

Mr. John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
eeet.sen@aph.gov.au
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Dear Mr. Carter,

UnitingCare NSW.ACT welcomes the opportunity to participate in the inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

We recognise that there is a legitimate role for independent contractors but also that commercial contracts can be misused when an employment contract would be more appropriate.

As the attached submission explains, we have several areas of concerns. The bill deprives many low paid workers of adequate protection against exploitation. The bill does not deliver the full policy intention of effectively protecting outworkers. Regulation can be used to override further state legislation and clauses within the bill itself.

People's human rights do not change depending on whether they are on employment or commercial contracts. We urge the Government to amend the legislation to give priority to more adequate and effective protection of the human rights of those workers who are most vulnerable to sham or exploitative contracts.

Yours sincerely



(Rev.) Harry Herbert
Executive Director

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

Submitter: Rev. Dr. Ann Wansbrough

Organisation: UnitingCare NSW.ACT

Address: PO Box A 2178
Sydney South NSW 1235

Phone: 02 8267 4280

Fax: 02 9283 5658

Email: annw@nsw.uca.org.au

Introduction

The Uniting Church in Australia supports the international human rights covenants and applies them to the evaluation of government policy proposals. The recent national Assembly of the Uniting Church adopted statements about employment relations and human rights. The following extracts set the theological context from which our submission arises.

On Human Rights, the Assembly said, *inter alia*:

1. The Uniting Church in Australia believes that human beings are created in the image of God who is three persons in open, joyful interaction. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community—all people—finding its life and sustenance in relationship.
2. Thus, the Uniting Church believes that every person is precious and entitled to live with dignity because they are God's children, and that each person's life and rights need to be protected or the human community (and its reflection of God) and all people are diminished.
3. In Jesus Christ we discern that which is truly human. As we feed the hungry, welcome the stranger and care for the thirsty, the sick and the imprisoned, there is the mysterious possibility that we will discover the life of Christ among us (Matthew 25: 31-46), and share the love of God.
4. We believe that God has given humanity gifts and skills for the benefit of the earth and humanity itself. These gifts include the capacity for love, compassion, wisdom, generosity and moral choice. They come with the responsibility to ensure the health and wellbeing of present and future generations and the earth. The well-being of the earth is crucial to the possibility of human community and well-being. Social, political and economic arrangements should reflect the dignity and worth of human beings and respect for the planet. Through the prophets and the life and words of Jesus, God calls people to work for justice for the poor and vulnerable.
5. We believe that Christians are called to love their neighbour as they love themselves and to extend that love even to enemies. It is the love of God in Christ Jesus which motivates us to live out this calling by working for peace with justice in our church, our communities and the world. The recognition of human rights is an affirmation of the dignity of all people and essential for achieving peace with justice.
6. We affirm the inherent and inalienable right of all people to live free of persecution and violence, with access to all that is necessary for a decent life.
11. We condemn the abuse of human rights and the failure to uphold and promote human rights as contrary to the gospel of God's love in Christ for all human beings and the earth.
12. We affirm our support for the human rights standards recognised by the United Nations (UN). Everyone has a birthright to all that is necessary for a decent life and to the hope of a peaceful future. This birthright is expressed in UN human rights instruments which describe human rights as civil, political, economic, social and cultural rights. These instruments provide a valuable framework for assessing political, economic and social systems and are an important tool for peace.

13. We note that the internationally recognised human rights are indivisible, universal and inalienable...

17. We urge the Australian Government to fulfil its responsibilities under the human rights covenants, conventions and treaties that Australia has ratified or signed, by upholding international standards in effecting social and legislative change.

18. We pledge to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable.

On industrial relations, the Uniting Church in Australia Assembly said, *inter alia*, that it:

1. affirms that all people are entitled to just remuneration and equitable conditions of employment in their working lives, and dignity in unemployment.

Assumptions

The Uniting Church in Australia recognizes that there are genuine contracts for services that are appropriately treated as commercial contracts and not as employment contracts. Many people with marketable skills choose such contracts rather than being employees. We note that the argument of many advocates for the legislation is that many workers choose to be independent contractors because they are able to obtain better remuneration and conditions through commercial contracts than as employees.

We are, however, also aware that there are many workers who are being coerced into moving from being employees to being contractors although this results in financial disadvantage and lost security of employment. They perform similar work to the work they performed as employees and/or to work done by employees working alongside them. There are many principals who choose such contracts as a way of reducing costs and shifting some costs onto the employee. These include both employment costs and capital costs.

Such arrangements appear to be contrary to the rationale that supporters of independent contractors use to justify the use of commercial rather than employment contracts. The Minister's discussion paper in 2005 recognised the importance of deterring sham contracts.

We therefore reject the assumptions (or "principles") of the Australian Chamber of Commerce and Industry and the Independent Contractors Association which suggest that contracts for services are automatically good for either the individual worker or the Australian economy or nation. Whether or not contracts contribute positively to anyone's wellbeing depends on their content and the circumstances to which they refer. An exploitative contract which results in less than a living wage (for the equivalent of full time work and after operational expenses are deducted) creates poverty and is not in the public interest. It is also most unlikely to encourage any of the values named by ACCI. Poverty damages both individuals and society (as UnitingCare Australia has explained in its submission to the poverty inquiry and in related publications).

This submission sets out basic principles which should guide public policy in this area, assesses the bill against them, raising a number of concerns, and recommends a number of changes.

Principles

1. We suggest that the following principles need to be followed if the legislation is to be responsible public policy:
 - 1.1. Contracts for service involve human work and therefore all the internationally recognised human rights related to work, just and favourable remuneration, safe working conditions, the right to join unions and to organize, and so on, are applicable whether a worker is under a contract of service or a contract for service. Human rights may not be alienated in the name of commerce.
 - 1.2. The first priority of government must be to protect the human rights of people who are on low wages and are most at risk of sham arrangements or unfair contracts. This is an employment and moral issue rather than a commercial issue.
 - 1.3. There need to be effective and accessible processes by which people are protected from being coerced into becoming independent contractors or accepting less than the remuneration and conditions available to employees doing similar work. Deeming provisions, such as those in Queensland that set criteria for declaring people to be employees rather than contractors, are preferable to reliance on individuals taking action under the proposed unfair contract provisions.
 - 1.4. Unions have a role to play in protecting people forced onto sham contracts or unfair contracts. This is evident in the work done by the LHMU regarding cleaners and the TCFUA regarding outworkers. Human rights instruments and the ILO conventions require that workers be able to act collectively. Australian legislation should be consistent with this.
 - 1.5. The section on unfair contract needs to be effective in recognizing contracts that are exploitative and providing remedies.
 - 1.6. Parliament should take responsibility for setting the scope, content and effect of legislation especially in matters such as overriding state and territory laws; this should not be left to regulation;
 - 1.7. The legislation needs to fulfil the Government's stated policy intention of maintaining all current protections for outworkers.
 - 1.8. Protection of outworkers and owner drivers provided in the legislation should not be able to be overturned by regulation, but only by a deliberate decision of parliament and after appropriate debate.

Concerns about the bill

2. Given the above principles, we have several concerns with the bill
 - 2.1. This bill will make it much more difficult for workers employed under sham contracts to know and exercise their right to be treated as employees. Under the proposed bill, workers in similar circumstances to one another will each have to take action, if they are contracted to different principals or even if they are contracted to the same principal. Also, it appears that they will not be able to ask the union to act on their behalf, and the union will not be able to intervene unilaterally, even if it knows that workers are being exploited and living in poverty.
 - 2.2. The focus is wrong. The bill is framed in a way that puts the onus on workers who are on sham or unfair contracts to prove that the arrangement is sham or the contract unfair, rather than putting the onus on the principal to show that the workers are genuine independent contractors. In this bill, freedom of commercial contract takes priority over human rights.
 - 2.3. It is inappropriate to override state deeming provisions. In the Qld provisions, the criteria are clear and arrangements that come within the criteria are likely to be either sham or unfair. The Qld approach allows classes of workers to whom the criteria apply to be recognised as employees; the problem with the bill is that workers are treated individually and action needs to be taken separately. While the NSW deeming provisions seem more *ad hoc*, they at least have the virtue of protecting significant groups of workers who are vulnerable to sham contract arrangements.
 - 2.4. The bill seems to eliminate the role of unions in protecting workers who are on sham or unfair contracts. This is unreasonable, given that unions have played an important role in assisting workers to learn about and claim their basic entitlements – which this bill purports to protect. For example, the TCFUA has played an important role with outworkers and the LHMU with cleaners. Often these workers have been unaware of their rights, or not in a position to exercise their rights without union intervention, especially those who are women of a non-English speaking background. Unless the aim of the bill is to leave low paid workers without real protection, unions should be given a role. Removing the role of unions is also contrary to human rights.
 - 2.5. The bill does not provide certainty for workers who are at risk of being coerced into becoming independent contractors or accepting unfair contracts for service. It involves a court or tribunal whereas an administrative process comparing net remuneration under the contract would be more appropriate (quicker, simpler, cheaper).
 - 2.6. The unfair contract provisions seem unduly restrictive compared to the state legislation that they override.

- 2.7. The matters to be taken into account in reviewing a services contract that may be unfair refer to “total remuneration” rather than net remuneration. Given that contractors usually have to cover a range of operational expenses that for employees are paid by the employer (such as capital assets and workers compensation), the comparison seems unrealistic. The TWU for example has pointed out that some operators who receive a total annual remuneration of \$70000, are left with an income of only about \$20000 once they have paid the instalments on their truck and other operational expenses that an employee would not pay.
- 2.8. The legislation is unsatisfactory in allowing regulations to be made that could override further state and territory legislation and also clauses within the legislation itself regarding outworkers and owner drivers.
- 2.9. The bill is unsatisfactory in its treatment of outworkers in the garment industry. UnitingCare NSW.ACT is a funder and participant in Fairwear NSW and fully endorses the Fairwear submission to the inquiry, which emerges from a detailed knowledge of the experience of outworkers and indicates what needs to be done to provide the necessary protections for outworkers. The deficiencies in the bill that need correction include the following:
- a. The bill does not fully maintain state laws which protect outworkers
 - b. The bill creates different, less comprehensive monitoring mechanisms for those the bill calls “contract outworkers”
 - c. The bill creates a category of “contract outworkers”, with less rights and possibly more obligations than other outworkers; individual outworkers would have to prove that they are employees
 - d. The bill fails to provide specific, effective protections against sham contract arrangements for outworkers
 - e. The bill allows parties to opt in to the reforms, thereby excluding the operation of state laws that protect them; this should not be allowed in the case of outworkers.

Recommendations

3. In the light of these problems we recommend the following:
- 3.1. The legislation should be based on a recognition that independent contractors are workers and that there are basic human rights that apply no matter what the form of the contract a worker enters into. This includes the right to join a union and related rights, and the right to just and favourable remuneration and conditions of work.
 - 3.2. The legislation should be refocused so that it has as a major purpose and effect to provide adequate protection to employees against being forced into sham arrangements. It should not rely on the common law definition of independent contractor, since the use of this definition encourages the employer or principal to shift costs onto the employee/contractor so that the arrangement conforms to the definition.

- 3.3. The legislation should provide a simple process by which groups of workers on similar sham or unfair contracts can take action jointly and with the assistance of unions to rectify their situation.
- 3.4. The legislation should provide that individual independent contractors can choose to be represented by a union in any proceedings related to the contract or negotiation of a contract.
- 3.5. If the bill continues in its present form, then section 15 (1) (c) should be clarified to ensure operational expenses are subtracted before total remuneration is compared to that of an employee.
- 3.6. The section on regulation should be amended so that regulations cannot override clauses in the legislation.
- 3.7. The section on outworkers needs to be amended to remove the concept of contract outworkers and to ensure that all current state or territory protections continue to apply to all outworkers, in accordance with the agreed policy intent of maintaining the existing protections for outworkers. The amendments should be negotiated with Fairwear.
- 3.8. The legislation should be clarified to ensure that outworkers cannot be asked to agree to opting in to the legislation.