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Employment Status and Remuneration of Statutory Officers

The purpose of this paper

- 1 The Remuneration Authority (**the Authority**) is often asked about the status of statutory officers and how certain legislative provisions, or employment conditions apply to those roles. This paper explains how the remuneration and terms of appointment of statutory officers are determined, and the role of the Authority in that process, with a view to helping officials in administering or appointing departments who advise Ministers on the appointment of persons to statutory roles or who administer the terms and conditions of appointment of such persons.
- 2 A statutory officer, for the purposes of this paper, is a person appointed to an independent role established by legislation, charged with legal responsibilities and functions, and whose remuneration is set by the Authority under schedule 4 of the Remuneration Authority Act 1977 (**the Act**) or schedule 1 part 3 of the Crown Entities Act 2004 and any other applicable statute.
- 3 This paper should be read in conjunction with the Authority's paper entitled "**Requirements for Determining the Remuneration of Individuals Appointed or Reappointed to Statutory Bodies and Other Positions**"¹.

Summary

- 4 Under section 12 of the Act, the Authority determines the remuneration of a range of statutory officers as listed in schedule 4 of the Act and in other statutes. The Authority also has power to consider remuneration payable to members of certain Crown entities and to determine how any provision of a remuneration determination is to be interpreted or applied or is to operate.
- 5 The Authority determines remuneration for statutory officers however it is not the employer of statutory officers, nor are statutory officers employed by the agencies within which they work.
- 6 It is not the Authority's role to advise on or determine the extent to which statutory officers can access what may be broadly termed "employment rights".
- 7 Even though statutory officers are not employees of the organisation within which they work, they may be deemed to be employees for some purposes such as income tax liability or membership of a retirement savings or superannuation scheme.
- 8 If the activities of certain statutory officers are to be treated as "employment" for the limited purposes of the Income Tax, this does not mean those officers should be considered "an employee" for any other purpose.
- 9 The Authority takes a total remuneration approach. In order for the Authority to undertake its remuneration role effectively both the statutory officer and the relevant appointing or monitoring entity must advise the Authority of any term of appointment or entitlement that may impact upon its determination of remuneration for the officer in question.

¹ This paper can be obtained from the Authority's website: <https://www.remauthority.govt.nz/independent-officers-and-boards>

Distinction between “employees” and “statutory officers”

- 10 Statutory officers are generally appointed by the Governor-General on the advice of Ministers or the House of Representatives².
- 11 Statutory officers include roles such as the Public Service Commissioner, the Commissioner of Police, and the Controller and Auditor-General³.
- 12 While the Crown appoints statutory officers it does not act in the role of an “employer” in the sense envisaged by the Employment Relations Act 2000. For example, employers set remuneration for their employees. As noted, the remuneration for statutory officers is determined independently by the Authority under the Act.
- 13 Terms of appointment are negotiated and agreed between statutory officers and the relevant appointing, administering, or monitoring entity (generally a government department such as the Public Service Commission, Ministry of Business, Innovation and Employment or the Ministry of Justice). The terms will set out relevant elements of the appointment, such as permissible leave arrangements.
- 14 Agreed appointment terms do not constitute an employment agreement or otherwise give rise to any employment relationship.
- 15 As a statutory officer is not an employee, they have no ability to access employment related rights such as personal grievance rights⁴.
- 16 However, statutory officers can agree annual leave arrangements in their terms of appointment, provided such arrangements are made known to the Authority, which will take account of such arrangements in determining the remuneration of the statutory officers whose remuneration it determines⁵.
- 17 Terms of appointment for statutory officers may also include sick leave, provision for parental leave, and related necessary administrative arrangements, such as how leave is to be taken and recorded and how administrative support services are to be accessed. Terms of appointment may be similar to or modelled on holiday entitlements under the Holidays Act 2003, but statutory officers are not an “employee” for the purposes of that Act.
- 18 Terms of appointment may also refer to other matters such as the period of appointment, (and how it may be terminated), retirement savings or superannuation entitlements and any expectations associated with the appointment, such as the maintenance of appropriate ethical standards and conduct, including avoidance of conflicts of interest and maintaining political neutrality.
- 19 Internal policies applying to employees of the organisation within which the statutory officer is working do not automatically apply to statutory officers. Internal policies generally apply only to employees of the organisation because a statutory officer is not always employed by the organisation.

² Section 2 Crown Proceedings Act 1950, cited in O'Rourke v Secretary for Justice [1996] 2 ERNZ 169 (FC, EC).

³ Section 4 of the Public Sector Act 2020, s 12 of the Policing Act 2008, and s 7 of the Public Audit Act 2001.

⁴ O'Rourke v Secretary for Justice [1996] 2 ERNZ 169 (FC, EC).

⁵ Remuneration Authority Act 1977, s 18(2)(b).

- 20 Accordingly, unless internal organisational policies can be and are specifically applied to the statutory officer in the relevant terms of appointment, they will not apply to the statutory officer.

Statutory officers' payment of earner liabilities

Personal tax

- 21 Liability for the payment of income or other taxes will vary depending upon the nature of the appointment and the individual circumstances of the statutory officer. In certain situations, some specified statutory officers are treated as if they were employees. The definition of "employment" in the Income Tax Act 2007 (Income Tax Act) specifically includes for the purposes of that Act "the activities performed by the Governor-General, a member of Parliament, or a judicial officer that give rise to an entitlement to receive a PAYE income payment for the activities"⁶.
- 22 However, that definition does not mean these, or other statutory officers are employees of the Crown for the purposes of employment law generally. Hence the definition of "employee" in the Income Tax Act – "a person who receives or is entitled to receive a PAYE income payment" – is different from the definition used in the Employment Relations Act and the Holidays Act.
- 23 The fact that the role undertaken by various statutory officers is not an employee role is reinforced by the Income Tax Act definition effectively deeming certain statutory officers to be an employee for PAYE purposes. If the statutory officers in question were otherwise able to be regarded as an employee, the extended Income Tax Act definition would not be necessary.
- 24 In cases of doubt statutory officers should seek independent advice on their tax position or contact the Inland Revenue Department for assistance.

Retirement Savings and Superannuation

- 25 Statutory officers may opt into, or already be a member of a superannuation scheme or retirement savings such as KiwiSaver. Consequentially a person who has been appointed to such a role may continue an existing contribution to a superannuation or retirement savings scheme and their "superannuation rights" as a member of that scheme will remain unaffected.
- 26 However, if a statutory officer is able to and chooses to contribute to a superannuation or retirement savings scheme the amount of any employer subsidy, inclusive of employer superannuation contribution, will be deducted from the statutory officer's total remuneration determined by the Authority.

ACC

- 27 The Authority is not responsible for determining whether statutory officers are required to pay ACC levies. Officers should check this with ACC and also check the administrative arrangements for payment with the organisation that manages their remuneration.

⁶ Section YA1 Income Tax Act 2007

Appointment of employee as statutory officer from within the same organisation

- 28 It is not unusual for an employee of an organisation to be appointed a statutory officer from within their organisation. In this case some aspects or conditions of the statutory officer's employment may continue. For example, it is likely the person appointed Police Commissioner will be an existing Police employee. The Policing Act 2008 makes it plain that if this occurs some aspects of the statutory officer's previous employment continue, notwithstanding the statutory appointment. So, a person who holds office as a constable when appointed Police Commissioner continues to hold the office of constable while they are Commissioner⁷.
- 29 In the absence of any statutory continuation of such provisions or agreement they should continue in the agreed terms of appointment, existing employee entitlements should not normally continue when an employee is appointed to a statutory office within that organisation. That is because those entitlements will have been earned by and able to be enjoyed by employees of the organisation. That status comes to an end once the employee is appointed and takes up the statutory officer role.
- 30 If existing employee entitlements are able to continue and are to do so, then the entitlement must be advised to the Authority who will determine whether (and if so to what extent) the entitlement impacts upon the remuneration the Authority has determined for the position.

Matters the Authority takes into account when setting formal remuneration determinations

- 31 The Authority takes a total remuneration approach, taking into account the criteria in its legislation and valuing salary, superannuation, leave, club and professional fees, motor vehicle entitlement and any other benefit in the nature of an allowance.
- 32 Any term of appointment that impacts upon the value of remuneration determined by the Authority for the appointment, such as an "employer" superannuation contribution, including employer superannuation contribution tax, will be deducted from the remuneration determined for the position by the Authority.
- 33 Provision for reimbursement of work-related expenses, such as phone rental, an office car park and Koru Club membership, is not generally considered part of remuneration and the Authority will not deduct it from the remuneration determined for the appointment. The ability of the statutory officer to remain a member of the Government Superannuation Fund is determined by the legislation under which the appointment is made. It is not the Authority's role to determine whether a statutory officer may retain membership but if the officer retains their membership, the administering department must advise the Authority so it may make any necessary adjustments when determining remuneration.
- 34 Retirement savings and superannuation provisions are to be taken into account in the remuneration determination and are not part of the conditions of appointment set by the relevant agency. The mechanism for the payment of superannuation is the responsibility of the administering department.

⁷ Section 12(3) Policing Act 2008

Administrative arrangements in regard to leave, codes of conduct relevant to the roles, conflict of interest declarations

- 35 Performance management processes may be provided by the specific statute for the statutory officer's role or otherwise incorporated into the terms and conditions of appointment. The outcome of these processes will not impact upon remuneration determined by the Authority because performance is not one of the criteria the Authority must take into account when determining remuneration.
- 36 Variation to terms and conditions may only be made through a written variation in accordance with applicable legislative provisions and agreed between the appointing or administering entity and the statutory officers. Administrative and terms and conditions of appointment changes that may impact upon remuneration must be communicated to the Authority via info@remauthority.govt.nz to ensure the Authority has the earliest possible opportunity to consider what impact such changes may have on the remuneration it is responsible for determining.
- 37 In determining remuneration, the Authority takes the same approach set out in the *Cabinet Fees Framework*⁸ under the heading *Payments to public sector employees appointed to bodies covered by the Framework* (paragraph 74) that statutory officers should not receive income for undertaking other roles in the public sector except when the other role is undertaken in their own time. Where there is agreement with the Minister concerned that a statutory officer can accept another appointment, a decision must be made on whether the officer will undertake the involvement in their own time (by taking leave or leave without pay) or in the organisation's time. When this occurs, the Authority must be notified by the appointing or monitoring department.

Determinations of Authority to prevail over contracts of service in case of conflict

- 38 Section 31 of the Act provides that every determination of the Authority shall prevail over any contract of service to the extent that there is any conflict between the determination and the contract (terms and conditions of appointment).

A list of the statutory officers whose remuneration is to be determined by the Remuneration Authority can be found on the Authority's website at the following:

<https://www.remauthority.govt.nz/independent-officers-and-boards/specified-officers-and-boards/>

⁸ Paragraph 74 Cabinet Office Circular CO (22) 2 - Revised Fees Framework for members appointed to bodies in which the Crown has an interest