PSA Submission on the Fair Pay Agreements Bill

to the Education and Workforce Select Committee

May 2022

PSA
For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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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 81,000 members. We are a democratic and bicultural organisation representing people working in the Public Service: including for departments, Crown agents and other crown entities including DHBs; and state-owned enterprises; local authorities; tertiary education institutions; and non-governmental organisations working in the health, social services and community sectors.

For over 109 years, people have joined 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. Our purpose as a union is to build organisation to influence the political, economic, social and industrial environment in the interests of PSA members – creating a better working life for our members.

We are committed to advancing the Tiriti o Waitangi of partnership, protection and participation through our work. Te Rūnanga o Ngā Toa Āwhina is the Māori arm of the PSA membership. The PSA is affiliated to Te Kauae Kaimahi the New Zealand Council of Trade Unions, Public Services International and UniGlobal.

This submission

This submission is in three sections. Section one sets out the PSA's overall view of Fair Pay Agreements; section two provides the home and community support industry as an example to illustrate the need for Fair Pay Agreements; and section three provides the detail and rational for changes we recommend to improve the Bill.

While this submission represents the views of the PSA as a union, many PSA members and groups are also submitting in support of this bill. Te Rūnanga o Ngā Toa Āwhina, the Māori structure of the PSA, has submitted on Bill and this is a partner to that submission.

The PSA supports and endorses the CTU's submission on the Bill and the submissions of other CTU affiliated unions.

Summary of PSA recommendations

We warmly welcome and support the Bill. We recommend the following changes to ensure the Bill delivers on its purpose. Full details and rationale for of each of these recommendations is provided in section three of this submission:

1. **Amend clause 3 to include a fuller description of the purpose of Fair Pay Agreements** including the upliftment of workers. We endorse the CTU's proposal about this. It is vital that the Bill is interpreted through the lens of improving worker rights.
2. **That the Bill is changed so that the following functions do not sit with MBIE**: Cl 28-34 – initiation; cl 104, 151, 152 - coverage overlap; cl 148,149 - verification of ratification; cl 156, 157, 158 - validation, issuing FPA notice. It is important that cl 159 allows chief executive of MBIE to make 'editorial changes' to a validated agreement only when the meaning is unclear and with the consent of the bargaining sides. Extreme care should be taken to amending such an important document after ratification has occurred.
3. **That Bill is amended where necessary to ensure that personal information of workers who are members of a union bargaining party must not be collected and disclosed** under the provisions of the proposed Act.
4. **That all of the timeframes provided for in the Bill are reviewed** and where necessary more closely specified to ensure they are tight, not longer than needed and do not have the effect of inhibiting or protracting the process of forming FPAs; and that employers and unions have equivalent timeframes.
5. **Changing the Bill to ensure it does not incentivise a party to engage in "surface bargaining".** We make a number of detailed recommendations in section three of this submission.

6. **That mandatory to discuss topics (cl 115) should be given same status as mandatory to agree topics (cl 114).** This could be achieved by bringing them together in a single clause.

7. **Fixing is vital to the success of this legislation. We strongly recommend the removal of all unnecessary and unhelpful fetters to accessing fixing, to fixing itself and to finalising Fair Pay Agreements.**

8. **That the work underway on protections for all workers, including contractors is given priority**.

Section one: Overall PSA response to the Bill

The PSA warmly welcomes and strongly supports the institution of a framework for industry-level working and employment conditions through Fair Pay Agreements. It is time to move on from New Zealand's three decades long experiment with deregulation' which eroded workers conditions, protections and safety and prioritised "flexibility" at the expense of efficient coordination at the industry level and worker wellbeing. By using Fair Pay Agreements to coordinate worker conditions and minimums set at industry level this legislation is an important progressive step toward fair and decent employment which will help create a more modern and democratic future of work.

The absence of regulatory measures to enable negotiation of industry-level standards by genuinely independent and democratic collective worker representatives from the design of New Zealand's labour regulation has resulted in negative outcomes for workers and their communities, for business and industries and for the country.

This has included discriminatory labour market and wellbeing outcomes for Māori and Pacific workers and for workers from smaller ethnic groups that also experience racism. Others with less power in the workplace and labour market including women, younger people, migrants and people with disabilities have all been disadvantaged by the race to the bottom this has created. New Zealand cannot, as a society or as an economy, afford the ongoing negative social and economic costs of this.

Enabling the free, independent and democratic negotiation of industry-level standards of working and employment conditions through Fair Pay Agreements will help address the conditions that contribute to inequality. Re-inserting fairness and decency to the labour market is a vital step to halt the descent into poverty and desperation of working people. It will also be an important means of

ensuring a trained workforce and will increase productivity both within industries and across the economy.

Fair Pay Agreements will bring significantly increased transparency to working and employment conditions within and across industries. This will empower workers by making visible whether or not their pay and conditions are fair compared with others. It will empower employers who will be able to be confident that they are operating within industry norms: It will give them confidence that there is a level playing field for all businesses in their industry. Importantly it will ensure that competition across an industry will no longer be at the expense of workers.

It is important that this change is made at this time. Along with the rest of the planet, Aotearoa faces the urgent challenge of climate change. Along with the constructive work already underway by the social partners on industry transformation and vocational education, Fair Pay Agreements will support the industry level coordination and cooperation needed to make necessary changes to reduce emissions, adapt to the changing environment and create a just transition for workers.

Section two: The home support industry – an example of the benefits of industry-level coordination and conditions that FPAs will provide

Every year, the home support industry provides a range of services to over 100, 000 people[1] who need support to live at home. Services include personal care, household management, nursing treatment, and complex care for people with serious needs. It is predicted that the number of people requiring these services will increase rapidly over the next decade as the population ages.

DHBs and the ACC and the Ministry of Health fund community-based agencies and private companies that employ support workers, caregivers and health care professionals to provide these services and the coordinators and administrators needed to support this. Home support for those living with disability and injury related needs can also be provided by family carers.

This industry faces many challenges. For workers these include:

[1] P3, EY, Recognising the Contribution of the Home and Community Support Sector to New Zealand, November 2019 https://hcha.org.nz/assets/EY-Report/2019-11-27-Recognising-the-contribution-of-the-Home-and-Community-HCHA-FINAL.pdf

- **Low levels of pay and poor terms and conditions**. In the 2019 Healthcare Workforce Survey only 44% of home support workers agreed that their pay was fair[2].
- **Insecure hours and unsafe rostering practices**. In the 2019 survey, only half of home support workers were satisfied with their hours of work and 61.5% said they wanted to work more hours if they were available[3].
- **Job insecurity**. In the 2019 Survey, less than half of home support workers were satisfied with their level of job security[4].
- **Low levels of employer support**. Home support workers have limited interaction with and visibility of their employer. In the 2019 survey, only 44% of home support workers were satisfied with the support they received from their team and employer[5].
- **Poor health and safety at work.** Homecare workers experience a high rate of injury from lifting and handling. They also face disproportionate exposure to workplace violence and verbal and physical harassment and exposure to illegal drug use while working in clients' homes. In the 2019 survey, only 6 in 10 home support workers said that they feel safe at work[6].
- **Stress and burnout**. In the 2019 survey, of those home support workers intending to quit, 15% cited stress and burnout as the reason.
- **Low paid care and support workers currently subsidise their employers and the health system** by having to pay for costs related to their work travel. A PSA/E Tu survey of home support workers in April 2022 shows 96.4% of support workers are out of pocket by some amount every week; 47% of respondents were paying $51-100 per week above the amount they were compensated for their travel and 21% were paying $101-250 above what they were compensated for.

For employers the challenges include:

[2] P 26, Ravenswood et al, AUT, 2021, The New Zealand Healthcare Workforce Survey 2019

[3] P28, Ravenswood et al, ibid.

[4] P 25, Ravenswood et al, ibid.

[5] P 31, Ravenswood et al, ibid.

[6] P41, Ravenswood et al, ibid.

- **Difficulty recruiting adequate numbers of staff**. There are tens of thousands of support workers employed around New Zealand and high demand for skilled and experienced staff. At time of writing there were over 2600[7] unfilled support worker vacancies around the country and reports of staff shortages and negative impacts on services. This shortage will be exacerbated as the population ages and grows and demand for services increases.

- **Difficulty retaining and growing a workforce with the right skills.** As digital technology transforms health care, home support workers are increasingly delivering care that is clinically complex and supports the management of chronic diseases. The workforce requires increasingly sophisticated technical skills, alongside the strong relational skills it has historically provided[8].

- **Pressure on sustainability of business due to funding approaches and levels.** A 2019 report found that 20 HCCS providers exited the market between 2015 and 2019, leaving 55 providers operating around the country but with the majority in the major urban centres. There is significant variation in funding models between funders and between regions, which is unrelated to service need[9]. We understand that pressures on business viability are exacerbated by worker and skills shortages.

It may appear from the picture we have painted that home support is an industry in crisis. This is not a temporary crisis as the issues identified are ongoing. These many challenges are not only of concern to those of us receiving, or who have family members receiving home support services. The 2018 Government initiated Health and Disability System Review Report highlighted problems with fragmentation and lack of coordination of primary and community services including home support.

We know that a Fair Pay Agreement for home support would help. Over the past decade, the PSA has attracted a strong and growing membership amongst home support workers. Over this time, along with our sister unions NZNO and E Tu, we have built relationships with employers and employer bodies based on a common interest in increasing the quality of work and services in this industry.

[7] https://lifechangingcareers.org.nz/#https://lifechangingcareers.org.nz/

[8] P3, EY, ibid

[9] P12, EY, ibid

Through their union fees, low paid support workers have funded legal challenges to achieve equal pay rates, guaranteed hours of work and compensation for travel in between clients. The rates set through these cases are fast being overtaken by inflation and rising costs, but they can only be adjusted by legislation or presumably further legal action. This is inefficient and unjust. The absence of any industry level frameworks to negotiate shared standards, such as that which will be provided by Fair Pay Agreements, has made this work hard and it has taken considerable time and determination from all parties to make modest advances of our shared goals. For workers, there is much left to do.

Section 3: Recommendations to improve the Bill

We make the following recommendations to improve the Bill:

Clear articulation of the purpose of fair pay agreements needed in clause 3

Clause 3 provides that the purpose of the Bill is to "provide a framework for collective bargaining for fair pay agreements that specify industry-wide or occupation-wide minimum employment terms" but it does not describe the purpose for doing this. The purpose clause provides a useful aid to interpretation of the substantive clauses of the Bill. The policy statement better outlines the purpose of the Bill in addressing key labour market failures and we recommend that this is included in clause 3 to assist with this. It will be vital that these worker-focussed and upliftment goals are brought to bear when the Bill is being interpreted by the Courts. We endorse the Council of Trade Union's proposed new wording for the purpose in clause 3.

The role of MBIE and the Authority

In our view it is inappropriate for MBIE to have a quasi-judicial role in relation to fair pay agreements. There are a number of clauses in the Bill that have this effect and we recommend they be removed from the Bill. In particular we share the CTU's concern that cl148 – 149 currently provides for oversight by MBIE of union democratic processes. Clauses of this nature also include: cl 28 – 34 (initiation); cl 104, 151, 152 (coverage overlap); cl 156, 157 and 158 validation. We draw attention also to cl159 which allows the chief executive of MBIE to make "editorial changes" to a validated collective agreement. It is important that this is changed so that cl 159 allows the chief executive of MBIE to make "editorial changes" to a validated agreement only when the meaning is unclear and with the consent of the bargaining sides. Extreme care should be taken to amending such an important document after ratification has occurred.

Protection against undue intrusion on workers' privacy

We strongly recommend that Bill is amended where necessary to ensure that personal information of workers who are members of a union bargaining party must not be collected and disclosed under the provisions of the proposed Act.

The Act should protect against the unwarranted collection, storage and disclosure of employee details that are already available to unions due to their existing union membership. Any lawful purpose in collecting and disclosing personal information should be narrowly construed as being to involve un-unionised employees in the process of FPA creation. As union members are already in touch with their representative unions, there is no need to collect and disclose their personal information.

Threshold for accessing fixing too high

CL 218 provides that in cases on impasse, both bargaining sides must have exhausted all other reasonable alternatives for reaching agreement or, used 'best endeavours' to identify and use reasonable alternatives to agree the relevant terms. This threshold is too high and suggests that fixing is not available in situations where one bargaining side has not expended or explored all reasonable alternatives at their disposal and, a bargaining side may prevent access to fixing by engaging in 'surface bargaining'.

We have further concerns about the process for fixing provided for in the Bill and in particular that some of the timeframes, criteria and considerations provided for are too broad and subjective. This risks delaying outcomes, misunderstanding and pushing parties to the Authority for clarification which could also unnecessarily complicate the process. Specific examples of this which need to be addressed include:

- There is no fixed timeframe for the period of impasse and, for renewal or replacement- 2 ratification processes must have failed.
- Cl 218, authority may only fix non-mandatory [to discuss or agree] term if both bargaining sides agree.
- Cl 219, list or criteria that the Authority must consider are very broad, unclear and unsatisfactory [fertile ground for litigation]. **Only consideration(iii) relates to the upliftment of workers,** which is one of the key purposes of fair pay agreements.
- Of particular concern are mandatory considerations (*iv) that requires consideration of the 'likely impact of terms on covered employers'* and *(vii) that requires consideration of 'any other relevant considerations.'* The Authority and the court do not have expertise and arguably standing to determine and impose such evaluative criteria as a test.

- Consideration *(vii) 'any other relevant considerations'* allow the court and the Authority to enumerate any number of additional considerations risks opening the door to lengthy delays or vexatious litigation
- Cl 220 (a), the Authority *'may consider any likely impacts on New Zealand's economy or society.'* This condition is very broad and does not correspond with the Authority's established function and expertise.
- Cl 220 (b), there is a risk that fixing determinations are appealable on the grounds that the Authority incorrectly applied any of the considerations [**including the discretionary consideration at cl 220 (b)**]. If the Authority's fixing is not final, there is a real risk that this would frustrate the purpose of the Bill.
- Schedule 3 cl 12 (3)(b), judicial review and any challenges over fixing should not be able to cause a stay on the passing of an FPA if the Authority or court so orders. Such challenges should not be able to delay the passing of FPAs.
- Schedule 3 cl 13, actions taken by MBIE and the Authority to approve initiation, certify compliance, coverage, verify ratification(if not deleted from the Bill) or by MBIE to call for and deal with public submissions may be subject to judicial review which could be used to frustrate and delay the passing of FPAs.

To address these issues, we recommend that the Bill is changed in the following ways:

- Fixing of terms where parties are at a bargaining impasse should be accessible where the only the applicant side (not both bargaining sides) has made all reasonable efforts to reach agreement.
- Cl 218 be simplified with a clear time-period of impasse after which either party may seek fixing.
- Cl 219 (c) be amended to allow a party to seek any non-mandatory term to be fixed where the inclusion of that term is important for achieving the [upliftment] objectives of the legislation.
- Criteria should be re-written to focus on upliftment principles.
- Schedule 3 should place limits on the ability of persons to appeal or review aspects of fixing or FPA process that might delay the passage on an FPA- Any appeal, dispute or review should not hold up FPAs and to ensure there is never more than one avenue to challenge.

- Rework schedule 3 to ensure that challenges to actions taken by MBIE and the Authority [e.g., Compliance, coverage, and ratification assessments (if not deleted)] cannot delay passing of FPAs.
- Prevent ability of members of the public from delaying the passing of FPAs by ensuring there is only one rather than multiple challenge avenues about the way in which public submissions were considered.

Protracted timeframes

We are concerned that a number of the timeframes provided for in the Bill are not specific and that this may have the effect of protracting the process of forming FPAs. For example:

- CL 32: No timeframe for chief executive of MBIE to assess an application to initiate bargaining.
- Cl 33: No effective limit on timeframe for making public submissions or MBIE consideration of these submissions- *the date by which submissions must be in by must be at least 20 days* **after** *the date of invitation*-
- Cls 35 and 45: Bargaining sides cannot form until after 3 months following chief executives notification of approval to bargain.
- Cl 56: Chief executive to wait 3 months after notification of approval to initiate before disclosing to each bargaining party, the name of each other bargaining party.
- Cl 156: After all steps are validly completed, no timeframe for MBIE to validate an FPA by issuing notice and making the agreement enforceable.
- Cl 172(3): Employers have up to **60 working days** to notify new employees of FPA coverage applies or that FPA bargaining is underway.

We recommend:

- Reviewing all of the timeframes provided for in the Bill and ensuring they are shortened. They are currently much longer than needed and will cause delay. This review of timeframes should also ensure that employers and unions have equivalent timeframes.
- Putting time limits on MBIE processes around approval of bargaining and limit time for public submissions and consideration of submissions.
- Allowing bargaining sides to constitute as soon as possible without having to wait 3 months. Provide a limit on how long a bargaining side can take to form.

- There is no good reason for the chief executive of MBIE to delay disclosure of the names of bargaining parties. This should be removed.
- Provide a clear and rapid timeframe for validation at the end of the FPA process.
- Cl 172: Employers should notify new starts as soon as possible and no later than 15 working days [to be more consistent with other notification timeframes]. 60 days is unnecessary and too long.

Distinction between mandatory to agree and discuss topics

The Bill provides a different status for mandatory to agree, and mandatory to discuss topics. We recommend that mandatory to discuss topics (cl 115) should be given same status as mandatory to agree topics (cl 114). This could be achieved by bringing them together in a single clause.

Exclusion of contractors

Contractors remain outside of the scope of FPAs with the Bill penalising misclassification. (Cl 21). However, unfortunately the deliberate misclassification of employees as contractors in order to avoid employer obligations is widespread and systemic in the labour market and, we note that the Government has begun work to address this issue[10].

If this bill is passed with contractors excluded and without first addressing systemic misclassification then many vulnerable workers are likely to be improperly excluded from the protection of the FPA scheme while the contractor law reform is underway.

We recommend this work on protections for all workers, including contractors is given priority.

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[10] https://www.mbie.govt.nz/have-your-say/better-protections-for-contractors/