



TEU

TERTIARY EDUCATION UNION
TE HAUTŪ KAHURANGI

Submission of

Te Hautū Kahurangi | Tertiary Education Union

to the

Employment Standards Policy, Labour and Immigration Policy,

Ministry of Business, Innovation & Employment

on the

**Better protections for contractors: Discussion document for public
feedback**

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1. Introduction

- 1.1. Te Hautū Kahurangi | Tertiary Education Union (TEU) welcomes this opportunity to respond to the *Better protections for contractors: Discussion document for public feedback*.
- 1.2. The TEU is the largest union and professional association representing almost 10,000 academic and general/allied staff in the tertiary education sector (in universities, institutes of technology/polytechnics, wānanga, private training establishments, and REAPs).
- 1.3. The TEU actively acknowledges Te Tiriti o Waitangi as the foundation for the relationship between Māori and the Crown. We recognise the significance of specific reference to Te Tiriti o Waitangi in the Education Act and the emergent discourse resulting from this. We also accept the responsibilities and actions that result from our nation's signing of the UN Declaration on the Rights of Indigenous Peoples.
- 1.4. The TEU expresses its commitment to Te Tiriti o Waitangi by working to apply the four whāinga (values) from our *Te Koeke Tiriti* framework as a means to advance our TEU Tiriti relationship in all our work and decision-making – with members and when engaging on broader issues within the tertiary sector and beyond – such as our response to this discussion document:

Tū kotahi, tū kaha: We are strong and unified; we are committed to actions which will leave no-one behind; we create spaces where all people can fully participate, are fairly represented, and that foster good relationships between people.

Ngā piki, ngā heke: We endure through good times and bad; we work to minimise our impact on the environment; we foster ahikā – the interrelationship of people and the land, including supporting tūrangawaewae – a place where each has the right to stand and belong.

Awhi atu, awhi mai: We take actions that seek to improve the lives of the most vulnerable; we give and receive, acknowledging that reciprocity is fundamental to strong and equitable relationships; and we work to advance approaches that ensure quality public tertiary education for all.

Tātou, tātou e: We reach our goals through our collective strength and shared sense of purpose, which are supported through participatory democratic decision-making processes and structures.

- 1.5. Our response to the *Better protections for contractors: Discussion document for public feedback* stems from our commitment to the whāinga expressed above and our wish to see these enacted in the tertiary education sector and in our society and communities.

2. CTU policy

- 2.1. The TEU is an affiliate of the Te Kauae Kaimahi | New Zealand Council of Trade Unions (CTU) and therefore strongly supports the CTU's submission on the *Better protections for contractors: Discussion document for public feedback*.

- 2.2. More specifically, we agree that:

- 2.2.1. in order to ensure better protections for contractors, it is essential that the category of employees is broadened so that virtually all workers in the 'grey zone' are considered as employees;

- 2.2.2. the existing law must be fully enforced as shown by the discussion document, and that the Labour Inspectorate should be given the power to undertake additional enforcement;

- 2.2.3. it is vital that rights to collectively bargain are extended to contractors, as this is an essential mechanism through which contractors are able to protect themselves against exploitation – unions should be responsible for such bargaining.

- 2.3. With regard to the 11 Options outlined in the discussion document:

- 2.3.1. We oppose Options 4 and 11.

- 2.3.2. We support Options, 1, 2, 3, 5, 6, 7, 8, 9, and 10.

3. Examples from the tertiary education sector

- 3.1. The TEU has had experience with some of our employers in the tertiary education sector using independent contractors as an attempt to circumvent the appointment of academic and general allied staff who would be covered by the relevant collective agreements. A number examples are as follows:
- 3.2. An employee at a polytechnic had been on a series of fixed-term appointments. There were issues as to whether or not the fixed term was in fact for a genuine reason (as per the collective agreement and the Employment Relations Act) as the work was for a permanent course and therefore continuous.

When the employee was asked to continue teaching the course the following year, they were advised by the Human Resources Manager that they could not continue being employed on a fixed term. Instead, the only the way the employment would continue was if the employee became a contractor.

Subsequently, the employee contacted the TEU, who were able to ensure that the employee was employed in a permanent position as an employee.

- 3.3. At another polytechnic, the employer has used contractors for work that would be covered by academic staff collective agreements. These independent contractors are being engaged to deliver work that falls within the coverage clauses of the collective agreement.

The employer was informed by the TEU that the collective agreement must apply to all new staff engaged, and that it was the TEU's view that the sole purpose of employing staff as contractors was to avoid appointing academic staff under the collective.

This issue occurred for various reasons, one example of which was when a permanent staff member was made redundant, yet the work associated with that role was ongoing and the employer instead appointed an independent contractor a number of times.

It is the TEU's view that the collective agreement provisions must apply to all new staff.

The TEU collective agreement defines an Employee as an "Academic Staff Member," mean(ing) a person employed in a teaching position." By this very definition, it is the TEU's expectation that contractors should not be performing the duties of an academic in this, or other similar, institutions.

The TEU also recognises that case law clearly defines the parameters of an employee versus contractor, and suggest that the polytechnic was engaging contractors to undertake work that would typically and usually be undertaken by an employee. We believe that, through those actions, the employer was undermining the collective agreement and our member's relationship with their employer.

3.4. What follows is another example as told from the point-of-view of a TEU member.

During the first half of 2012, I worked as a "contractor" for a polytechnic (Polytechnic A) in Auckland. At the same time, I was working for two other polytechnics, as well as briefly for a university, and at a Private Training Establishment (PTE). The contractual arrangements varied.

I also provided services to a publishing house to update a companion website for a textbook. In the case of the publishing house, the contractual arrangements could best be described as a "contract for services," whereas with the educational establishments the arrangements could be best characterised as a "contract of service."

The arrangement with Polytechnic A illustrates that, for all intents and purposes, I was an employee of the Polytechnic concerned, while enjoying none of the rights and protections normally afforded to employees. These types of arrangements do a disservice to education.

The arrangement with Polytechnic A was that I was engaged for the duration of one semester to teach an evening class in one paper, and teach and be the Course Coordinator for another paper. There was a pre-agreed global "fee" for my services. I was expected to teach the classes, liaise with the other lecturer(s) on the courses, set assignments and examinations, write course materials, arrange for moderation, and attend to the pastoral care of students for both papers.

In the contractual documentation, Polytechnic A was described as "the principal" and I was described as "the contractor." There was no real ability to negotiate the terms, nor was there was an allowance for annual or sick leave. I was required to make my own arrangements in regard to the payment of tax and to set up a GST account. There was no contribution to KiwiSaver. Polytechnic A provided shared office space.

The global fee which I had agreed to – taking into account the many facets of the role – worked out, on an hourly basis, as being well below the minimum wage. It was difficult to pay attention to the educational and pastoral needs of students for various reasons, not least of which was that I was seldom on campus at the times that the students were available for appointments. I had no control over the timetabling of the classes.

Moving between providers at different campuses was extremely stressful. I worked – unpaid – on statutory holidays and most weekends. I had little or no contact with my colleagues. There was no time to maintain professional currency or engage in research – a requirement of the Education Act (because two of the courses which I taught were at degree level). There was no time for professional development.

On the available legal tests, I believe that I was an employee of Polytechnic A. With regard to the “intention” test, it was clear that Polytechnic A – due to the wording of the “contractor agreement” – intended for me to perform the services of an employee, despite the agreement being called a “contract for services.”

On the control test, I was an employee because Polytechnic A prescribed my work method and class times, supplied materials (classrooms, learning platforms, access to databases and other materials). I taught to a prescribed syllabus and the deadlines for marking assignments and examinations were set by Polytechnic A, in terms of their policies. In order to cancel a class, I would need to notify Polytechnic A, get permission and arrange cover, which, had it been necessary, Polytechnic A would have had to arrange. I reported to a Line Manager. I worked and behaved as an employee.

The work which I performed was fundamental to Polytechnic A’s business. Both of the courses which I taught were core courses, without which the students could not graduate in the qualifications concerned. The work was continuous, for the benefit of Polytechnic A, and of a type usually performed by employees. I was an integral part of a team, did not supply my own equipment, and was not reimbursed for expenses occurred. Therefore, on the integration test, I was an employee.

Finally, despite having to make my own arrangements for matters such as the payment of tax, if one looks at the substance rather than the form of my arrangements with Polytechnic A, I was an employee. This was the fundamental/economic reality.

The arrangements that I made with the publishing house reflected an entirely different reality. I worked in my own time and the deadlines were not fixed. The project which I worked on was a “one-off.” There was no supervision and no Line Manager. I worked from home. It was a flexible arrangement and, in the circumstances, fair.

By contrast, the arrangement that I had with Polytechnic A was unfair and exploitative. It was used, I believe, to provide flexibility for Polytechnic A – a flexibility which was not reciprocated. It resulted in insecure work and a gross power imbalance. Such arrangements were, I believe, fairly widespread at Polytechnic A, and used, in my submission, as a means of circumventing the requirements of S66 of the Employment Relations Act. Polytechnic A would have been unable to supply a genuine reason for what was effectively a fixed term.

The arrangement made it very difficult to participate in the activities of my union. There was no platform for voicing my opinion on professional issues, the content of the course, or my conditions of employment. Apart from the obvious financial, social, and professional disadvantages that insecure employment brings, there was a very real disadvantage for students in terms of their pastoral care and educational advancement.

As far as I can recall, the arrangement did not require me to adhere to Polytechnic A’s Code of Conduct, which, if correct, potentially placed Polytechnic A at risk. I do not know what arrangements were made in terms of insurance, but this may also have been a potential area of risk for Polytechnic A.

The disadvantages of the arrangements such as the one that I entered into with Polytechnic A include, but are certainly not limited to:

- No protections and rights under the Employment Relations Act;
- No representation;
- Uncertainty regarding income;
- General economic uncertainty;
- Uncertainty for students;
- Lack of time and resources relevant to pastoral care of students;
- Isolation from the teaching profession;
- Lack of time to maintain professional currency; and,
- Inability to engage in research

Fortunately for me, I negotiated a release from the arrangement with Polytechnic A before the semester concluded and I returned to permanent work under a collective agreement at another education provider.

4. Conclusion

- 4.1. We submit that for there to be better protections for contractors, it is essential that:
 - 4.1.1. the Labour Inspectorate should be able to undertake additional enforcement of the existing law as outlined in the discussion document;
 - 4.1.2. the category of employees be broadened so that virtually all workers in the 'grey zone' are considered as employees.
- 4.2. As the examples from the tertiary education sector outlined in our submission show, the misclassification of employees lead to workers facing employment uncertainty, financial constraints, and other forms of exploitation. These are all factors which contribute to stress, undermine the functioning of our education system, and inevitably impact negatively on the conditions of learning available to our ākonga/learners.