Employment Relations Amendment Bill

Submission to the Transport and Industrial Relations Select Committee by the Public Service Association: Te Pūkenga Here Tikanga Mahi

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

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25 July 2013

Introduction

1. The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 58,000 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.

2. As an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi, we strongly support their submission and each of the recommendations they have made. This submission does not reproduce the points made by the CTU but rather addresses the Bill from the particular perspective and experience of the PSA and its members.

3. This submission represents the view of the PSA as a whole. In preparing this submission we asked PSA members to contribute their views about the Bill and also about what their priorities would be for changes to employment legislation. You will find we use their words throughout this submission.

4. We make general comment on the aims of the Bill and then more specific comment on the individual changes proposed. We have divided this comment into three sections: one on the changes that will make collective bargaining less efficient and employment relations less effective; one on the changes that will decrease procedural fairness protections for individuals; and one on flexible working arrangements. A table of specific recommendations for changes to the Bill is attached as appendix 1.

5. PSA members have had a strong response to the Bill and many individuals, and groups of members, have also made personal submissions. These submissions will reflect their personal experiences of the impact of current and past legislation on their lives in and outside of work.

The PSA's view of the changes proposed - why the Bill will not achieve its aims of balance and flexibility

6. The Government has the opportunity to make changes to the employment relations framework that promote both employment and New Zealand's economic performance. The changes proposed in the Bill achieve neither of these aims. Our concern is that, instead, these changes will place those who are already disadvantaged at further disadvantage.

7. This bill largely deals with the provision in New Zealand's employment relations framework for collective bargaining, and procedural fairness protections at work for individuals. We do not support the proposals in the Bill that will make collective bargaining less efficient and employment relations less effective or those that will decrease procedural fairness protections. Neither of these outcomes are desirable for individuals and neither will strengthen New Zealand's economic performance.

8. The Bill also proposes extending the right to request flexible working arrangements. We support this. We make recommendations to strengthen these proposals as the changes as they stand are unlikely to achieve the change the government is seeking.

9. The Bill's explanatory notes says the Bill is aimed at "creating an employment relations framework that increases flexibility and choice, ensures a balance of fairness for employers and employees and reduced compliance costs"… and "reduces unnecessary regulation".

10. We ask the committee to note that OECD measures of workforce flexibility already place New Zealand among the four most flexible countries. While this may sound positive, this measure frames "flexibility" in terms of the level of employment protection provided by a country's employment relations framework – low employment protection equates to greater flexibility. In effect, New Zealanders already have some of the lowest levels of employment protection in the OECD.

11. We also ask the committee to note that economic analysis from the International Labour Organisation shows that high flexibility (and low protection) is not a determinant of higher GDP or employment rate[1].

12. The PSA's interest is in legislation that provides for a fair and effective employment relations framework, including arrangements for efficient collective bargaining. We are well placed to comment on the proposals in the Bill. We have, as we have noted above, over 58, 000 members and for over 100 years we have operated within the regulatory settings of the employment relations frameworks of the day. We have a deep understanding of people's experience of fairness at work and a very practical experience of collective bargaining under the Employment Relations Act, and its predecessors.

13. The PSA has no interest in protracted, inefficient bargaining or ineffective employment relations. We work with 539 employers. We bargain, arguably, more agreements than any other organisation in New Zealand and so we are well aware of the amount of time this takes and of the costs of compliance with the current regulatory regime.

[1] P20, 21, Employment protection and collective bargaining: beyond the deregulation agenda, Cazes et al, ILO, Employment Sector, Economic and Labour Market Analysis Department, Geneva, 2012.

14. The Bill and the explanatory notes do not provide a robust evidence base for the changes proposed. We are concerned that the Bill assumes that the balance of fairness is currently skewed towards employees but there is no evidence given to support this assertion. There is, rather, significant hard evidence to the contrary – as the CTU's submission notes, real wages are dropping, collective coverage is decreasing and working New Zealanders' share of productivity gains, and GDP, is decreasing. Pay and employment inequities persist.

15. The Government does not currently have the information it needs to make decisions about policy and legislative settings in this area. Information about collective bargaining is not gathered or reported in a systematic or comprehensive way. We have been concerned for some time at the lack of funding or capacity for this work at the Ministry of Business, Innovation and Employment (MBIE) and its predecessors. There is a statutory requirement to provide copies of collective agreements to the Ministry but we understand that little or no resource is dedicated to managing this process or making use of this information. No analysis or information is forthcoming.

16. The PSA calls on the Government to delay progress of this Bill and any further changes in the rules around collective bargaining until it has funded and put in place robust arrangements to enable the gathering and analysis of information regarding collective bargaining, so that a robust evidence base is available to inform legislative changes.

17. It is our experience that collective bargaining is more likely to be efficient and promote positive employment relations where all parties have the necessary skills, technical understanding and organisational support. Better measures to increase the effectiveness of New Zealand's employment relations framework could be achieved through increasing its investment in practical and tailored support for employers and unions in relation to collective bargaining.

18. MBIE's Mediation Services have the potential, through early intervention and support, to significantly reduce the time and money spent on bargaining. Practical, tailored information provided by the Ministry also has a large role to play. The now disestablished Partnership Resource Centre and Pay and Employment Equity units of the former Department of Labour provided direct practical assistance to employers and unions. We are concerned that the current restructuring of Mediation Services will reduce the effectiveness of the service through the loss of invaluable specialist knowledge of employment relations.

19. While the PSA's experience to date of facilitated bargaining has not been overwhelmingly positive, we believe that, if properly resourced and directed, it has the potential to be a useful and practical intervention in difficult bargaining.

20. The PSA calls on the Government to increase the effectiveness of New Zealand's employment relations framework and its contribution to the economy by increasing its investment in practical and tailored support services for employers and unions around collective bargaining and in particular through Mediation Services and facilitation.

21. Changes to the regulatory regime around collective bargaining should not be lightly made. Collective bargaining is important and impacts directly on the economy. Analysis of the robustness of economies following the global financial crisis has identified low levels of co-ordination or organisation of collective bargaining as something that has a negative impact on employment and on a country's overall

macroeconomic performance[i2]. Internationally, New Zealand already has a very low level of coordination or organisation of collective bargaining and the changes proposed will exacerbate this.

22. Collective bargaining arrangements are also one of the government's levers for achieving fairness for both employers and employees in terms and conditions of employment and access to employment opportunities.

23. For employers, collective bargaining offers opportunities for efficiencies in dealing with employment arrangements and an enhanced ability to deal with complex issues and change management. For example, the Auckland Transition Agency's report on the Auckland local government amalgamation transition identifies this as a "key foundation" of that change process[3].

24. From an employee's perspective, collective bargaining is also an opportunity to organise themselves to speak directly to their employer (rather than just their manager) about issues important to them. This is important because in modern, complex organisations, working arrangements are not determined by individuals. They are part of management and performance systems set by organisations to promote effectiveness and productivity. Collective representation gives employees an opportunity to be involved in decisions about these systems that impact significantly on their experience of work. There are clear links between high levels of employee involvement and high organisational performance and productivity[4]. As noted by the Independent Taskforce on Workplace Health and Safety, following the Pike River tragedy, worker involvement is also key to workplace health and safety[5].

[2] P20, Employment protection and collective bargaining: beyond the deregulation agenda, Cazes et al, ILO, Employment Sector, Economic and Labour Market Analysis Department, Geneva, 2012

[3] P281, Auckland Transition Agency, Auckland In Transition - Report of the Auckland Transition Agency, March 2011.

[4] P68 Eurofound (2013), *Work organisation and employee involvement in Europe*, Publications Office of the European Union, Luxembourg.

[5] Pp93 – 98, Taskforce on Workplace Health and Safety, report to the Minister of Labour, 30 April 2013.

Proposals that make collective agreement bargaining less efficient and employment relations less effective

25. We recommend that none of the proposals discussed in this section proceed. These proposals are inconsistent with the purpose of the Act, which is to promote collective bargaining. They are also inconsistent with the international conventions regarding collective bargaining to which New Zealand is a signatory. We ask the committee to note that the ILO has stated that New Zealand legislation must not merely allow collective bargaining but rather should promote and encourage collective bargaining. The ILO said that to achieve this:
    1) The collective bargaining mechanisms must be clear and easy to operate so that they do not restrict the right of representative unions to bargain.
    2) The provisions on the relationship between collective and individual employment contracts must reflect the overall principle that collective bargaining should be promoted.
    3) The provisions on good faith must reflect the overall principle that collective bargaining should be promoted.[6]

26. A one-page summary of New Zealand's international obligations regarding collective bargaining is attached as appendix 2.

Clause 8 – Repealing aspects of good faith bargaining

27. The PSA does not support repealing the requirement for a union and employer to keep bargaining about other matters even if they have reached a standstill or deadlock about a matter.

28. Our experience of collective bargaining is that it can be helpful to "park" an issue on which the parties have reached a deadlock and go on to other matters. The removal of the requirement to keep bargaining on other matters will undermine the ability of the parties to agree on a new collective agreement and give the employer more power to put 'take it or leave it' offers on the table without properly exploring issues that employees want their employer to consider.

Clause 9 – removing the duty to conclude bargaining

29. The PSA does not support removing the good faith obligation to conclude bargaining. This proposal will disproportionately affect the balance of fairness in bargaining. It will also move the focus from addressing the substantive issues under negotiation to litigating the bargaining process. This will result in increasingly protracted, costly bargaining and increased litigation of the bargaining process, both in the Employment Relations Authority (the Authority) and the Employment Court.

30. The removal of the duty to conclude could reduce wages and conditions as workers will be under increased pressure to accept an unfair offer in order to avoid the employer seeking a declaration that bargaining is over. Or perversely, given the particular circumstances, it could encourage employees to take industrial action earlier and for longer. They will do this to try and get an agreement before an employer seeks a declaration that bargaining is over. Either outcome is undesirable.

[6] Committee on Freedom of Association, 295th Report Case No. 1698, paragraph 255.

31. The PSA has recent experience of the serious and negative consequences of such a situation. In 2010, the PSA was in bargaining with the Ministry of Justice. The Ministry walked away from the table, saying that bargaining was concluded. The PSA and the Ministry had spent six days in bargaining and had further meetings with a mediator on four occasions. The PSA made extensive efforts to get the Ministry back to the table through both formal and informal mediation, phone calls, emails and meetings but they refused.

32. This case proceeded to the Employment Court and is now the leading case on the existing good faith duty to conclude a collective agreement.[7] The judgment in this case has a number of useful comments to make about the good faith duty to conclude and the general nature of collective bargaining.

33. Despite the fact that the employer walked away from the bargaining table, the judgment in this case notes that when compared with other negotiations for collective bargaining, these negotiations were not of "excessive or even unusual proportions."[8] The judgment found that the bargaining was of "unexceptional duration and intensity,"[9] yet in this case, the employer still tried to abandon the bargaining.

34. The judgment also as says that there must be "real and significant compromise on the part of each (party) to reinvigorate the bargaining and allow the settlement of a collective agreement for ratification,"[10] and "that is not unusual and indeed the stock standard way in which disputes are resolved as they invariably are."[11]

35. This is the reality of collective bargaining in the current environment, where disputes occasionally arise and are invariably resolved. The removal of the duty to conclude will encourage employers and unions not to resolve disputes and lengthy (and early) strikes and litigation are likely to ensue.

36. The impact of the Ministry's action in walking away from bargaining was felt beyond the immediate bargaining context and created negative consequences in the wider relationship between the employer and employees.

Clause 12 - the process for applications to conclude bargaining

The tests for determining whether bargaining is over

37. Clause 12 contains the proposed tests for the Authority to apply when determining whether bargaining is over. They are "whether the parties have attempted to resolve the difficulties in concluding a collective agreement by use of mediation and, if applicable, facilitation…." The PSA is concerned that the proposed tests are too weak and make it too easy for employers to walk away from bargaining.

[7] *The New Zealand Public Service Association Inc v Secretary for Justice* [2010]. NZEMPC 11, 25 Feb 2010)
[8] See para 14
[9] See para 65
[10] See para 68.
[11] Ibid.

38. We do not accept that merely attending mediation at some stage during the bargaining should be used as a factor to assess whether bargaining is over. This requirement will significantly reduce the use of mediation when parties are experiencing difficulties in collective bargaining.

39. The Mediation Service provides an excellent service in assisting parties in reaching new employment agreements. The PSA has used the Mediation Service on numerous occasions where bargaining is not progressing and we have found the process very useful.

40. The reference to facilitation "if applicable" is an indication that the tests the Authority will apply to determine whether bargaining is over are lower than the tests the Authority applies when determining whether to accept an application for facilitation. This is a weak test and would mean that the Authority would be able to declare bargaining over all too easily.

41. If the Government insists on removing the good faith duty to conclude, the tests must be strengthened. We consider that at a minimum, the Authority should have to consider whether the applicant party has complied with the duty of good faith in the Act before declaring that bargaining is over and if they have not, the Authority should not be able to make the declaration that bargaining is concluded.

42. In addition, the tests for facilitation should be reduced and facilitation should have been attempted before any declaration is given by the Authority that bargaining is concluded. The current tests for facilitation are too high and if the proposed removal of the good faith duty to conclude a collective agreement goes ahead, the Act will not promote collective bargaining.

The 60 day period

43. The PSA is opposed to the introduction of a 60 day period, following a declaration from the Authority that bargaining is over, during which parties cannot initiate bargaining. Our concern is that this will not function as a "grace period" as described by the explanatory note, but rather as a period during which the employer can incite employees to leave the union, reduce terms and conditions or contract out the workforce. This proposal is unnecessarily inflexible and will encourage behaviour that will not promote positive employment relations.

The retrospective element

44. In addition, we have grave concerns about the proposal in clause 2(2) that the removal of the duty to conclude would apply whether the bargaining began before or after the commencement of the Act. If passed, this would amount to a retrospective law which is arbitrary, unfair and which undermines the Rule of Law. This proposal has already unhelpfully complicated some of the current bargaining to which the PSA is a party.

Clause 10 - Equalisation of timeframes for initiation of bargaining

45. The PSA has seen no evidence of demand from employers for the timeframes for initiation of bargaining to be equalised. In fact, in our experience it is extremely rare for an employer to seek to initiate bargaining. This proposal will introduce opportunities for gamesmanship and litigation of process rather than substance. This will increase compliance costs for all parties.

Clause 11 – Opting out of multi-employer collective agreement bargaining

46. The PSA strongly opposes enabling employers to opt out of bargaining for multi-employer collective agreements (MECAs) for no reason.

47. The PSA is party to a number of occupationally based MECAs with District Health Boards (DHBs). PSA members working for DHBs are clerical workers, mental health nurses and allied health professionals such as occupational and physical therapists, psychologists and dieticians.

48. The DHB MECAs have been of great benefit both to employers and employees in the health sector. Before the MECAs were negotiated, the PSA was party to in excess of 70 collective agreements. Now there are 7. This has significantly reduced compliance costs for all parties and bought much needed coordination to health sector employment relations. The MECAs have also generated an impetus and a forum for greater co-operation in the wider sense, between DHBs and between unions and DHBs.

49. PSA members feel strongly about the benefits of the MECAs under which they are covered:

"It would be really devastating if they took away our staff's MECA as they work hard for a very small wage and by having the MECA in place they have something to work towards and strive for improvement." Trudy, Wairarapa.

"*I feel very strongly that our MECA in my place of work could be severely affected by this proposal and I am very much against losing the support of the MECA. I am extremely passionate about further education in my workplace as it is required as we are now statutorily recognised in New Zealand as a trade group and now need to participate in continuous personal development as a mandatory standard annually. In order to assist us with this situation we need the support of our unions and MECAs in order to push through our needs and to be heard when employers do not appear to be willing or interested to listen to our requests for assistance or support.*" Louise, Auckland.

"The MECA bargaining structure is pivotal to staff morale. A collective, fair and reasonable solution can be wrestled out when all parties are well represented and work to gain agreement and stability." Christine, Taranaki.

50. MECA bargaining is an efficient and effective way of co-ordinating bargaining within industries. It offers significant benefits to industries and employer groupings beyond the setting of terms and conditions of employment. It provides opportunities to deal with industry or sector wide issues such training and skill development, and health and safety. It also facilitates more seamless and efficient skill deployment and management of overall sector workforce capability.

Clauses 47 – 53 – notice requirements for strikes

51. These proposals introduce strict notice requirements for all strike action and significantly limit the right to strike. Again, the PSA has seen no evidence presented that current procedural requirements around strikes are an issue.

52. The Ministry of Business, Innovation and Employment's recently released annual report on work stoppages reports only 10 work stoppages in 2012 – 2013, an historical low. The two stoppages with the highest loss of working hours were high profile lockouts by employers, rather than strikes.

53. These requirements are unnecessarily detailed and will increase litigation over the legitimacy of strike action and also compliance costs. We support the CTU's submission that clauses 47 – 53 should be deleted. If they are not deleted then s86 of the Act should be further amended to confirm that strikes will not be declared unlawful on the basis of a technicality.

54. In addition, the PSA does not see the need or logic behind the prescriptive approach proposed to withdrawing a strike notice. Withdrawal of notice should be as easy as possible to ensure that strikes can be easily called off when the parties have resolved a dispute or are making progress in agreeing on a new collective.

55. Nobody takes the decision to take strike action lightly. It is a huge step for an individual to agree to walk away from their work, especially when they are strongly committed to the service they are delivering. At such times of heightened feeling in the workplace, attempts by employers to divert energy and resource into litigating technical aspects of strike notices will leave people even more dissatisfied. In the absence of a strong case for the need for these requirements, and given their likely negative contribution to employment relations, it seems counterproductive to introduce them.

Clause 56 - pay reductions for partial strikes

56. This is another proposal that will draw out collective bargaining and increase costs for all parties. Allowing employers to make deductions from the pay of those who take partial strike action will lead to time and money being spent litigating the amount to be deducted. A likely result of this proposal will be to push workers to fully withdraw their labour earlier, which will rapidly escalate and entrench bargaining disputes.

57. Giving employers the choice to deduct a flat 10% of a striking employee's wages will allow employers to make wage deductions that may far outweigh the actual time spent on strike. This has the potential to be both unfair and punitive. In addition, it is anomalous that while a union may challenge the calculation of a specified deduction, there is no ability to challenge an employer's decision to make the 10% deduction.

Procedural proposals that decrease fairness for individuals

58. There are a number of proposals in the Bill that we understand are intended to increase choice and also tip the balance of fairness towards employers. We recommend that none of the proposals discussed in this section proceed. As we have already asked the committee to note, New Zealand already has a very low level of employment protections in place. There is no economic or social benefit to be gained from reducing these protections even further. These changes are unfair and will impact disproportionately on those already disadvantaged in the labour market and in the workplace.

Clause 4 – changes to the duty of good faith where employment is at risk

59. The PSA does not support this proposal which cuts across principles of natural justice. Section 27 of the New Zealand Bill of Rights Act 1990 provides that every person has the right to observance of the principles of natural justice by any tribunal which has the power to make a determination in respect of that person's rights.

60. Clause 4 provides that an employer can withhold information when making a decision about whether to dismiss an employee. This is clearly in breach of an employee's right to natural justice and could result in significant unfairness and harsh treatment. This provision also goes far further than over-turning the decision of the Employment Court in the Massey University v Wrigley case[12] which is referred to in the explanatory note to the Bill.

61. The current good faith provisions of the Act already allow employers to withhold confidential information which is relevant to the continuation of employment if there is "good reason" to maintain the confidentiality of the information. This safeguard is sufficient.

62. When an individual faces losing their job, they are at their most vulnerable. These are difficult situations for organisations and individual managers to manage well, and often they do not. The stakes are high. To face losing your job is to face losing your ability to support yourself and your family. It puts at risk your future plans and can shake people to the core.

63. In both criminal and civil settings, people accused have a right to know the case against them and have the opportunity to respond to it. This should be no different at work. The changes proposed would put in place too high barriers to achieving a fair outcome; they also legitimise a culture of decisions based on opinion over evidence.

64. Change management processes also work best when all parties have the information needed to contribute. There is no justification for enabling employers to withhold opinion information, such as consultants' reports, that informs decisions about which and whose jobs are lost.

"In many cases, having access to information such as consultants' reports (showing what has prompted an employer to initiate change) is a vital resource enabling an employee to engage effectively in the change process. Withholding this information devalues employees and puts them at a disadvantage when negotiating with the employer." Jaime, Palmerston North.

Clause 16 – repeal of the 30 day rule

65. This clause aims to "provide employers with more flexibility on what they are able to offer to new employees as their starting terms and conditions of employment. It will enable employers to offer individual terms and conditions that are less than those in the collective agreement."[13] The PSA opposes this change. This will disproportionately impact on those already disadvantaged in negotiating terms and conditions in a new job such as young workers, women and migrant workers.

66. Young workers change jobs more often than other workers and are not well placed to negotiate pay or conditions.

"With two teenagers in my household, one in her final year at high school, the other unemployed, I want to know that they will be able to have as much support as possible when gaining employment, to not have so many obstacles which the amendments will surely add to." Mandy, Auckland.

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[12] *Vice-Chancellor of Massey University v Martin Wrigley* NZEmpC 37 18 April 2011

[13] 15, Employment Relations Amendment Bill 2012: Paper One – Collective Bargaining and Flexible Working Arrangements.

"I have two teenagers trying to make their way into the workforce. It is hard enough for them. They are treated like lesser people and their pay is reflected in that. They do a decent days work and get a partial days pay. I don't want them having it made any harder than it already is. They are our future and we are crushing their work ethic spirit." Tracey, Wairarapa.

67. One of the drivers of the gender pay gap is women's lesser bargaining power at the point of employment. These changes will further entrench pay inequities.

68. This proposal will also undermine collective agreements, which all parties have endorsed, and create concerns about fairness and dissatisfaction in the workplace. The transparency and consistency of terms and conditions which the current 30 day rule brings is not only fair and equitable but also more efficient, in terms of payroll and administration systems.

Clauses 28 – 34 and 36 – changes to Part 6A

69. No robust case has been presented that it is necessary to reduce protections for these already vulnerable categories of workers. Rather, we recommend that the provisions of Part 6A should be extended to other groups of low paid and vulnerable workers, many of whom faced reduced terms and conditions when their work is contracted out.

Exemption for small employers

70. Part 6A already covers only a limited number and categories of workers. The PSA does not support limiting this further based on whether there are fewer than 20 employees employed. Whether someone works for a firm of 19 or 21 people should not determine the level of protection or fairness to which an employee has access.

The timeframe in which to elect to transfer to a new employer

71. In our view, the "election of new employer" timeframe is too short to be practical.

Clauses 43 – 46 – removing minimum rights to rest and meal breaks

72. These proposals remove minimum rights to rest and meal breaks, including the timing and duration of breaks and whether they are able to be taken at all. This proposal has received a very strong response from PSA members, on grounds of both fairness and health and safety.

73. PSA members work in intense industries that benefit from proper breaks. For example, those that work in service related jobs including responsibilities for the care or wellbeing of others. Being able to take breaks throughout this time is essential for both worker wellbeing and client service or patient care.

"As someone who works with people with mental health issues it's important that staff have access to a rest and or meal break to ensure safety in the workplace and also to respond to personal needs within business hours and staying connected with families as required." Jonelle, Christchurch

"This bill is going to make it much harder to take breaks at work and in health care this poses a huge risk in terms of fatigue, poor decision making the potential mistakes that will reduce productivity and may cause harm to patients." Miranda, Dunedin

74. Some PSA members working in the health sector also provided comment to us from their perspective as health professionals:

"As a dietician, my work will be compromised as my patients will be unable to follow the guidance provided. This will potentially increase the number of non-compliant patients, which would render the patients ineligible for certain medical procedures in the future. This is not just a risk on working conditions, but potentially a risk to health and life of individuals within New Zealand." Caryne, Auckland

"Medical evidence shows that regular eating is important to maintain glucose levels which can affect people's ability to focus and function well. I work with people with eating disorders. Being able to take regular meal breaks is very important in recovery for people with eating disorders and irregular opportunities to eat can increase vulnerability to eating disorders." Rachel, Christchurch

Clause 61 – Determinations of the Employment Relations Authority

75. The PSA opposes the proposal that the Authority be required to give an oral indication or determination on a matter at the end of an investigation meeting. This would be a major downgrading of the Authority which plays an important role as the only place where workers can challenge unfair decisions of their employer.

76. In this regard, there is no reason to treat the Authority differently from the other tribunals and decision-making bodies that operate in New Zealand. We agree with the submission of the Employment Court that this provision would result in a large number of otherwise unnecessary appeals to the Employment Court.

77. We cautiously support the requirement that the Authority issue determinations within three months. The PSA has experienced long delays in the issuing of Authority determinations which can leave the parties in a state of uncertainty. This is particularly so in the case of decisions on dismissal and re-instatement where the financial and emotional impact on employees of the delay can be significant.

Extending the right to request flexible working arrangements

78. The proposed amendments provide that any employee (not just those with caring responsibilities) will be able to request a flexible working arrangement. Further, this can occur from the start of employment, there will no longer be a cap on the number of requests that can be made, and employers will have 1 month to consider requests (reduced from 3 months). We support the intention of these amendments and propose further ideas to strengthen their effectiveness.

79. At present the grounds for refusal include inability to reorganise work among existing staff, inability to recruit additional staff, detrimental impact on quality, performance or cost. These do not change and there is still no ability to legally challenge a decision by an employer who refuses a flexible work arrangement. This means that the right to request flexible work has no real power for employees and it is likely that the extension as it stands will not result in significant increase in access to flexible working for those who are already less likely to be able to negotiate this.

80. Evidence from the United States indicates that access to flexible working arrangements in regimes such as that proposed, reflects established workplace hierarchies and relationships. Those with influence are more likely to have flexible working arrangements, as are men[14]. Further, European research indicates that, in the context of similar regimes, the higher educated, white workers and men have increased access to flexible working arrangements, while those with children and those working in lower skilled industries have reduced access[15]. It would seem that approaches such as this which reinforce managerial discretion around flexible working arrangements, entrench the barriers that the least influential have to accessing such arrangements.

81. Flexible working arrangements are sorely needed by many workers and offer employers opportunities to address complex workforce issues such as how to best manage the large current cohort of ageing workers. Flexible working arrangements have a significant role to play in enabling employers to make best use of the skills these workers have and in enabling these workers to stay on in the workplace.

82. The PSA recommends that, to support the Government's aims to truly extend access to flexible working, additional amendments are proposed to address these issues. The approach taken in the United Kingdom, which has a similar "right to request" regime that sits alongside their stronger prohibitions on discrimination, requires an employer to take into account whether refusing a request for flexible work will disadvantage an employee taking into account their personal characteristics.

83. Also in the UK, the Government has coupled the extension of the right to request with a commitment that the Civil Service will be an exemplar in flexible working practices, which they describe as 'leading by example'. We urge the New Zealand government to require State services agencies to do the same, perhaps through a Government Workforce Policy Order.

84. We would also support strengthening the extension to give the ability to challenge the grounds for an employer's refusal in the Authority and Court. A stronger right to take paid or unpaid leave around school holidays, and stronger rights for people to gradually reduce hours to enable older workers to stay on, could also be considered.

For further information about this submission contact

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[14] Kelly E and Kalev A (2006) Managing flexible work arrangements in US organizations: formalized discretion or 'a right to ask'. *Socio-Economic Review*, 4(3): 379-416.

[15] European Foundation for the Improvement of Living and Working Conditions (2007) *Flexicurity – Issues and challenges*. Available at http://www.eurofound.europa.eu/pubdocs/2007/90/en/1/ef0790en.pdf

Appendix 1

Summary of recommendations

The PSA supports each of the recommendations made in the submission of the New Zealand Council of Trade Unions Te Kauai Kaimahi. In addition, the PSA makes the following recommendations:

Bill ref.	Submission para. ref.	Recommendation
General	17	The PSA calls for the Government to delay progress of this Bill and any further changes in the rules around collective bargaining until it has put in place adequately funded and robust arrangements to enable the gathering and analysis of information regarding collective bargaining.
General	10	That the committee note that OECD measures of workforce flexibility already place New Zealand among the four most flexible countries.
General	11	That the committee note that economic analysis from the International Labour Organisation shows that high flexibility (and low protection) is not a determinant of higher GDP or employment rate.
General	21	The PSA calls on the Government to increase the effectiveness of New Zealand's employment relations framework and its contribution to the economy by increasing its investment in practical and tailored support services for employers and unions around collective bargaining and in particular through Mediation Services and facilitation.
General	26	That the committee note that the ILO has stated that New Zealand legislation must not merely allow collective bargaining but rather should promote and encourage collective bargaining.
cl.12	42	That the Authority should have to consider whether the applicant party has complied with the duty of good faith in the Act before declaring that bargaining is over and if they have not, the Authority should have to make a declaration that the bargaining is over.
cl.12	43	That the tests for facilitation should be reduced and that facilitation should have at least been attempted before any declaration is given by the Authority that bargaining is concluded.
General	57	That the committee note that the Ministry of Business, Innovation and Employment's recently released annual report on work stoppages reports only 10 work stoppages in 2012 – 2013.
cl.20	96, 98	That, to support the Government's aims to truly extend access to flexible working, additional amendments are proposed to address these issues including requiring an employer to take into account whether refusing a request for flexible work will disadvantage an employee taking into account their personal characteristics, introducing an ability to challenge the grounds for an employer's refusal in the Authority and Court, and introducing a stronger right to take paid or unpaid leave around school holidays, and stronger rights for people to gradually reduce hours to enable older workers to stay on.
cl.20	97	We urge the New Zealand government to require State services agencies to be exemplars in providing access to flexible working arrangements.

Appendix 2

Summary of New Zealand's international commitments regarding collective bargaining

New Zealand has ratified several international treaties mandating work rights for its citizens.

- The International Covenant on Civil and Political Rights[16] protects the right to freedom of association, which expressly includes the right to form and join trade unions for the protection of workers' interests.[17]

- The International Covenant on Economic, Social and Cultural Rights (ICESCR)[18] protects the rights to work,[19] and to just and favourable conditions of work.[20] This treaty also requires the New Zealand government to ensure the right of workers to form trade unions, join the union of his or her choice, to promote and protect its economic and social interests. Moreover, it protects the right to strike.[21]

- The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)[22] protects the equal right of women to work, and to decent conditions of work.[23] The Concluding Observations of the Committee on the Elimination of all forms of Discrimination Against Women, which monitors New Zealand's compliance with this treaty, has expressed its concern about the gendered impact of the reform of collective bargaining, recommending that New Zealand ensure that it does not negatively affect women's employment and trade union rights.[24]

- The Convention on the Rights of Persons with Disabilities (CRPD)[25] protects the equal right of disabled people to work, and expressly includes the ability to exercise labour and trade union rights on an equal basis with others.[26]

- The International Labour Organisation Convention 98 on the Right to Organise and Collective Bargaining (ILO C98)[27] regulates interaction between workers, employers and their organisations. It protects workers against acts of anti union discrimination, against acts of interference, and requires New Zealand to establish measures allowing the right to organize, including machinery for voluntary negotiation between employers or employers' organizations and workers' organisations.

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[16] New Zealand ratified the ICCPR on 28 December 1978.
[17] Article 22, ICCPR.
[18] New Zealand ratified the ICESCR on 28 December 1978.
[19] Article 6, ICESCR.
[20] Article 7, ICESCR.
[21] Article 8, ICESCR.
[22] New Zealand ratified CEDAW on 10 January 1985.
[23] Article 11 of CEDAW.
[24] Committee on the Elimination of Discrimination against women, 6 August 2012, *Concluding observations of the Committee on the Elimination of Discrimination against Women – New Zealand*, CEDAW/C/NZL/CO/7, paragraph 33(e).
[25] New Zealand ratified CRPD on 25 September 2008.
[26] Article 27(1)(c) of the CRPD.
[27] New Zealand ratified ILO C 98 on 9 June 2003.