LOCAL GOVERNMENT
NEW ZEALAND
TE PŪTAHI MATAKŌKIRI

10 September 1999

AM00-02

-MEMORANDUM-

TO: All Mayors/Chairs
CC: All Chief Executives

FROM: Louise Rosson, President

SUBJECT: **Chief Executive Contracts**

Your chief executives have recently received a letter from the Office of the Auditor General (dated 7 September) and a legal opinion from the Solicitor General, to the effect that the practice many councils have used of re-negotiating contracts of employment with their chief executives, after performance reviews and without re-advertising, is illegal. However, this advice from the Auditor General has, from now, redefined what has been the practice since 1989.

This opinion is of great concern to *Local Government New Zealand.* In our view it fails to recognise the differences between the situation of local government executives and those in the state sector. If left unchanged, it will have a number of negative consequences.

The National Council has today decided that *Local Government New Zealand* will take a leadership role in seeking to have the law amended to confirm the past and current practices of many councils when employing chief executives. We will be working closely with SOLGM on this matter.

To this effect I have immediately commissioned our legal advisers to draft the appropriate amendments to the Local Government Act and other necessary statutes and will be forwarding this, and *Local Government New Zealand's* views, to the Minister of Local Government with a request that he progress this legislative change with urgency.

PO Box 12 14, Wellington
New Zealand
Phone: 64-A-470 0000
Fax: 64-A-470 000 1
Email: info@localgovtnz.co nz
www.lgnz.co.nz

s:\mr\ce contracts.doc

40148

I *attach* for your information a number of papers:

1. Advice from our solicitors on the Office of the Auditor General's letter.

2. The resolutions of the National Council empowering *Local Government New Zealand* to pursue the issue with urgency.

3. A background paper outlining the issues prepared by *Local Government New Zealand* for the presidential team.

If you have any further queries please don't hesitate to contact me or the Vice Presidents. This issue is important – please be assured we are giving it our full attention.

Louise Rosson
President
Local Government New Zealand

SIMPSON GRIERSON
LAW

9 September 1999

Partner Reference
J M T Salter
e-mail jms@sglaw.co.nz

The Chief Executive
Local Government New Zealand
PO Box 1214
WELLINGTON

9/9

For: Carol Sugley

Reappointment of Chief Executives

We refer to the Solicitor-General's opinion dated 3 September 1999 and the letter dated 7 September 1999 by which the Office of the Auditor-General circulated the opinion to all local authorities.

We set out below our response to these developments.

1. The Solicitor-General's opinion does not definitively determine the legal issue. That could only be achieved by a judgment of a Court or by some statutory provision.

2. There continue to be competing legal opinions on the issue.

3. We continue to hold by our opinion, that the matter is not at all as clear as the Solicitor-General's opinion suggests.

4. The Solicitor-General's opinion relies heavily on the perceived statutory intention of sections 119E, 119H and 1191 of the Local Government Act 1974. It does not contain a great deal of reasoning or authority on the words themselves, and in particular on what constitutes a "vacancy" for the purposes of section 1191, or the significance of section 119J.

5. The reliance on the intention rather than the wording, gives rise to the unusual conclusion that section 1191 does not apply to a reappointment for a new two year term after an initial three year term, but it does apply to a new three year term after an initial three years.

BARRISTERS & SOLICITORS
Unisys House, 44-52 The Terrace, P O Box 2402, Wellington, New Zealand. Telephone 0-4-499 4599, Fax 0-4-472 6986. DX SX11174
Auckland: Simpson Grierson Building, 92-96 Albert St, Private Bag 92518, Wellesley St, Auckland, New Zealand. Telephone 0-9-358 2222, Fax 0-9-307 0331. DX CX10092
Website http://www.simpsongrierson.com

SIMPSON GRIERSON
LAW

6. The Assistant Auditor-General's statement in his letter of 7 September 1999 that *"it would appear that existing contracts entered without public notification are illegal"* is unhelpful and unwarranted.

7. The Solicitor-General's opinion does not deal at all with the consequences of non-notification. As far as we are aware, the Auditor-General has no specific legal advice on the issue.

8. Even if the Solicitor-General's opinion on the necessity of notification is correct, which we do not concede, it does not follow that contracts that have been renewed inside or beyond an initial five years without notification are illegal or invalid.

9. This is because there is a complex body of administrative law relating to the consequences of breaches of statutory provisions. Common law contract principles and the discretionary nature of relief in judicial review proceedings add to the uncertainties.

10. Our very preliminary view on the issue is that existing contracts are unlikely to be invalid and unenforceable merely because they have been renewed without notification of a vacancy. It is also our preliminary view that the reference in the Auditor-General's letter to the Illegal Contracts Act 1970 is misleading.

11. In all the circumstances, we recommend that you distribute advice to your members to balance the views distributed by the Office of the Auditor-General. We also recommend that you urge members not to act precipitately in response to the information they have received.

12. Please let us know if you would like us to give further consideration to the issues raised.

Yours faithfully
SIMPSON GRIERSON

J M T Salter

cc: David Smith
New Zealand Society of Local Government Managers

10 September 1999

LOCAL GOVERNMENT
NEW ZEALAND
TE PŪTAHI MATAKŌKIRI

-MEMORANDUM-

TO: National Council

FROM: Mike Reid

SUBJECT: **CE Contracts**

To assist our discussions on the issue of Chief Executive contracts we have prepared the following recommendations for the Council's considerations.

That the National Council:

(i) NOTE the Opinion of the Solicitor General date 3 September to the effect that the maximum term of employment of chief executives and senior executive officers employed by a local authority is five years.

(ii) NOTE that since 1990 the practice, as part of their performance review processes, of the majority of councils has been to re-negotiate contracts with their chief executive beyond the five-year maximum without re-advertising.

(iii) AGREE that the Minister of Local Government be requested to amend, with urgency, the appropriate statutes to allow councils to renew chief executive contracts without re-advertising on completion of satisfactory five years service.

(iv) AGREE that the Chief Executive provide the Minister of Local Government with a draft of the legislative changes required to achieve the amendments detailed in recommendation (iii).

(v) AGREE that the presidential team be authorised to advance this issue in the best interests of the sector.

Mike Reid
Strategy Leader
Governance
Local Government New Zealand

PO Box 1214, Wellington
New Zealand
Phone: 64-4-470 0000
Fax: 64-4-470 0001
Email: info@localgovtnz.co.nz
www.lgnz.co.nz

s:\mr\cecontract.doc

9 September 1999

AM1102

- MEMORANDUM -

TO: Louise Rosson
Gordon Blake
Phil Warren
Carol S tigley

FROM: Mike Reid

SUBJECT: **Chief Executive's Contracts**

Background

An issue has recently arisen regarding the legality of the practice whereby Chief Executives have had their contracts with councils "re-negotiated" after the expiration of the five-year term, without advertising.

A recent legal opinion provided to the Office of the Auditor General has taken the view that "the Local Government Act does not permit the reappointment of a Chief Executive without public notification". The implications of this opinion, if it were to become definitive with regard to the issue, would be widespread.

- The practice of many councils which have renewed the employment contracts of their Chief Executives without re-advertising the positions would be unlawful.

- The ability to attract and retain an experienced and qualified Chief Executive service within the sector would be diminished, as many would seek more secure employment in other sectors.

While ostensibly the Audit Opinion would simply bring local government Chief Executives into line with the practice employed in central government, there are a number of important differences between the relationships at the local level, between Mayors/Chairs and Chief Executives, and the national level, between Ministers and their CEs.

Differences Between Local and Central Government

Amongst these differences are:

Role of the State Service Commission
At the central government level the relationship between Minister and CE is governed by well established groundrules, including procedures and precedents, which are overseen by a neutral body, the State Service Commission. At the local level there is no equivalent "protection" for Chief Executives, who are required to establish relationships with incoming councils and politicians without the help of any third party with established authority. This exposes CEs' at the local government level to a greater level of uncertainty and "risk" which might be translated into a demand for greater remuneration, or otherwise the ability to negotiate long term contracts.

At the central government level there is a "pool" of chief executives – the chief executive service – from which many appointments are made, and it is not uncommon for individuals to move across departments or ministries. That option is not available at the local government level, where moving between councils is basically a zero based exercise.

What Parliament Intended?
One question to be answered is whether the difference in the legislation governing local government and central government Chief Executives is sufficient to justify the view that Parliament intended that the accountability regime for local and central government Chief Executives be different. If the Government in 1989 had intended that there be compulsory contestability of Chief Executive positions it could have said so explicitly, which it didn't. In other words councils that wish to renew a contract of employment with their Chief Executives without advertising the vacancy, are acting lawfully.

Where to Now?

The uncertainty regarding the law is posing a number of problems for those councils and Chief Executives about to undertake, or currently within, contract renewal negotiations. The Auditor General has sought advice from the Crown Law Office which has just been received and has taken the view that current practice is illegal.

While this resolves the uncertainty it creates a number of other problems:

1. the likelihood that CEs will demand greater salaries to deal with the uncertainty of their employment,
2. the possible loss of experience as some existing CEs decide to leave the local government sector,
3. increased costs associated with re-advertising every 5 years
4. greater instability as council time is distracted more often than currently on matters of CE employment.

The letter from the Office of the Auditor general which is being sent to local authorities today, 9 September, will have the effect of raising concerns about the legality of existing contracts and increasing uncertainty about the future contracts, especially where a CE has finished their current term.

Jonathan Salter is preparing a brief memo providing a complementary view to that sent by the OAG to Councils which may reduce the level of anxiety. It is proposed that this be an attachment to the President's letter stating what *Local Government New Zealand* is intending to do. Instructions have also been given to Simpson Grierson to draft the changes to the relevant statutes to "legalise" the previous practice, and this should be done quite quickly.

Mike Reid
Strategy Leader
Governance
Local Government New Zealand