

**Senate Education and Employment References Committee**

**Questions on Notice – 10 July**

**Perth, WA**

**Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders**

| Question number | Hansard page number                   | Witness   | Question asked by | Answered |
|-----------------|---------------------------------------|---|-------------------|----------|
| 1               | 2                                     | Cairde Sinn Fein Australia                                  | Chair             | Yes      |
|                 |                                       |   |                   |          |
| 1               | 9 - 10                                | Australian Catholic Religious Against Trafficking in Humans | Chair             | Yes      |
| 2               | 10                                    | Australian Catholic Religious Against Trafficking in Humans | Senator Johnston  | Yes      |
|                 |                                       |   |                   |          |
| 1               | 19                                    | Employment Law Centre of Western Australia                  | Senator Rice      | Yes      |
|                 | 23 (repeated on page 25 by the Chair) | Employment Law Centre of Western Australia                  | Senator Johnston  | Yes      |

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**1. HANSARD, PAGE 2**

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**Mr Keating:** A migration agent but also the whole process. Even two years ago, I think it increased twice within the space of three months. Even if you are not using an agent, the cost is fairly high.

**CHAIR:** You say Edith Cowan University did a report.

**Mr Keating:** They did an excellent report on 457s either last year or the year before.

**CHAIR:** Do you know who the academic who did the report was?

**Mr Keating:** Not off the top of my head, but I could email that to you.

**CHAIR:** That would be great if you could give that to us on notice.

[https://www.ecu.edu.au/\\_\\_data/assets/pdf\\_file/0003/406353/FINAL-34028-ECU\\_Research\\_Report-Web.pdf](https://www.ecu.edu.au/__data/assets/pdf_file/0003/406353/FINAL-34028-ECU_Research_Report-Web.pdf)

I would also recommend the Migration Council report.

<http://www.migrationcouncil.org.au/policy/policy-papers/>

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**1. HANSARD, PAGE 9 -10**

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**CHAIR:** I want to go to the recommendation in your submission on temporary work visa holders. You are suggesting that we tighten up the controls around migration brokers. We have heard evidence in other inquiries about some of the roles the migration brokers take—the charging in the country of origin and so on. What do those tightened up controls look like? Can you give us some specifics? You are free to take it on notice if you want to.

**Mrs Heffernan:** Could I write to you formally?

**CHAIR:** Yes, that would be good.

My recommendation while being given the opportunity to present material to the Senate Inquiry - was for ACRATH to do a paper to the Economic and Security Council on this issue, which is something I can do for International Women's Day & undertake to do.

This is further ideas to assist with tightening up controls. Migration brokers are part of a chain therefore some interrelationships area tackled also below.

**Recommendation 1** for controls around migration brokers - is to have the Government abolition of excessive fee-charging recruitment agencies (workers debt) in countries of origin and fee-charging employment agencies in countries of destination (workers debt) and the sub-agent fees (worker debt).

The migration cycle involves

- Creation of migrant debt
- Transfer of migrant debt
- Enforcement of migrant debt

Prohibition with monitoring and regulation will avoid the current theme of workers not being free to remit all their wages. Without prohibition, workers are involved in the cycle.

While not all exploitation directed at migrants can be characterized as human trafficking, a great deal of the debt bondage, forced labour, and abuse of migrants still is seriousness as Australia's reputation is under threat where profit is more important than human rights.

Labour law and migration expert Dr Joanna Howe, a senior lecturer with the University Of Adelaide Law School, said the 417 visa system had been corrupted so severely it was jeopardising Australia's reputation globally. "We will be known as a country that exploits vulnerable people who are looking for a better chance at life," she said. "We would never accept this if it were Australian workers being

treated in this way, but because it's 417 visa holders and we don't know them, there's a lid on it, we accept that it's OK.<sup>1</sup>

**Recommendation 2** for controls around migration brokers - is to have all Businesses agree to the abolition of recruitment fees that result in worker debt

It requires an ethical commitment not to be involved in the services of hiring companies and subsidiaries that impose, transfer, or enforce worker debt.

Businesses themselves can remove these predatory networks that involve Sponsors routinely confiscate passports and identity documents and force workers to remain in abusive situations by threatening them with deportation and withholding of wages.<sup>2</sup> The international community and individual states should commit to the abolition of these schemes.<sup>3</sup>

As is the known case facts in the Carabooda matter in Western Australia in June 2015 a Four Corners investigation revealed the food being picked, packed and processed by exploited workers is being sold to consumers nationwide. The supermarkets involved include Woolworths, Coles, Aldi, IGA and Costco. Fast food outlets KFC, Red Rooster and Subway are also implicated.

**Recommendation 3:** for controls around migration brokers - is to have Transparency by Businesses in a statement to the Government of what they are doing to stop slavery and human trafficking in their supply chains in their new Modern Slavery Laws.

Another UK model is British businesses are being required to set out annually what they are doing to stop slavery and human trafficking in their supply chains. Although it will be permissible for companies to say they have done nothing to check their supply chain for suspicion of human slavery, the government believes a statement making such an admission would lead to the company being named and shamed into action.

**UK Modern Slavery Act 2015 - 54** Transparency in supply chains etc.

(1) A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation.

(2) A commercial organisation is within this subsection if it—

(a) Supplies goods or services, and

(b) has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State.

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<sup>1</sup> Labour exploitation, slave-like conditions found on farms supplying biggest supermarkets: **Four Corners** By Caro Meldrum-Hanna, Ali Russell & Mario Christodoulo Updated 7 May 2015, 4:23pm Thu 7 May 2015, 4:23pm

<sup>2</sup> ILO " Report of the DG: 80<sup>th</sup> Supplementary Report

<sup>3</sup> Anne Gallagher: Page 69 Journal of International Affairs Spring/ summer 2015, Vol 68. No 2

(3) For the purposes of subsection (2)(b), an organisation's total turnover is to be determined in accordance with regulations made by the Secretary of State.

(4) A slavery and human trafficking statement for a financial year is—

(a) A statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(B) A statement that the organisation has taken no such steps.

(5) An organisation's slavery and human trafficking statement may include information about—

(a) The organisation's structure, its business and its supply chains;

(b) Its policies in relation to slavery and human trafficking;

(c) Its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

(F) The training about slavery and human trafficking available to its staff.

(6) A slavery and human trafficking statement—

(a) if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent);

(b) If the organisation is a limited liability partnership, must be approved by the members and signed by a designated member;

(c) If the organisation is a limited partnership registered under the Limited Partnerships Act 1907, must be signed by a general partner;

(d) If the organisation is any other kind of partnership, must be signed by a partner.

(7) If the organisation has a website, it must—

(a) Publish the slavery and human trafficking statement on that website, and

(b) Include a link to the slavery and human trafficking statement in a prominent place on that website's homepage.

(8) If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.

(9) The Secretary of State—

(A) may issue guidance about the duties imposed on commercial organisations by this section;

(b) must publish any such guidance in a way the Secretary of State considers appropriate.

(10) The guidance may in particular include further provision about the kind of information which may be included in a slavery and human trafficking statement.

(11) The duties imposed on commercial organisations by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.

(12) For the purposes of this section—

- “commercial organisation” means—

(a)

a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, or

(b)

a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and for this purpose “business” includes a trade or profession;

- “partnership” means—

(a)

a partnership within the Partnership Act 1890,

(b)

a limited partnership registered under the Limited Partnerships Act 1907, or

(c)

a firm, or an entity of a similar character, formed under the law of a country outside the United Kingdom;

“slavery and human trafficking” is then defined.

Four Corners has also found farmers and suppliers who play by the rules and pay workers correctly are being dropped by the supermarkets, who are instead awarding contracts and sourcing food from cheaper suppliers using grossly exploited labour.

SA Potatoes, one of the largest potato suppliers in Australia, recently lost supply contracts to supermarkets, which opted to go for cheaper competitors using exploited migrant workers.

"It's gutting," company CEO Steve Marafioti said, referring to the situation in South Australia.

"They're cheating the system. They're taking it from the little guy, from the people on the farm and the people in the pack sheds and using that as their competitive advantage in the marketplace.

"It's not the correct thing. It's not the right thing. It's actually changing the shape of our industry."<sup>4</sup>

The Transparency by Businesses in a statement to the Government of what they are doing to stop slavery and human trafficking in their supply chains would prevent the problems that are also impacting on the farmers.

The Transparency by Businesses could also apply to migration agents.

Other options countries' r considering: are to have stickers like the foundation has saying "All products are from Slavery Free supply chains." Seeing a minimum price that is real for all products so everyone is paid the right wage.

**Recommendation 4:** for controls around migration brokers requires links with other tools – An Independent Slavery Commissioner as a one source of truth, is a possible tool to assist Australia (following the UK model).

This model in section 41(7) has excellent elements to protect national security and to prevent reports being published like the Gillian Trigg's example. In my humble view this simply draw away resources & would be better handled behind closed doors. There are so many cross relationships with these issues the Australia Government has a right to protect its reputation internationally by effective & efficient law including when a party has an Independent Position reporting.

The UK announced the opportunity to find out more about the migration cycle with the independent anti-slavery commissioner, Kevin Hyland, leading a fact-finding mission to the Vietnam this autumn to identify what more the UK can do to defeat human traffickers in relation to the heavy use in the UK of Vietnamese.

The article reported similar problems to what Australia is facing shown in the Four Corners program. In the UK the article said; 3,000 Vietnamese children are thought to have been trafficked to Britain to work in cannabis farms and nail bars, and are often housed in atrocious conditions. Overall, the government scientific adviser has suggested there may be as many as 13,000 victims in the UK. Vietnam is the fourth biggest source country of people trafficked to the UK.<sup>5</sup>

## UK Modern Slavery Act 2015 41 General functions of Commissioner

(1) The Commissioner must encourage good practice in—

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<sup>4</sup> Ethical Farmers are also suffering: **Video:** 'Slaving Away': The dirty secrets behind Australia's fresh food. (ABC News)

<sup>5</sup> <http://www.theguardian.com/world/2015/jul/29/david-cameron-vows-crackdown-trafficking-slavery-vietnamese-children>

- (a) the prevention, detection, investigation and prosecution of slavery and human trafficking offences;
- (b) the identification of victims of those offences.

(2) For the purposes of this section a slavery and human trafficking offence is an offence under—

- (a) section 1, 2 or 4 of this Act,
- (b) section 1, 2 or 4 of the [Human Trafficking and Exploitation \(Criminal Justice and Support for Victims\) Act \(Northern Ireland\) 2015 \(c. 2 \(N.I.\)\)](#) (equivalent offences in Northern Ireland),
- (c) section 22 of the Criminal Justice (Scotland) Act 2003 ([asp 7](#)) (traffic in prostitution etc),
- (d) section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking for exploitation),
- (e) section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 ([asp 13](#)) (slavery, servitude and forced or compulsory labour).

(3) The things that the Commissioner may do in pursuance of subsection (1) include—

- (a) making reports on any permitted matter to the Secretary of State, the Scottish Ministers and the Department of Justice in Northern Ireland;
- (b) making recommendations to any public authority about the exercise of its functions;
- (c) undertaking or supporting (financially or otherwise) the carrying out of research;
- (d) providing information, education or training;
- (e) consulting public authorities (including the Commissioner for Victims and Witnesses), voluntary organisations and other persons;
- (f) co-operating with or working jointly with public authorities (including the Commissioner for Victims and Witnesses), voluntary organisations and other persons, in the United Kingdom or internationally.

(4) The matters to which the Commissioner may have regard in pursuance of subsection (1) include the provision of assistance and support to victims of slavery and human trafficking offences.

(5) In subsection (3) (a) “permitted matter” means a matter which—

- (a) the Secretary of State, the Scottish Ministers or the Department of Justice in Northern Ireland have asked the Commissioner to report on, or
- (b) the current strategic plan, approved by the Secretary of State under section 42(6), states is a matter the Commissioner proposes to report on.

(6) The Commissioner must (after ascertaining whether the Secretary of State, the Scottish Ministers, the Lord Advocate or the Department of Justice in Northern Ireland wish to exercise the powers conferred by subsections (7) to (10)) publish each report made under subsection (3)(a).

(7) The Secretary of State may direct the Commissioner to omit from any report before publication any material whose publication the Secretary of State thinks—

(A) would be against the interests of national security,

(b) might jeopardise the safety of any person in England and Wales, or

(c) might prejudice the investigation or prosecution of an offence under the law of England and Wales.

(8) The Scottish Ministers may direct the Commissioner to omit from any report before publication any material whose publication the Scottish Ministers think—

(a) might jeopardise the safety of any person in Scotland, or

(b) might prejudice the investigation of an offence under the law of Scotland.

(9) The Lord Advocate may direct the Commissioner to omit from any report before publication any material whose publication the Lord Advocate thinks might prejudice the prosecution of an offence under the law of Scotland.

(10) The Department of Justice in Northern Ireland may direct the Commissioner to omit from any report before publication any material whose publication the department thinks—

(a) might jeopardise the safety of any person in Northern Ireland, or

(b) might prejudice the investigation or prosecution of an offence under the law of Northern Ireland.

(11) If the Secretary of State, the Scottish Ministers or the Department of Justice in Northern Ireland lay before Parliament, the Scottish Parliament or the Northern Ireland Assembly a report made by the Commissioner under subsection (3)(a), they must lay the report as it is published by the Commissioner under subsection (6).

**Recommendation 5 for controls around migration brokers requires a focus on sectors and industries.** Anne Gallagher is specific “Forget trying to measure the scale of the problem. Focus instead on sectors and industries. Far more effective in shifting public opinion and shaping realistic policy are detailed, forensic investigations into specific sectors and industries.

The best of these shine a bright light on how exploitation happens, who is suffering, and who is responsible.

They offer a chance to craft tailored, evidence-based responses that can be properly monitored and evaluated. Strong, focused interventions will help to develop new ways of thinking and working that can be replicated more widely.”<sup>6</sup>

An option: With this suggestion in mind the UK has enacted **The Gangmasters Licensing Act 2004** to prevent the exploitation of workers, particularly by debt bondage and forced labour and to improve health and safety standards, in what had become an unregulated area of employment.<sup>7</sup>

Businesses which provide labour in the following sectors need to be licensed:

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<sup>6</sup> Page 69 Journal of International Affairs Spring/ summer 2015, Vol 68. No 2

<sup>7</sup> <http://www.gla.gov.uk/index.asp?id=1012760>

- agriculture, including horticulture, dairy farming, the production of consumable produce (whether for profit or not), the raising of animals that will enter the food chain, and the use of land as grazing, meadow or pasture land
- processing and packaging of products (food and drink) containing an agricultural component, any animal product that will enter the food chain, shellfish/fish products, plants/flowers/bulbs, and pet/animal feed
- gathering shellfish.

Companies who use labour providers in these sectors are termed ‘labour users’, and have faced prosecution if they use workers or services provided by an unlicensed labour provider, since 1 December 2006.

Four specific offences have been established by the Act:

- Operating as a gangmaster without a licence - s12 (1) offence (maximum penalty 10 years)
- Using an unlicensed gangmaster (subject to a reasonable steps/due diligence defence) - s13 offence (maximum penalty six months)
- Obtaining or possessing a false licence or false documentation likely to cause another person to believe that a person acting as a gangmaster is licensed - s12 (2) offence
- Obstruction of enforcement officers/compliance officers exercising their functions under the Act - s18 offence

Below are details of convictions arising out of investigations by the Offences under the Gangmasters (Licensing) Act 2004 included are:

\*Operating as a gangmaster without a licence - S12 (1)

\*Possession of documentation - either false, improperly obtained or belonging to someone else - with intent to appear licensed S12 (2)

\*Using an unlicensed gangmaster (S13)

\*Obstructing a Gangmaster Licensing officer (S18)

| <b>Offence</b> | <b>S12</b> | <b>S13</b> | <b>S18</b> | <b>Other</b> | <b>Offenders</b> |
|----------------|------------|------------|------------|--------------|------------------|
| 2015-16        | 5          | 0          | 0          | 6            | 1                |
| 2014-15        | 9          | 0          | 0          | 4            | 5                |
| 2013-14        | 5          | 1          | 0          | 3            | 6                |
| 2012-13        | 11         | 15         | 0          | 0            | 26               |
| 2011-12        | 8          | 4          | 0          | 0            | 12               |
| 2010-11        | 14         | 3          | 0          | 0            | 16               |
| 2009-10        | 5          | 1          | 1          | 2            | 8                |
| 2008-09        | 1          | 0          | 0          | 0            | 1                |
| <b>Totals</b>  | <b>58</b>  | <b>24</b>  | <b>1</b>   | <b>15</b>    | <b>75</b>        |

Last updated 6 May 2015 from the [gla.gov.uk](http://gla.gov.uk) website

The 2015 data above shows a decline in offending from the use of this model in the UK.

**Recommendation 5** for effective controls around migration brokers requires a focus on sectors and industries. An opportunity exists to legally – have the law provide for the Prevention of legalised prostitution venues having their own people involved as migration agents.

MIGRATION agents registered by the federal government are helping to run illegal prostitution rackets across Melbourne. Up to six migration agents have worked with the mostly Asian syndicates running prostitution rackets in Melbourne and Sydney. One of the agents involved in the sex industry

in Melbourne helps to find Asian women, including those on student visas, to work as prostitutes in four different CBD apartments.<sup>8</sup>

An opportunity exists legally - to make stronger links with the legalised prostitution in Australia with the *Migration Amendment (Reform of Employer Sanctions) Act 2013* (Cth). This Amendment has introduced several important changes to the *Migration Act 1958* (Cth) (the Act). These include offences and civil contraventions for employers in addition to increased powers for the Department of Immigration and Citizenship.

- Unlawful Non Citizens

Individuals who are not Australian citizens and do not hold a visa are not allowed to work in Australia. The Amendment made several important changes to the provisions surrounding employer responsibility and liability for employing such unlawful non-citizens. **Employers bear responsibility if they allow unlawful non-citizens to work for them.** Section 245AB of the Act states:

*(1) A person (the first person) contravenes this subsection if:*

*(a) the first person allows, or continues to allow, another person (the worker) to work; and*

*(b) the worker is an unlawful non-citizen.*

*(2) Subsection (1) does not apply if the first person takes reasonable steps at reasonable times to verify that the worker is not an unlawful non-citizen, including (but not limited to) either of the following steps:*

*(a) using a computer system prescribed by the regulations to verify that matter;*

*(b) doing any one or more things prescribed by the regulations.*

- Lawful Non Citizens

- Individuals who are not Australian citizens but hold a visa may be either:
  - not permitted to work, or
  - permitted to work a restricted number of hours or
  - permitted to work only for a sponsoring employer.

The Amendment changed **employer responsibility for employing such lawful non-citizens** and then allowing them to work in breach of whatever work restrictions are contained in their visa. The ABC documentary showed unofficially we have a backdoor (namely, the working holiday maker and international student visas) which allow vast numbers of temporary migrants to perform low-skilled and unskilled work in the Australian labour market. It would be good to see prosecutions from that program.

**Recommendation 6** for effective controls around migration brokers requires a focus on international migration brokers.

The crime of trafficking is often transnational (e.g. Carabooda) in both commission and effect including the role played by international migration brokers.

**European Trafficking Convention, 2005, Art. 31; UNODC, 2004, pp. 103-110; UN Organized Crime Convention, 2000, Arts. 15, 16) attached in Appendix 1** - It is essential to ensure that the international mobility of offenders does not enable them to evade prosecution by taking refuge in other countries.

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<sup>8</sup> <http://www.theage.com.au/victoria/visa-agents-involved-in-sex-trade-20110330-1cgfb.html>

Accordingly, extradition powers in relation to trafficking-related crimes should be specifically included in the national legal framework and within the terms of extradition treaties to which states are party. States are also required to establish their jurisdiction in such a way that they either extradite *or* prosecute for offences committed abroad. In-principle agreement is, of course, only the first step.

**At present, there are no instances of extradition** requests being made or met in relation to trafficking in person's cases in relation to migration agents/ brokers, and it is far from clear that this new commitment will provide sufficient momentum to overcome the numerous political and procedural obstacles traditionally associated with extradition.

Institutional mechanisms can be developed to protect migrant workers, including frameworks to ensure the protection of migrant workers' rights, **the licensing and regulation of recruitment agencies**, the negotiation of bilateral agreements, and the training of migrant workers prior to departure, as well as the provision of protection and repatriation programmes that take the principle of non-refoulement ( into account. Some states have enacted such measures; yet, they still fail to protect migrants from abuse and exploitation. A key reason for this is corruption and vested interests in maintaining existing exploitative systems for financial gains.<sup>9</sup>

Research carried out by the United Nations Inter-Agency Project (UNIAP) on Human Trafficking found that debt bondage and the use of brokers significantly increased the risk of exploitation and trafficking. Data involving Cambodian deportees from Thailand showed that male migrants, in particular, were almost twice as likely to be cheated or trafficked as female migrants, primarily because the risk of being exploited or trafficked increased one and a half times for every broker involved, and men used brokers more often than women<sup>10</sup>

In closing the reason I came before the panel was to look after victims so may I please finish with two very academic and knowledgeable parties in this area: Gallagher and Holmes note that the *Council of Europe Convention on Action against Trafficking in Human Beings* explicitly states that the accurate identification of victims is critical to the provisions of protection and assistance, and failure in this regard will likely result in a denial of their human rights.<sup>11</sup>

Please would you pass this on to Senator Johnson also asked me about ACRATHs funding.

According to Minister for Justice Michael Keenan, **four organisations will receive \$360,000 over three years under the Grants to Australian Organisations Program. "Australian Catholic Religious Against Trafficking in Humans (ACRATH),** Anti-Slavery Australia, Project Respect and Scarlet Alliance are specialists in their fields and work tirelessly to prevent human trafficking and slavery by identifying people who are in need of help, and

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<sup>9</sup> G Hugo, p. 23; also see: S Molland, 'Is 'Safe Migration' Along the Thai-Lao Border Truly 'Safe'?', *Asia Pacific Memo*, 2012, retrieved 10 January 2013, <http://www.asiapacificmemo.ca/is-safe-migration-along-the-thai-lao-border-truly-safe>

<sup>10</sup> United Nations Inter-Agency Project (UNIAP) on Human Trafficking, *Human Trafficking Sentinel Surveillance. Poipet 2009-2010*, UNIAP, Bangkok, 2010, p. 49.

<sup>11</sup> A Gallagher and P Holmes, 'Developing an Effective Criminal Justice Response to Trafficking in Persons: Lessons from the Front Line', *International Criminal Justice Review*, vol. 18, no. 3, September 2008, p.320

providing ongoing care and support to those who have experienced extreme exploitation,” Keenan said. “Human trafficking is a hidden crime. We need to better recognise the signs and have the know-how to respond. “This funding will be used for detection activities, direct support for individual victims of trafficking and slavery, and cutting-edge awareness programs to push our community to expose suspected exploitation. “Globally, human trafficking is one of the biggest sources of income for organised crime and the Coalition Government understands that the work of Non-Government Organisations is crucial to the success of Australia’s strategy to combat human trafficking and slavery.”<sup>12</sup>

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<sup>12</sup> [http://www.probonoaustralia.com.au/news/2014/03/govt-invests-144m-tackling-human-trafficking:](http://www.probonoaustralia.com.au/news/2014/03/govt-invests-144m-tackling-human-trafficking)

## Appendix 1.

### **UN Organized Crime Convention, 2000, Arts. 15, 16**

#### **Article 16. Extradition**

1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (*a*) or (*b*), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.
2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.
3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.
5. States Parties that make extradition conditional on the existence of a treaty shall:
  - (*a*) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
  - (*b*) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.
6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.
7. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.
8. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.
9. Subject to the provisions of its domestic law and its extradition

treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

11. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.

12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

13. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

14. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

16. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

17. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

### **Article 15. Jurisdiction**

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party;
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
- (c) The offence is:
  - (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;
  - (ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

### **European Trafficking Convention, 2005, Art. 31**

#### **Article 31 – Jurisdiction**

1 Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

a in its territory; or

b on board a ship flying the flag of that Party; or

c on board an aircraft registered under the laws of that Party; or

d by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;

e against one of its nationals.

2 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 (d) and (e) of this article or any part thereof.

3 Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.

4 When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

5 Without prejudice to the general norms of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law.

**Senate Education and Employment References Committee**  
**Questions on Notice by the Employment Law Centre of Western Australia – 10 July**  
**Perth, WA**

**Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders**

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**1. HANSARD, PAGE 19**

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**Senator RICE:** I am interested to know—

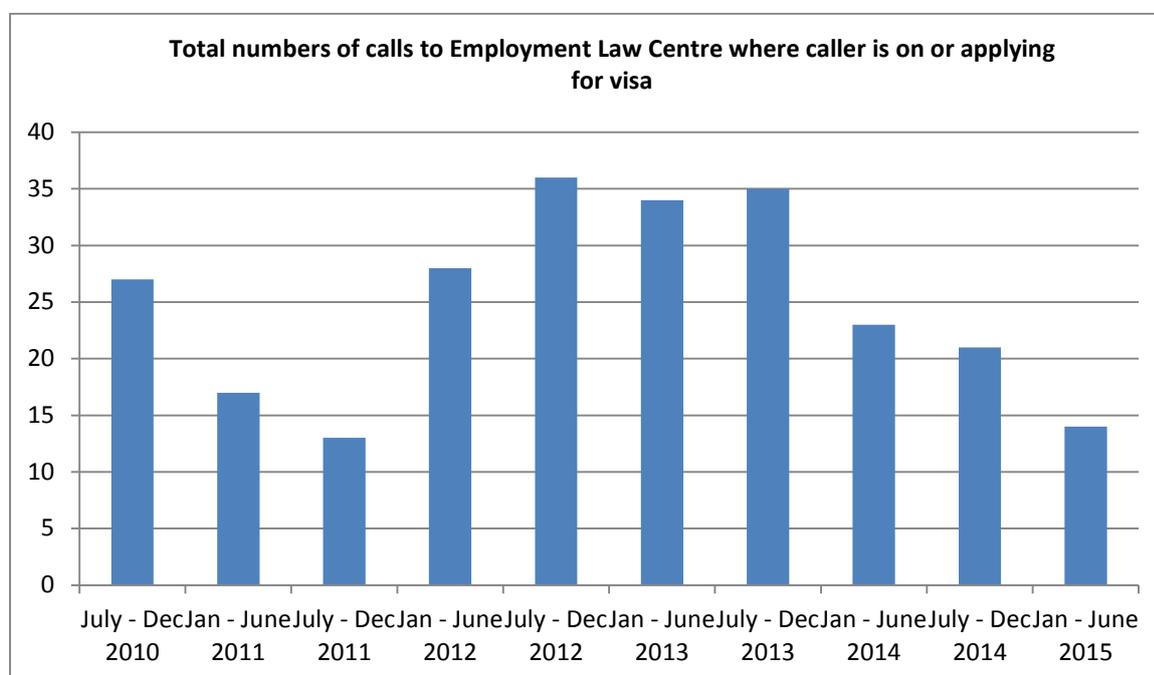
**Ms Smith:** Whether it is increasing?

**Senator RICE:** Yes, whether it is increasing.

**Ms Smith:** As we have had only about a week's notice about appearing today, unfortunately I have not been able to track that over time, but we could take that question on notice if you would like us to get back to you about whether there has been an increase. I noticed in the Job Watch submission that they had tracked an increase over time in the numbers of 457 visa holders who are contacting them. I would not be surprised if we saw the same thing, but I could not tell you off the top of my head.

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**Response to Question 1: Statistics on Employment Law Centre's contact with visa holders over time**



Note: these are only the calls where the caller specifically mentioned that they were on a visa or in the process of applying for a visa.

The Employment Law Centre does not routinely ask all clients whether they are on a visa or in the process of applying for a visa.

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## 2. HANSARD, PAGE 19

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**Senator JOHNSTON:** It would be very difficult, if after 90 days you had been returned home because your visa had expired. Thank you for your case studies; they are quite fascinating. Are they real case events?

**Mrs Smith:** Yes.

**Senator JOHNSTON:** Do you know the outcomes of them? I am more interested in what happened at the end.

**Ms Smith:** We do not necessarily track the outcomes. We only see people at the time they are having the problem and at the time they need the advice. If it were helpful, we could potentially try to contact the particular clients to see what the outcome was and get back to the committee about them.

**Senator JOHNSTON:** I think we would appreciate that, because some of these things are quite disturbing to me. I do not know about the other committee members, but I would like to know whether the law is actually performing as we hope it would such that some of these victims receive some justice. I am looking at case study (1), where the person with arm injury was dismissed for taking time off; at case study (2), the car accident, and at case study (4). I thought the situation was that the repayment of the visa costs was unlawful.

### **Case study 1**

Ms A was on a 457 visa. Her annual salary according to the contract should have been around \$60,000. However, she was not paid this amount.

Ms A was given a cheque once a week for just under \$1,000. Ms A's employer required Ms A to deposit the cheque into her bank account to meet the requirements of her 457 visa and then withdraw and return the payment to her employer.

Ms A injured her arm at work and took time off work. She was dismissed because she took this time off work.

### ***Update:***

#### General protections claim

Ms A made a general protections claim against her employer (for dismissing her because of her absence from work due to her injury) in the Fair Work Commission in mid-2014.

Ms A did not reach an agreement with the employer at conciliation.

Ms A now has a hearing scheduled for late 2015, about one year and seven months after she lodged her claim.

Money still outstanding from employer

The employer forced Ms A to pay around \$12,000 for her visa and told Ms A that they would reimburse this amount after a year. The employer also borrowed several thousand dollars from Ms A personally. The employer is yet to repay any amount to Ms A.

Employment and sponsorship

Ms A was not able to find another job or another sponsor. However, she applied for, and was granted, a student visa.

## **Case study 2**

Mr B holds a 457 visa. He was involved in a car accident at work and took time off work to recover. He made a workers' compensation claim in respect of the injuries sustained in the accident.

Mr B contacted the employer about returning to work after his recovery. The employer told him that it had hired another person on a 457 visa and that Mr B's role had been made redundant.

Mr B believes he was dismissed because of his temporary disability or absence from work due to injury.

### ***Update:***

#### Employment and sponsorship

Even though the employer initially told Mr B that he had been made redundant, he is still technically employed by the employer and is still being sponsored by the employer.

However, Mr B has not worked since mid-2014 – he has been on leave since then.

#### Claims against the employer

Mr B has not made a claim against the employer and explained his reasons for not doing so:

*"I don't want to leave Australia so I don't want to make a claim and lose my sponsorship. But the employer knows this. They promised they would give me permanent residency but they have not."*

#### Comments about 457 visa program

Mr B made the following comments about his experience on a 457 visa:

*"If I had permanent residency, I would have had better job chances..."*

*"Obviously the employer knowing that, they take advantage of the situation".*

### **Case study 3**

Mr C is on a 457 visa. He is consistently paid late and he has not been paid any superannuation.

Mr C wants to resign, but is concerned that if he resigns within two years of starting employment, under his contract, he is required to repay visa and relocation expenses to his employer.

Mr C feels extremely vulnerable as he has no other relatives in Australia and has to support a wife and child.

#### ***Update:***

#### Resignation, deductions from wages and unpaid entitlements

Mr C resigned. The employer withheld nearly \$10,000 from his pay in respect of visas for Mr C's family and flights for his wife and baby.

Mr C discovered that his employer was also attempting to recover the same amount from the host business where Mr C worked during his employment with the employer.

The employer is yet to make any superannuation contributions in respect of Mr C.

#### Claims against the employer

Mr C did not bring a claim against the employer and attempted to negotiate the amount of the repayment to the employer.

#### Employment and sponsorship

Mr C found another job with a new employer who was willing to sponsor him. He is satisfied with the new employer.

#### Comments about 457 visa program and assistance he received

Mr C made the following comments about his experience on a 457 visa and about the help he received from the Employment Law Centre:

*"Because of the specialist advice from your service, I felt much more confident resigning when they weren't paying me properly."*

#### **Case study 4**

Ms D is on a 457 visa. When she started work, she signed a letter stating that if she left the employer within two years, she would repay several thousand dollars in visa sponsorship costs to her employer.

Ms D started looking for other work as she discovered that she was being paid less than other employees who weren't on 457 visas.

When the employer became aware that Ms D was looking for other work, Ms D was asked to resign and her entitlements (including annual leave and notice) were withheld in lieu of repayment of the visa sponsorship costs.

#### ***Update:***

##### Claims against employer and employee

Ms D made a claim against the employer in Fair Work and was paid about \$1,700. The employer has now made a claim against Ms D in the Magistrates Court for the visa sponsorship costs, which include a nomination charge, a visa application charge and migration agent costs.

Ms D has received advice from a migration agent that the only fee recoverable by the employer under immigration laws is the application charge of \$1,035.

Ms D and the employer did not resolve the Magistrates Court matter at mediation. The matter is due to go to trial.

##### Employment and sponsorship

Ms D has since found a job with a new employer who has sponsored her. Ms D was out of work for seven weeks. Ms D said *"it was really tough"*.

**Case study 5**

*This case study was originally included in the case studies provided informally to the Committee members on 10 July 2015. We have been unable to get in touch with the client to confirm that he consents to the publication of his story, so it has been removed.*

## **Case study 6**

Mr F was on a 457 visa. English is his second language and he has dependants. Mr F experienced problems at work after making a complaint about another staff member's performance.

Following this, Mr F was isolated, accused of misconduct and breaching confidentiality, and ultimately dismissed on the grounds of redundancy. Mr F believes he was dismissed because he made a complaint.

Mr F lodged an unfair dismissal claim.

### ***Update:***

#### Unfair dismissal claim

Mr F found the process of making an unfair dismissal claim very difficult, particularly because he was initially unrepresented and because he spoke English as a second language. Mr F said:

*"As other party was allowed to be legally represented, I was not in winning position as I could not fully comprehend the complexity of the litigation."*

*"After the first hearing, it became clear to me that level of my English was not allowing me to have effective and intelligent communication."*

Mr F commented on his experience in the Fair Work Commission:

*"I felt pressure from Commissioner to go ahead with hearing which was too formal for me. Commissioner made number of jokes and remarks during session as to the level of my English. I have found it disrespectful and intimidating to myself. Seeing such an attitude coming from the representative of Justice System it discouraged me greatly and made me feel emotionally unwell."*

The Employment Law Centre assisted Mr F to obtain pro bono legal representation through the Law Society's Law Access scheme.

Mr F's unfair dismissal claim is ongoing. Mr F lodged his unfair dismissal claim last year.

#### Employment and sponsorship

Mr F eventually found another job, but it took him several months to do so.

Mr F was unable to find another sponsor. As he was in a de facto relationship, he reapplied for a partner visa.

## Case study 6 (continued)

### Comments about 457 visa program

Mr F made the following comments about his experience as a worker on a 457 visa:

*“To my greatest disappointment, there is no effective regulatory body to monitor workers on a 457 visa and a very limited support in case things go wrong.”*

*“It is pure luck that I was able to get pro bono representation as otherwise it is not affordable to bring qualified representation into the case.”*

*“The wages most of the workers as a rule just on the border line of the recommended minimum as it is the main reason the workers are employed by employers, so they can save more on qualified workers.”*

*“I felt... I had to work much harder and more in order to please my employer, so I can count on their support. I was exploited by my employer on such grounds. I done work beyond my direct duties. For example, I worked for free for their other businesses.”*

*“I felt powerless to harassment I was experiencing from my colleagues.”*

*“Emotionally I have found it very stressful as well.”*

### **Case study 7**

Mr G worked full-time on a 457 visa. His employer frequently demanded payments from Mr G for bringing Mr G to Australia.

The employer told Mr G that if he did not pay the amounts sought, the employer's business would close and Mr G would have to return to his home country.

Mr G recorded a conversation where the employer demanded money from him. Mr G told the employer this, and believed that he would be dismissed for this reason.

#### ***Update:***

##### Dismissal

Mr G was eventually dismissed by his employer.

##### Claims against the employer

Mr G did not make a claim against the employer because he was concerned about the lawfulness of his recording of the conversation described above.

##### Employment and sponsorship

Mr G found another employer to sponsor him and now has his permanent residency.

##### Comments about 457 visa program

Mr G made the following comments about his experience on the 457 visa program:

*"I'm fine now and happy with permanent residency. But I don't know how the other people still working there are going."*

*"I know what happened to me is happening a lot in Perth. You always hear stories, it's very common."*