



Quality of Work for Women in Precarious Work: The International Experience

Project Objective

This project examines the international experience of governments' positive intervention to improve pay and employment equity and quality work outcomes for people in precarious work and to assess the potential applicability to the New Zealand context.

The following initiatives were designed to impact in particular ways on the employment conditions and/or wage levels of low paid and vulnerable workers in different countries around the world:

- Minimum wage laws
- Prevailing wage law
- Living wage ordinances
- Contract compliance requirements
- Industrial awards
- Transfer of Undertakings (protection of employment) Regulations (TUPE)
- Pension/superannuation protection
- Positive Duties
- Health care payments
- European Union Directives
- Equality Impact Assessments
- Codes of Practices
- International Labour Organisation Conventions
- Decent work programmes

Some of these have their genesis in the early 20th century and others are very recent initiatives. Some are inter-related.

The initiatives are discussed below under appropriate main headings.

In so far as the available literature allows, the nature and impact of the initiatives have been examined in the following countries and regions:

- United States of America (USA)

- Canada
- England
- Wales
- Scotland
- Northern Ireland
- Ireland
- Europe
- Scandinavia
- Australia.

Interventions

ILO Convention C94 – Public Contracts 1949

Description

This Convention concerns the provision of goods and services by public authorities of signatory countries. It says:

‘Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on ...or the nearest appropriate district... or generally observed in the trade or industry...’

New Zealand has never ratified this convention but it has been ratified by countries such as Denmark, Finland, Belgium, Cuba, Brazil, France and the Netherlands.

Impact

This project has not found any reference to the effectiveness or otherwise of this early ILO convention. Even when countries ratify a convention they are not necessarily actively implemented and some may become obsolete. For example, a Finnish government website reported that while Finland had ratified 97 conventions only 81 were in force.

Possible relevance to New Zealand

The wages rates and conditions of the New Zealand occupations/industries this project is focussing on are generally poor and therefore there may be no benefit from comparing with rates in other locations – even if the convention had been ratified by this country.

If it was ratified, it could be applied in situations where a public body (such as a DHB) retained a function usually contracted out (such as cleaning services). Wages in this entity could provide a wage and conditions benchmark for the

contracted out services by similar entities. The usefulness of this is predicated on the setting of fair and reasonable wage rates and employment conditions by the public body with in-house services.

Minimum wages

Description

Most countries (or at least those that New Zealand would see as appropriate comparators to itself) have some kind of minimum wage law that sets the 'wage floor'.

Eighteen of the 25 European Union (EU) member states have statutory minimum wage laws in compliance with the European Union (EU) Directive¹. In January 2004 the monthly rate varied from €121 (Latvia) to €1403 (Luxembourg).² The USA equivalent was €727. Applying a common unit called the Purchasing Power Standard (PPS)³ markedly reduces the differences in the minimum wage levels between the countries. Seven EU countries have a greater PPS than the USA.

The proportion of full-time employees earning the minimum wage varies considerably between the countries and is usually higher for females.

EU countries which do not have minimum wage laws include Germany, Austria and Switzerland. In their case it is because almost all employment relationships are covered by collective contracts and deliver minimum rates by industry (see table 3 in Appendix 1.)

The minimum hourly wage in the United Kingdom (UK) is set to rise to £5.25 in October 2006. At time of writing, the minimum wage in Ireland was €7.65.

There are a variety of mechanisms for setting minimum wages. These are described in table 2 in Appendix 1.

Minimum wage laws in Canada were first introduced in 1918 in the provinces of British Columbia and Manitoba. Every territory now has a minimum wage law, although the rates and the coverage vary.

In 2004, Ontario raised its minimum wage rate for the first time since 1994. In 2006, the general rate was \$7.75 and in 2007 it will be raised to \$8.00. The rate varies for some categories of workers and interestingly the rate for home workers will be \$8.80 in 2007.

¹ See Appendix 1 for tables on comparative EU rates and setting mechanisms in nationally set rates and bargained rates

² Paternoster, Anne. (2004). *Eurostat Report - Minimum Wages EU Member States, Candidate Countries and the US 2004*. European Communities.

³ Ibid. This is a way of comparing minimum wages after removing the effect of price level differences by applying Purchasing Power Parities (PPPs) for households' final consumption expenditure. PPPs convert the minimum wage expressed in national currencies into an artificial common unit that is called Purchasing Power Standard (PPS).

From the information available, it appears that the Ontario rate is at the high end of the continuum of rates. For example, the 2007 rate in New Brunswick will be \$6.60, Manitoba (2005) \$7.25, Newfoundland and Labrador (2006) \$6.75 an hour. Nova Scotia \$7.15 (2006).

Like Ontario, the federal minimum wage in the USA has not been adjusted since the mid 1990's and there appear to be no plans to do so. Attempts to raise the federal minimum wage have not been successful.

The federal minimum wage in the USA has fallen 38 percent from its peak of \$8.46 in 1968 (in 2003 dollars). In 1968 an individual working full time for the entire year at the minimum wage had earnings 20 percent above the poverty line for a family of three. In 2003 a similar worker earning the federal minimum wage \$5.15 – fell 27 percent below the three person poverty line – itself considered by many experts to be an inadequate measure of true poverty.

During his presidency, Bill Clinton gave states the power to set their minimum wages above the federal level. At the time of writing, 18 states had done so. Some government entities, such as counties and cities, observe minimum wages that are higher than the state as a whole.

Impact

None of the literature examined claimed that the minimum wage provided an adequate living wage, especially for families with children.

The inadequacy of the minimum wage in the USA has prompted two other significant interventions in setting wage floors: Prevailing Wages and Living Wage Ordinances.

Possible relevance to New Zealand

New Zealand has minimum wage laws. The adult rate is currently \$10.25. This means that a full time worker on the minimum wage will earn \$410 a week before tax or \$21,320 pa. It may be that many of the jobs that attract the minimum wage are not full time but are precarious in that working hours may be inadequate or unpredictable – particularly in the service and hospitality industries. The New Zealand Council of Trade Unions is currently campaigning to raise the adult minimum wage to \$12 an hour⁴.

It is doubtful that anyone in New Zealand would consider the minimum wage adequate particularly for a family that included children.

⁴ The Government's Confidence and Supply Agreement with NZ First and the Co-operation Agreement with the Green Party state that the Government will: 'continue the practice of annually increasing the minimum wage, with a view to it being set at \$12.00 per hour by the end of 2008 if economic conditions permit.'

Prevailing wages

Description

Determined by the Davis-Bacon Act (1931), prevailing wages in the USA are generally higher than the minimum wage, but can be lower than a living wage (see text below). Prevailing wages do not prevent workers being paid a poverty level wage. The Act applies to federal ⁵and state construction work – generally male dominated occupations. The prevailing wage levels for different occupations are published by the federal and state governments.

The motivation for this legislation was both to insure that workers on government projects could earn a living, and insure against low-quality work by low-bidding contractors – similar objectives to Living Wage Ordinances discussed in the next section.

A current variation on the prevailing wages approach was taken by the Greater London Authority (GLA) in England. They were the first public authority to enact a fair wages policy. In 2002 the GLA introduced a fair employment clause into its contracting procedures. Private contractors working for GLA are now asked if they are willing to pay their staff at least the equivalent of public sector wages for the same jobs. This may have been implemented to extend the formal provisions of Transfer of Undertakings (protection of employment) regulations (TUPE) to all contractors (see later discussion on TUPE). The GLA has so far applied this policy for the cleaning and catering services for City Hall.

In 2005, the mayor of London told a Trade Union Council conference that then London Olympic and Paralympic Games would set new standards for fair employment. He said:

‘We have drawn up an initial statement of the principles we want for the Games. These cover areas from environmental protection, to skills development and the acceptance of a Living Wage.’

The GLA has developed draft Procurement Principles for the Olympic Delivery Authority to ensure that they include provisions for ‘...employee representation, fair and ethical employment, London living wage ...’⁶

⁵ Most State governments have also adopted this law.

⁶ Greater London Authority. (2005, September). London Games will set new standards for fair employment, says Mayor. Press release.

Impact

'The impact of Davis-Bacon has been investigated quite carefully by labour analysts. Regarding competitiveness, this research found that by providing a level playing field, responsible, higher-quality contractors were able to compete successfully with 'lowball bidders'. In addition, the research shows that increased labour costs were generally absorbed through more efficient production. One study of the effect of repealing the state version of the federal law in Utah was that total cost overruns on state highway construction tripled after the act was repealed' State version have generally found that contracts were completed more efficiently and with fewer delays.⁷ (Bernstein: 2002)

The status of prevailing wages sometimes appears fragile. For example, in 2004 the White House temporarily suspended the obligations of businesses to pay prevailing wages during the re-building after hurricane Katrina.

Possible relevance to New Zealand

In many ways, prevailing wages are similar in intent to the ILO Convention 94 and will be most useful when there is established award or collective contract rates for particular occupations. It is difficult to see any general applicability of prevailing wages in a highly deregulated labour market such as New Zealand.

Living wage ordinances (LWO)

Description

LWO are the result of very active USA State campaigns by coalitions of unions, community groups and academics to improve the wages and employment conditions of low wage workers employed by state contractors.

In 1994, Baltimore was the first American city to adopt a LWO. Since then about 130 municipalities have adopted LWO. 'Why have living wage ordinances been so widely embraced by so many cities at a time when economic conservatism and faith in 'market forces' seem politically dominant? At the heart of the movement's success are both the simplicity of its message and the organisational strategy that activists have employed to carry the message forward. The motivation for living wage ordinances originates with two related trends: the deterioration of the economic opportunities available to low-income working families, and the use of taxpayer dollars to create poverty level jobs.'⁸

The level of the living wage is usually determined by consulting the federal poverty guidelines for a specific family size. Often, living wage levels are

⁷Bernstein, Jared. (2002, May/June). Making a Living – How the Living Wage Movement has Prevailed. *NHI* (National Housing Institute) *Issue* 123.

⁸ Bernstein (2002), op cit.

equal to what a full time worker would need to earn to support a family of four at the poverty line (\$17,690 or \$8.20 an hour in 2000) . Some living wage rates are set at 130 percent of the poverty line, which is the maximum income a family can have and still be eligible for food stamps.

The laws mandate that businesses under contract with the city – or in some cases businesses that receive grants, subsidies, or tax breaks from the city - pay employees a wage large enough to lift their families out of poverty.

In California, wages under such agreements range from a low of \$7.25 in Pasadena to a high of \$11 an hour in Santa Cruz. Santa Fe, San Francisco, New Orleans, and Washington DC have broader LWO that cover workers in all private businesses in their communities. Such ordinances have been banned in several cities.

LWO vary in scope and conditions e.g. indexation to inflation, size of contract, inclusion of non-profit contractors, hours worked, union 'friendly' or not etc:

- More than half the ordinances are indexed to inflation.
- Some ordinances have 'labour friendly' clauses in them. In San Jose, the living wage ordinance requires proposed contracts to undergo a so-called 'third-tier review' which allows the city to ensure that its contractors adhere to good labour practices. The Minneapolis ordinance gives preferential treatment to firms that engage in 'responsible labour relations'.
- Ordinances can be quite specific about who is covered – In Los Angeles (LA), non-supervisory workers who work for a service contractor are covered but not the employees of firms that sell goods to the city. A security guard who worked for a firm providing cleaning or bus services would be covered; a guard who worked for a firm providing building supplies would not.
- As a result of bargaining during the political process, certain exceptions are usually built into the ordinance. For examples, contracts and subsidies below a certain dollar value may be exempted. In Boston, the living wage ordinance applies to firms which have direct service contracts with the city for more than \$100,000; for subcontractors, the threshold is \$25,000.
- Hours worked can also affect coverage. In Jersey City all workers under service contracts are covered by the living wage, but only full time workers are required to receive vacation and health benefits. In Milwaukee all workers, including part-timers and temporary staff, are covered.
- Some ordinances exempt non profit contractors (e.g. Chicago) while others include them, arguing that the city or county should increase the funds to cover the wage increases. Unlike private firms, non profits are

unable to absorb the cost of a LWO through reduction in their profits, although they can absorb some through decreases in turnover and absenteeism.

Unlike minimum wage laws that cover the vast majority of the low-wage workforce, living wage ordinances have a much narrower coverage – a few hundred in a small city, a few thousand in larger cities like LA and Chicago. There is no ‘one size fits all’ model ordinance – and the flexibility is reported as positive. For example, the living wage in San Jose is one of the highest in the nation, in recognition of the very high cost of living in the Silicon Valley area and the long distances many employees must travel to get to work. However, flexibility at a State level can also carry political risks in that it depends on who has the upper hand in the negotiation and how forceful the ordinance is.

Current living wage rates are between 50 percent to well over 100 percent greater than the federal minimum rate – and families will still generally require some form of state assistance.

Impact

Predictably, the LW movement has its fierce supporters and detractors. There is a wealth of research modelling the predicted impact of the introduction of LWO in different States – mostly around employment loss, business migration, cost to the city and limited impact on the target workers. Other studies have focussed on the actual impacts on contracting firms, workers and state coffers and have tended to find more positive outcomes and impacts.

Many detractors have based their analysis on standard economic theory. This holds that a rise in the minimum wage hurts employment by interfering with flow of supply and demand. In the early days of LWO campaigns most economists accepted that when government forces businesses to pay higher wages, businesses in turn hire fewer employees.

The veracity of this view was challenged in the mid 90s by work done by two Princeton economists – David Card and Alan B Krueger – both of whom started off believing the standard theory.

Their 1995 and 2000 research⁹ on the effects of raising the minimum wage in New Jersey and in Pennsylvania where it remained at the federal level showed a modest increase in wages did not appear to cause any significant harm to employment and in some cases, a rise in the minimum wage even resulted in a slight increase in employment.

⁹ Card, D., & Krueger, A. B. (1995). *Myth and Measurement: The New Economics of the Minimum Wage*. Princeton University Press.

Card, D., & Krueger, A. B. (2000). Minimum Wage and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania. *American Economic Review*, Vol. 90.

Subsequent research on wage mandates has shown that their impact is proportional to the number of people they reach. Research in 2002 suggested that a typical living wage ordinance will rarely reach more than 1-2 percent of a city's workforce¹⁰ and that this mitigates against the kinds of economic distortions – layoffs, hours reductions, fewer contract bids – that opponents feared. Coverage in cities with broader ordinances is estimated at between 5-15 percent of the local workforce¹¹.

Three cities currently have city wide ordinances – Santa Fe, Washington DC and San Francisco. The coverage and the wage rates vary. For example in San Francisco where coverage has been extended to cover all employees in companies of 10 or more employees working at least two hours a week. Non-profit organisations are also excluded. In 2003, Santa Fe also passed a LWO that included all employees in businesses with more than 25 employees. It was estimated that this would only affect 15 percent of companies in Santa Fe. In response to the ordinance, the Santa Fe challenged the ordinance in court saying that the city did not have the authority to mandate wages for private firms. In November 2005 the court re-affirmed the ordinance. The ordinances in three other cities were overturned through court challenges.

Studies describing actual impacts generally present a positive picture¹². The conclusions of the Brenner and Luce study (2005) of three early adopters of LWO are reasonably typical. They found:

- In contrast to theoretical predications, firms forced to raise wages significantly expanded the number of staff assigned to their city contracts and did not turn to part-time jobs instead of full time jobs to absorb the higher labour costs.
- There was little evidence that they raised prices – to city or other customers. The one clear move a significant number of affected firms pursued was to accept lower profits.
- There was a growth in overall employment and a shift away from part time to full time staff.
- In Boston LW beneficiaries are primarily women and people of colour.

¹⁰ Bernstein, op cit

¹¹ Sonn, P.K. (2005) Citywide Minimum Wage Laws : A New policy Tool for Local Governments, Economic Policy Brief, Brennan Center for Justice.

¹² See Farris, D., Runsten, D., Briones, C. & Goodheart, J. (2005). *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses*. Howes, Candace. (2002). *The Impact of a Large Wage Increase on the Workforce Stability of IHSS Homecare Workers in San Francisco County*. University of California Institute for Labor and Employment, and the University of California Center for Labor Research and Education, Berkeley.
Bernstein (2002), op cit.

- The incidence of poverty fell sharply – although close to a third of these workers remained poor even after the law took effect – if poverty is defined realistically and taking into account Boston’s high cost of living.

US research on both contracting and wage mandates suggests that most contractors will be able to absorb the increases in labour costs by some combination of lower profits and efficiency gains. Because every contractor faces the same mandate, the ordinance helps prevent ‘low-ball’ bidders – no bidder is at a comparative disadvantage because of the ordinance. To the extent that low bidders with wide profit margins absorb the increase by cutting profits, the ordinance will have its intended effect: partially redistributing taxpayer dollars from low paying contractors to low wage workers.

There are some efficiency gains for participating contractors through a decrease in absenteeism and turnover and gains to the State or county through quality tender applications. Bernstein states that, ‘Efficiency gains are an under-appreciated absorption mechanism.’¹³

One of the most influential studies has been the recent study of the impact of the LA LWO on workers and businesses.¹⁴

In 1997, LA became one of the first major cities to pass a living wage law. The city’s policy currently required city contractors to pay workers \$10.03 an hour, or \$8.78 plus a \$1.25 contribution to health benefits. It also provided workers with 12 paid days off and 10 unpaid days off per year

The study showed:

- Most firms affected by the law have adapted to the living wage without eliminating jobs. Employment reductions amounted to 1 per cent of all affected jobs, or an estimated 112 jobs – many of these were in not for profit firms
- Businesses experienced some positive results, including decline in employee turnover and absenteeism. (32 percent turnover in living wage firms compared with 49 percent in non-living wage firms) On average, affected firms recovered 16 percent of the increased cost of the mandatory wage increase through turnover reductions.
- Firms adapted to the remaining costs in a variety of ways including cutting fringe benefits and overtime, hiring more highly trained workers, cutting profits and passing on costs to the city or to the public.
- The ordinance had no impact on the use of part-time workers, the intensity of supervision, the tendency to fill vacancies from within or the use of equipment and machinery.

¹³ Bernstein (2002), op cit.

¹⁴ Farris et al (2005), op cit.

- Firms have not actively displaced workers in order to hire workers who are better qualified and most firms had not changed hiring standards as a result of the ordinance.
- Compared to the original workforce, workers hired after the LWO have similar levels of education, are of similar age and are no less likely to be members of racial or ethnic minority groups.

One of the interesting findings was that new hires were more likely to be male (56 per cent cf 45 percent before) and have more formal training (22 percent cf 12 percent). These changes occurred mainly through normal attrition at the firms. The results suggest somewhat diminished job opportunities in city contract work for women and workers with less formal training, compared to before the ordinance. The writers speculate that the decreased proportion of female workers may result from employer discrimination, facilitated by the increased wages and the more male dominated applicant pool that it may generate.¹⁵

The LA research found that while workers and their families experienced measurable gains from the living wage, it also showed that many workers still struggle to get by. Thirty one percent lack health benefits and 44 percent rely on at least one government assistance programme.

There were also some unexpected outcomes such as the behaviour of non-state contractors who raised their wages to compete effectively for workers. This means that the LWO effectively established a new market rate for particular kinds of employment. (See also Brenner and Luce¹⁶.)

It is acknowledged in the literature that where the ordinances included non-profit organisations, these organisations had difficulty absorbing the increased costs and reported that they would be deterred from seeking government contracts in the future. While some states increased contract rates for non-profits in acknowledgement of the increased cost, this is by no means universal.

The Howes study deals specifically with the impact of the LWO on homecare workers and reports positive outcomes for both workers and the quality and sustainability of services provided.¹⁷

All the direct care services in the US (as elsewhere) employ low-wage, frequently immigrant workers and native born women of colour, and all are afflicted in varying degrees by high rates of turnover, labour shortages and quality problems. In contrast to the more usual practice of providing publicly funded homecare services through agencies that contract directly with the

¹⁵ Farris et al (2005), op cit.

¹⁶ Brenner, Mark D., & Luce, Stephanie. (2005). *Living Wage Laws in Practice - the Boston, New Haven and Hartford Experiences*. University of Massachusetts: Political Economy Research Institute.

¹⁷ Howes (2002), op cit.

state, 85 percent of California IHSS (in home supportive services) are provided through the independent provider model – the consumer has the option to directly hire, train and supervise the caregiver.

The Howes study is one of the few large scale empirical investigations on the effect of wages on labour market outcomes in any direct care industry, and possibly the only such study specifically addressing conditions in the homecare industry. It records the impact of nearly doubling the wages for homecare workers in San Francisco County over a 52 month period.

The principle conclusions are:

- There was a 54 percent increase in the numbers of IHSS workers over the four year period of the study.
- Possibly because the wage increase and/or the addition of health benefits made it easier for consumers to hire an acceptable provider, the number of consumers increased by 47 percent over the same period.
- The number of hours worked per caregiver increased significantly for non-family caregivers in some ethnic groups.
- The annual turnover rate of matches between consumer and caregiver fell by 6 percent. When adjusted to eliminate the turnover of matches that may end for natural reasons, the annual 'bad'¹⁸ turnover rate of matches fell 20 percent.
- The annual turnover rate of the workforce fell 17 percent, but adjusted to measure only 'bad' turnover, the rate fell by 30 percent.
- The proportion of consumers matched to a provider of their own ethnicity – which is a measure of the quality of the match – rose by 6 percent.
- A rough calculation shows the wage increase could have reduced the number of people living below the poverty line in San Francisco by as much as 15 percent, other things being held constant.
- In 2001, the IHSS program was bringing in \$114 millions every year to San Francisco, compared to \$37 million in 1997, at a gross cost to the county of \$18 millions and possibly a net cost of as low as \$8 million. That would mean every dollar spent by the county brought an additional \$13 in income from state and federal sources to very poor San Francisco communities.

¹⁸ 'Bad' turnover excludes turnover as a result of events such as death or moving out of the area.

In addition to supporting the finding of previous studies, the Brenner and Luce research of LWO in three cities in New England, found, 'The law has also turned a discrete set of jobs into better paying jobs – typically with better hours and sometimes better benefits...Our results also show that far from disadvantaging lower-paid workers, the living wage policy has given many a pathway to a better job.'

The research reporting the positive outcomes of LWO have been steadfastly criticised by an organisation called Employment Policies Institute (EPI). In particular Aaron S Yelowitz ¹⁹ has written several papers for the organisation. He maintains:

- Research that claims positive outcomes of LWO have used flawed economic and statistical techniques.
- That the broad Santa Fe LWO has resulted in job losses for low waged workers – especially those with low education levels.
- Those that do keep their jobs work an average of 1.6 hours a week less than before the LWO.
- The minimum wage has increased unemployment.
- Loss of tax and welfare entitlements by low waged workers once their pay is increased effectively makes them worse off financially – their living standards are not improved.

At first reading, the papers appear convincing. However, the EPI is one of several front groups created by Berman and Co – a public affairs firm owned by Rick Berman who lobbies for the restaurant, hotel, alcoholic beverages and tobacco industries. Launched in 1991, the Institute has been accused of trying to create confusion by adopting a name which closely resembles the Economic Policy Institute – a much older, progressive think tank with ties to organised labour. The Economic Policy Institute supports a living wage and mandated health benefits for workers. Berman's organisation opposes both and opposes any minimum wage at all. It is hard to avoid the conclusion that this view could be connected to the nature of his PR clients that tend to employ low waged workers.

The research acknowledges that in some cities, enforcement of the LWO appears weak.

¹⁹ Yelowitz, Aaron. S. (2005, September). *Santa Fe's Living Wage Ordinance and the Labor Market*. Employment Policies Institute.
Yelowitz, Aaron. S., & Tiokka, Richard. S. (2005, May). *Effective Tax Rates and the Living Wage*. Employment Policies Institute.

Possible relevance to New Zealand

LWO have had a very significant impact on low waged workers in the States (although in reality on a very small proportion of the labour force) but do operate in an environment of extremely poor statutory minimum employment standards.

In the US living wage rates are about 50-120 percent higher than the federal minimum wage. Translated into the New Zealand context, this would mean a rate of between \$15-22 an hour or approximately \$31-45,000 a year.

Calculations of poverty lines and “living wage’ equivalencies²⁰ is complex and often controversial. LWO depend on a definition of the poverty line and an acceptable margin above that line to lift workers out of poverty. This is clearly a possible policy step in New Zealand.

The argument often mounted in New Zealand that moderate increases in minimum wages hurts employment by interfering with flow of supply and demand and that when government forces businesses to pay higher wages, businesses in turn hire fewer employees is not supported by the research on LWO in the USA.

Health benefits

Some LWO require either that the contractors pay a specified minimum hourly rate or they pay a lower rate and provide a set contribution to the health insurance costs of the employee. This is an acknowledgment of the high cost of privatised health care and the general need for private health insurance.

The most notable case where a State or City intervened in the provision of Health benefits is New York City. The City passed the Health Security Bill in 2005 to expand and protect health care for 27,000 workers in the grocery industry.

The first of its kind in the country, it requires medium to large groceries to meet the industry standard of health care spending for their workers. Currently over 70 percent of employers in the grocery industry pay for their employees’ health care. However, the City believed that the cost-cutting practices of ‘big box’ stores such as Wal-Mart, that refuse to provide health care, force responsible businesses to do the same in order to remain competitive.

The new law is also expected to ease the burden on taxpayers. New York State’s Medicaid, the tax funded health care programme for the poor, costs, local and federal taxpayers approximately \$45 billion each year. It is estimated that New York City taxpayers alone spend roughly \$615 million per year covering costs of publicly funded assistance programmes for workers who do not have health care provided by their employers. This has also been part of a

²⁰ These take into account different household compositions when assessing the amounts required to provide an equivalent standard of living between the households.

cost-benefit argument put forward by LWO advocates – although the evidence of this actually happening is not conclusive. A significant proportion of the beneficiaries of LWO still need to access some government assistance programme(s).

Possible relevance to New Zealand

Using the above argument, it is possible to argue that the New Zealand government's provision of community services cards and Working for Families packages etc are a form of wage subsidy for businesses employing low-wage workers.

Any determination of a living wage in New Zealand would need to take sufficient account of family health care costs and interface with the benefit and welfare system generally, including childcare subsidies.

Contract compliance

Description

Implemented in the USA in 1960s and in Canada in the 80s, contract compliance legislation mainly focussed on increasing the representation of women and minority groups in employment.

USA

Executive order 11246 of 24 September 1965 required that non construction companies with 50+ employees or contracts of more than \$50,000 must develop and maintain a written affirmative action programme and that the Department of Labour Office of Federal Contract Compliance Programmes (OFCCP) could ask for this action programme to be filed. As part of the programme the organisation must conduct a workforce analysis of each job title, determine workforce availability of women and minorities for each job group and conduct a utilisation analysis to determine whether women and minorities are 'underutilized'. If so, the organisation is required to develop specific goals to rectify this.

'..all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

Subpart B (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include but not be limited to the following: employment...rates of pay or other forms of compensation...In the event of the contractor's non-compliance with the non-discrimination clauses of this contract...this contract may be cancelled, terminated or suspended ...'

Canada

In Canada, the Federal Contractors Program targeted non-federally regulated contractors with a resident workforce of 100 or more employed which received federal contracts for goods and services of \$200,000 or more.

These organisations must:

- Collect and maintain data on those employed;
- Analyse the representation of each of the designated groups in all occupational groups;
- Compare this representation with external representation;
- Identify under-representation;
- Remove all barriers impeding designated groups;
- Prepare employment equity plan – long and short term goals and as required, provide accommodation and special measures for designated groups; and
- Provide report of progress.

Periodic compliance reviews are undertaken.

Australia

Communication with the Equal Opportunity for Women in the Workplace Agency (EOWA) in Australia²¹ confirms that the government procurement policy does require contractors to comply with the Equal Opportunity for Women in the Workplace legislation (if they are covered by it) but the EOWA Act does not require an organisation to demonstrate that they meet any particular minimum standards in pay or conditions.

EOWA report that (as far as they are aware, and that I could determine) government agencies are not directly involved in influencing pay and conditions when they contract for services. The core of the procurement process is 'value for money'. Four policies are described as intersecting with the procurement policy. These include health and safety, but do not include any equity policy. The main mechanism for achieving fair pay rates is said to be through union negotiated awards.

New labour legislation in Australia has altered (amongst other things) the structures for setting minimum wage rates. This will now be done through a new Agency – The Fair Pay Commission. Taking account of business interests is part of its terms of reference. Unions believe that the 'business agenda' will be more dominant than in previous processes. The government has also set up the Awards Review Taskforce, which 'will report on how to reduce the duplication and complexity in current federal awards'²². It is due to report to the government in July this year.

²¹ Personal communication with Imelda Hunt of EWOA.

²² From the Award Review Taskforce website – www.awardreviewtaskforce.gov.au

Any assessment of the impacts of these recent and potential changes on employment outcomes for low paid and precarious workers will obviously be made over time.

Outcomes

Evaluations of the US and Canadian programmes concur that while in the early years they resulted in modest improvements in employment outcomes for targeted groups, the decline of good data, monitoring and active enforcement is currently limiting their potential. In practice it seems that the pay and conditions of workers once hired, were a very minor or absent focus of the programmes.

In 2000 the OFCCP concluded that,

‘Currently OFCCP cannot measure the impact of its civil rights enforcement – that is, its contribution to the reduction of employment discriminations as a whole. Lack of recent, appropriate evaluation data prevents a detailed, accurate assessment of day-to day operations and overall effectiveness. ..(and) the OFCCP....has not adequately established the practical utility of particular reporting requirements...the implementation of an Equal Opportunity Survey has been criticized as burdensome and not providing useful, reliable data.’

In April 2002 an evaluation was undertaken in Canada of the Federal Contractors Programme²³. It concluded:

‘Overall the Federal Contractors Program (FCP) appears to be highly relevant to the current government’s agenda and is characterized by important potential impacts ... (but) ..the evaluation found that FCP to be a program (sic) of continuing relevance, but whose full potential impacts have not yet been realised.’ One of the weaknesses highlighted was a lack of enforcement activities.

Contradicting the contract compliance equity agenda is more recent developments in Canada. The Ontario, Quebec and British Columbia governments have passed legislation giving them the power to override existing collective agreement provisions when services are contracted out. This means there is no security of wages or tenure and eliminates provisions requiring new employees to retain the terms of existing agreements for a minimum of one year.

²³ Human Resources Development Canada. (April 2002). *Evaluation of the Federal Contractors Program*.

Possible relevance to New Zealand

Contract compliance models in the USA and Canada were developed for a somewhat different agenda – reflecting the focus at the time on increasing the representation and distribution of EEO target groups. The processes are reported as being overly bureaucratic and highly prescriptive and over time have been less vigorously enforced. The concept is perhaps better articulated in the ‘positive duty’ approach.

Initiatives in the UK

There have been/are several (and sometimes inter-related) government initiatives in the UK designed to promote equity in the way government bodies do business. These are:

Transfer of Undertakings (protection of employment) Regulations (TUPE);
Protection of pension/superannuation rights;
Positive duty;
Code of Practice on Workforce Matters in Local Authority Service Contracts;
Equality impact assessments; and the
Equality Bill

Transfer of Undertakings (protection of employment) Regulations (TUPE)

Description

The European Commission’s Acquired Rights Directive 77/187 (ARD) protects the rights of employees in the event of a relevant transfer of an undertaking to a new employer. The Directive is certainly acknowledged by member countries although it seems that the vigour of promotion and the extent of monitoring compliance is variable.

The Directive was put into effect in the UK in 1981 through the Transfer of Undertakings Regulations (TUPE). Decisions from the European Court of Justice forced the widening of the interpretation of the Directive in the UK.

Over the years there has been extensive debate and confusion over the application of TUPE in tendering. Escott and Whitfield reported in 1995 that the government sought to minimise the application in local government tendering, although it appeared to more readily accept that TUPE applies in market testing in the civil service. Loopholes in the original TUPE regulations have been addressed over years – specifically the application of TUPE to labour intensive service contract and the transferability of pensions.

It appears that TUPE was relatively ‘dormant’ in the UK until the early 1990s when the unions ‘discovered’ it as a useful tool when negotiating staff

conditions on transfer from being employees of local authorities to the employees of the successful contractor.²⁴

This interest in TUPE arose because of concern about the development of a 'two tier workforce' as an outcome of competitive tendering.

Compulsory Competitive Tendering (CCT) was first introduced as part of the Local Government Planning and Land Act 1980. This required authorities to tender an increasing proportion of building repair and maintenance and highway work. By 1992, the requirement for competition was considerably extended. Building cleaning and catering were the two female dominated work areas most affected. UK²⁵, Canadian²⁶ and Australian²⁷ studies have documented significant negative impacts on pay and working conditions of women as well as impacts on service delivery.

Northern Ireland research²⁸ examined 20 contracts for health and education services. It found that that competitive tendering had an adverse impact on female employment. This was due to two factors. First, the majority of the services selected for tendering were female dominated. Secondly, there was a gender differential in the reduction of employment, hours of work and wages brought about by the process. Competitive tendering resulted in a higher rate of job loss, a greater reduction in working hours and a larger decrease in wages for women than men.

Overall it appears that the competitive tendering process in the UK and Canada, particularly when it led to the awarding of contracts to private companies, resulted in less access to both statutory and contractual benefits.

There have been two significant recent amendments to the TUPE regulations – after a very long consultation process. These are the development of a clearer definition of a relevant transfer (i.e. when TUPE applies) and changes to the rules around the transfer of pension rights. These were implemented in 2005.

'Relevant transfer' applies when the following two questions are answered in the affirmative:

²⁴ Personal communication with Dexter Whitfield of Centre for Public Services, UK.

²⁵ Escott, Karen & Whitfield, Dexter. (1995). *The Gender Impact of CCT in Local Government*. Centre for Public Services, for the Equal Opportunities Commission.

²⁶ Armstrong, Pat., Amaratunga, Carol., Bernier, Jocelyne., Grant, Karen., Pederson, Ann & Willson, Kay. (2001). *Exposing Privatization – Women and Health Care Reform in Canada*. Ontario, Canada.

²⁷ Frazer, Lyn. (1997). *Impact of Contracting Out on Female NESB Workers: Case Study of the NSW Government Cleaning Service*. Ethnic Communities Council of NSW Inc.

²⁸ Northern Ireland Equal Opportunities Commission. (1996). *Report on Formal Investigation into Competitive Tendering in Health and Education Services in Northern Ireland*.

- Is there a 'stable economic entity' that is capable of being transferred?
- Will the economic entity retain its identity after the transfer in question?

TUPE applies to (amongst other situations) contracting out of services and changing contractors. The law on relevant transfers in the case of contracting out and changes of contractors for labour intensive activities such as cleaning, catering and security has given rise to much confusion. The amendments of April 2006 clarify this and confirm that TUPE does apply in these situations.

When a TUPE transfer applies:

- All terms and conditions of work and continuity of employment should be preserved.
The transferor has a responsibility to conduct a full and meaningful consultation of staff at the earliest practicable time. Failure to do so results in liability for the payment of compensation by the transferor, which may be up to 13 weeks pay.
- The transferee takes over all the liability for all statutory rights, claims and liabilities arising from the contract of employment.

The new regulations do not allow changes to contracts for 'a reason connected with the transfer' unless this is for an 'economic, technical or organisational reason entailing changes to the workforce'. The phrase 'connected with the transfer' captures many more situations than the one it replaces, 'by reason of the transfer'.

The Agenda for Change programme in the UK Health Sector resulted in new pay scales and relativities between health occupations. Health authorities were partially funded by the government to meet the extra costs of the pay rises. However a similar commitment was not made when pay and relativities were reviewed in local authorities, resulting in reluctance by some authorities to embrace the new pay process and outcomes.²⁹

UK commentators suggest that when authorities are not funded for an increased wage bill and have to make economic trade offs then fair pay is unlikely to be the winner and low bidding contractors will seem attractive.³⁰

Pensions/superannuation

From April 2005 the TUPE regulations also apply to pension rights. This means that if the previous employer provided a pension scheme then the new employer has to provide some form of pension arrangement for for employees who were eligible for, or members of the old employer's scheme. It does not have to be the same as the arrangement provided by the previous employer

²⁹ Personal communication from Sue Hastings, Pay Equity Consultant/Expert, UK.

³⁰ Personal communication from Dexter Whitfield, Centre for Public Services; and Escott, Karen & Whitfield, Dexter. (2002). *Promoting Gender Equity in the Public Sector*. Centre for Public Services.

but will have to be of a certain minimum standard specified under the Pension Act 2004.

Not everyone has been happy with the TUPE amendments. For example, 'The new Transfer of Undertaking ... Regulations will significantly strengthen the rights of staff involved in a transfer and will be a bitter blow to employers, lawyer's warned'.³¹

Impact

Where TUPE has been applied it has provided continuity (although not improvement) for pay and working conditions. The recent amendments have strengthened its impact.

However, TUPE does not apply to contracting situations where there is no transfer of the function or the staff.

Possible relevance to New Zealand

The Employment Relations Act provides employment protection for employees if their job is affected by the sale or transfer of their employer's business or if their work is contracted out. However, currently some people in precarious work are not protected.

On 1 December 2004, a new Part 6A Employment Relations Act 2000 came into effect. Subpart 1 of Part 6A was designed to protect a listed group of 'vulnerable workers' (including cleaners, food catering workers, laundry workers and caretakers) in "restructuring" situations. Restructuring situations included contracting out, contracting in, sales and successive contracting. Subpart 2 of Part 6A covered all other non-vulnerable workers and simply required provisions dealing with restructuring situations to be agreed in employment agreements.

The provisions of subpart 1 required any incoming employer to employ those workers who wished to transfer their employment to the incoming employer, and to employ them on their existing terms and conditions, including recognising their previous service.

However, in early 2005 a successive contracting situation occurred when Dunedin Association changed the cleaning contract company from Southern Cleaning to Crest Commercial Cleaning. Crest refused to employ the cleaners employed by Southern Cleaning to clean the kindergartens on the grounds that the legislation did not cover successive contracting situations.

In a decision of the Full Court of the Employment Court, dated 18 July 2005, (*Gibbs & Others v Crest Commercial Cleaning Ltd*, CC 10/05) the Court held that the definition of restructuring in the Act did not cover successive

31 Thomas, Dan. (21 February, 2006). Updated TUPE Puts Employers in Contractual Straightjacket. *Personnel Today*.

contracting situations. Therefore, there was no obligation on Crest to employ any of the cleaners.

The Court stated (para 75) – “*The extent to which a court can divine and apply Parliament’s true intended meaning to ill-expressed legislation is at the heart of the case.*” Essentially, the Court accepted that it was the intention of the proponents/drafters of the Bill as introduced into Parliament to cover succession to contracting, but that continued intention could not be sufficiently ascertained following its exit from the Select Committee process, as changes had been made to the definition of restructuring at that stage of the process.

As of 18 July 2005 the situation reverted to the pre-1 December 2004 status. In other words, there was and remains, currently, no legislative protections for these vulnerable workers in change of contract situations.

At present, the government is working on introducing a Bill to protect these vulnerable workers.

Positive Duty

Description

The Race Relations (Amendment) Act (2000) sets both general and specific legal obligations on listed public bodies throughout the UK. In addition, specific positive gender duty legislation has been implemented in England, Wales, Scotland and Northern Ireland.

Positive Duty is a broader approach to influencing equity by requiring the mainstreaming of equity considerations into all aspects of policy development and service delivery by local authorities and public bodies. At its heart is the need to deliver quality and relevant services. As part of the policy and service development process it is required that an assessment is made of the impact on the policy or service recipients and the service providers – especially those acknowledged to be in the most vulnerable groups. Contract compliance is one mechanism for achieving this.

Such positive duties are designed to compensate for the limitations of existing antidiscrimination law, by requiring the taking of positive steps to promote equality and eliminate discrimination, rather than just compelling a reactive compliance with the letter of the (equality) law.³²

The Race Duty

In 2000, the UK government introduced a positive duty on public sector bodies to promote race equality in the wake of the Stephen Lawrence inquiry³³.

³² O’Cinneide, Colm. (2005). Positive Duties and Gender Equity. *International Journal of Discrimination and the Law*.

³³ In the 1990s videotaped the brutal treatment of a young black man (Stephen Lawrence) resulted in a highly publicised inquiry into racism within the police force

The provisions of the Race Duties cover both employment and services delivery. The two general duties under Section 71 of the Act oblige public bodies to

‘eliminate unlawful racial discrimination’

and

‘promote equality of opportunity and good relations between persons of different racial groups.’

Specific duties include³⁴:

- Ensure equal employment opportunities in their employment practices
- Prepare and publish a Race Equality Scheme including their plans for assessing and consulting on the impact of any new policies for the promotion of race equality
- Ensure access to information and services to ethnic minority communities
- Train their staff on the implications of the duties.

Northern Ireland

Section 75 of the Northern Ireland Act 1998 introduced a new statutory obligation requiring public bodies to have due regard to the need to promote equality of opportunity for a wide range of groups. As well as dealing with disability and differences of religion and politics, sex, or race, this requirement also extends to people of different ages, of different sexual orientation and to those with or without dependents. It is described as ‘mainstreaming’ equality considerations into the heart of public policy and decision making.

Separate Schedules of the Act impose several specific Duties upon public bodies and government departments. They must first prepare Equality Schemes setting out how they will fulfil their Duties and second undertake Equality Impact Assessments. In this regard, Section 75 builds on the Policy Appraisal and Fair Treatment (PAFT) Guidelines established in 1993 which had limited effect primarily because they were voluntary guidelines and applied only to government departments.

As a result of the Duty requirement authorities report the implementation of many changes to recruitment, selection and promotion procedures, grant and licence conditions and funding policies. In addition there have been more substantial policy changes

Authorities must undertake equality impact assessments that subject new and existing policies to a systematic process of appraisal to establish their likely impact on the nine different equalities groups. Where adverse impact is identified the public bodies and government departments must also state how they will amend the legislation/policy to ameliorate these effects or introduce

³⁴ Not all duties apply to all public bodies.

other measures to offset them. The Equality Commission for Northern Ireland has established a seven-stage procedure for the conduct of assessments and the outcomes of these impact assessments must be published.

A self-assessed report on progress on positive duty requirements is submitted to the Equality Commission by the public authority. The Commission collates this information and issues an annual report. While the Commission reports considerable variability in the quality of the schemes and the impact assessments the Centre for Public Services reported that, 'All government departments reported positive impacts in policy planning, implementation and assessment and in service delivery. This included increased awareness of equality considerations in the design, delivery and monitoring of policies and services, increased engagement of equalities groups and changes and adjustments to policies and services...(however) Evidence from progress reports in 2002-03 indicated that there was limited evidence that government departments were monitoring the impact of policies that had been equality impact assessed.'³⁵

Wales

Sub-section 1 of Section 120 of the Wales Act (1998) requires the National Assembly for Wales (NAW) to:

'make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people.'

Further subsections mandate the NAW to prepare an annual report containing

(a) a statement of the arrangements made in pursuance of subsection (1) which had effect during that financial year, and (b) an assessment of how effective those arrangements were in promoting equality of opportunity.

There are two key limitations on the scope of this Duty. First, it extends only to devolved policy areas such as education, health, economic development and local government. Second, the legal provisions placed by Section 120 on the NAW lack more specific Duties such as Duties to monitor specific methods of implementation and there are few legally sanctioned enforcement mechanisms open to the NAW.

Chaney and Fevre's 2002 report for the Institute of Welsh Affairs³⁶ assessed progress to date in implementing the legal duty placed upon the National Assembly for Wales by Section 120 of the Wales Act (1998). The report described glowing progress by the Welsh Assembly government in promoting an equalities culture and in mainstreaming equalities concerns throughout executive and Assembly business. However, other commentators suggest that, 'the short time elapsed since the implementation of the Wales Act meant

³⁵ Centre for Public Services. (2004). *The Case for a Positive Public Duty on Age Equality*.

³⁶ Chaney, Paul & Fevre, Ralph. (2002). *An Absolute Duty: Equal Opportunities and the National Assembly for Wales. A Study of the Equality Policies of the Welsh Assembly Government and their Implementation: July 1999 to March 2002*. Institute of Welsh Affairs.

that it was impossible to produce outcome based evidence of progress.’
(Centre for Public Services 2004).

The Welsh National Assembly has developed the use of contract compliance to support its positive duty legislation.

They determined they would do this by:

‘Developing our Value for Money (contract) criteria to take equality of opportunity policies and practices of suppliers into account; clearly specifying the information we want from prospective suppliers, in order that we can apply those criteria fairly – these should include practical, measurable demonstrations of their commitment to equality in terms of their working practices, recruitment policy, equal opportunity plans and their contractual arrangements with others; inviting prospective suppliers to describe their equality of opportunity policies and credentials to us, whilst taking care not to impose unnecessary barriers to public sector markets; and working with suppliers to identify how their employment and other policies and practices can reflect the code of practice.’

The Assembly executive launched a voluntary code of equality practice supported by a dedicated website. In accordance with EC law, most contracts are still awarded on the basis of open competition, but suppliers who support the new voluntary Code are be assisted with positive action such as guidance on ways to improve their practices, and constructive feedback on unsuccessful tenders. This aims to assist businesses improve their competitive advantage and be better placed to secure future contracts. In the first few months following its introduction 70 new suppliers signed up to the Voluntary Code.

If contractors do not comply with the Code, they will not be invited to tender. Interestingly, procurement performance is measured against six targets, which include value for money and sustainable development but not equality of opportunity.

However ‘The Welsh strategy is very much in the ‘persuasive’ category and falls short of having equalities duties and fair wages as contract conditions and evaluated in the award of contracts.’³⁷

Scotland

While the Scottish Parliament has no statutory powers to promote equality, Schedule 5 of the Scotland Act (1998) enables the Scottish Parliament to undertake the following matters:
encouragement (other by prohibition or regulation) of equal opportunities and in particular of the observance of the equal opportunity requirements.

Imposing duties on -

³⁷ Centre for Public Services. (2004), op cit.

a) any office holder in the Scottish Administration, or any Scottish public authority, to make arrangements with a view to ensuring that their functions are carried out with due regard to the need to meet the equal opportunities requirements, or

b) any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.

In 2002 the Scottish Executive signed a protocol ensuring that in all future public private partnerships (PPPs) contract workers will receive 'fair pay' and rights over pensions. The protocol is said to have convinced a number of Scottish councils to alter plans on staff transfers to the private sector. The aim of this is to avoid the much-described 'two tier workforce in local government services'.

In addition to the Scottish Local Government Act (2003), the Scottish Executive has issued Statutory Best Value Guidance. This Guidance, includes Equal Opportunities and places specific obligations on authorities to ensure that the encouragement of equal opportunities is reflected in the authorities' overall objectives and highlighted in plans 'at corporate and service level. Officers and elected members are to be committed to mainstreaming 'equalities' in the Best Value process including ensuring that equality requirements are taken into account in the procurement strategy.

England

In February 2003, the Office of Deputy Prime Minister introduced changes governing contracting out in all Best Value³⁸ authorities including English local government and police authorities. The Code of Practice on Workforce Matters in Local Authority Service Contracts obliges contractors to offer new staff 'fair' and reasonable terms and conditions which are no less favourable than those of transferred employees. The Code guarantees new joiners reasonable pension provision – with a minimum of 6 percent employer contribution.

The Local Government minister said at the time:

'It will prevent good contractors with high quality employment standards from being undercut by those willing to abuse the system. And it will remove the risk that service quality is undermined during the life of the contract by a provider who is willing to drive down staff terms and conditions.'

³⁸ The best value regime was designed by central government to improve local public services. Under legislation, best value authorities - must: 'make arrangements to secure continuous improvement in the way in which they exercise their functions, having regard to a combination of economy, efficiency and effectiveness' (Local Government Act 1999)

The Code requires that service providers must contact representatives of a trade union where one is recognised, or other elected representatives of the employees, on the terms and conditions to be offered to new recruits. Local authorities are required to monitor compliance with the Code by service providers. However, the Code does not cover situations where there has been no transfer of staff, such as home help service, where a local authority is paying contractors to provide the staff for the service or where it only provides funding to a voluntary or community sector organisation. This clearly limits its impact. However, UNISON note that local authorities do have the power to require contractors to ensure that staff employed on local authority contracts receive fair pay and conditions.³⁹

In 2005 the Cabinet office issued a Code of Practice on Workforce Matters in Public Service Contracts. This covers public sector organisations and requires that even when TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the regulations applied.

The Equality Act

The Equality Act (April 2007) introduced the positive duty for gender equity into UK public authorities. The duty requires public authorities to pay due regard to promoting gender equality and eliminating sex discrimination. This means service providers and public sector employers will have to design employment and services with the different needs of women and men in mind. It requires public bodies to set their own gender equality goals in consultation with their service users and employers and to take action to achieve them.

The new duty is enforceable by law: instead of depending on individuals taking complaints about sex discrimination

The Act is said to be designed to generate policy-making that is sensitive to gender differences, services that are tailored to meet the different needs of women and men, employment practices that challenge occupational segregation and remove the barriers to women reaching their potential, and procurement practice that promotes equality. The gender duty includes any breach or contraventions of the Equal Pay Act (1970) – an act that covers equal pay for work of equal value.

The Act establishes a new single Commission for Equality and Human Rights (CEHR) that will bring together all six strands of discrimination – race, age, gender, disability, religion and sexual orientation – into one unified organization.

The report of the U.K. Women and Work Commission strongly recommended (prior to the passing of the Act):

³⁹ UNISON. (2003, April). *UNISON Guide - Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts in England*.

- Decision makers ‘should develop practical, equalities-led procurement advice which actively encourages public sector procuring authorities to promote good practice in diversity and equal pay matters among contractors so that it becomes the norm’
- ‘Public authorities should ensure that their contractors promote gender equality in line with the public sector Gender Duty, and equal pay in line with current legislation. This intention should be flagged up in contract documents to ensure that it is built into contractors’ plans and bids.’
- ‘Government should appoint a ministerial champion of procurement as a means of spreading best practice in diversity and pay matters.’
- ‘The government should develop a strategy for the social care sector incorporating issues such as pay, quality of care, qualifications of the workforce and future demand.’

This went further than the Equality Act.

Impact

The Centre for Public Services suggests that:

‘The government’s modernisation policies are increasing the rate at which services and functions are being transferred to the quasi-public/private sector. Understanding these trends and developments should provide an important part of the context in determining the scope of a Duty to Promote Equality... There has been a considerable growth in the last decade of new quasi-public/private companies and organisations to which services have been transferred’ and, ‘the commissioning and procurement process (covering outsourcing and quasi-public/private organisations and companies providing transferred services) will increasingly dominate the management of public authorities. This could have profound implications for equalities groups. It also suggests that a Duty to Promote Equality on public authorities alone will have limited impact.’⁴⁰ In a personal communication from Dexter Whifield of the Center he says:

“Basically I think a package of measures is required including:

- TUPE type legislation
- Procurement best practice
- Rigorous evaluation of the employment proposals and practices in shortlisting and bids to ensure that quality employment is funded in the bid.

⁴⁰ Centre for Public Services (2004), op cit.

- Equality impact assessment to cover all changes in employment and policy.
- Positive duty legislation
- Secondment model – instead of transferring staff are seconded by the local authority to a contractor or joint venture company – arguing this in a number of strategic service-delivery partnership contracts at present. This protects low paid admin women workers.

I don't think any one mechanism alone is inadequate."

While it is too soon to judge the effectiveness of the positive duty requirements, experience to date does suggest that the keys to success could be:

- there is an ongoing need to make sure that key officials understand the aims and principles of the requirement;
- officials need to be trained not just on appointment but at regular intervals during employment; and
- procedures are developed to enforce and monitor compliance after the contract has been awarded.

Information on the specific impact of the Positive Duties obligations on the pay employment conditions of the staff of contractors to local authorities does not appear to be available. However, it clear from the literature that there is now a will to have positive duty inform contracting out in ways that go beyond the TUPE regulations.

Possible relevance to New Zealand

In many ways the positive duty approach fits the New Zealand current approach to the implementation of equity objectives.

It is prescriptive in terms of the outcomes expected but not the means used to achieve the goals. It is proactive and positive rather than individual complaint based and is supported by assistance and tools for employers. It aims not only to remedy current employment inequities but also prevent inequitable impacts of future policy formation.

Positive duty requirements on New Zealand public entities could require a gender analysis of the impact of policies such as contracting out. Far from being simply a 'politically correct' initiative, overseas experience is that it is equally driven by the need for sustainable and quality services.

UK experience would also suggest that for public bodies to be wholehearted in the implementation of the full spirit of positive duty obligations, sufficient resources (especially financial) need to be provided by government.

Decent Work

The ILO has developed a Decent Work agenda that includes:

- Opportunities for work that is productive and delivers fair income
- Equality of opportunity for women and men

The Decent work Pilot Programme was initiated in October 2000 to pioneer ways in which the concept of decent work can be effectively promoted and applied in ILO member countries. The programme aims to 'strengthen national capacity to integrate decent work into national policies.' Eight countries are part of the pilot programme: Bahrain, Bangladesh, Denmark, Ghana, Kazakhstan, Morocco, Panama, and Philippines.

The outcomes discussed in the 2004 country report from Denmark are fairly generalised. The key outcome appears to be that, 'what are often supposed to be incompatible trade-offs between economic and social objectives can be reconciled through an appropriate policy mix. The labour market in Denmark is highly flexible not in spite of, but because of, an effective system of social security... In addition to analysing dynamic macro-economic and social policies, the study examines the contributions of vocational education and training, social protection and welfare reform, active labour market policies and programmes to reconcile work and family life.'⁴¹

In 2001 New Zealand undertook to develop a Decent Work Action Plan. The New Zealand tripartite partners - the government, New Zealand Council of Trade Unions and Business New Zealand - developed a working definition of decent work:

'Decent work recognises differing needs; provides satisfying and productive work; adequate income and social protection; stability for people and their families; respects peoples' rights; allows people time for other activities; and gives people a say and an opportunity for involvement'.

The major social development priorities are described as:

- Workplace productivity
- Parental leave
- Pay and employment equity
- Work-life balance
- Workplace Health and Safety Strategy
- Holidays Act
- Employment Relations Act review
- Partnership Resource Centre
- Consideration of ratification of ILO Conventions

⁴¹ International Labour Office. (2004, 23 September). Decent Work Pilot Programme. <http://www.ilo.org/public/english/bureau/dwpp/>.

Conclusions and recommendations

The literature confirms that the issue of precarious work, in particular inadequate income and a lack of security of working terms and conditions, has been an issue addressed by governments around the world. Prompted by concerns for quality tenders, public money funding poverty level wages, sustainable quality services and social equity, the solutions have generally focussed on either setting wage floors or requiring quality labour practices to be part of the procurement conditions.

In the UK and Europe in particular, there has been a strong focus on maintaining pay and conditions when services are contracted out by local authorities. In New Zealand, the contracting out process is long established and there are now few occasions when there is a service contracted out for the first time. Homecare, cleaning and the provision of residential services by private or not-for-profit providers is well entrenched. Until recently, initiatives in the UK and Europe have addressed new contracting out situations. While the issue in New Zealand is somewhat different, the consequences of precarious work are very similar and could well be addressed by similar style interventions. Recommended in particular is:

- Public Sector commitment to good employer practices is extended to include an expectation on businesses receiving public money through contracting for services;
- Government procurement policies include an explicit commitment that public money should not support precarious work outcomes for service providers;
- Links between funding poor employment conditions and unsustainable service quality and continuity are understood and promulgated;
- Decisions about the level of funding for the contracting of public services includes an explicit calculation of adequate (and required) minimum income levels for those providing the service;
- Public sector procurement processes include quality and equitable labour practices as part of the selection criteria and procedures for ensuring compliance are in place;
- Quality labour practices include:
 - observing all legal employment obligations
 - actual wage levels⁴² at, or above, the minimum adult wage
 - adequacy of working hours
 - predictability of income;

⁴² This takes into account any 'hidden' cost to the employee such as unpaid travel or training time, split shifts etc.

- Transparency of employee wage levels and working conditions is required from all tenderers for public sector contracts and preference is given to those with wages above the minimum wage; and
- Research to establish 'living wage' levels is undertaken and then informs procurement decisions and any modelling of government funding levels.

Appendix 1: Minimum Wages

Looking first at the countries with statutory minimum wages, this shows the level of minimum wages in the national currency in 2004 (rates in EUR are given in parenthesis for countries that are not members of the 'euro-zone').

*Table 1: National minimum wage (adult rate), 2004, in national currency (gross)**

Belgium	Monthly	EUR 1,210
Bulgaria	Hourly	BGN 0.71 (EUR 0.36)
	Monthly	BGN 120 (EUR 61.43)
Czech Republic	Hourly	CZK 39.60 (EUR 1.24)
	Monthly	CZK 6,700 (EUR 210.09)
Estonia	Hourly	EEK 14.60 (EUR 0.93)
	Monthly	EEK 2,480 (EUR 158.50)
France	Hourly	EUR 7.61**
	Monthly	EUR 1,286.09**
Greece	Daily	EUR 25.01
	Monthly	EUR 559.98
Hungary	Hourly	HUF 305.00 (EUR 1.21)
	Daily	HUF 2,440 (EUR 9.70)
	Weekly	HUF 12,000 (EUR 47.68)
	Monthly	HUF 53,000 (EUR 210.60)
Ireland	Hourly	EUR 7.00
Latvia	Hourly	LVL 0.474 (EUR 0.71)
	Monthly	LVL 80 (EUR 120.26)
Lithuania	Hourly	LTL 2.95 (EUR 0.85)
	Monthly	LTL 500 (EUR 144.81)
Malta	Weekly	MTL 53.88 (EUR 125.89)
Netherlands	Monthly	EUR 1,264.80
Poland	Monthly	PLN 860 (EUR 189.98)
Romania	Hourly	ROL 16,342.44 (EUR 0.40)

	Monthly	ROL 2,800,000 (EUR 69.12)
Slovakia	Hourly	SKK 37.40 (EUR 0.93)
	Monthly	SKK 6,500 (EUR 162.41)
Slovenia	Monthly	SIT 117,500 (EUR 491.45)
Spain	Daily	EUR 16.36
	Monthly	EUR 490.80
UK	Hourly	GBP 4.85 (EUR 7.14)

* Conversions into EUR, where necessary ** Rate applies only to workers on 39-hour week.

Source: EIRO.

Table 2: Statutory minimum wage adjustment and enforcement

Country	Frequency of adjustments	Adjustment body	Adjustment criteria	Supervising institutions	Fines in case of non-compliance
Belgium	Annually.	Social partners.	Indexation (minimum wage rise is linked to 'health index' of prices).	Industrial tribunal or Federal Public Service Employment, Labour and Social Dialogue.	Yes.
Bulgaria	Regularly (no fixed period, but annually since 2000).	Government decree; usually implemented unilaterally by the government.	Economic and social situation.	No monitoring system.	No; paying wages lower than the minimum wage is a very common practice.
Czech Republic	Annually.	Government, after consulting the social partners.	Consumer prices index.	Public labour offices (of which there are 100).	If labour offices find shortcomings, the employer is fined and obliged to top up pay to the level of the minimum wage.
Cyprus	Annually.	Government in consultation with the social partners.	Various factors (especially consumer prices index).	Ministry of Labour and Social Insurance's Department of Labour Relations.	Yes; the amount depends on the number of days of non-compliance.
Estonia	Annually.	Government decree, based on a decision by the social partners.	Various factors - in particular forecast for consumer prices index, labour productivity and economic situation.	Labour inspectorate.	No penalties. If employer pays less than the minimum wage, the employee can demand the arrears with 0.5% interest, through labour inspectorate.
France	Annually.	Government decree, after consulting the social partners.	Development of prices index and basic hourly manual worker's wages.	Labour inspectorate, with various monitoring bodies.	Maximum fine of EUR 1,500 for each case of non-compliance.
Greece	Twice a year.	Government by law (different laws	Consumer prices index.	Labour inspectorate	Employer has to pay any

		for private and public sector), based on national collective agreement.		and labour courts can intervene in the event of complaint.	arrears with interest.
Hungary	Regularly	Government, after an agreement is concluded by tripartite council.	Negotiations are integrated into the annual intersectoral bargaining round.	Labour inspectorate.	Maximum is EUR 410 (single case) to EUR 24,500 (multiple cases).
Ireland	Every 16 months (in practice).	Government and social partners through social pacts; recently, Labour Court has a role.	Negotiated as part of national pacts.	Labour inspectorate	Fines and/or imprisonment.
Latvia	Irregularly, depending on political considerations (every 1-2 years).	Government, after consulting the social partners.	Pressure from social partners, budgetary considerations and minimum wage increase plan agreed by social partners and adopted by cabinet in 2003.	Labour and financial control institutions.	Courts rule on cases of non-compliance. Normally, employer must pay all unpaid wages.
Lithuania	Regularly.	Government, upon recommendation of tripartite council.	No specific criteria.	Labour inspectorate.	Employers paying less than the minimum wage are fined up to LTL 10,000 (EUR 2,896).
Malta	Annually.	Government, upon recommendations made by the Employment Relations Board.	National minimum wages increase linked to the cost of living index.	Government Department of Industrial and Employment Relations.	Penalties range between EUR 231 to EUR 2,313 in the second case of non-compliance.
Netherlands	Twice a year (frozen since 2003).	Government decision.	Development of collectively agreed wages.	Labour inspectorate.	No penalties; government stipulates that employers should not pay less than minimum.
Poland	Once or twice a year.	Tripartite commission, with reference to proposals and information presented by the government.	Forecast for consumer prices index and other economic indicators.	Labour inspectorate.	Yes.

Romania	Annually (since 2002)	Governmental decree, after consulting the social partners.	No formal criteria, though the government decides to adjust the minimum wage according to developments in the cost of living, consulting the social partners.	Labour inspectorate.	The amount varies between 3 and 6 months' gross minimum wages.
Slovakia	Annually.	Government, based on a decision made by social partners (tripartite agreement).	Relationship with average wage and subsistence minimum, plus whole economic situation.	Labour inspectorate; employee representatives at the workplace.	Up to SKK 1,000,000.
Slovenia	Annually.	Government, based on a decision made by social partners (tripartite agreement).	Expected inflation.	Labour inspectorate.	Up to SIT 500,000.
Spain	Once or twice a year.	Government, after consulting the social partners.	Forecasts for inflation, productivity, economic situation.	Labour inspectorate.	Yes.
UK	Annually (in practice, since 2000).	Government decision, based on recommendations by the Low Pay Commission.	Whole economic situation (taking into account economic and social implications).	Inland Revenue and employment tribunals or civil courts.	GBP 7.20 per day and worker; employer has to pay any arrears to employees.

Source: EIRO.

Table 3: Adjustment and enforcement of collectively agreed minimum wages

Country	Frequency of adjustments	Criteria for adjustments	Supervising institution	Fines in case of non-compliance
Austria	Annually.	Pay increases influenced by bargaining outcomes in pattern-setting metalworking industry; increases vary with the sectoral power of trade unions.	No specific supervising institution; trade unions support employees when they appeal to the labour court over non-compliance with minimum rates of pay.	No, but employer has to refund any arrears.
Denmark	Annually.	No specific criteria used in bargaining.	Industrial court and trade unions.	Unions are allowed to take action against companies failing to pay, through boycotts.
Finland	Annually.	Specified in collective agreements, with no single criterion (such as inflation) used.	In conflicts between an individual employee and an employer, a trade union can take the case to the civil court on behalf of its members. Additionally, the unions provide legal assistance to members when they sue their employers.	Yes. Additionally, the employer has to refund the arrears.
Germany	Annually or every two years.	Productivity, inflation, profits.	No institution; but individual employees or unions can appeal to the labour court; with regard to statutory minimum wages based on Posted Workers Act (AEntG), customs authority fights against illegal working including non-compliance with minimum wage.	No, but employer has to refund any arrears; fines only exists for sectors affected by the AEntG.
Italy	Every two years.	Expected inflation rate.	Labour tribunal.	Yes. Additionally, the employer has to refund the arrears.
Norway	Annually.	Metalworking industry is pattern-setting; wage increases are based on productivity and inflation.	Social partners, in particular trade unions, and labour court in case of conflict.	No. Employer has to pay the correct wages if agreement is found to have been breached.
Sweden	Annually.	Expected inflation rate, productivity growth (as for ordinary wage-setting).	Labour court.	No, but employer has to refund any arrears.

Source: EIRO.

Bibliography

- Addressing the Gender Dimensions of Decent Work at Country Level: Views & Lessons from the Decent Work Pilot Programme.* A Brief for the Gender Inter-Regional Consultation Meeting. Turin, April 2005
- Armstrong, Pat., Amaratunga, Carol., Bernier, Jocelyne., Grant, Karen., Pederson, Ann & Willson, Kay. (2001). *Exposing Privatization – Women and Health Care Reform in Canada.* Ontario, Canada.
- Armstrong, Pat., Armstrong, Hugh., & Coburn, David. (2001). *Unhealthy Times: Political Economy Perspectives on Health and Care in Canada.* Toronto, Oxford University Press.
- Bernstein, Jared. (2000, August). Higher Wages Lead to More Efficient Service Provision: The Impact of Living Wage Ordinances on the Public Contracting Process. *EPI (Economic Policy Institute) Issue Guide on the Living Wage.*
- Bernstein, Jared. (2002, May/June). Making a Living – How the Living Wage Movement has Prevailed. *NHI (National Housing Institute) Issue 123.*
- Brenner, Mark D., & Luce, Stephanie. (2005). *Living Wage Laws in Practice - the Boston, New Haven and Hartford Experiences.* University of Massachusetts: Political Economy Research Institute.
- Card, D., & Kruger, A. B. (1995). *Myth and Measurement: The New Economics of the Minimum Wage.* Princeton University Press.
- Card, D., & Kruger, A. B. (2000). Minimum Wage and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania. *American Economic Review, Vol. 90.*
- Centre for Public Services. (2002, August). *Modernising Public Services? Evidence from the Frontline*
- Centre for Public Services. (2004). *The Case for a Positive Public Duty on Age Equality.*
- Centre for Public Services, (not dated) *The Employment and Financial Impact of Market Testing in the NHS in Northern Ireland.*
- Chaney, Paul & Fevre, Ralph. (2002). *An Absolute Duty: Equal Opportunities and the National Assembly for Wales. A Study of the Equality Policies of the Welsh Assembly Government and their Implementation: July 1999 to March 2002.* Institute of Welsh Affairs.
- Department of Labour Office of Federal Contract Compliance Programs, USA. Executive Order 11246: Equal Employment Opportunity.
- Egger, Philippe & Sengenberger, Werner. (2001). *Decent Work Issues and Policies.* International Labour Office.
- Equality Commission for Northern Ireland. (2005). *Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities.*
- Escott, Karen & Whitfield, Dexter. (1995). *The Gender Impact of CCT in Local Government.* Centre for Public Services, for the Equal Opportunities Commission.
- Escott, Karen & Whitfield, Dexter. (2002). *Promoting Gender Equity in the Public Sector.* Centre for Public Services.

- Farris, D., Runsten, D., Briones, C. & Goodheart, J. (2005). *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses*.
- Frazer, Lyn. (1997). *Impact of Contracting Out on Female NESB Workers: Case Study of the NSW Government Cleaning Service*. Ethnic Communities Council of NSW Inc.
- Gertner, Jon. (2006, January 15). What is a Living Wage? *New York Times*.
- Grant, K., Amaratunga, C., Armstrong, P., Boscoe, M., Pederson, A. & Willson, K. (eds.) (2004). *Caring For/Caring About: Women, Home Care and Unpaid Caregiving*. Ontario, Canada.
- Greater London Authority. (2005, September). London Games will set new standards for fair employment, says Mayor. Press release. http://www.london.gov.uk/view_press_release.jsp?releaseid=5646
- Greve, Carsten. (2003). Public Private Partnerships in Scandinavia. *International Public Management Review*. Vol 4; Issue 2.
- Griffin Cohen, Marjorie & Cohen, Marcy. (2004, April). *A Return to Wage Discrimination: Pay Equity Losses Through the Privatization of Health Care*. Canadian Centre for Policy Alternatives.
- Howes, Candace. (2002). *The Impact of a Large Wage Increase on the Workforce Stability of IHSS Homecare Workers in San Francisco County*. University of California Institute for Labor and Employment, and the University of California Center for Labor Research and Education, Berkeley.
- Human Resources Development Canada. (April 2002). *Evaluation of the Federal Contractors Program*.
- International Labour Office. (1999). Report to the Director-General on Decent Work. Geneva.
- International Labour Office. (2004, 23 September). Decent Work Pilot Programme. <http://www.ilo.org/public/english/bureau/dwpp/>.
- International Labour Office. ILO Convention C94 – Public Contracts 1949
- International Services, Department of Labour. New Zealand's Decent Work Action Plan (DWAP). <http://www.dol.govt.nz/services/international/int-decent.asp>.
- Northern Ireland Equal Opportunities Commission. (1996). *Report on Formal Investigation into Competitive Tendering in Health and Education Services in Northern Ireland*.
- O'Cinneide, Colm. (2002). *A Single Equality Body: Lessons from Abroad*. EOC Working Paper Series No. 4. Manchester, EOC.
- O'Cinneide, Colm. (2002). *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality*. London, Equality and Diversity Forum.
- O'Cinneide, Colm. (2003). Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law, in *Mainstreaming Equality: Models for a Statutory Duty*. Dublin, Equality Authority.
- O'Cinneide, Colm. (2005). Positive Duties and Gender Equity. *International Journal of Discrimination and the Law*. Social Science Research Network (SSRN) web article: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=707384
- Ontario Health Coalition. (2005, March). *Market Competition in Ontario's Homecare Sector: Lessons and Consequences: Summary*. Canada.

- Paternoster, Anne. (2004). *Eurostat Report - Minimum Wages EU Member States, Candidate Countries and the US 2004*. European Communities.
- Pollin, Robert & Luce, Stephanie. (1998). *Living Wage: What It Is and Why We Need It*. (a response to an article by Paul Krugman panning the LW)–web
- Reich, Michael & Hall, Peter. (1999). *Living Wages at the Airport and Port of San Francisco: Benefits and Costs*. Bay Area Living Wage Research Group, Centre on Pay and Inequality, University of California.
- Sonn, Paul. (2005) *City Wide Minimum Laws: A New Policy Tool for Local Governments*, Economic Policy Brief No 1, Brennan Center for Justice
- Thomas, Dan. (21 February, 2006). Updated TUPE Puts Employers in Contractual Straightjacket. *Personnel Today*.
- UK Cabinet Office. (2005). *Code of Practice on Workforce Matters in Public Sector Service Contracts*
- UNISON. (2003, April). *UNISON Guide - Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts in England*.
- UNISON. (2004, June). *How to End the Two Tier Workforce in Public Services and Achieve Fair Wages*.
- Women and Work Commission. (2006, February). *Shaping a Fairer Future*.
- Yelowitz, Aaron. S. (2005, September). *Santa Fe's Living Wage Ordinance and the Labor Market*. Employment Policies Institute.
- Yelowitz, Aaron. S., & Tiokka, Richard. S. (2005, May). *Effective Tax Rates and the Living Wage*. Employment Policies Institute.