



The Human Rights Council of Australia Inc.
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Foreign Affairs and Aid Sub-Committee
Mr Chris Crewther MP

27th April 2017

Joint Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into Modern Slavery

Dear Mr Crewther,

Thank you for the opportunity to make this submission to the abovementioned inquiry.

If you have any questions or wish to contact the Human Rights Council of Australia in relation to this submission, please contact Sanushka Mudaliar by email Sanushka.Mudaliar@hrca.org.au Alternatively, please feel free to contact me at any time on [0293939393](tel:0293939393) or [0293939393](tel:0293939393)

Yours Sincerely,

Andrew Naylor
Chairperson



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Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into Modern Slavery

The Human Rights Council of Australia Inc. (HRCA) is a small non-government organisation committed to protecting and promoting universal human rights for all without discrimination in Australia, the Asia-Pacific region and the world. HRCA members are human rights professionals with extensive domestic and international experience in all areas of human rights policy and practice. The HRCA's goals include monitoring actions by the Australian government, calling for the observance of international human rights obligations and contributing towards the improvement of Australia's human rights policies and performance. The HRCA advocates a human rights-based approach that considers inequalities and discrimination by reference to international human rights standards, and proposes action directed towards the promotion and protection of human rights for all.

This submission will comment on items 3, 4, 5 and 6 of the Joint Standing Committee's terms of reference for its inquiry into modern slavery.

Item 3. International best practice to prevent modern slavery, and Item 4. The implications for Australia's visa regime

The HRCA welcomes the Government's efforts to address the myriad human rights violations related to modern slavery. The international human rights system provides authoritative guidance as to international best practice to prevent modern slavery. The HRCA submits that a human rights-based approach would substantially strengthen Australia's ability to take a position that is both meaningful and demonstrates leadership in relation to the elimination of modern slavery within our borders and internationally.

Australia has ratified or is otherwise party to a number of international human rights instruments relevant to the issue of modern slavery. For example, the *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Australia on 13 August 1980, provides that "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited" (Art 8(1)). This article is in very similar

terms to Art 4 of the *Universal Declaration of Human Rights (UDHR)*, which was adopted by the General Assembly of the United Nations on 10 December 1948 when former Australian Deputy Prime Minister, Minister for External Affairs and High Court Justice Dr Herbert Evatt sat as its President. The HRCA recommends that the Government conduct a thorough audit of domestic compliance with the articles of these and other relevant treaties and protocols, and rectify all deficiencies in their implementation as part of any action regarding modern slavery.

The HRCA also urges the Committee to recognise that efforts to combat modern slavery in Australia can be hampered by the operation of immigration laws and visa regimes concerning migrant workers. The success of any future Australian Modern Slavery Act is contingent upon the simultaneous implementation of a broad set of reforms pertaining to the protection and enforcement of the rights of migrant workers in Australia.

Migrant workers are at risk of being enslaved. Their position is precarious. They are at risk of being exploited by their employer sponsors while at the same time effectively being deprived of access to complaint and redress mechanisms.¹ Australia's current system for recruiting and deploying temporary workers primarily through employer sponsors, or by incorporating restricted work rights into other visa categories, must not be permitted to be used as a vehicle to enable slavery. Proper design of the system has profound implications for attempts to eliminate modern slavery in Australia, as indeed it is essential to the maintenance of labour rights and workplace standards for both Australian and non-Australian workers. The Australian system for temporary work, and in particular the conditions governing the employment of international students and working holiday makers, places very significant power in the hands of employers. This in turn increases the likelihood that individuals will undertake irregular work in exploitative conditions that can result in slave-like working conditions. Australia must take urgent steps to ensure that current legislation and practice upholds the principle of non-discrimination in respect of non-citizen workers; and protects the rights of all non-citizens on temporary visas working in Australia.

In its submission to the 2013 Senate Inquiry into the Current Framework and Operation of Subclass 457 visas, the HRCA outlined specific difficulties with Australia's treatment of temporary workers. Relevant sections of that submission are annexed to this submission to the inquiry into modern slavery. These aspects of the HRCA's earlier submission remain as pertinent and as important today as in 2013. (The HRCA notes that after the 2013 inquiry, the time period for 457 visa holders to find an alternative employer sponsor was subsequently extended from 28 days to 90 days. It was then

¹ Opening Statement by HRCA Chairperson Andrew Naylor to public hearing on 17 July 2015 by the Senate Education and Employment References Committee Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders (copy attached).

reduced to 60 days towards the end of 2016. While 60 days is an improvement, freedom of employment for migrant workers remains a matter of significant concern and is relevant to the Committee's inquiry into modern slavery).

As we outlined in our 2013 submission, it is imperative that action is taken to dramatically strengthen, and increase resources for, protection and enforcement of the rights of temporary migrant workers in Australia. Failing to do so means that common ways in which temporary migrant workers in Australia are exploited can continue to contribute to an ecosystem where the violation of worker rights becomes normalised. This entrenches the existence of an under-class of vulnerable non-citizen workers living with precarious employment conditions, and in turn enables the operation of slavery and slavery-like practices within our borders. Further to this, careful consideration should also be given to methods of enabling workers who may arrive temporarily, to extend their stay in Australia, and become permanent residents and citizens. These methods should not be primarily based on the patronage of one employer sponsor. This positions temporary workers as dependent on individual employers and vulnerable to exploitation.

The Government's recent decision to replace the 457 visa with a new Temporary Skills Shortage (TSS) visa did not include measures to alleviate the precarious employment conditions of temporary workers in Australia. This new visa will increase the vulnerability of workers in the Medium-Term stream by extending the amount of time before a worker is eligible for employer sponsorship. In all other respects, holders of TSS visas remain as vulnerable to the employer pressures as 457 visa holders. More broadly, it is important to emphasise that political leaders speaking publicly should take care to avoid misrepresenting the operation of migration programs in any way that may inflame hostility towards non-citizens and migrant workers.

The HRCA has previously recommended² and the Senate Education and Employment References Committee has accepted³ that the Australian Government should ratify the United Nations International Convention on Protection of the Rights of All Migrant Workers and Members of their Families (the UN Migrant Workers Convention).⁴ The HRCA has also recommended urgent ratification of the following international treaties:⁵

² Submission to the Education and Employment References Committee Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders dated 15 May 2015.

³ Australian Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016, [9.216]-[9.218], [9.318]-[9.320].

⁴ *International Convention on Protection of the Rights of All Migrant Workers and Members of their Families*, adopted by GA Res 45/158, UN GAOR, 45th session, UN Doc A/RES/45/158, 18 December 1990 (entered into force 1 July 2003). The UN Migrant Workers Convention recognises that migrant workers, both temporary and permanent, are as deserving of recognition of their human rights as citizens. It also requires States Parties to take steps to eliminate irregular movement of workers and prevent the employment of workers without permission to work.

⁵ Submission to the Education and Employment References Committee Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders dated 15 May 2015.

- 1) The International Labour Organization Migration for Employment Convention (Revised) 1949 (ILO C-97);⁶ and
- 2) The International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO C-143).⁷

These three conventions (The Migrant Worker Conventions) contain the international human rights framework for migration for employment. Ratification of all three instruments, and consonant changes to domestic legislation and policy, is necessary to strengthen the protection of migrant workers in Australia. This would be an important step towards combatting modern slavery in Australia as well as demonstrating to other nations Australia's commitment to eradicating slavery. The HRCA notes that the report of the former United Nations Special Rapporteur on Trafficking Ms Joy Ngozi Ezeilo's mission to Australia in 2011 specifically recommended that Australia recommend the UN Migrant Workers Convention and ILO C-189.⁸

The Department of Foreign Affairs and Trade (**DFAT**) has long maintained that Australia already has in place a domestic framework that guarantees the protection of the rights of migrant workers.⁹ The HRCA's 2013 submission (see annex) demonstrates the multiple ways in which this is simply not the case. Various representatives of the Australian government have also contended that the UN Migrant Workers Convention is "incompatible with domestic migration policies" because it would require "Australia to treat migrant workers and their family members more favourably than other migrants in visa application processes".¹⁰ In 2012, the HRCA submitted Freedom of Information requests to the Department of Foreign Affairs and Trade, and the Department of Immigration. The information that was released indicates that there has never been a comprehensive assessment of the extent to which

⁶ *Migration for Employment Convention (Revised), 1949 (No. 97) Convention concerning Migration for Employment (Revised 1949)*, adopted by 32nd ILC session, Geneva, 1 July 1949 (entered into force 22 January 1952). ILO C-97 covers the conditions under which migrant workers are employed. It specifies the need for migrant workers to have access to accurate information, and applies the principle of treatment 'no less favourable' than that afforded to nationals. ILO C-97 contains provisions that allow for discrimination between non-citizens and citizens in certain areas. For example, with respect to social security, limitations can be prescribed concerning benefits that are wholly paid out of public funds.

⁷ *Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* adopted by 60th ILC session, Geneva, 24 June 1975 (entered into force 9 December 1978). ILO C-143 requires signatories to adopt all necessary means to suppress clandestine movement of migrants, and illegal employment of migrants, in collaboration with other members. ILO C-143 also mandates equal treatment with nationals for migrant workers working legally.

⁸ Available from the webpage of the United Nations Office of the High Commissioner for Human Rights at: <http://www.ohchr.org/EN/Issues/Trafficking/Pages/visits.aspx>

⁹ Mr Craig Chittick, Ambassador for People Smuggling Issues, Department of Foreign Affairs and Trade, quoted in *Trading Lives: Modern Day Human Trafficking*, Inquiry of the Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, 2013, p104.

¹⁰ Ibid

the provisions in the UN Migrant Workers Convention are compatible with domestic migration policies. Over our many years of advocacy for ratification of this Convention, the HRCA has been unable to ascertain why government officials believe that the Convention places any restrictions on the implementation of the Australia visa regime. To the contrary, two points regarding these conventions should be noted. First, the Migrant Worker Conventions do not interfere with State sovereignty or fetter States' discretion in relation to regulating the entry of non-citizens. The UN Migrant Workers Convention explicitly protects a State's ability to "establish the criteria governing admission of migrant workers".¹¹ Second, these conventions do not create new rights for migrant workers. Indeed, Australia has already accepted the rights contained in the UN Migrant Workers Conventions by its ratification of the ICCPR and *International Covenant on Economic, Social and Cultural Rights* (ICESCR).¹²

Ratification of the ICCPR does not, however, mean that the human rights of temporary migrants in Australia are already sufficiently protected. The UN Migrant Workers Convention applies existing rights so that they are meaningful in the context of migration.¹³ The UN Migrant Workers Convention is needed because, as outlined in our 2013 submission, there is clear evidence that the human rights of temporary workers in Australia are not adequately protected either by general industrial measures designed to protect the rights of all workers, or by specific regulatory criteria governing work within Australia's temporary visa regime. There is further evidence that existing safeguards are not sufficiently enforced.

Over the coming years, a new United Nations Global Compact on Migration will be negotiated. The Compact will not result in a new treaty on migration for work. Although it will include non-binding principles and voluntary guidelines relevant to migration, it will not in any way render the UN Migrant Workers Convention irrelevant. The UN Migrant Workers Convention remains the authoritative statement on how human rights apply in the context of migration for work. By ratifying this convention, Australia would position itself as a global leader with respect to the treatment of vulnerable migrants and the conditions that lead to modern slavery. This would enable Australia to significantly influence the Global Compact negotiations.

Item 5. Provisions in the United Kingdom's legislation; &

¹¹ See for example Article 79 of the UN Migrant Workers Convention.

¹² ICCPR, 999 UNTS 172, 16 December 1966 (entered into force 23 March 1976); ICESCR, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976).

¹³ Address by Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International and Development Studies, Geneva - 14 December 2011, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E> [accessed 15 Feb 2012]

Item 6. Whether a Modern Slavery Act should be introduced in Australia

The HRCA supports calls by civil society for the appointment of an Anti-Slavery Commissioner, and to require businesses to publish publicly accessible modern slavery statements. It is submitted that the position of an Anti-Slavery Commissioner be created within the Australian Human Rights Commission (AHRC). It is further submitted that any business reporting requirements closely adhere to the *United Nations Guiding Principles on Business and Human Rights* adopted by the UN Human Rights Council in 2011.¹⁴

While proposed Australian legislation on this issue could take note of provisions contained in the United Kingdom's *Modern Slavery Act 2015*, the HRCA urges the Joint Standing Committee to ensure that any Australian draft legislation on modern slavery be directly tied to, and fulfil our obligations under, international human rights law. The UK Act has been heavily criticised for failing to, amongst other things, require UK companies to report on the operations of the supply chains of their subsidiaries based outside the UK; mandate reporting for a larger number of companies; adequately protect the rights of domestic workers; and to provide victims of trafficking with a right to civil compensation.¹⁵ The UK Act also fails to establish extraterritorial jurisdiction over slavery offences. Australia has ratified a number of United Nations human rights instruments whose treaty bodies have placed an obligation on states to prevent and redress extraterritorial human rights violations by corporations.¹⁶ These issues should be investigated as part of the preparation of any equivalent Australian legislation.

It is imperative that Australia implement effective strategies to address modern slavery in Australia and within the supply chains of Australian businesses. Such strategies must be embedded within a human rights framework.

¹⁴ resolution 17/4 of 16 June 2011.

¹⁵ See Srivankova, K. (2015). *Analysis of the Modern Slavery Act*, Anti-Slavery International, 27 March. Available at: <https://www.antislavery.org/analysis-modern-slavery-act/>; Chandran, P. (2016). *Modern Slavery Act gives UK companies a free pass to profit from slavery*, The Guardian, 18 October. Available at: <https://www.theguardian.com/sustainable-business/2016/oct/18/modern-slavery-act-gives-uk-companies-a-free-pass-to-profit-from-slavery-overseas>; Haynes, J. (2016). The Modern Slavery Act (2015): A Legislative Commentary. *Statute Law Review*, 37(1), 33-56.

¹⁶ Including the *International Convention on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, and the *Convention on the Elimination of All Forms of Racial Discrimination*. See Augenstein, D., & Kinley, D. (2015). Beyond the 100 Acre Wood: In which international human rights law finds new ways to tame global corporate power. *The International Journal of Human Rights*, 1-21.