



PSA Submission

Better protections for contractors
Discussion document for public feedback

February 2020

About the PSA

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 75,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

The PSA champions group which highlights the issues of contractors and labour hire workers in the public sector as well as members who experience contracting and labour hire in the public sector have contributed significantly to this submission. An extract of their contribution is attached in the Annex.

The PSA is an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU) and supports the submission of the CTU on the consultation document.

Introduction

The PSA welcomes the commitment of the present Government to taking action to ensure that organisations and businesses treat contractors fairly. We welcome the opportunity to share our views and experiences on the different options presented by MBIE for strengthening rights and protections for vulnerable contractors, namely:

- Deter misclassification of employees as contractors
- Make it easier for workers to access a determination of their employment status
- Change who is an employee under New Zealand law
- Enhance protections for contractors without making them employees.

The PSA strongly shares the objectives underlying the intention of strengthening rights and protections for vulnerable contractors:

- Ensure all employees receive their statutory minimum rights and entitlements
- Reduce the imbalance of bargaining power between firms and vulnerable contractors

The PSA supports an inclusive economy. In order to achieve this, competition needs to be limited through regulation to the advantage of the disadvantaged, marginalised and vulnerable. The PSA supports and encourages greater cooperation for an inclusive society and economy.

The need for protection for all workers in public and community services

In public and community services an increasing number of workers are denied their basic rights at work. That's because they've been hired as **self-employed contractors** or are **employed by a labour hire company** (also referred to as temp agency). The law currently differentiates between contractors and employees. If a person is employed by a labour hire company and working in a public and community services organisation, the worker is in a triangular employment relationship because he or she is not directly employed by the public and community services organisation.

Contractors do not have the right to engage in collective bargaining for instance; they don't have access to annual leave, sick leave or KiwiSaver contributions etc. Employees of labour hire companies who work in a public or community organisation are denied access to the collective agreement that workers who are directly employed by the organisation enjoy. They are employed on less favourable terms and conditions. This can encourage public and community organisations to contract a labour hire company for increased flexibility and cost savings. The same is true for self-employed workers or dependent contractors.

They (as a self-employed or labour hire worker) can have their contract cancelled with little or no notice (unlike directly employed workers) which is why these workers find it harder to ask for better conditions. They have limited -if at all- access to unions and collective bargaining.

These contractors and labour hire workers tend to do the same work as (directly) employed workers. Frequently, they work alongside each other. Dependent contracting is happening to care and support workers, cleaners, security guards, couriers, drivers, IT workers and many others. Labour hire workers are also prevalent in administrative and other office related work in the public and community services sector.

The PSA is highly concerned about the **privatisation of employment in the public and community services** because the responsibilities of the employer are pushed onto the individual worker or passed on to a labour hire company. These responsibilities include decent terms and conditions of work, education and training and ensuring inclusive workplaces. The privatisation of employment contributes to an increasingly polarised or tiered workforce characterised by an equality gap especially in relation to valuing people's work, their pay and skills development. This has detrimental effects on the spirit of service, the work culture and ultimately on the delivery of services and the flourishing of communities.

The PSA's position

The PSA believes that the **protection of contractors needs to go hand in hand with the protection of labour hire workers**. In order to stop a race to the bottom, minimum standards must apply to all workers.

We strongly support the ongoing work on the **Fair Pay Agreements** which would set minimum standards for all workers in an industry or occupation. We also strongly believe that coherent and comprehensive procurement is crucial to ensuring decent work for all. **Procurement** can be a vehicle to ensure certain social, environmental and labour standards must be considered and adhered to when tendering for and winning a contract. Other related work of the government such as the review on Temporary Migrant Worker Exploitation is relevant and necessary to implement the Government's Employment Strategy (2019) 'to support a productive, sustainable and inclusive economy that raises the wellbeing of all New Zealanders'. The protection of workers other than the directly employed is not a nice-to-have but essential to ensure New Zealand can -in a sustainable fashion-

- build a skilled workforce
- support industries and regions to thrive
- support workplaces to modernise
- support workers and businesses to be resilient and adaptable in the face of the changing nature of work

We particularly support

1. The development of **mechanisms and procedures to enforce workers are properly classified**. By doing so much of the contracting and labour hire work in the public and community services would be converted to direct employment.
2. **The increase of bargaining power of dependent contractors and labour hire workers** to reduce the power related imbalance of the work relationship. Through this collective mechanism workers have a more influential voice to improve their terms and conditions as a group of workers. The bargaining should be undertaken by a union.

The PSA **disagrees with the option to create a new category** of workers with some employment rights and protections. This is extremely hard to enforce and monitor specifically in the NZ context.

The PSA members' experience in public and community services

The PSA champions group tasked with highlighting the issues of contractors and labour hire workers and advocating for improvement in the public sector has contributed significantly to this submission. Additional members who experience or have experienced contracting and labour hire in the public sector have also contributed to this submission.

Please see our Annex for detailed views, experiences, issues and ideas on how to improve the terms and conditions of contractors and labour hire in the public sector.

Annex

We have asked our members for their view, experiences and ideas. We share them below.

What do you experience in your sector and in your workplace?

- Contracting was used to abuse CEAs it wasn't sustainable
- Contractors seem to lack a sense of belonging
- Got jobs that no one else wanted, worked when no one else wanted to work
- Contracting can be seen as a trial period.
- Feel like a 2nd class worker. Not valued, not suitable for mature people
- Jealousy of contractors pay rate, but happy not to have to put up with the "worst' clients".
- We have casual bureau agencies used for clinical staff as well as casual staff for security in DHBs.
- Being a contractor or labour hire worker undermines your sense of value as a worker
- The dominance of contractors in certain areas of work such as IT makes it hard to find the critical mass to initiate bargaining. Enable contractors to participate in bargaining.
- There are issues around intellectual property rights for contractors and the public sector employer. If you are genuinely self-employed shouldn't you own the code?
- Undermines the collective agreement and other issues in terms of pay progression, working time
- Casual pool in DHBs has been used in the past. To avoid the casual pool, labour hire and contractors are used.
- To prevent them to gain permanent direct employment, restraint clauses are included in the labour hire contracts to disable workers to take up work with the organisation they are actually working for.
- On the flipside, public sector employers are prevented from taking on labour hire workers permanently through penalty clauses with labour hire companies. Restraint and penalty clauses contribute to guarding the business of labour hire.
- They are treated as inexperienced because not employed by the organisation. Therefore, it is much harder for labour hire workers to find permanent direct employment.
- People don't know each other well enough- all impacts on the culture at work

Are more contractors engaged then five/ten years ago?

- Yes: influx of new graduates
- Now they are called Franchisees.: sort of “controlled” contractors
- I hope not. Couldn’t get a mortgage, but have heard of 3month+3month+3month contracts still existing
- Yes. But we have to “wear so many hats” that many go bust (GST, insurance, H & S, PPE gear, tax, admin, legal, etc)
- Some job descriptions still sound like contractors, e.g. Home Support Workers in community public services (CPS) (provide own vehicle and roster phone, do own admin, checking payroll constantly, no rostered rest breaks...)
- Definitely more contractors than we saw 5 years ago in DHBs.
- The cap on public service employees means that at local councils the number of contractors and labour hire workers has increased.

What type of work do they do?

- Specialists/ one-off projects. Usually end up with permanent position
- Whatever they do or don’t want: more variety of jobs, mix-and -match
- What the big companies won’t do: high risk, “bad” clients, weekend, Public holidays
- In CPS they often do weekends, public holidays, 7pm-7am times, wealthy clients, high-needs clients.
- In DHBs they are often engaged in administration, security, watches, clinical health care professionals.
- I have also heard of incidences where we have used such temp agencies as Madison to provide administration cover.

If more contractors come into the public sector what would it mean for you and your colleagues?

Public services

- Risk of untrained workers not delivering to the agreed standards
- No access to worker, no offer of training possible and thus no assessment of their capabilities. This is because they fall out of employee group. Risk to high quality public services.
- Increased talent utilisation. Full coverage
- Roll-over of contracts; often contracts are slightly tweaked to justify another contract

Workplace

- Workers are ostracised and are socially stigmatised
- It is disruptive to teams
- The polarisation of the workforce could increase; there are already first- and second-class workers
- Lots of training required by contractors which takes up other employees' time. Pay transparency and team culture deteriorating.
- Jealousy, undermining the regular employees
- Temps would create "fires" while settling in, but promise of permanent position is good
- Competition: contractors wouldn't have any training, not up to date with qualifications
- Regular workers wouldn't be happy. There would still be plenty of work. Bosses should pay everyone a better rate
- Instant dismissal of contractors possible jeopardises teams, service delivery and can lead to disruptive all of system functioning
- Inconsistencies and a more unsafe environment
- Bad workplace culture can lead to inability to recruit someone on an employment basis and contractors are used to fill the gap- this does not address the underlying issue of detrimental workplace culture which can have serious impacts on public services; contracting is used to cover the issue and postpone its resolve
- There is a reliance on a temping pool, yet they do the same work. Using different types of workers creates a tiered structure
- Increasing number of contractors (not necessarily allowed to do certain tasks, e.g first aid person, training on the job required) means increasing responsibilities of employees which leaves less time to fulfil their actual roles

Public Sector

- Contractors are not bound by the spirit of service or local code of conduct which means there are different expectations and related outcomes (contractors have no skin in the game)
- To ensure continuity of service and quality service delivery, people who were trained (they are these days often contractors) should continue (and on an employment basis)- would that not be more efficient?
- An increase in contracting and can lead to hollowing out of institutional knowledge in the public sector
- Government agencies should be exemplars
- H&S risk, Mental stress
- Consistent quality of care is at risk
- Contractors are often used to avoid negotiations and collective bargaining
- How can we ensure accountability of employer?
- How to we adequately distinguish different forms of work?
- It will be increasingly difficult to keep information confidential and ensure employees' privacy

Communities

- Less bankruptcy
- More employed, less poverty
- 1-stop shop value to customers
- Stress on those who can't physically do the regular work
- Stability of care, expertise shared to all clients
- Dependent contracting is not in line with a well-being budget as it is not sustainable and creates uncertainties which create an insecure social life, contribute to mental health issues, and potential financial bottlenecks

If they enjoyed minimal rights and were able to bargain collectively, what would it mean for you and your colleagues?

Public Services

- Justice
- Public services would have to pay more than "apple juice" so that contractors could live the "champagne lifestyle" of regular workers.
- Equality
- Keeping existing clients, continuity.

Workplace

- The test for status would need to be very simple and principle based
- Pay Transparency. Benefit to all workers
- Strength of the workers to draw respect from bosses
- Less stress, good relationships
- Solidarity of the Unions, MECCAs. Better productivity from supplying choice and less exploitation
- More across the board fairness of jobs, more well-trained professionals, less safety risks (adequate training to the standard of the DHB can be provided)

Public Sector

- Less training required for newcomers
- Business support
- Possible permanent positions for all workers would improve the businesses
- One general CEA for all. Less need for HR management, less official training as contractors share their expertise
- The government should be an exemplar employer leading the way
- In order to measure outcomes of contracting not only financial measures should be applied; instead a wider well-being framework should be applied (including a perspective of the worker rather than an organisational/business perspective)

Communities

- General wealth improvement, less defaults on mortgages
- Less bosses and flatter hierarchies, as contractors show regulars how to manage themselves
- Stability, respect, shared strength, increased self-esteem
- Mature working keeping their health, less accidents
- Less mental health and accident recovery costs. Fairness. A strong economy. A happy workforce. A happy country.

When discussing the different options proposed by MBIE, members commented as follows

1. The development of mechanisms and procedures to enforce workers are properly classified. By doing so much of the contracting and labour hire work in the public and community services would be converted to direct employment.

- Absolutely! There is currently abuse of CEAs, benefits, Guaranteed Hours; Seem to be OK if done through agency.
- Yes- stress of daily terror of paying the bills.
- Might suit starters & young workers.
- Yes. Businesses will always think of the \$\$ before people. 100%, if Government involved.
- Employee education is key
- Transparency around the agreement
- Share information about all workers so that unions get access to support workers
- Active choice form could apply to contractors too.

2. The increase of bargaining power of dependent contractors and labour hire workers to reduce the power related imbalance of the work relationship. Through this collective mechanism workers have a more influential voice to improve their terms and conditions as a group of workers.

- 100% Yes! Agencies are secretive. Unsuspecting starting contractors are vulnerable.
- It suits the individual, it's not a constant compromise.
- Yes. How does an individual know or learn of a possible collective agreement?
- Yes, we don't know the suitable rate of pay.
- Yes. It is a human right to be collective.
- There need to be strong protection for workers asking for determination of status throughout the process, but how do you make the distinction between independent and dependant contracts.
- Information of contractors and labour hire working in an organisation should be provided to the union to organise and support them.

3. The PSA disagrees with the option to create a new category of workers with some employment rights and protections. This is extremely hard to enforce and monitor specifically in the NZ context.

- No. Difference is distinguishable: Permanent / Exit choices.
- No- “self-employed” is a clear definition.
- Could be useful but would require clear protection.
- No. The tax man would be the only one to benefit.
- No. The most vulnerable would be more so, workers are people, treat all people well.
- No parallel structure but one collective from which terms and conditions can apply to contractors
- FPA (or common terms and conditions) for the sector and CA in the enterprise regardless of work status.
- Some basics/ essential terms and conditions should be part of minimum standards for all.

Thank you for considering our submission.

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