Inquiry into the Fair Work Amendment (Protecting Australian Workers) Bill 2016

Senate Education and Employment Legislation Committee

SUBMISSION

April 4, 2016

The Salvation Army Freedom Partnership and the Federation of Ethnic Communities Council of Australia (FECCA) welcome commitments to crack down on employers who exploit workers.

Fair Work for all workers (Item 3)

FECCA and the Freedom Partnership strongly support this amendment to ensure that the *Fair Work Act* (FW Act) *2009* applies to all workers regardless of their immigration status. However, if there is no provision to prevent the removal of a worker from Australia as a result of complaining about a contravention of the FW Act, they are essentially not covered under the full breadth of the FW Act, particularly unfair dismissal provisions. While we understand the Fair Work Ombudsman (FWO) may be able to pursue unpaid wages and entitlements for returned workers, in our experience, this has not occurred consistently. Further, it is not feasible, and not particularly logical, for a worker to fight an unfair dismissal from overseas. We argue that repatriating workers who are unable to obtain a new sponsor is discriminatory and acts as a disincentive to reporting contraventions of the FW Act. Given the majority of the FWO's investigations derive from complaints; this gap should be addressed, if not in this policy, then in another, to remove this barrier.

Whilst some assert this change is unnecessary, we refer to Dr. Stephen Clibborn's submission to the Education and Employment References Committee Inquiry into the Impact ofAustralia's temporary work visa programs on the Australian labour market and on the temporary work visa holders. This submission detailed two court cases where judges ruled that a visa breach negated the employment contract, and consequently, that the workers were not covered by the relevant workplace legislation. We support Dr. Clibborn's thesis that there is sufficient ambiguity in the law to give rise to such rulings.

Phoenixing (Item 14)

We strongly support provisions in this bill addressing phoenixing; however, we assert that additional resources will be required to enable the Fair Work Ombudsman to effectively execute their current and new responsibilities.

Criminal Offences for serious contraventions of the FW Act (Item 22)

The Salvation Army and FECCA believe that strengthening penalties to offset the advantage unscrupulous employers hold over vulnerable workers is an important and necessary step. However, penalties alone do not address the many disincentives workers have to complaining about exploitative work arrangements.

Firstly, the effectiveness of any penalty relies on the extent to which it is exercised. According to Department of Immigration and Border Protection (DIBP) data, the employer sanctions for aggravated offences under the *Migration Amendment (*Reform of Employer Sanctions*) Act 2013* were not exercised in financial year 2014-15.[1] To have the dual effect of both discouraging employers from doing the wrong thing and encouraging workers to come forward with complaints, penalties for workplace violations need to be enforced and workers should see them being enforced.

[1] Bob Kinnaird, 'Foreign worker exploitation', http://johnmenadue.com/blog/?p=5379

Secondly, policy must also create incentives for workers to come forward; otherwise, the penalty regime cannot be applied to the fullest extent. To build confidence in the system, workers must see tangible examples of accountability for unscrupulous employers and protection for workers. The Freedom Partnership and FECCA have recommended that workers on temporary work visas be put in contact with unions or community organisations that can support them on arrival and labour hire companies be licensed so there is transparency about what companies are operating, who is controlling them and driving out the dodgy operators by making it an offence to run or use an unlicensed labour hire business. While these fall outside the IR portfolio, it is essential that the policies are aligned and function together to reduce exploitation.

Clarifying the definition of *coercion*

The proposed new offences include contraventions of the FW Act involving coercion or threat (both within the meaning of Division 270 (slavery and slavery-like conditions) of the *Criminal Code*.

We support the creation of new offences; however we are concerned about their practicality. The Australian Federal Police face enormous difficulties in meeting the burden of proof required to prosecute the slavery offences, particularly in cases that involve greyer aspects of the law, including *coercion*[2], *psychological oppression*[3], *abuse of power*[4] and *taking advantage of a person's vulnerability*[5]. Noting these challenges, it would be useful to further clarify the definitions of *coercion* and *threat*.

An illustrative example is the frequent use of revoking employer sponsorship as a veiled threat of deportation. We have seen numerous cases where an employer provides what appears to be a legitimate and legal contract to workers recruited overseas. Sometimes it is translated in writing, but often is it read aloud, in which cases, workers do not understand what they are signing.

Upon arrival, conditions change, including pay, amount of debt, hours, and often living arrangements. In serious cases, workers become bonded labourers. While the employer may not be making explicit threats of harm to a worker or his/her family members, the worker is stuck in substandard conditions, exploitative work, with no power to negotiate.

We also submit that the new offences involving exploitation constitute aggravated offences and should carry a higher penalty, as in the employer sanctions provisions under the *Migration Amendment (Reform of Employer Sanctions) Act* 2013, s.245AD, of five years imprisonment.

In addition to coercion and threat, it would useful also to refer to *deceptive recruiting for labour or services*, which is commonly involved in both labour exploitation and trafficking cases. Within the slavery offences, *deceptive recruiting* is defined in s270.7 and carries a penalty of 7 years or 9 years for aggravated offences):

A person (the recruiter) commits an offence if:

a. the recruiter engages in conduct; and

[2] Criminal Code s270.1A(a)
[3] Criminal code s270.1A(d)
[4] Criminal code s270.1A(e)
[5] Criminal code s270.1A(f)

b. the recruiter engages in the conduct with the intention of inducing another person (the victim) to enter into an engagement to provide labour or services; and
c. the conduct causes the victim to be deceived about:
    i. the extent to which the victim will be free to leave the place or area where the victim provides the labour or services; or
    ii. the extent to which the victim will be free to cease providing the labour or services; or
    iii. the extent to which the victim will be free to leave his or her place of residence; or
    iv. if there is or will be a debt owed or claimed to be owed by the victim in connection with the engagement—the quantum, or the existence, of the debt owed or claimed to be owed, or
    v. the fact that the engagement will involve exploitation, or the confiscation of the victim's travel or identity documents; or
    vi. if the engagement is to involve the provision of sexual services—that fact, or the nature of sexual services to be provided (such as unprotected sex).

Thank you for the opportunity to provide feedback. Please do not hesitate to contact us to discuss further.

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