



Submission to the Senate Standing Committees
on Education and Employment on the

***Fair Work Amendment (Protecting Vulnerable
Workers) Bill 2017***

Anti-Slavery Australia
Faculty of Law
University of Technology Sydney
PO Box 123, Broadway NSW 2007
(02) 9514 9660

Anti-Slavery Australia welcomes the opportunity to provide submissions to the Senate Standing Committees on Education and Employment on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017. Established in 2003, Anti-Slavery Australia is a research, policy and legal centre at the University of Technology Sydney with the mission to abolish human trafficking, slavery and slavery-like practices such as forced labour and forced marriage in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced human trafficking, slavery, slavery-like conditions and forced marriage in Australia.

Acknowledgements

Indika Chandrasekera, Anti-Slavery Australia

Hannah Wade, Anti-Slavery Australia

Jennifer Burn, Director, Anti-Slavery Australia, University of Technology Sydney

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EXECUTIVE SUMMARY

This submission is made to the Senate Standing Committees on Education and Employment (“the Committees”) inquiry into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (“Fair Work Amendment Bill”), and focuses on the intersection between labour exploitation under the civil framework of the *Fair Work Act 2009* (Cth) (“Fair Work Act”) with the Fair Work Ombudsman (“FWO”), and criminal exploitation of labour as investigated by the Australian Federal Police (“AFP”). Anti-Slavery Australia is a law, policy and legal practice centre based within the Faculty of Law at the University of Technology Sydney. This submission draws upon Anti-Slavery Australia’s research and publications, as well as advocacy and legal casework experience with survivors of human trafficking and slavery in Australia.

Anti-Slavery Australia supports the introduction of the proposed amendments to the Fair Work Act to “address increasing community concern about the exploitation of vulnerable workers (including migrant workers) by unscrupulous employers.”¹

While recognising the specific jurisdiction of the Fair Work Act, this submission will address the Fair Work Amendment Bill in the context of severe forms of labour exploitation, identified as criminal offences under divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (“Criminal Code”). The Criminal Code criminalises slavery, servitude, forced labour, debt bondage and human trafficking. This submission will refer to these types of severe exploitation as human trafficking and slavery. This submission observes the intersection of criminal and civil responses to crimes of human trafficking and slavery in Australia.

Anti-Slavery Australia identifies the following key areas of the Fair Work Bill as relevant to identifying and responding to human trafficking and slavery in Australia:

- *Schedule 1, Part 1 – Increasing maximum penalties for contraventions of certain civil remedy provisions*
- *Schedule 1, Part 2 – Liability of responsible franchisor entities and holding companies*
- *Schedule 1, Part 4 – Powers of the Fair Work Ombudsman*

In response to these proposed amendments, Anti-Slavery Australia makes the recommendations set out in this submission.

¹ Explanatory Memorandum, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth).

1. AUSTRALIA'S RESPONSE TO HUMAN TRAFFICKING & SLAVERY

Human trafficking and slavery are severe forms of human rights abuses that occur around the world. These types of exploitative practices are both complex and clandestine, as such the prevalence of human trafficking and slavery can only be estimated. The International Labour Organisation's ("ILO") global estimate of the prevalence of forced labour is that 21 million people are victims of forced labour worldwide, with 19 million of these victims suffering exploitation by private individuals and enterprises.²

Survivors of human trafficking and slavery suffer lasting physical and psychological trauma. This trauma is often amplified by economic and social impacts, including unpaid wages and lost earning capacity.

Australia is a destination country for the trafficking of women, men and children subjected to forced labour and other forms of human trafficking and slavery.³ These exploitative practices occur in Australia in a range of industries including agriculture, construction, hospitality and domestic service.⁴ The Australian Government has obligations under international law to address human trafficking and slavery pursuant to various international instruments, including:

- *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime;*
- *The International Covenant on Civil and Political Rights;*
- *The International Covenant on Economic, Social and Cultural Rights;*
- *The Convention on the Elimination of All forms of Discrimination against Women;*
- *The Convention on the Rights of the Child;*
- *The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;* and
- relevant ILO forced labour conventions.⁵

These obligations are reflected in Australia's criminal and civil responses to exploitative practices, including human trafficking and slavery. The Criminal Code contains the offences of human trafficking, slavery and slavery-like practices such as servitude and

² International Labour Organization, *Forced labour, modern slavery and human trafficking*, <<http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>>.

³ Interdepartmental Committee on Human Trafficking and Slavery, 'Trafficking in Persons: the Australian Government response 1 July 2015 – 30 June 2016' (Australian Government, 2016) 3.

⁴ *Ibid.*

⁵ These include the *Forced Labour Convention, 1930* (No. 29) and the *Worst Forms of Child Labour Convention, 1999* (No. 182).

forced labour, and also includes the offence of conducting a business involving servitude, which carries a maximum penalty of 15 years imprisonment,⁶ or 20 years if the victim is under the age of 18.⁷ At a Federal level, matters involving labour exploitation may also come within provisions of the Fair Work Act and/or the *Migration Act 1958* (Cth).

The Australian Government's *National Action Plan to Combat Trafficking and Slavery 2015-2019* ("National Action Plan") provides the national policy framework for combatting human trafficking and slavery in Australia, and addresses key areas of focus, including labour exploitation in supply chains. The National Action Plan contains a series of action items to assist in the delivery of effective measures to combat human trafficking and slavery in Australia, including:

- fostering collaboration between domestic government agencies, such as the AFP, Department of Immigration and Border Protection, and the FWO,⁸
- monitoring the effectiveness of existing civil and criminal law frameworks under the Criminal Code and the Fair Work Act;⁹
- ensuring that referrals are made to the relevant agency where indicators of trafficking and slavery are identified;¹⁰ and
- training frontline officers to effectively identify and respond to instances of human trafficking and slavery.¹¹

Human trafficking and slavery are severe forms of exploitation that exist at the extreme end of a spectrum of exploitative practices.¹² Other forms of exploitation which exist on this spectrum include practices that breach civil frameworks such as the Fair Work Act. These include, for example, underpayment of workers, or non-payment of wages. In some cases, these types of civil law breaches can be indicators of criminal exploitation of labour, such as slavery and forced labour.

The FWO's functions are outlined in the Fair Work Act, and include:¹³

- promoting and monitoring compliance with the Fair Work Act and fair work instruments;

⁶ *Criminal Code Act 1995* (Cth) s270.5(2).

⁷ *Criminal Code Act 1995* (Cth) s270.8(1).

⁸ Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 1 December 2014, 38.

⁹ *Ibid*, 46.

¹⁰ *Ibid*, 59.

¹¹ *Ibid*, 63.

¹² See Klara Skrivankova, 'Between Decent Work and Forced Labour: examining the continuum of exploitation' (2010) *European Commission Together Against Trafficking* <https://ec.europa.eu/anti-trafficking/publications/between-decent-work-and-forced-labour-examining-continuum-exploitation_en>.

¹³ *Fair Work Act 2009* (Cth) s682(1).

- making inquiries into and investigating acts and practices that may be contrary to legislation, fair work instruments and safety net contractual entitlements; and
- referring matters to relevant authorities.

In performing these functions, FWO inspectors identify circumstances where workers may be victim to a range of exploitative practices including the criminal exploitation of labour. As a result, Fair Work Inspectors may detect and identify cases of human trafficking and slavery in Australia.

2. INCREASING MAXIMUM PENALTIES AND EXTENDING LIABILITY TO RESPONSIBLE FRANCHISOR ENTITIES AND HOLDING COMPANIES

Anti-Slavery Australia supports the proposed amendments to increase maximum penalties where there has been a serious contravention of civil remedy provisions under the Fair Work Act and related instruments.¹⁴ The increase in penalties, combined with increased capacity for enforcement and the public communication of cases which have led to the imposition of a penalty, may deter employers who deliberately and systematically exploit their workers. These measures may also increase raise awareness in the broader community about the role of the FWO in identifying and investigating the exploitation of workers.

The effect of these increased penalties will be enhanced by the proposed amendments that extend liability to responsible franchisor entities and holding companies.

3. STRENGTHENING THE POWERS OF THE FAIR WORK OMBUDSMAN

Anti-Slavery Australia supports the inclusion of provisions in the Fair Work Amendment Bill that strengthen the evidence-gathering powers of the FWO, assisting in the effective investigation of cases of labour exploitation.

Our experience providing legal and migration assistance to victims of trafficking and slavery, coupled with recently reported Australian cases,¹⁵ have demonstrated a number of barriers to the identification of exploited workers, including:¹⁶

- fear of authorities and distrust of government agencies and officials;
- fear of deportation;

¹⁴ *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) ss 1 to 13.

¹⁵ See for example the underpayment of workers at 7-Elevens throughout Australia, exposed in a joint investigation between Four Corners and Fairfax Media in 2015.

¹⁶ See also, Hannah Andrevski, Jacqualine Joudo Larsen and Samantha Lyneham, 'Barriers to trafficked persons' involvement in criminal justice proceedings: An Indonesian case study' (2013) 451 *Trends and Issues in crime and criminal justice*, 2-4, <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi451.pdf>.

- fear of identification by perpetrators, and subsequent reprisals;
- stigma and denial associated with being a ‘victim’ of trafficking or slavery;
- criminalisation or re-victimisation of victims of trafficking, who may also be prosecuted or detained;
- lack of awareness about Australia’s labour laws; and
- social and linguistic isolation.

These factors demonstrate that while new evidence-gathering powers may enhance the capacity for the FWO to investigate cases of human trafficking and slavery in Australia, there remain significant barriers in the identification of victims and potential victims.

While offences of human trafficking and slavery are criminalised under provisions of the Criminal Code, for many reasons, the rate of conviction for these offences remains low when compared to investigation and referral numbers.¹⁷ It is therefore extremely important and in line with international best practice, that all front-line officers are aware of the indicators of human trafficking and slavery and make appropriate referrals to other relevant agencies such as the AFP. Effective referral practices will ensure that the proposed new evidence-gathering powers lead to increased identification of human trafficking and slavery in Australia, particularly in high risk industries where there may be vulnerable workers.

3.1. TRAINING OF OFFICERS AND INTERAGENCY REFERRAL PATHWAYS

Anti-Slavery Australia supports the steps taken by the FWO to provide comprehensive training to FWO officers. In developing Anti-Slavery Australia’s materials we have found that regular audits of outreach and training material with the inclusion of ongoing case reviews is an important part of content revision and evaluation of materials. As part of an audit process, existing training could be expanded to articulate the intersection between labour exploitation and the criminal offences of human trafficking and slavery. Such an approach would ensure that FWO officers are well- placed to respond to situations of human trafficking and slavery efficiently and effectively and reflect FWO’s commitment to building the capabilities of its workforce.¹⁸

As a matter of good practice, it is important to identify interagency referral pathways in line with Action Item 29 of the Australia Government’s National Action Plan. Action Item 29 is aimed at fostering cooperation between agencies addressing issues of trafficking and slavery in Australia. Clear identification of referral pathways by FWO will ensure that potential cases of human trafficking and slavery in Australia are identified and

¹⁷ Frances Simmons, Brynn O’Brien, Fiona David and Laura Beacroft, ‘Human trafficking and slavery offenders in Australia (2013) 464 *Trends & issues in crime and criminal justice*, Australian Institute of Criminology <<http://www.aic.gov.au/publications/current%20series/tandi/461-480/tandi464.html>>.

¹⁸ Fair Work Ombudsman, above n 19, 26; Fair Work Ombudsman, *Strategic Intent*, Australian Government <<https://www.fairwork.gov.au/ArticleDocuments/725/strategic-intent.pdf.aspx>>.

referred to the AFP for investigation where the exploitation of labour constitutes a criminal offence under divisions 270 or 271 of the Criminal Code. Expanding training programmes will ensure that FWO officers understand the types of remedies which are available to victims of severe labour exploitation, human trafficking and slavery, and are able to refer victims to appropriate service providers that can assist them to access civil remedies, legal services and statutory compensation schemes as appropriate.

Anti-Slavery Australia's eLearning course is an online training program funded by the Australian Government aimed at raising awareness and assisting frontline workers, including community and social workers, health care professionals, government workers and teachers, to identify cases of human trafficking and slavery.

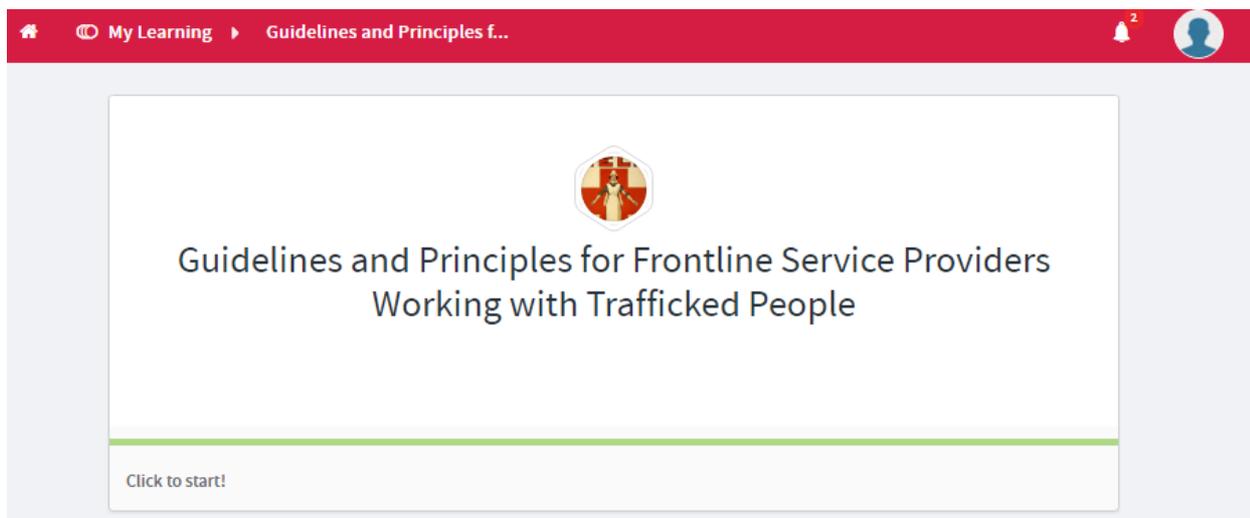


Figure 1: Image taken from Anti-Slavery Australia's eLearning course, Guidelines and Principles for Frontline Service Providers module (2017)

This eLearning course could be expanded to include training modules that would assist government frontline workers to identify and respond to individuals who may be suffering from severe exploitation in the workplace.

Anti-Slavery Australia has also provided onsite training, presentations and seminars to a variety of government and non-government organisations. This onsite training identifies indicators of trafficking and slavery, and outlines the appropriate responses and referral pathways for frontline workers to use where they suspect that workers are being exploited in these ways.

REPORT SUSPECTED INCIDENTS OF TRAFFICKING, SERVITUDE AND LABOUR EXPLOITATION



Figure 2: Materials presented to City of Sydney Council Inspectors (August 2016).

Training of frontline officers is integral to providing streamlined and effective assistance to vulnerable workers who have suffered extreme forms of exploitation in the workplace.

Recommendation:

To complement the proposed amendments to the Fair Work Act, more robust and ongoing training programs should be developed and reviewed to allow FWO officers to identify human trafficking and slavery in workplaces. These programs should include reference to appropriate interagency referral pathways, and maintain a human rights based approach.

3.2. AWARENESS-RAISING MATERIALS

In its 2015-16 Annual Report, FWO identified the need to engage with migrant communities as central to ensuring the success of enforcement tools. The establishment of the Migrant Worker Strategy and Engagement Branch represents a positive step toward this.¹⁹ In addition, the recent commitment of the Australian Government Migrant Workers' Taskforce to better communicate with visa holders, including the development of an anonymous online reporting tool in various languages,

¹⁹ Fair Work Ombudsman, 'Annual Report 2015-16' (Australian Government, 2016) 5 <<https://www.fairwork.gov.au/annual-report>>.

and further research into communication with migrant workers, are welcome developments in this area.²⁰

However, as discussed earlier, a lack of awareness amongst migrant communities, vulnerable persons and migrant workers in Australia about Australia's labour laws remains a key barrier preventing victims of trafficking and slavery from being identified. One way to strengthen the response to this issue is the production of accessible materials outlining workers' rights, and providing key information on referral pathways and emergency service providers to migrant communities across Australia. These materials should also highlight the support services available to victims of labour exploitation, human trafficking and slavery. They should include information on the different forms of employment identified under Australian law, such as independent contracting, as well as the rights, requirements and obligations associated with these different types of work, including risks associated with sham contracting of vulnerable workers. It is essential that these materials be made available in community languages and should be distributed overseas in countries that have been identified as source countries for labour migration to Australia.

These materials should also be made available in rural and regional communities throughout Australia, through local service providers, community centres and agencies to ensure that vulnerable rural and regional workers have access to information, services and support.

Anti-Slavery Australia, in conjunction with Sydney City Council, has produced a kit of multilingual resources about trafficking and exploitation in Australia. These materials have been translated into community languages including: Arabic, Hindi, Korean, Simplified Chinese, Tagalog, Thai and Vietnamese.

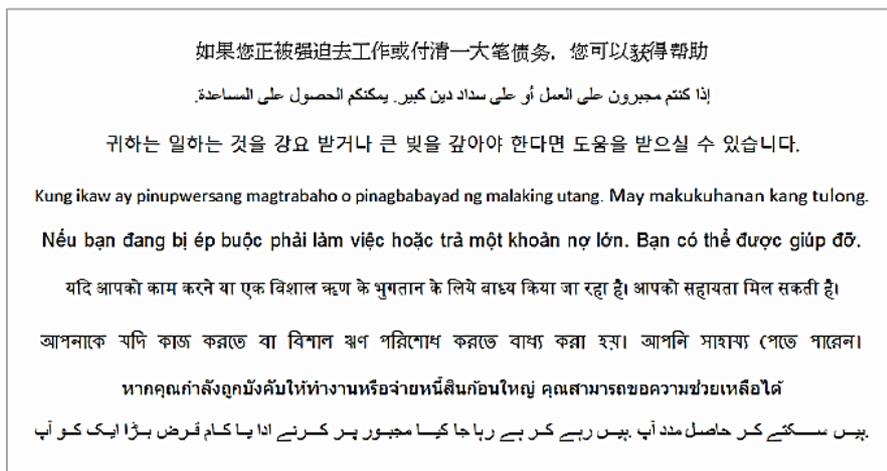


Figure 3: "If you are being forced to work or pay off a big debt. You can get help." Anti-Slavery Australia business card sized resource.

²⁰ Prof. Allan Fels AO, 'Chair's Public Statement February 2017 (Media Release), Migrant Workers' Taskforce, Australian Government Department of Employment (February 2017) <<https://www.employment.gov.au/chairs-public-statement-february-2017>>



Figure 4: “Being exploited at work?” flyer produced in Simplified Chinese.

Anti-Slavery Australia recommends that the production of multilingual resources by the FWO should be developed in consultation with community groups, NGOs and key service providers.

Recommendation:

To overcome barriers that may prevent the detection of human trafficking and slavery in Australia, multilingual resources should be produced in conjunction with communities and service providers. These resources will assist vulnerable workers to understand their rights and entitlements under Australian law and identify avenues of reporting workplace exploitation. Resources should provide information on support services available to victims of human trafficking and slavery.