

Submission From:
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Submission to the Parliamentary Joint Committee
on Law Enforcement initiated by an inquiry into
Human Trafficking

19 February 2016

In particular, this submission will examine Term of
Reference 3 and 6:

- practical measures and policies that would address human trafficking;
- the effectiveness of relevant Commonwealth legislation and policies;

INTRODUCTION

Human trafficking is defined by the Protocol to Prevent, Suppress and Punish trafficking in Persons, Especially Women and Children (the Trafficking protocol) and involves the recruitment or transportation of a person by means of deceit, force, and coercion for the purposes of exploitation. Similarly, Human trafficking laws in Australia all aim to prohibit exploitative conduct that deprives the victim of basic rights and freedoms.¹ There has been a recent enactment of the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People trafficking) Act 2013, which encompasses more expansive definitions of human trafficking including forced labor, forced marriage, organ trafficking, harboring a victim and sexual servitude.

¹ *Commonwealth Criminal Code Act 1995* ss 270, 271.

- Thirteen of the 15 convictions under the Criminal Code have been for offences of slavery and sexual servitude.
- There is an expectation that the victims as well as witnesses are protected from potential retaliation.²

Victim support during the trial process as a result of heightened vulnerability is essential. This can be due to the language barriers present, greater social isolation, shame and risk of stigmatization, lack of access to passports and a limited understanding of Australian culture and laws.

Comparatively trafficking victims are in a more difficult position than most victims of crimes as they undoubtedly experience a tenuous migration status. This is evident in the fact that they are in a foreign country with a language barrier, without a support network making them highly vulnerable.³

Therefore, it is essential that there are reforms in the way of evidential burdens within the court process to facilitate a greater amount of convictions of human traffickers.

Prior signed statements by victims of trafficking have been used to attack the credibility of the victim, therefore making it difficult for prosecutors to convince the court that the victim is telling the truth.

SUBMISSION OVERVIEW

When enforcement is effective – there should be more court cases being successfully prosecuted in Australia.

Our submission focuses on legal improvements to the taking of statements, legal drafting, media control and court systems improvements and support for victims.

The Law Changes required addressing TOR 3 & 6:

We are recommending changes to the Evidence Act in relation to:

1. Improvements as outlined on pages 6 & 7.
2. Look at amending the Evidence Act to the extent that we have in Australia with respect to aggravated sexual assault and other charges like that where we have the witness give the evidence in a different room but on video and the cross-examination of that witness is removed.
3. Our recommendation is that the laws used to prosecute offending need to be stronger to prevent a reverse onus of proof being placed on the victims, as occurred in this Estonian case in Western Australia.
4. Our recommendations include that Australian Law Enforcement looks at how we take evidence to give the victim more protection in giving the complaint and pursuing the complaint.
5. Our recommendations include the material in **Annexure 2** to this submission that more information is at the Airports as a Vector to assist parties who enter or leave Australia. The information needs to be in multiple languages to have

² UNTOC Art 26, Art 25, 24

³ Australian Government Department of Social Services 'Trafficking of women for sexual purposes' January 2008

the opportunity to be aware of their rights. We would also like to see major signage as is used for the CITES Convention awareness or perhaps like Asia where Drug Traffickers are warned repeatedly they will be prosecuted.

We are recommending changes to the law to stop Media Coverage of witnesses/complainants:

6. Our recommendation is anonymity of witnesses (like in the Family Court) should be applied to this area of prosecutions involving slavery, slavery like practices(servitude, forced marriage, forced labour) and people trafficking to and from Australia.

CONTEXT FOR SUBMISSION

To assist with our joint submission we have reproduced the transcript parts that came from Issues that have already been raised in relation to continuous improvements in relation to TOR 3 & 6 of this Committee Inquiry

- that were discussed by Felicity Heffernan at the SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE
- with Senator Johnston
- as reproduced below and portions highlighted that are integrated to our submission to this committee.

Australia's temporary work visa programs

(Public)

FRIDAY, 10 JULY 2015

PERTH

Under the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013, forced labour is a criminal offence in Australia, and to date there has been only one conviction here. A Federal Court judge ordered that an Indian man trafficked to Australia and exploited in a restaurant in a Sydney suburb be paid \$186,000 by the restaurant owner. Sadly, as far as the Department of Immigration was concerned, this was a legitimate work contract facilitated through a 457 visa, however, the chap involved, Mr Ram, was kept as a slave. In this case, it was debt bondage, where the accused was represented by a colleague, a pro bono lawyer from Clayton Utz, who said Mr Ram was effectively held against his will—he was held as a chattel basically; he was a thing which was under the control and possession of his employer; he was trapped. He spent 16 months working 12-hour days in the restaurant. He had just one day off in all that time—Christmas Day. When the restaurant was closed, he slept on a mattress in the dry storeroom and bathed using water from a bucket.

Closer to home, in Perth, we have got case examples here. The WA ACRATH branch was involved with the victim support of the Estonian workers here who were employed by an employment hire company called Skills for the Future. This was web based. Both men were employed as welders at a factory that allegedly paid a company, Skills for Workers, a fee to find the workers from overseas. After the victims went to the Australian consulate and the police as at 30 June last year, three young men in Perth were facing a number of charges, including two counts of human trafficking involving debt bondage, two counts of intent to extort money, two counts of possession of foreign travel documents, and the company owner, Skills for the Future, was also charged with a further count of intent to extort money.

The charges related to the two European men who were allegedly recruited by a company through an online recruitment website called Skills for the Future, and we are finding this is a common pattern of some of the people that are coming to us. The men were allegedly told to apply for working holiday visas while the company owner arranged airfares, accommodation and employment for a fee. The men lived in backpackers hostels and were allegedly told they would be given about \$100 a week from their pay to cover the basic costs of living. They were allegedly threatened with violence if they did not repay their debts. It was further alleged that there were implied threats of violence to their families if they did not comply with the demands.

In the opening address, the Commonwealth prosecutor, Anthony Evers, said the two welders came to Australia in March 2012 after contacting one of the accused through the website of a company called Skills for the Future. He said when they arrived they were given work as welders at a Welshpool factory, but before they started they signed an agreement to hand over a portion of their income. The Commonwealth prosecutor said that before that point at no stage did the company owner of Skills for the Future ever represent the fact that each of the two men would be required to hand over a considerable amount of their income. The allegation was he had deceived them until they had already arrived in the country. The Crown alleged it was always the intention of the Skills for the Future company managers to take money from their income. The men were to be illegally exploited and subject to a debt bondage.

The defence appears to have been successful, sadly, in arguing that the victims—the focus moved to them—had falsified their qualifications to get into Australia, and at one stage you find defence counsel stating for one of the parties that the two Estonian men that were treated like this were frauds.

Sadly, the jury failed to reach a verdict on allegations that the three Estonian men tried to extort \$25,000 from two countrymen that they had brought to Australia to work as welders. The outcome known so far in this matter is that two accused were acquitted and one accused was only convicted of having improper possession of a passport and was reported to face a sentencing hearing. That is pending.

Our recommendation is that the laws used to prosecute offending need to prevent a reverse onus of proof being placed on the victims, as occurred in this Estonian case. We also want to make sure that any migrants who are making allegations concerning forced labour and human trafficking are given adequate language support and adequate victim support.

Senator JOHNSTON: Mrs Heffernan, in the prosecution of these various matters we have a clear reluctance of the complainants to commit to the prosecution, for obvious reasons. One of the reasons, I suspect, is the nature of the evidence required and the mode of taking that evidence. Do you feel that that is such a significant deterrent to the prosecution that we need to look at amending the Evidence Act to the extent that we have with respect to aggravated sexual assault and other charges like that where we have the witness give the evidence in a different room but on video and the cross-examination of that witness is removed and we have anti vilification and victimisation laws that protect that person from future retribution, notwithstanding that they probably will not ever go back to that point of employment? Obviously, they would be very worried that, in a community that is culturally based—so, if they were Philippino, or Irish even, or whatever—they would need some protection in the future. Do you think it is such a problem that we need to have a look at how we take that evidence to give the victim more protection in giving the complaint and pursuing the complaint?

Mrs Heffernan: I think that it is an excellent tool to be explored, and I do not think it is just for a woman either.

Mrs Heffernan: Yes, I think that would be very valuable, as would that interface with language, because of course our court is conducted in English, and one of the biggest issues, I think, in the Estonian case was that the lady that was interpreting for them was talking all the time. It was not just now and then; it was constant. What our volunteer noticed was their language skills. Were they ever capable? It is not whether they had the qualifications or not. It was that possibly they could not even understand the instruction they were being given. I think it would be very helpful to explore those areas and to have as much protection as the law allows available to any human being that has been subject to any of these horrific events.

Senator JOHNSTON: The point is it takes people trafficking to a higher level. It is not like defending a common or garden variety petty sessional district court matter. Trafficking is something the whole community is really down on and wants to stop—and, accordingly, we give the victim every opportunity to bring a complaint.

Mrs Heffernan: I think another problem was that you were supposed to apply to the court to prevent publish people's names and have them in the media. That part of the process could definitely be tidied up. Perth was terrible. Their names were everywhere immediately. Unless they were staying in a hotel under a false name or whatever—

Senator JOHNSTON: So anonymity like in the Family Court, for instance, would be helpful?

Mrs Heffernan: Yes. They were named and shamed at equal stance to the people who were accused and were photographed.

CHAIR: But we need to know what it is that we need to ask you about. Anything you have got around the giving of evidence, the taking of evidence and things that would improve the rate of successful prosecutions would, I think, be helpful to the committee.

FURTHER EVIDENCE ACT - CONTEXT FOR RECOMMENDATIONS

Section 30 of the *Evidence Act 1995* (Cth) states that 'A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.'

- Recommendation:
This section needs some form of modification as the court is making a judgment based on how well the witness understands the English language, regardless of whether the witness is comfortable giving evidence in that language. The witness and victim of Human Trafficking should be given the option of whether to address the court in their mother language or English irrespective of whether the court decides they can sufficiently converse in the English language.

Section 41 of the *Evidence Act 1995* (Cth) Improper questions

(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:

- (a) misleading; or
- (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

- (a) any relevant condition or characteristic of the witness, including age, personality and education; and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Section 165 the *Evidence Act 1995* (Cth) Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

- (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;

- (b) identification evidence;
- (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
- (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
- (e) evidence given in a criminal proceeding by a witness who is a prison informer;
- (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;

- Recommendation

This section of the evidence addresses the unreliability of evidence which can be attributed to the lack of successful convictions of human trafficking cases in Australia. The questioned reliability of a victim of human trafficking often leads to the inadmissibility of evidence as a result of the fact that not all victims have 'clean hands'. This means that the credibility of alleged victims of trafficking are often attacked on this basis. This was illustrated in the case of *Sieders & Yotchomchin* where the key witness had not paid tax on their earnings while working in the sex industry; this was a means of attacking the credibility of the witness.

Moreover, there are stereotypes about migrant's sex workers and women in particular which are used as a means of undermining a victims credibility in court. This was exemplified in the Xu case where the defense counsel claimed that the victim had in fact fabricated her set of facts in order to avoid deportation from Australia.⁴ This has been a tactic used frequently by defense counsel in a attempting to portray victims of human trafficking as all knowledge, understanding and in fact very cunning.⁵

Section 26 of the *Evidence Act 1995* (Cth) Court's control over questioning of witnesses. The court may make such orders as it considers just in relation to: (a) the way in which witnesses are to be questioned; and (b) the production and use of documents and things in connection with the questioning of witnesses; and (c) the order in which parties may question a witness; and (d) the presence and behaviour of any person in connection with the questioning of witnesses.

⁴ R v Tran, Xu & Qi 8 April 2005.

⁵ R v Sieders & Yotchomchin [2006] NSWDC

- Recommendation
This is essential in protecting the vulnerability of victims of human trafficking when giving evidence. However, this needs to be expanded to enable assured access to consistent and appropriate protection in court for witnesses in trafficking prosecutions. There needs to be the minimization of harm caused to the victims of trafficking when giving evidence.

We have more information to discuss at the hearings and a power point presentation on possible legal drafting options as [redacted] has a Commonwealth Secretariat Legal Drafting Diploma.

We thank you for the opportunity to make a written submission by a law student

to the **Parliamentary Joint**
Committee on Law Enforcement initiated by an
inquiry into Human Trafficking

Appendix 1

Cases:

Commonwealth DPP v Xu [2005] NSWSC 191

DPP v Glazner [2001] VSCA 204

R v DS [2005] VSCA 99

R v Johan Sieders & Somsri Yotchomchin [2006] NSWDC 184

R v Kwok, R v Ong, R v Tan, R v Yoe [2005] NSWCC 245 (District court's power to make a non-publication order)

R v Wei Tang [2007] VSCA 134

Appendix 2



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

Australia's temporary work visa programs

(Public)

FRIDAY, 10 JULY 2015

PERTH

BY AUTHORITY OF THE SENATE

Senator JOHNSTON: Let's take the two Estonians you refer to. Where do they go and how do they disclose the fact that they were promised a job but when they arrive they are told a portion of their wages is going to be withheld? Is there a remedy other than going to someone like the Commonwealth prosecutor? They would probably be very unwilling to rock the boat, so to speak, because they would be in jeopardy of being sent home, but we need a confidential capacity for them to say to someone in authority: 'Is this correct? Can you help us? We are paying a proportion of our wages to these people. They didn't tell us about that. We're obviously being ripped off or we think we are. Is this legal?'

Mrs Heffernan: There is possibly an opportunity at the airport. We have had those discussions in Canberra. There has been a focus on doing some more public information on entry around forced marriage and for young people. Another opportunity is having some information available for people on what their rights are. On entry, they need to know what Australia requires, but the emphasis is very much more about 'What's in your bag?' Having something to tell people where to go—the Ebola exercise has been pretty active even in doing a PILOT — would be useful. I know these things are expensive, but even doing three months to see what that might produce—for example, how many people came forward because they had information on entry.

The hardest part is that some of these people do not fit under 457. Sometimes they are actively told, 'Don't come in as if you're on holiday or doing something else.' There is also a group that falls between the gaps and that is why I have put them in your bucket of 'any related matter'. You want to look after everything, otherwise you would not be travelling around the country.

Senator JOHNSTON: I think those people you are referring to are a very vulnerable class of people. They obviously do not want to put their hands up to say they are being exploited because they know they will be sent home or arrested or whatever. Are the penalties adequate for those people who are aiding and abetting workers coming to Australia without visas?

Mrs Heffernan: I would like to see more emphasis on the people who facilitate it, and, yes, the penalties could be increased.

Senator JOHNSTON: Were you happy with the way the Federal Police dealt the couple of cases of people trafficking you were involved in? Were you happy with the level of commitment the police applied to the prosecutions in those instances?

Mrs Heffernan: We are very happy with all the government efforts. It is just that it is new and we are learning to work together. The Organised Crime Unit invited me to attend the briefing, but the people had left by the time I got the invite. However, the information was still shared. How does that work in with the AFP? We have never been blocked and we see them regularly at meetings. The last time I attended a public day in Fremantle for the unions, I had a number of people come forward about instances they knew of where young girls were being removed from school, so I was able to give that information to the AFP. So the working relationship is very good, but, again, it could be better if you had state based memorandums of understanding and groups and teams that were working together regularly or even training together regularly—'What do we do in this circumstance?'

Senator JOHNSTON: So a requirement to how to inform state police officers that interact with Federal Police officers?

Mrs Heffernan: We do a lot of work in that space. I get invited regularly to talk to all the people graduating from the recruit school here and they also approach us to be part of other workshops and other assistance. It is more about: 'The law's changed here. This is the change and we've got some new plans coming out.' There has been great work done in relation to forced marriage. It would be nice to see the same education stance taken in relation to labour trafficking and other areas. That would also allow us to include some of the migration agents and some of the other people who may not be aware that they are facilitating these sorts of activities.