Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Senate Standing Education and Employment Legislation Committee

20 April 2017
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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council’s Constituent Bodies. The Law Council’s Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council’s six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
Acknowledgement

The Law Council is grateful for the assistance of the Migration Law Committee and Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section in preparing this submission.
Executive Summary

1. The Law Council is grateful for the opportunity to make a submission on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the Bill) to the Senate Standing Education and Employment Legislation Committee (the Committee).

2. The Bill is intended to amend the Fair Work Act 2009 (Cth) (Fair Work Act) to provide increased powers to the Fair Work Ombudsman (FWO) to uncover labour exploitation, as well as increased penalties for persons that deliberately and systematically exploit vulnerable workers. The Law Council welcomes the introduction of the Bill as an important step towards eliminating labour exploitation in Australia and commends the additional resources to be provided to the FWO to discharge its proposed new functions.

3. The Law Council also notes the implications the Bill will have in strengthening Australia's modern slavery framework (currently the subject of a separate inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade). Modern slavery includes human trafficking, as well as slavery and slavery-like practices, such as forced labour, servitude and debt bondage, and there is often overlap between human trafficking and labour exploitation.

4. Relevantly, the Attorney-General’s Department has identified that in recent years, trafficked persons are being identified in Australia in industries such as domestic work, hospitality, agriculture and construction.¹ Migrant workers are particularly susceptible to exploitation, as their visa conditions may be linked to remaining with the same employer or not exceeding a certain amount of hours of work per week. In addition, they may speak little English, be indebted to employers or others, fear jeopardising their migration status or generally fear repercussions.

5. As has been noted, it is not uncommon that labour exploitation is disguised by unscrupulous employers through falsified documents that make it appear as if workers are being properly remunerated in accordance with their entitlements under Australian law.² Disguised or falsified records, coupled with the vulnerable status of migrant workers, can make labour exploitation difficult to uncover. The Bill provides the FWO with the tools and resources to assist in uncovering that exploitation, and leaves little doubt that those who would deliberately and systematically exploit vulnerable workers will be held accountable.

¹ Australian Government, Submission to the New South Wales Legislative Council Select Committee’s inquiry into human trafficking (Submission No 23) 2

² See for example the case of Ram v D&D Indian Fine Food Pty Ltd & Trivedi [2015] FCCA 389, Australia’s first successful prosecution of trafficking for the purposes of labour exploitation, provides another example of how exploitation can be disguised. Mr Ram had been trafficked from rural India to work in Mr Trivedi’s Indian restaurant in Sydney, where Mr Ram was held as a slave for 16 months. Relevantly, as the FWO had only been able to rely upon falsified time and wage records supplied by Mr Trivedi, the FWO found that Mr Ram’s complaints were unsupported. Mr Trivedi had also used sham documents to deceive the Department of Immigration and the Australia Taxation Office. Only when the case was brought to the Federal Circuit Court was Mr Ram awarded his rightful wages for the period which he went unpaid. It is noted that falsified or deceptive documents and practices were also a part of the 7-Eleven scandal which in some respects motivated the introduction of the Bill: see Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 i.
6. However, the Law Council considers that there are some aspects of the Bill which could be strengthened to better ensure due process and fairness, and provides the following recommendations:

(a) Where the privilege against self-incrimination is abrogated, both use immunity and derivative use immunity, for both criminal and civil proceedings, should be provided. In the context of the Bill, this means that:

(i) Use and derivative use immunity for civil proceedings should be extended to evidence or information required to be given pursuant to ss 709(d) and 712 of the Fair Work Act; and

(ii) Derivative use immunity for both civil and criminal proceedings should be extended to FWO notices.

(b) The use of the word “deliberate” in proposed new section 557A relating to serious contraventions of civil remedy provisions is ambiguous, and if intended to be read synonymously with “intentional”, should be substituted for the word “intentional”.

(c) Arrangements not to take migration action against exploited persons should not be contingent upon those persons assisting law enforcement, and any action taken against any person lacking work entitlements with their visa should be mindful of any trafficking issues relevant to the person.

7. The Law Council understands that one of its Constituent Bodies, the Queensland Law Society, will be subsequently lodging a submission to the Committee, on other aspects of the Bill not otherwise covered by this submission.
Immunities provided for abrogation of the privilege against self-incrimination should be consistent and comprehensive

8. The Law Council notes that, as part of those increased investigatory powers, the Bill would give the FWO powers similar to those held by regulators such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission. The new powers given to the FWO include the power to issue FWO notices. The FWO notice scheme also abrogates the privilege against self-incrimination.

9. The privilege against self-incrimination is a fundamental and long-standing common law right. It can only be abrogated by statute in the clearest terms, and generally can only be justified when the public benefit which will derive from negation of the privilege decisively outweighs the resultant harm to civil rights. The Law Council considers, and has previously expressed, that the guiding principles for legislators should be that the privilege against self-incrimination is not to be abrogated except:

(a) in circumstances where there is a real and foreseeable risk to public health and safety;

(b) by clear, express statutory provisions;

(c) where both use and derivative use immunity are provided; and

(d) where it is restored when the immediate danger, the subject of the investigation or enforcement activity which triggered the abrogation, has been averted or downgraded.

10. In relation to (c) above regarding use immunity and derivative use immunity, the Law Council notes that:

(a) use immunity/derivative use immunity is already provided for persons required to provide information pursuant to powers exercised by the inspector under ss 709(d) and 712(1) of the Fair Work Act (collectively, inspector-issued notices) for criminal proceedings only;

(b) use immunity is provided for persons required to provide information pursuant to a FWO notice (which are created by proposed new section 713A), for both civil and criminal proceedings; and

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(c) no derivative immunity is provided for persons required to give information pursuant to a FWO notice in either civil or criminal proceedings.

11. Therefore, if the Bill is enacted, the immunity afforded to a person under the Fair Work Act depends on whether a person is subject to compulsory powers exercised pursuant to an inspector-issued notice or a FWO notice. The result is that:

(a) persons subject to an inspector-issued notice have protection from evidence or information they are compelled to provide being used, directly or indirectly, against them in criminal proceedings, but not in civil proceedings; and

(b) persons subject to a FWO notice have protection from evidence and information they are compelled to provide being used directly against them in criminal, civil and other types of non-judicial proceedings, but not against information being used indirectly against them, in any type of proceeding.

Use immunity

12. The Law Council considers that there is insufficient justification for the disparate treatment afforded to individuals subject to an inspector-issued noticed compared with a FWO notice regarding use immunity. In relation to FWO notices, the Explanatory Memorandum states that:

the greater [compared with inspector-issued notices] protection [use immunity for both civil and criminal proceedings] is conferred in recognition of the stronger examination powers being exercised in this context, which also attract commensurately higher maximum penalties in relation to contraventions.6

13. However, the existing compulsory powers that may be exercised pursuant to inspector-issued notices are already extensive, allowing an inspector to compel a person to produce a record or document,7 or to interview any person while inspecting premises.8 The only additional power conferred under the FWO notice framework is that a notice may be given compelling a person to attend the FWO to give evidence, whereas pursuant to inspector-issued notices, a person can only be interviewed while the inspector is inspecting premises.

14. The powers to demand the production of records or documents under a FWO notice compared with inspector-issued notices do not differ substantially.9 While the Bill does provide higher penalties for serious contraventions of civil remedy provisions, information regarding or evidence of serious contraventions of civil remedy provisions could equally be gathered pursuant to inspector-issued notices as it could a FWO notice.

15. Therefore, given the compulsory powers that can be exercised by an inspector under a FWO notice are both extensive and largely similar, the Law Council considers that the two should be treated similarly in terms of immunities conferred. Use immunity in relation to civil proceedings should extend to evidence and information produced under both FWO notices and inspector-issued notices.

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6 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [153].
7 Fair Work Act 2009 (Cth) s 712.
8 Ibid s 709.
9 Compare ibid s 712 with Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 s 712A(2)(b).
Recommendation:

- Use immunity in relation to civil proceedings should extend to evidence and information produced pursuant to both FWO notices and inspector-issued notices.

**Derivative use immunity**

16. Unlike inspector-issued notices, there is no derivative use immunity in criminal proceedings for persons compelled to give evidence or information under a FWO notice. Regarding proposed new section 713(2), which abrogates the privilege against self-incrimination in relation to FWO notices, the Explanatory Memorandum states that:

   The provision does not include a ‘derivative use’ immunity – that is, a prohibition on the indirect use of information etc. provided by a natural person to gather other, admissible evidence against him or her...

   This approach addresses several difficulties associated with derivative use immunity.

   The burden [of proving that additional evidence would have been uncovered by the regulator through independent investigation processes] placed on investigating authorities in conducting a prosecution before the courts is the main reason why the powers of... the Australian Securities and Investment Commission were amended to remove derivative use immunity.\(^\text{10}\)

17. The Law Council considers that an explanation that relies upon the fact that no derivative use immunity is extended in other Commonwealth legislation which abrogates the privilege against self-incrimination is insufficient to justify why it is necessary in relation to FWO notices. Given the exceptional nature of abrogating the privilege against self-incrimination, the Explanatory Memorandum should provide a specific justification for why, in the context of FWO notices, it is necessary to preserve the ability to indirectly use evidence or information gathered from a person under the exercise of compulsory powers, against that person in civil or criminal proceedings.

18. It cannot be said that to do so would frustrate all prosecutions under the Bill. For example, as the privilege against self-incrimination does not extend to body corporates,\(^\text{11}\) if use/derivative use immunity applied for all natural persons, it would not prevent prosecutions of body corporates for serious contraventions of civil remedy provisions based on information or evidence obtained from a natural person pursuant to a FWO notice.\(^\text{12}\)

19. Therefore, derivative use immunity for criminal proceedings should be extended to cover FWO notices as well as inspector-issued notices. In addition, in both cases, as per the principles listed above at [9], derivative use immunity should cover both criminal and civil proceedings.

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\(^\text{10}\) Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [155], [156], [158] and [159] (paragraph numbers omitted).

\(^\text{11}\) See also Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [141].

\(^\text{12}\) See Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 s 557B.
Derivative use immunity should be extended to FWO notices. If not, then a specific explanation should be provided in the Explanatory Memorandum as to why derivative use immunity is provided for inspector-issued notices but not for FWO notices.

Derivative use immunity for should be expanded to cover both criminal and civil proceedings, for both FWO notices and inspector issued-notices.

The word “deliberate” in proposed new section 557A should be replaced with the word “intentional”

20. The Bill increases penalties for contraventions of civil remedy provisions under the Fair Work Act. Subsection 557A(1) provides that a contravention of a civil remedy provision is a “serious contravention” if it is:

(a) deliberate; and

(b) part of a systematic pattern of conduct relating to one or more other persons.

21. Subsection 557A(2) then provides matters which are relevant for a court to determine whether the person’s conduct constituting the contravention of the provision was part of a systemic pattern of conduct. Subsection 557A(3) then provides that subsection 557A(2) does not limit the matters which a court can take into account in determining whether a contravention is part of a systematic pattern of conduct. The Law Council considers it sensible and appropriate that the Bill does not seek to fetter the discretion of a court to determine whether or not contraventions are systemic, noting that this assessment will have to be made on a case-by-case basis.

22. The term “deliberate” is not defined in the Bill. The Explanatory Memorandum provides that “the term ‘deliberate’ is not defined, but is intended to be read synonymously with the term ‘intentional’ that is used elsewhere in the Fair Work Act”. The Law Council considers that the word “deliberate” is nebulous and vague, as it does not appear in the Fair Work Act nor other relevant Commonwealth legislation that may be instructive. Therefore, to ensure that the provision is effective, and can be interpreted by a court in a way that is consistent with the intention of the provision, if “deliberate” is intended to be read analogously with the word “intentional”, then it should be substituted for the word “intentional”.

Recommendation:

- The word “deliberate” in proposed new section 557A relating to serious contraventions of civil remedy provisions should be replaced with the word “intentional”.

Other matters relevant to the Bill (visa arrangements for exploited migrant workers)

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13 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 [22].
23. In January 2017, the Department of Immigration and Border Protection (DIBP) and FWO agreed that the DIBP would not take action against temporary visa holders with a work entitlement where they may have been exploited and have reported their circumstances to the FWO, provided the visa holder commits to abiding by visa conditions in the future and there is no other basis for visa cancellation. For a temporary visa holder who has no work entitlement attached to their visa the DIBP makes no other commitment than to consider each case on its merits.\textsuperscript{14}

24. Similar arrangements are provided for victims of human trafficking, as Bridging Visa F allows a suspected victim of human trafficking to remain in Australia while cooperating with law enforcement. The Law Council has previously recommended to other inquiries that support under the human trafficking visa framework be de-linked from the provision of assistance to law enforcement agencies.\textsuperscript{15}

25. The Law Council repeats that recommendation here. Victims of labour exploitation may be traumatised and fear repercussions, and therefore may not report their circumstances to the FWO, despite best efforts to make that process as easy and not risky for vulnerable workers as possible.\textsuperscript{16} Supporting victims of labour exploitation, including by not taking adverse immigration action against them, should not be contingent upon their cooperation with law enforcement or the FWO.

26. As noted above, some victims of labour exploitation may also be victims of human trafficking, and this should be taken into account when formulating arrangements regarding any action to be taken against exploited persons with no work entitlement attached to their visas. While such persons might not be entitled to protection from migration action under the labour exploitation arrangements, they may be eligible for a Bridging Visa F regarding their trafficking, and a coordinated response to any migration action to be taken against them would be required.

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Recommendation: \\
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\textbullet\ Arrangements not to take migration action against exploited persons should not be contingent upon those persons assisting law enforcement or the FWO. \\
\textbullet\ Any action taken against any person lacking work entitlements with their visa should be mindful of any trafficking issues relevant to the person. \\
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\textsuperscript{16} The Law Council welcomes the work that has been done by the Migrant Workers’ Taskforce to make it easier and less risky for vulnerable workers to contact government agencies to complain about exploitation, and by the FWO, for example by introducing a new online anonymous reporting tool, promoted to vulnerable workers both online and through various community groups: Migrant Workers’ Taskforce, "Chair’s Public Statement” (February 2017) Department of Employment <https://www.employment.gov.au/chairs-public-statement-february-2017>.