MINISTERIAL REVIEW OF THE [WESTERN AUSTRALIA] STATE INDUSTRIAL RELATIONS SYSTEM

Submission by The Salvation Army Australia
Projects of The Salvation Army

- The Freedom Partnership to End Modern Slavery
  www.endslavery.salvos.org.au/

The Salvation Army acknowledges the forced labour, servitude and enslavement of Aboriginal and Torres Strait Islander people and Pacific Islander peoples in Australia's history, and recognises the trauma and long-term impacts of those injustices on individuals, their families and communities.

Contents

Introduction

The Salvation Army welcomes the Ministerial Review of the Western Australian Industrial Relations System and is grateful to make a modest submission to this review. We endorse the Minister's aim to "create a contemporary, accessible State industrial relations system for employers and employees and a strong independent umpire in the form of the Western Australian Industrial Relations Commission."

The Salvation Army's interest in this review is to ensure that all workers, including migrant and temporary workers, workers from culturally and linguistically diverse (CaLD) backgrounds, and workers in precarious employment arrangements enjoy equal legal protection under industrial relations law and equal access to justice under that law where necessary.

In particular, The Salvation Army is focused on addressing unlawful workplace conditions and barriers to justice that give rise to contemporary forms of slavery, including debt bondage, servitude and forced labour—all of which are crimes under the Commonwealth Criminal Code. The Salvation Army has an international mandate to fight 'modern slavery', which encompasses these and other crimes, and is operational in 128 countries. In Australia, we have been working directly with victims since 2008, when The Salvation Army established the first and only safe house in the country dedicated for women who experienced trafficking and slavery. The Safe House provides case management services to safe house clients and community-based clients, including women, men, youth and children.

The Salvation Army has supported more than 300 individuals, including migrant workers who have experienced criminal exploitation in a variety of industries, including but not limited to: construction, personal/aged care, hospitality and tourism, and private domestic work.

In July 2014, The Salvation Army launched the Freedom Partnership1 to build a national movement to end slavery, trafficking and other slavery-like practices in Australia. The Salvation Army does this by providing services to victims and by engaging survivors, service providers, communities, corporations, and all levels of government to seek and implement solutions to end slavery.

Collectively, the Salvation Army-Freedom Partnership team in Australia has more than 40 years of experience working in this sector in the United States and Australia as supported accommodation providers, case workers, community organizers, trainers, media spokespeople, policy advocates and research consultants. Salvation Army-Freedom Partnership staff have provided professional consultation to the International Labour Organisation, US State Department Office to Monitor and Combat Trafficking in Persons and United Nations Office on Drugs and Crime in countries as diverse as Jordan, Myanmar, Taiwan, Canada and Fiji.

In addition to our direct service work, The Salvation Army raises general awareness of trafficking and slavery by providing education, training and capacity-building to community and government agencies. We have been engaged in Western Australia for the past three years supporting the WA Freedom Network-a group of non-governmental organisations and unions working to respond to cases of 'modern slavery' and worker exploitation. We also convene the WA Interagency Group on Trafficking and Slavery, which is a unique group of stakeholders from all levels of government and civil society examining exploitation and 'modern slavery' at the local and state level in Australia.

At the community level we collaborate with migrant worker groups from source countries of temporary migrant workers, both international students and 417 visa holders, such as Nepal,

[1] http://endslavery.salvos.org.au/

Taiwan, South Korea, Hong Kong, India, Malaysia. We have hosted inductions on work rights, how to travel safely in Australia and where to go to for help.

The Salvation Army is currently focused on exploitation in the horticulture sector and in private domestic work, as both are high risk industries for forced labour and slavery-like offences. Of particular concern are visa categories where workers are bonded to or reliant on their employer for work opportunities in Australia, including the Temporary Work (International Relations) visa (subclass 403) Seasonal Worker Stream and Diplomatic or Consular Domestic Worker Stream; the working holiday maker (WHM) visa (subclasses 417 and 462) where WHM visa holders are reliant on an employer to sign off on 88 days of regional work for them to secure an extension on their visa; and the temporary skilled work visa (subclass 457).

The Salvation Army has been campaigning for the past two years to improve identification of and response to severe forms of labour exploitation within high risk industries, particularly horticulture. We participate in the National Farmers Federation Horticulture Roundtable. We engage with unions, workers, farmers, and farming representative bodies about unsafe and exploitative business models of working hostels and labour hire contractors, as well as advocating for better government oversight and enforcement of controls and standards.

We have also been advocating for the past three years for improved protections for private domestic workers, particularly those employed by diplomats and foreign officials, as they face some of the most significant barriers to assistance and justice.

Many of our goals regarding workers vulnerable to exploitation would be met through ratification of the Protocol to the Forced Labour Convention, 1930 (ILO c 29) and the Domestic Workers Convention (ILO c189), which are contingent on reforms to the Western Australian industrial relations system. Thus, The Salvation Army sees this review as an extremely positive and necessary step in the advancement of protections not only for workers in the state, but also for workers across Australia.

This submission will focus on Terms of Reference 4, 6 and 7. Please do not hesitate to contact me should you have any questions or wish to discuss any of our recommendations further.

Yours Sincerely,

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Term of Reference 4 – Definition of "employee"

"For me, this is not just about the wages that I am owed and the time that I have lost fighting for my rights. It is bigger than that. It is about justice for a group of people who are not treated as human beings. Their freedom and their labour are being stolen."
–Survivor trafficked into domestic servitude by a foreign diplomat posted to Australia

Domestic Workers[2]

There are at least 67 million domestic workers globally and some 21.5 million in Asia.[3] Approximately 11.5 million are migrants, constituting nearly one fifth of all domestic workers. The International Labour Organisation (ILO) Domestic Workers Convention (No. 189) (hereafter "ILO 189) defines domestic workers as "any person engaged in domestic work within an employment relationship." Domestic work is defined as "work performed in or for a household or households." The work may include cleaning, cooking, washing and ironing, taking care of children, elderly or sick members of a family, as well as household pets, gardening, guarding the house and driving for the family. Domestic workers include full- or part-time employees. Some live in their employers' residence while others live in their own homes. They may be migrants or nationals of the country they work in. Most are women.[4]

Globally, domestic workers are among the most marginalised and exploited workers on the planet, despite their economic and social value to households and society in general. The ILO estimates domestic workers typically earn less than half of the average wages of all other workers in the labour market – and sometimes no more than about 20 per cent of average wages.[5] The situation is further exacerbated for migrant domestic workers, some of whom may have been recruited through intermediaries and would have had little or no interaction with their intended employer before commencing work, or who may face language barriers in the workplace.[6]

According to the ILO[7], at least one third are excluded from national labour legislation; 45 per cent have no entitlement to weekly rest periods/paid annual leave; and more than a third of women domestic workers have no maternity protection.

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[2] Much of this section has been adapted from our 2015 policy paper, co-authored with the Walk Free Foundation, Improving Protections for Migrant Domestic Workers in Australia, available at: http://endslavery.salvos.org.au/wp-content/uploads/2015/02/Improving-Protections-for-Domestic-Workers-in-Australia.pdf.

[3] Domestic Workers: Making decent work a reality for domestic workers worldwide, The International Labour Organization, accessed 1 December 2017, available at: http://www.ilo.org/global/topics/domestic-workers/publications/WCMS_436974/lang--en/index.htm.

[4] Snapshot ILO in Action: Domestic Workers, accessed 1 December 2017, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_214499.pdf.

[5] International Labour Organisation. (2011). Remuneration in domestic work. Domestic Work Policy Brief 1. Geneva: ILO.

[6] ILO, Remuneration in Domestic Work, International Labour Office Asian Knowledge-Sharing Forum: Realizing Decent Work for Domestic Workers Bangkok, Thailand, 24-26 April 2013, accessed 4 December 2017, available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_211133.pdf.

[7] Snapshot ILO in Action, supra note 3.

An unknown number of migrant domestic workers are employed within Australia. There is no clear definition of 'domestic work' in Australia, there is no category for 'domestic work' in the ABS jobs classification list, and there are only a few visas that formally identify domestic workers migrating for said purpose. Since 2011, approximately 600-700 visas have been granted to domestic workers entering on a range of visas, including:

- Domestic Worker – Diplomatic or Consular visa (subclass 426);
- Domestic worker (diplomatic or consular) stream, Temporary Work (International Relations) visa (subclass 403);
- Domestic worker—Executive visa (subclass 427);
- Exchange and Domestic Worker (Executive) streams of the Temporary Work (Long Stay Activity) visa (subclass 401); and
- Temporary Activity Visa (subclass 408)—allows individuals to enter Australia temporarily to do full-time domestic work in the households of certain senior foreign executive.[8]

Additionally, an unknown number of migrants on other visa categories, such as working holiday visas, student visas, and visitor visas, are also working as domestic workers.

Evidence of abuses in Australia

Despite the small size of the official migrant domestic worker cohort in Australia, several serious cases of domestic worker exploitation in Australia have arisen in recent years.[9] Some of these cases are well known to the authorities, such as the Kovacs[10] case involving the enslavement of a young woman from the Philippines in far north Queensland. Other cases are less well known.

Since 2007, The Salvation Army have assisted nearly 30 domestic workers who have been subjected to degrading and humiliating conditions, including deprivation of food, withholding of identity documents, abuse, threats, and intimidation. Individuals seeking our assistance have withstood verbal humiliation and psychological and physical abuse, sexual harassment and assault, denial of medical care, control of their movement and communications with other people, invasion of privacy, excessive work, and little no pay at all. Sadly, this is consistent with patterns of exploitation and abuse that are perpetrated against migrant domestic workers in countries around the world.[11]

While domestic help has not historically been a common feature of Australian households, economic growth and an increase in women's participation in the workforce in recent decades has driven demand for home-help services. This is coupled by an international increase in the migration of women largely from developing countries to seek overseas employment as maids, cleaners, nannies and carers. While there is potentially a match to be made between this supply of and demand for home-help, without a considered policy framework in place, unfortunately the result tends to be

[8] See Appendix 1 for further detail.
[9] http://endslavery.salvos.org.au/learn/resources/#undefined
[10] CDPP, Australia's Federal Prosecution Service, 'Melita Kovacs and Zoltan Kovacs: Human Trafficking and Slavery', 2007-2008, accessed 4 December 2017, available at: https://archive.sclqld.org.au/qjudgment/2008/QCA08-417.pdf.
[11] Indonesian maid testifies in Hong Kong trial. BBC News China 8 December 2014, accessed 4 December 2017, http://www.bbc.com/news/world-asia-china-30374002; Maid 'abused' by Saudi rescued after video goes viral, France 24 10 December 2014, accessed 4 December 2017, http://observers.france24.com/en/20141208-filipino-domestic-workers-saudi-arabia-abuse; UK Supreme Court allows domestic workers to sue Saudi diplomat despite his claiming immunity, Independent, 18 October 2017, accessed 4 December 2017, http://www.independent.co.uk/news/uk/home-news/trafficked-domestic-workers-saudi-arabia-diplomatic-immunity-supreme-court-uk-jarallah-al-malki-a8007091.html.

that migrant women domestic workers are particularly vulnerable to extreme forms of exploitation, including human trafficking, forced labour, and physical and sexual abuse.

Whilst the number of confirmed cases remain low, absence of concerted outreach and education efforts, coupled with common barriers to help seeking, make it highly likely that these situations are underreported. It is the experience of The Salvation Army that, as more attention is drawn to the issue, more cases will be identified.

Sandra's story (pseudonym used)

"I spent three years in slavery in Sydney. I knew the people who brought me here. I worked for them in my country. They were people I trusted. They promised me a paid job as their housekeeper, they will help me to get permanent residency and that later I can bring my children. I had no reason to doubt them and I wanted to improve my life and the lives of my children. They organised my visa and paid for my plane ticket. I lived in Sydney with the man, his wife and two sons. They told me to do all the housework and I started doing this work the day after I arrived. After two weeks, they took my passport and said it was for applying for permanent residence, so I gave it to them. I think they would help me. I worked seven days a week, from 7 in the morning till 10 at night. I had no breaks; I did all the housework, gardening and took care of the dogs and swimming pool. I worked very hard. They used to threaten me and swear at me. I had set times I could eat and could only eat certain things. For three years of work, I was never paid. Not one dollar. I had severe headaches and bloody noses but was not taken to a doctor. They forced me to stop practicing my religion. I couldn't contact my family and I couldn't leave. I wouldn't know where to go. They held not only my passport, but the power and control of my life. I had no choices, no freedom."

Practical Challenges

There are a number of practical challenges, each of which contributes to making it very difficult for migrant domestic workers to access services and labour protections that might in theory be available to them.

Isolation

Migrant domestic workers are a hidden population, isolated from the public eye, and often living within the family home of their employer. As Sandra's story illustrates, because of the private nature of their working conditions, and the fact some workers' movements are restricted, many domestic workers have reported not knowing their rights and not knowing where to get help. Physical isolation – along with cultural and linguistic barriers - can make it difficult to provide information to domestic workers, or for workers to access safe opportunities for leaving.

Excessive Dependence on Employer

When domestic workers do come in on a formal domestic worker visa program, their visa is attached to their employer's, creating a relationship of dependence and thus, fertile ground for exploitation. The practical result of this dependence is that an employer can easily dismiss a worker for complaining, resulting in loss of the visa and work opportunity. According to Visa condition 8107 which applies to both the Temporary Work (Long Stay Activity) visa (subclass 401) – "the Domestic Worker (Executive) stream"[12], and the Temporary Work (International Relations) visa (subclass

[12] Application for a Temporary Work (Long Stay Activity) visa, Australia Government: Department of Immigration and Border Protection, available at: http://www.immi.gov.au/forms/Documents/1401.pdf.

403)[13], the visa holder "must not, during the period of stay: cease to be employed or cease to undertake the activity in relation to which the visa was granted…or engage in work for another person or on their own account". Furthermore, subclass 403 holders are subject to visa condition 8110, which states "you must not engage in work in Australia except in the household of the employer in relation to whom the visa was granted; [and] you must not remain in Australia after the permanent departure of that employer except if you have written permission of the Foreign Minister". Domestic workers in non-diplomatic households face similar barriers as they are commonly working in breach of a visa condition, which is easily used against them. In either situation, current immigration policy indicates the worker faces likely deportation, regardless if they have a legitimate industrial case. In simple terms, the system favours the employer and disadvantages vulnerable workers.

Vulnerability

For domestic workers both in diplomatic and non-diplomatic households there is a very real and perceived imbalance of power between the worker and "employer" that reinforces the "employer's" ability to manipulate and coerce the worker. The general profile of "employers" is that they are often from a higher class or social stratum than their workers. They are often respected in the larger community, both in Australia and in their country of origin, with extensive familial, business, government and community connections that can be used directly and indirectly against the workers if they complain. This power imbalance in itself creates a situation of vulnerability for the worker and is a disincentive to them taking action to change their situation. This inherent structural vulnerability is a very powerful tool that "employers" use to create an environment of fear, a perception that they sit above the law both at home and in Australia and that any complaints made against them are futile and will be dismissed. In some cases, "employers" have threatened to "blacklist" workers who complain barring them from any future employment. One worker The Salvation Army has had contact with has had her passport cancelled by her own government after she left her diplomat employer and returned to her country. She has not been able to obtain a new passport.

Access to Justice

Jurisprudence suggests that migrant workers, including domestic workers, who work in breach of their visa conditions are technically not eligible for protection under the Fair Work Act because their contract is unenforceable. While the Fair Work Ombudsman has declared that her position is that all workers are covered by the Fair Work Act regardless of immigration status, there remains a great deal of confusion about this. This reality has the practical result of denying access to stolen wages, even where a person has been forced or tricked into unlawful status. Unlawful workers who have been victims of a criminal offence (such as theft or assault) or a civil offence (such as wage theft or unfair dismissal) do not have access to a formal immigration remedy unless the AFP recognises them as a victim of trafficking/slavery. As such, it is extremely difficult for migrant workers, including domestic workers, to remain in Australia to pursue civil employment claims. The situation is even more complicated when the employer holds diplomatic privilege.

Under the Vienna Convention on Diplomatic Relations 1961[14] (VCDR), diplomatic agents enjoy almost complete immunity from the criminal, civil and administrative jurisdictions of the receiving State. Whilst diplomatic agents are bound under the VCDR to "respect the laws and regulations of the receiving State" (*Article 41*), a series of cases around the world have shown that some diplomats will hide behind immunity to evade accountability for failing to honour this obligation.

[13] Application for a Temporary Work (International Relations) visa, Australia Government: Department of Immigration and Border Protection, available at: http://www.immi.gov.au/forms/Documents/1401.pdf.
[14] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

Cristina's story

Cristina (pseudonym) was recruited to work for a foreign diplomat in Australia. Cristina had a written contract that said she would be paid $2,150 per month for 40 hours per week as a live-in housekeeper. Cristina was granted an Australian domestic worker visa. From the time she arrived, Cristina's conditions and pay were not as agreed. Her employer took her passport, refused to let her go out, and forced her to work seven days per week. She was not paid according to her contract and was forced to sign false declarations about payment of her salary. Cristina's employer warned there were cameras in the house watching her.

Cristina's employer also threatened that there were many poor people in her country where "there is a lot of corruption and a man's life is only worth $100." He told her about his many friends and connections in her country. Cristina began to feel increasingly unsafe and contacted her embassy to help her escape. The Government granted her discretionary approval to remain in Australia but she was limited to seeking work from the diplomatic community, where she had great difficulty finding a job that would pay the minimum wage. Cristina's only successful remedy for redress was a private lawsuit brought by Salvos Legal on her behalf under the Fair Work Act against her employer after her efforts with criminal justice agencies failed (due to diplomatic immunity) and the Fair Work Ombudsman declined to pursue her case. It took Cristina over three years to achieve an outcome in relation to her case.

Cristina's case illustrates the frustrating realities domestic workers face in accessing justice. Her attempts to recover stolen wages from her employer were complicated by both the lack of an immigration remedy and the timidity of public agencies to attempt to pressure the employer to settle the dispute. Thus, the onus was entirely on her; and her ability to obtain justice depended entirely on a precarious culmination of circumstances, including a supportive and trustworthy embassy, successful connection with an informed NGO, and access to a legal provider willing and able to provide pro bono services.

Other cases of domestic workers indicate Cristina's situation was not an anomaly.[15] In historic cases, DFAT has referred employment disputes to the Fair Work Ombudsman (FWO)[16], which, in turn, has declined to investigate on the basis of immunity—despite not all diplomats enjoying full immunity[17], there being means under the VCDR to sue diplomats once they have left their post[18], and a range of other mechanisms under the VCDR to press for settlement.[19] Workers whose employer sponsorship

[15] See http://endslavery.salvos.org.au/learn/resources/#undefined.

[16] http://www.canberratimes.com.au/act-news/sacked-maid-takes-on-peru-embassy-in-australia-20131214-2zeb1.html

[17] Under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 3227, 500 U.N.T.S. 95, Article 43 states: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

[18] Article 31 of the Vienna Convention on Diplomatic Relations provides immunity for diplomats in criminal, civil and administrative jurisdictions. However, Article 39 of the VCDR states: When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist. In other words, full diplomats retain immunity only for official acts.

[19] Article 32 of the VCDR allows the sending State to waive immunity, thus exposing their staff to possible prosecution and Article 9 empowers the Australian Government to declare a diplomat 'persona non grata', meaning the diplomat is no longer welcome in Australia. In other cases, receiving States can refuse applications for additional workers until a matters are resolved.

is revoked—the typical response to worker complaints—have only 28 days[20] before being legally required to leave Australia, making it practically impossible to bring a private civil action.

Work is hidden as chores

In the absence of any clear guidance on when household chores become work, it is relatively easy for family members exploiting a relative in domestic work to disguise the work performed as general unpaid chores. The Salvation Army has assisted workers who did everything from standard household chores to child, elderly and animal care; from grounds maintenance to personal care, including massages. In some cases, domestic worker clients of The Salvation Army have reported being "loaned out" by their "employers" to provide personal care, domestic work, clean and serve at parties, maintenance work (painting, gardening, vehicle washing) and other duties to friends and family members of their "employers" for no pay. A formal definition of domestic work, such as the definition provided by the ILO20, would provide practical guidance to government departments, advocates, and workers themselves to ensure they are able to assert their employment rights.

Susan's story

Susan (pseudonym) brought to Australia by a wealthy Australian couple in 2010. Susan worked as a housekeeper for her employers in her home country, but did not live with them. When they offered her work in Australia, she eagerly accepted the opportunity to continue working to make a better life for her children. She trusted her employers to make all arrangements, thought she was entering Australia on a legitimate work visa and had no reason to raise concerns to immigration upon her arrival. Unfortunately, things changed. Susan spent the next few months cooking, cleaning, and caring for the family children and pets without pay and proper food and living conditions. She did not know where she was living and was locked inside the house so she could not leave independently. Susan also suffered regular verbal abuse.

When Susan found the courage to request access to her own passport, her employer told her that she had no rights in Australia and to do as she was told. Susan sought help from a neighbour, who called the police. An altercation ensued with her employer who assaulted her and ordered her to return to the house. Susan feared that she would suffer further physical violence if she returned. When the police arrived, Susan's employer told them she was "illegal" and was leaving the next day to return to her country. The police only took information from Susan's employer.

"I was there to tell them what was happening to me… they didn't give me a chance; they were just listening to my employer. It felt like my country, because the people who have power are the people from high class (who) don't allow the people from the lower class to talk."
During the five hours Susan spent at the police station, the police did not ask her what had happened, why her passport had been held or how she came to be in Australia. The Salvation Army staff noted that Susan was in pain and had not been offered any assistance/ medical care in relation to being assaulted. To date, Susan still has health issues related to this injury.

[20] http://www.theage.com.au/news/National/Maid-owed-43000-by-consul-to-be-deported/2005/03/08/1110160827556.html

Lack of Awareness

Compared to many countries, live-in domestic workers are relatively uncommon in Australia and little is known about them. As a result, little attention has been drawn to the issue and few Australians are aware of and able to identify and report the problem. This is pertinent to law enforcement officials who may refer cases to immigration officers without first noticing signs of trafficking or exploitation. Indeed, implementing authorities of the National Action Plan to Combat Human Trafficking and Slavery, including the Department of Employment, have a key role to play in gathering information on victim cohorts, like domestic workers, which may serve as an evidence base for future intervention efforts.

Susan's story above illustrates the lack of awareness amongst local police about the rights and entitlements of domestic workers. It is important to note, however, that were this case to have occurred in Western Australia, the issue would not necessarily have been about lack of police awareness, as Susan actually would have had no entitlement to protection or justice under state industrial relations legislation.

Gaps in Legal Protections

In most States and Territories, domestic workers – including migrant domestic workers – are covered by the Fair Work Act 2009 (Cth) (Fair Work Act). However, in Western Australia, where there is a dual system of employment laws (i.e. State and national), domestic workers employed by individuals in private homes are specifically excluded from industrial relations protection."[21] This leaves domestic workers in Western Australia dependent on common law contracts for any legal rights. Considering a contract may be as informal as a verbal agreement, and the worker may not understand the terms and conditions they are agreeing to, this leaves domestic workers with minimal protection. The WA Government can address this gap by including a clear definition of 'domestic work' and 'domestic worker' under the definition of 'employee' in the IRA.

Another gap relates to migrant domestic workers who are working in breach of their visa conditions. The situation for this group is particularly tenuous as demonstrated in the case of *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964, where it was decided that employment laws do not apply to undocumented workers. This echoed a previous decision in the workers' compensation case of *Australian Meat Holdings v Kazi* [2004] QCA 147, where it was found that where a person is not entitled to work under the Migration Act 1958 (Cth), that person will not have a valid and enforceable contract of employment and will therefore not be covered by the Fair Work Act 2009 (Cth) and its minimum employment standards. It follows that domestic workers who are employed in breach of visa conditions do not have a legal means of redress (contractual or statute) if they are exploited in the workplace.

If followed, this line of jurisprudence would have the result that unscrupulous employers could benefit from exploitative migrant worker labour, while retaining no liability to pay unpaid wages. The situation is further compounded by the reality that an illegally employed migrant worker is unlikely to seek help from the authorities if this would mean they are risking detention and

[21] Industrial Relations Act 1979 – Sect 7, "employee means – (a) any person employed by an employer to do work for hire or reward (d) but does not include any person engaged in domestic service in a private home", access 4 December 2017, available at: http://www.austlii.edu.au/au/legis/wa/consol_act/ira1979242/s7.html.

deportation as per the Migration Act.[22] Individuals who are specifically identified as victims of trafficking may benefit from special visa arrangements, however, this is not the case for those who are merely seeking repayment of stolen wages. While these cases are likely less severe than modern slavery cases, there is a strong practical argument for ensuring that some mechanism exists to allow migrant domestic workers in these situations to remain in Australia to pursue civil remedies against their employers. Without this, it is too easy for unscrupulous employers to deliberately withhold or not pay wages, knowing their workers will be deported before payment can be secured. This has the perverse effects of gross impunity for wage theft and exploitation; depressing wages; and undermining work opportunities for Australian citizens and permanent residents.

The Western Australian Government can address these gaps, at least in part, by clarifying in the definition of 'employee' that all workers are covered under the IRA, regardless of immigration status. Additionally, state authorities should work collaboratively and assertively with federal immigration authorities to improve screening of workers in breach of their visa conditions to improve both identification of victims of criminal forms of labour exploitation; but also to uphold the integrity of the state industrial relations system. State authorities should also push Border Force officials to grant temporary visas so exploited workers can remain in Australia to cooperate with authorities in the investigation and prosecution of criminals.

Finally, labour laws depend at least in part for their effectiveness on the existence of strong inspection services. In theory, occupational health and safety inspectors could also uncover exploitative labour situations. However, in reality, this is very unlikely with regard to domestic work because of the residential nature of the workplace and restrictions on powers of entry. Where the private home is also a workplace, there are strong arguments for ensuring these are subject to inspection. Despite this, the Model Work Health and Safety Act 2011 currently being enacted across Australia provides that inspectors may only enter a place used for residential purposes if the resident provides consent, and the inspector has a search warrant. This high threshold for inspection largely relies on domestic workers being able to alert someone of a situation worthy of examination. Such requirements fail to take into account the reality for domestic workers – many of whom are unable to speak English, uncertain over whom to alert, fearful of retribution from their employer, and unsure of their precarious visa status.

The Western Australian Government could address this through amendments to the IRA which acknowledge the unique working conditions of domestic workers and identify ways to ensure authorities have adequate right of entry to inspect. For example, in South Africa, access to the household is possible under…authorization by the labour court on written application by a labour inspector who states under oath or affirmation the reasons for the need to enter the workplace…For serious violations constituting criminal offences like child labour or forced labour access can be gained by the police department irrespective of labour inspection. In Western Cape Town, labour inspectors summon employers and domestic workers to come to neutral places for interview, mostly when investigating complaints.[23]

Additional measures discussed by the ILO[24] include:

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[22] Productivity Commission Inquiry into the Workplace Relations Framework, Submission by Dr Stephen Clibborn, the University of Sydney Business School, available at: http://www.pc.gov.au/__data/assets/pdf_file/0008/187361/sub0026-workplace-relations.pdf.

[23] See p 28, ILO, Labour Inspection of Domestic Work, accessed 4 December 2017, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_308907.pdf.

[24] See supra note 14, p 27.

1. **Maximizing documented evidence and diminishing the need to visit the workplace through:**
   - Requiring the employer to declare the admission of workers to the ministry of labour or other institutions,
   - Requiring the employer to keep documents such as labour contracts, working schedules, payslips, risk assessment reports or even to send it to the labour inspectorate,
   - Summoning the employer for interviews or meetings with the labour inspectors and to demonstrate via the document registries that they complied with the law,
   - Interviewing workers to compare his or her version of the facts with the documents provided by the employer; and
2. **Enhancing mechanisms of cooperation with the judiciary, such as:**
   - Legal presumptions in face of indicators of violation of the law presented by the labour inspectorate,
   - Creating urgent judicial procedures for obtaining authorization of access,
   - Using electronic shared platforms for expedite communication between labour inspectorates and courts.

The above strategies would be greatly facilitated through more information about domestic work in Western Australia. Thus, another way the state Government could address gaps related to domestic worker protections is through advocating to include a new and distinct category in the ABS jobs classification list (to be defined in accordance with ILO 189) and for employment of domestic workers to be captured in census data and any relevant state data collection. Western Australia could also recommend to the Commonwealth Minister for Justice, Minister Michael Keenan, Member for Stirling, to appropriate funding for an awareness-raising campaign on labour trafficking, including information targeting migrant domestic workers.

Recommendations

1. **The current definition of 'employee' within the Western Australia Industrial Relations Act (hereafter IRA) should be amended to include private domestic workers. The new definition should adopt the definition of 'domestic worker' and 'domestic work' from the ILO Domestic Workers Convention (No. 189).**
2. **Western Australia should establish an award or amend an existing award to ensure full coverage for private domestic workers.** In consideration of appropriate protections and entitlements for domestic workers, the reviewers should consider protections enshrined in the ILO Domestic Workers Convention (No. 189), particularly those with respect to:
   - Effective protection again all forms of abuse, harassment and violence (Art. 5);
   - Decent living conditions where the worker resides with the employer (Art. 6);
   - Rest periods, annual leave and maintaining travel and identity documents (Art. 9);
   - Protections for migrant domestic workers recruited or placed by private employment agencies against abusive practices (Art. 15); and
   - Effective access to courts (Art. 16).
3. **An expanded and clarified definition of 'employee' in the IRA should stipulate that all employees are covered under minimum conditions, regardless of their immigration status and wherever some form of an employment relationship can be verified.** This will be particularly important for domestic workers, many of whom are lured, forced or coerced into working in breach of or without a valid work visa and without a formal contract; or where the employer exercises contract replacement or confiscates and tears up a contract.
4. **To ensure equal and adequate protections for all employees, an expanded and clarified definition of 'employee' should include 'piece' workers, or those working in the horticulture, viticulture and similar industries earning pay based on the amount of produce harvested.**

Term of Reference 6 – State Awards

As the reviewers would be aware, in the federal system, award modernization under the Fair Work Act left a lot of workers worse off—particularly low paid workers.

As such, The Salvation Army recommends that updating state awards should proceed only after new protections and pre-conditions are in place to ensure all workers, and especially low paid workers and workers vulnerable to exploitation—are not unduly disadvantaged.

We refer to the submission by Unions WA for further discussion of what protections and pre-conditions are required.

Term of Reference 7 – Reviewing statutory compliance and enforcement mechanisms

Over the past couple of years, there have been a range of responses to the issue of worker exploitation. While not outcomes in and of themselves, processes like taskforces, inquiries, and reviews have assisted to shed light on a hidden problem and to secure greater attention and resources to finding its solutions. The 7-Eleven case provides an example of good practice where the federal government's reserved discourse and moderate action toward workers, coupled with increased scrutiny and now legislative reform have created a culture of safety, which arguably has fostered higher reporting and cooperation rates amongst workers with investigating authorities.

However, the prevailing national approach has remained heavily weighted toward provision of written information on rights and increasing penalties as key methods of deterrence. While both are necessary, alone they are insufficient to comprise a comprehensive and fully effective response to labour exploitation.

Information does not necessarily change behaviour

In our submission to the Inquiry into Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 earlier this year, we argued that while education on rights and responsibilities for workers is essential, relying on an informative approach has limits because it does not address the reasons why people remain in exploitative work, including fear, shame, debt, and powerlessness. Phil Marshall, a researcher examining human trafficking prevention efforts has noted: "behavioural theory and evidence highlights that we cannot assume that increasing a person's knowledge and understanding about a particular risk will lead them to take action to avoid that risk."[25]

Not only does research show that provision of information on rights does not necessarily translate to exercising rights, the recent national temporary migrant work survey[26] found that lack of knowledge about the minimum wage is not the primary reason why temporary migrants are underpaid or why they do not seek help, stating:

> "The vast majority of temporary migrants who earned $15 or less in their lowest paid job knew that the minimum wage was higher (Figure 23). This included around three quarters of international students (73%) and Working Holiday Makers (78%)…At least two thirds (64%) of participants perceived that many, most or all other people on their visa are paid less than $17.70 per hour…[and] the perceived extent of underpayment increased among lower paid temporary migrants (Figure 26). At least 86% of temporary migrants who earned $15 per hour or less in their lowest paid job believed that many, most or all other people on their visa are paid less than $17.70 per hour. This suggests a perception of a labour market in which unlawfully low wage levels heavily predominate. Put differently, it suggests that although most temporary migrants are aware of the approximate statutory minimum wage, they believe that few temporary migrants on their visa can expect to receive that wage."

Rather, the researchers have told The Salvation Army[27] that main reasons for why workers do not report include fear of government, fear of losing one's visa and work or study opportunity, not

[25] Marshall, P. with Asian Development Bank and United National Inter-agency Project on Human Trafficking. (2011). Re-thinking trafficking prevention: A guide to applying behaviour theory, p 6.
[26] Laurie Berg and Bassina Farbenblum (2017) Wage theft in Australia: Findings from the national temporary migrant work survey, accessed 8 December 2017, available at: http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf.
[27] Personal communication, 8 December 2017.

wanting to complain where no one else is complaining, and self-blame for accepting the low wage. These findings indicate that while provision of information on rights is still necessary, the more prominent barriers to help seeking require a different approach. One approach suggested by the Salvation Army is *ongoing* access to information and support services through meaningful linkages with community-based support services. It is our experience that exploited workers in precarious immigration status are more likely to report unlawful workplace conduct with the support of an advocate, service provider, or community liaison.

Penalties will be useless if workers are too fearful to report

Similarly, an approach that emphasises penalties has limits because it does not address the power imbalance which enables unscrupulous employers to leverage control over workers, keeping them silent about unlawful workplace conduct. Increasing pecuniary penalties is an important and necessary step forward to ensure fines for noncompliance are not so low that they can simply be written off as a 'cost of doing business'. However, even with higher financial penalties, employers will continue to exploit workers if the perceived risk of getting caught remains low. This is illustrated by the case of the 7-Eleven store owner continuing to require cash-back from workers even after extensive scrutiny of the franchise through government inquiries and media reports.[28]

This is but one reason why Dr. Stephen Clibborn of Sydney University has recommended in recent federal inquiries that the Fair Work Act 2008 (Cth) be amended to clarify its coverage to all workers, regardless of immigration status[29]. It is also why The Salvation Army is recommending to this review that Western Australia make similar changes to state industrial relations legislation to offset the power employers continue to hold over dependent workers.

Penalties will only work if workers feel safe, capable and supported to report unlawful workplace conduct. Workers will not report unless they perceive it to be in their own best interest, which requires consideration of how to respond to individuals working in breach of visa conditions—whether they are doing so knowingly, unknowingly, and/or under duress as is the case in many trafficking situations.

The announcement earlier this year by the Migrant Worker Taskforce that "where temporary visa holders with a work entitlement attached to their visa may have been exploited (and provided they have reported their circumstances to the Fair Work Ombudsman), the Department of Immigration and Border Protection will generally not cancel a visa, detain or remove those individuals from Australia..." is a positive step.[30] However, The Salvation Army has recommended this arrangement should be formalised, at minimum, in the Memorandum of Understanding between the FWO and the DIBP/Border Force (ABF) and communicated in practical terms to visa holders with work rights via any and all education campaigns targeting temporary work programs. To uphold the integrity of Western Australia's industrial relations system, the reviewers should consider how to work with Border Force officials to ensure workers are paid in accordance with state awards and laws and that employers who are breaking the law, undermining ethical competitors, and depressing wages are not inadvertently benefiting from the premature deportation of unlawful workers.

[28] https://www.sbs.com.au/yourlanguage/punjabi/en/article/2016/11/21/7-eleven-workers-forced-pay-back-wages-cash-employer, accessed 6 December 2017.
[29] Clibborn, Stephen (2015). Submission to Productivity Commission inquiry into the workplace relations framework.
[30] https://ministers.employment.gov.au/cash/turnbull-government-welcomes-action-migrant-workers-taskforce

Failure to implement existing penalties weakens the system

In addition to extending the approach beyond information and penalties, further areas for improvement include making greater use of existing penalties, such as the employer sanctions within the Migration Act, and holding labour hire providers—a common culprit in serious exploitation and trafficking[31]--to account through greater transparency, regulation and law enforcement.

According to the DIBP's Annual Report 2015-16[32], 414 infringement notices were given out for unspecified "noncompliance", but it does not appear that any employer was sanctioned under the Migration Act 1958 (Cth) (Migration Act) s245AB[33], which provides a financial penalty of up to 90 penalty units and two years' imprisonment for employing an unlawful non-citizen. Similarly, no employer was reported to be sanctioned under Section 245AC, which provides similar penalties for allowing a lawful non-citizen to work in breach of visa conditions[34] or s245AH, which provides up to five years' imprisonment for an aggravated offence of allowing an unlawful non-citizen to work and exploiting them.[35]

Similarly, while the DIBP's Annual Report 2016-17[36] indicates that 447 business sponsors were sanctioned in the last year, the nature of the sanctions were either "cancelling sponsorships", which simultaneously penalises the workers, or by "barring them from further sponsorship." The report does not provide any information on sanctions for employers deemed to be noncompliant for having employed and exploited an unlawful noncitizen. Thus, one may logically conclude that the provisions are not being utilised, which, in turn, gives license to those breaking the law. It also provides no incentive to workers to report unlawful conduct since, as seen in this week's Border Force compliance operations in Manjimup and Pemberton[37]—the workers will bear a disproportionate consequence if the arrangement is discovered.

If loss of work opportunities, or deportation, is the inevitable result of reporting unlawful workplace conditions, there will be little if any incentive to cooperate with the system. The result will be that exploitation will continue, temporary overseas workers will be selected over Australian residents and citizens, and the integrity of the IR system will continue to be undermined.

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[31] International labour Organisation, *Trafficking for forced labour: How to monitor the recruitment of migrant workers training manual, 2005.* At http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/ wcms_081894.pdf; See Trafficking for Forced Labour, UN.GIFT.HUB, Global Initiative to Fight Human Trafficking http://www.ungift.org/knowledgehub/en/about/trafficking-for-forced-labour.html;

[32] https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/annual-report-full-2015-16.pdf

[33] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s245ab.html

[34] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s245ac.html

[35] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s245ad.html

[36] https://www.border.gov.au/about/reports-publications/reports/annual/annual-report-2016-17

[37] http://www.watoday.com.au/wa-news/border-force-swoops-on-labour-hire-intermediaries-in-was-south-west-20171205-gzytx5.html

Recommendations

In summary, there is a great deal Western Australian can learn from federal inquiries focused on noncompliance in the workplace relations system, particularly as they relate to workers who are at greater risk of exploitation.

The Salvation Army urges the reviewers to adopt a more robust, effective and balanced compliance and enforcement state IR framework based on the following principles:

- Information on rights and responsibilities is simple, understandable and accessible as is delivered in a culturally and linguistically appropriate manner;
- consequences for employer noncompliance are adequate to act as an effective deterrent and may include pecuniary penalties as well as potential criminal penalties;
- consequences for noncompliant employers are no less than the consequences likely to be imposed on workers;
- appropriate protection is in place via legislation and is practically accessible for those who report unlawful conduct via access to unions and other employment law services; and
- there is visible evidence of accountability for those who break the law, as demonstrated through public messaging and reporting of use of existing penalties.

Appendix 1

Domestic Worker Visa Grants							
Visas	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**TOTAL**
Diplomat Sponsored Domestic Workers							
Domestic Worker – Diplomatic or Consular visa (subclass 426)[38]	148	61	<5	n/a	n/a	n/a	**~214**
Domestic worker (diplomatic or consular) stream of the Temporary Work (International Relations) visa (subclass 403)[39]	n/a	44	96	85	96	87	**408**
Sub-Total	***148***	***105***	***<101***	***85***	***96***	***87***	***~622***
Non-Diplomat Sponsored Domestic Workers							
Domestic worker—Executive visa (subclass 427)[40]	12	7	n/a	n/a	n/a	n/a	**19**
Exchange and Domestic Worker (Executive) streams of the Temporary Work (Long Stay Activity) visa (subclass 401)[41]	n/a	n/a	11	12	10	<5	~38
Temporary activity visa (subclass 408)		n/a	n/a	n/a	n/a	5	5
Sub-Total	***12***	***7***	***11***	***12***	***10***	***~10***	***62***
Total	**160**	**112**	**112**	**97**	**106**	**~97**	**~684**

[38] Visa repealed on 24 November 2012.
[39] The subclass 403 visa commenced on 24 November 2012. While the visa number remained unchanged, its name and apparent application was narrowed to domestic workers in 2014-15.
[40] Visas repealed on 23 November 2012.
[41] Visa commenced on 24 November 2012 and provided a pathway for the repealed subclass 411 visa. From 23 March 2013 the visa provided a pathway for the repealed 427 visa. It is unclear what proportion of these visa was for Executive sponsored domestic workers so this visa is not figured into totals.