantage employers.

- **The Association supports this amendment**

3.8. Clause 13 – Repeal Sections 44A to 44C – Opt-Out of Multi-Employer Bargaining

3.9. These proposed changes remove the opportunity for employers to opt out of multi-employer bargaining at the point of initiation. This clearly worked against the philosophy of collective bargaining and allowed for bad faith and breached the ILO conventions C87 and C98. The removal of the opt out provisions goes hand in hand with the amendments at clause 12 (initiation of bargaining). Both amendments in 2015 were intended to advantage employers and neither supports good faith bargaining.

- **The Association supports repeal**

3.10. Clause 16 – Amend Section 54 – Inclusion of Salary Rates

3.11. The desire by some employers to have collective agreements with virtually no information in them is intended to disempower the agreement. ASMS has encountered this on occasion. The concept of an employment agreement without wage or salary rates belies the intent of such a document. Section 54(3)(A)(ii) that requires collective agreements to contain the rates of wages or salaries payable to employees is necessary, and ASMS would like to see mandatory inclusion for other basic conditions.

- **The Association supports this amendment**

3.12. Clause 17 – Insert new 59AA – Information to new employees

3.13. The Association supports the insertion of 59AA in principle because the provision of suitable information to employees is central to a good employer/employee good faith relationship. However, two issues concern us. Firstly, the new 59AA only applies to an existing collective agreement between the union and employer. Where a union is on a new site, and has no agreement in place at that point, this creates a 'roadblock'. We propose that 59AA should apply where the union is a party to, or has initiated bargaining for, a collective agreement.

3.14. Secondly, the Association notes there is no timeframe within which the employer must respond to a request. In a good faith relationship, an employer would be expected to respond as quickly as possible. A lack of clarity on this issue, however, may well result in compliance issues.

The Association submits, therefore, that a union can ask an employer to pass on information to new employees when the union is a party to a collective agreement with that employer, or has initiated bargaining with that employer, and that employer must respond in a timely manner, namely within one month.

- **The Association supports this insertion but requires clarification**

4. Individual employees' terms and conditions of employment

4.1. Clause 18 – Employers Obligations in Respect of New Employees

4.2. Clause 18 replaces section 62 with new sections 62 to 63AA.

4.3. These changes restore what was previously known as the '30-day rule' and require the employer to pass on information about the collective agreement and union to the new employee.

4.4. These are logical and sensible changes, and the Association supports them.

4.5. Every employee has the right to join a union and the collective agreement but since the removal of the 30-day rule and with no obligation for the employer to advise the employee about their rights, we have seen employers (even at DHB level) providing confusing information that could be interpreted as intentionally disempowering the new employee.

4.6. The New Zealand public health system has a general shortage of senior doctors and currently recruits up to 50% of new doctors from overseas. Many of these new arrivals have little or no understanding of unions or of their employment rights, and the Association has dealt with a number of senior doctors who have missed out on some employment conditions as a result. This has had a negative impact, with some senior doctors recruited to New Zealand subsequently feeling they have been misled, and/or choosing to leave the country. For some specialists, union membership in their home countries is a dangerous activity. The Association's advice and support to these new doctors benefits them, their employers and the broader public health system. Our involvement has avoided many potential difficulties between prospective employees and DHBs, but many new doctors are not aware this free service is available to them. The inclusion of section 63 will ensure these doctors are provided with information to give them a better start in their new roles in New Zealand.

4.7. The new section 63AA will allow the Association to identify and contact all new senior doctors being employed in DHBs across New Zealand and at the other 16 workplaces where we have collective agreements. As a result, the Association will be able to ensure they have been suitably welcomed into the New Zealand health workforce and have been employed on the correct terms and conditions of employment.

4.8. This increases the likelihood that these new doctors stay in New Zealand and make a long-term contribution to the health system. The Association strongly supports the changes to section 62 overall.

4.9. There is one point of clarification needed. The proposed S62(4) notes that

"However, the new employee's terms and conditions of employment do not include any bargaining fee paid under part 6B"

4.10. The Association has an agreed bargaining fee arrangement in the ASMS-DHB MECA. We assume that the new 62(4) only applies to the first 30 days employment but this needs to be clear; as currently written, this is not the case.

- **The ASMS supports this amendment (given that it must be clear that s62(4) only applies to the first 30 days of employment).**

4.11. Clauses 21 – 23 inclusive - Amendments to Part 8 strikes and lockouts

4.12. The repeal of sections 80(bb), 95A to 95H, 100(1)(c) and 2(c) and 100(4) and 100(5) removes one of the most punitive areas of the Employment Relations Act and is strongly supported.

4.13. Senior doctors have historically been very reluctant to take any form of industrial action, regarding it as a last resort in collective agreement negotiations. If they do contemplate such action, they always seek to minimise the impact on their patients. The introduction of the concept of 'partial strikes' and proportionate pay deductions in the Employment Relations Amendment Act 2014 allowed employers to make a specified pay deduction for any form of action "whether or not the act involves any reduction in the employee's normal duties, normal performance of work, normal output, or normal rate of work". This was viewed by many as draconian and resulted in pay deductions for employees who wore tee shirts or badges at work, instead of than their usual uniforms. The repeal of these sections will allow members to take the least action possible, to the good of their patients, without facing pay deductions as a result.

- **The Association supports this amendment**

4.14. Clauses 24 to 27 inclusive – Personal Grievances, Disputes and Enforcement

4.15. There is no place within a good faith relationship for discrimination against any employee for any reason.

4.16. The Association views the proposed changes in wording from "or involvement in the activities of a union" to "or the employee's union membership status or involvement in union activities" as logical and necessary. The current wording only protects employees "engaged in union activities" from discrimination, meaning that union members who are members but 'not actively engaged' have no protection. There have been many examples across numerous industries where a union is trying to establish membership on a new site and/or are looking to establish a collective agreement where 'ordinary' union members are discriminated against. The proposed changes protect all union members, and indeed those intending to join who have not yet done so. The second major change is increasing protection against discrimination to those who have been union members actively or otherwise within the last 18 months rather than only 12 months. This, too, makes discrimination less likely and is strongly supported by the Association for all employees.

- **The Association supports this amendment**

4.17. Clause 29 –90 Day Trial Period

4.18. The '90 Day Trial Period' has been one of the most debated and significant previous changes to the ERA. The amendment to Section 67A (When employment agreement may contain provision for trial period for 90 days or less) is strongly supported by the Association but we submit that the amendment does not go far enough.

4.19. We note that the Labour Party policy manifesto added further protections, but these were removed at the insistence of New Zealand First. The Association strongly recommends removing the right of any employer to 'fire on a whim', regardless of the size of workforce, in the interests of fairness and maintaining balance within any form of good faith relationship.

4.20. We acknowledge that the proposed amendments, should they not be enhanced, limit use of the 'fire at whim' provisions to employers with fewer than 20 employees at the time the employment agreement is entered into, meaning that no DHBs are eligible. But, for most non-DHB members, the proposed amendments could apply.

4.21. For some years, and for the foreseeable future, New Zealand has had and will continue to have a serious shortage of senior doctors in its workforce and a corresponding recruitment and retention problem. Remuneration rates for medical specialists employed in New Zealand are already significantly lower than those offered in other countries, particularly Australia

where the rates are between 35% and 45% higher than here. This discrepancy in remuneration is a major contributor to the recruitment and retention problems faced by this country's senior medical workforce.

4.22. We already have the second highest proportion of international medical graduates (IMGs) of any OECD country (behind Israel). At least 43% of senior doctors practising in New Zealand gained their initial medical qualification overseas and, as noted above, the rate of new IMG recruits is higher still. For some time now we have relied on the availability and willingness of IMGs to seek and accept appointments in New Zealand. Up to two=thirds of the senior doctor's workforce in some provincial DHBs are IMGs. Anything that threatens the flow of IMGs should be avoided if New Zealand is to have any realistic prospect of filling the current and future medical and dental vacancies in our health service.

4.23. Should non-DHB employers seek to include a 90-day trial period in their offers of employment to new senior medical and dental officers, it will almost certainly create a further and significant disincentive for IMGs looking at working in New Zealand. The Association will be obliged to actively advise IMGs and new appointees of the serious risk they face from such a trial period, and discourage them from accepting appointment in New Zealand.

4.24. The Association also notes that the problem of any 'fire at whim' legislation affects our members even when not applying directly to them. Workers who suffer loss of employment through this legislation (noting that approximately 30% of the workforce could be affected) are affected well beyond just losing their job. The mental health of workers unfairly or unjustly dismissed suffers, and the effects of the subsequent lack of employment contributes to broader issues including poverty within society. Our members, especially in emergency departments and GP practices, must face the realities of vulnerable people who lose not just their jobs but also their health. The Association strongly urges the Select Committee to go further than the current amendment through deleting section 67A and 67B in toto.

- **The Association supports the amendment to 67A but encourages deletion of 67A and 67B in toto**

4.25. Clauses 30 – 34 inclusive - Continuity of Employment given Restructuring

4.26. The Association supports all proposed amendments to Part 6A, section 69 in overturning the damaging changes brought about by the previous Government in 2014.

4.27. Although uncommon for senior doctors or dentists, we have had situations where a section of a DHB has been privatised or where non-DHB practices have changed ownership. Several DHBs over the years have privatised laboratory or radiology services to some extent, and these have brought about, in most cases, a transfer of undertakings. These situations cause difficulty for our members but also other employees working elsewhere in the hospitals. The changes proposed will help to reduce 'the race to the bottom' for the pay and conditions of those workers.

- **The Association supports this amendment**

4.28. Clauses 35 – 37 inclusive – Rest breaks and meal breaks

4.29. As senior medical specialists, our members are well aware of the need for employees to have suitable rest breaks and meal breaks during their period of work. Long periods without an opportunity for rest or sustenance can lead to fatigue and increase the likelihood of mistakes. The health of an employee denied such breaks can suffer or be made worse. Additionally,

according to research from 2015[1], unlike cellphones that run optimally until their batteries die, people "have to charge more frequently before we deplete all the way,". The study shows a link between taking breaks and other important outcomes that employers may care about: higher job satisfaction; reduced emotional exhaustion; and greater efforts by employees to undertake work above-and-beyond their job description.

4.30. The proposed changes to the Act at sections 69ZC to 69ZEB will reduce the incidence of fatigue and lessen the risks. The Association strongly supports these proposed amendments.

- **The Association supports these amendments**

4.31. Clause 38 and 39 Section 125 – Amendments relating to remedy of reinstatement

4.32. The proposed amendments at section 125 are simple and restores to law the requirement of reinstatement as the prime remedy for unjustified or unfair dismissal in the Employment Relations Act as was the case prior to 2000. The Association sees reinstatement as a fundamental employment right.

4.33. Loss of employment after unjustifiable dismissal adds 'injury to insult' for most employees, including senior doctors, and can have a catastrophic impact on their careers and employment prospects. Having reinstatement as the primary remedy on the very rare occasion where one of the Association's members has been dismissed is critical to being able to protect their reputation and minimise any loss of confidence.

4.34. The Association is concerned that the inclusion of "reasonable" in s125(2) weakens the right to reinstatement as the primary remedy. Including the test of 'reasonableness' introduces room for argument, which we consider detracts from the intention of the amendment overall. We propose that "reasonable" is deleted and s125(2) reads:

"If this section applies, the Authority must provide for reinstatement wherever practicable ~~and reasonable~~, irrespective of whether it provides for any other remedy as specified in section 123"

4.35. The Association supports this amendment and the amendment at section 5 (insertion of a definition of reinstatement).

- **The Association supports the amendments and proposes the added deletion of "reasonable" in s125(2)**

5. Amendments to Part 10 (institutions)

5.1. The Association notes that changes proposed to Part 10 as being consequential only.

- **The Association supports these amendments**

6. Proposed areas of further amendment

6.1. We note that no change to Section 103A has been proposed, to the Association's surprise and disappointment.

6.2. 103A relates to the "Test of Justification" and the question of whether a dismissal or an action was justifiable.

[1] Hunter, E. M., & Wu, C. (2016). Give me a better break: Choosing workday break activities to maximize resource recovery. Journal of Applied Psychology, 101(2), 302-311

6.3. Currently 103A (2) notes that the test for justifiable dismissal is

"whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all circumstances at the time the dismissal or action occurred"

This was amended by changing the word "would" to "could" in 2011.

6.4. This change meant that, if the employer's actions to dismiss an employee is one which the employer could take, considered objectively, then the Employment Authority or Court could not substitute its views for the actions taken by the employer.

6.5. Basically 'would to could' means that the Authority or Court could no longer determine justification by asking what a notional fair and reasonable employer in the circumstances would have done. The change gave employers more scope for defending charges of unjustified dismissal (or other action under dispute) and gave the Authority and Court less say over the dismissal or action being fair.

6.6. The Association submits that 103A of the Employment Relations Act should be amended further than those amendments scheduled by reversing the change from the 2011 amendments and changing the word "could" to "would in 103A (2) and thus allowing the Authority or Court the opportunity to better consider justification of the employer's actions when considering the justification of that employer's actions.