Australian Government

Department of Immigration and Multicultural Affairs

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Curtis,

Please find attached the Department of Immigration and Multicultural Affairs' submission to the inquiry of the Senate Legal and Constitutional Committee ("the Committee") into the *Migration Amendment (Employer Sanctions) Bill 2006* ("the Bill").

The submission addresses the three areas that the Committee flagged for consideration when referring the Bill, namely:

- the legal work relationships found in industries where illegal workers are located;
- the work conditions of illegal workers; and
- the onus that the proposed offences would place on employers to identify illegal workers.

Please do not hesitate to contact me should the Committee require any further information to assist with its inquiry.

Yours sincerely,

Neil Mann
First Assistant Secretary
Compliance Policy and Case Coordination Division
18 April 2006

Submission of the Department of Immigration and Multicultural Affairs to the inquiry of the Senate Legal and Constitutional Committee into the *Migration Amendment (Employer Sanctions) Bill 2006*

Introduction

Australia is one of the few OECD countries without offences for employers of illegal workers. Countries such as the United Kingdom, Canada, New Zealand, United States, Denmark, Sweden, Finland, Norway, Belgium, Netherlands and Switzerland already have similar offences as part of their immigration laws.

Illegal work causes a number of problems for the Australian community. It takes job opportunities from Australian citizens and lawful migrants and in some cases is linked to organised crime, particularly in the sex industry, where women may be trafficked to work illegally in conditions of sexual servitude.

The proposed fault offences in the *Migration Amendment (Employer Sanctions) Bill 2006* ("the Bill") will ensure that penalties can be appropriately imposed on the relatively small number of employers and labour suppliers who are deliberately doing the wrong thing by knowingly or recklessly engaging illegal workers.

They would compliment the department's efforts to encourage voluntary compliance through the Employer Awareness Campaign and the Entitlements Verification Online checking service. The department is also working closely with other agencies to discourage illegal work, for example with the NSW Ministry of Transport to ensure illegal workers are not granted taxi driver licences.

Considerable care has been taken to ensure that the legislation would not place an undue burden on business. There has been consultation with industry groups and other stakeholders and this consultation is continuing. The legislation deals with the concerns that have been raised.

In summary the Bill will help to maintain the integrity of Australia's migration system at the same time as helping to prevent the exploitation of illegal workers.

Unless otherwise indicated, this submission uses the term "illegal worker" to describe unlawful non-citizens and lawful non-citizens who work in breach of their visa conditions.

Work relationships in industries where illegal workers are located

The top 5 business sectors where the department locates illegal workers are: (1) Accommodation, Cafes and Restaurants; (2) Agriculture, Forestry and Fishing; (3) Manufacturing; (4) Construction; and (5) the Sex Industry.

This section of the submission outlines the types of legal work relationships under which illegal workers may be engaged in several key industries where the department regularly locates illegal workers. It also explains why, in the department's view, the proposed offences need to apply to a variety of work relationships that go beyond traditional "employment".

It should be noted that the location statistics provided below are likely to under estimate the full extent of the illegal worker problem. This is because very few non-citizens admit to working illegally when apprehended. A significant proportion of the estimated 46,400 visa overstayers are believed to be working illegally to support their continued stay in Australia.

Construction industry

In 2004-05, the department located 362 illegal workers in the construction industry. As noted in the *Final Report of the Royal Commission into the Building and Construction Industry*, on site workers in the construction industry may be engaged as employees or independent subcontractors.

If the proposed offences only applied to traditional employment contracts, businesses that knowingly engage illegal workers under other types of contracts could escape liability. For this reason, the department considers it is appropriate for the definition of “allows to work” in proposed subsection 245AG(2) to capture both types of work relationships commonly found in the construction industry. Workers who are “employed” would fall under paragraph 245AG(2)(a) while those who are engaged as independent contractors would come under paragraph 245AG(2)(b). These types of work relationships also feature in other business sectors such as the cleaning and agricultural industries.

It is worth noting that a head contractor at a building site would not commit an offence under subsection 245AB(1) if its subcontractor allowed an unlawful non-citizen to work at the site. This is because the relationship between the head contractor and the unlawful non-citizen would not satisfy the definition of “allows to work” in section 245AG. In this situation the subcontractor would commit an offence under subsection 245AB(1) if it knew or was reckless to the status of the illegal worker.

The department believes it is appropriate that the offences only apply to persons who are in a direct relationship with an illegal worker as these people would be best placed to assess and check the work entitlements of any prospective employees who might be illegal workers.

Sex industry

A significant number of illegal workers are also located in the sex industry. In 2004-05, the department located 290 sex workers who were working without visas or were working in breach of their visa conditions.

There is information to suggest that some brothel owners may be contriving landlord/tenant relationships to avoid the responsibilities that flow from employment. These businesses claim they do not employ sex workers but instead are only renting rooms to sex workers who are self employed (see for example *Phillipa v Carmel (433 of 1996) Industrial Relations Court of Australia*).

Proposed paragraph 245AG(2)(d) would ensure that brothel owners cannot hide behind these sorts of legal devices. The proposed offences would apply to brothel owners who knowingly or recklessly lease a room to an illegal worker with the intention that the illegal worker use the room to perform sexual services.

Paragraph 245AG(2)(d) is important because the aggravated offences in sections 245AB(2), 245AC(2), 245AD(2) and 245AE(2) are designed in part to deter unscrupulous employers in the sex industry from taking advantage of non-citizens who are in sexual servitude. Given that the aggravated offences can only apply where the primary offences are first established, it is important that the primary offences cover the range of work relationships found in the sex industry.

Transportation industry

A significant number of non-citizens are also located working illegally as taxi drivers. In 2004-05 the department located 143 illegal workers in the transportation industry.

The legal relationship between a taxi owner and the driver is often one of bailment, rather than one of employment. For example, clause 12.1 of the *Taxi Council of Queensland's Standard Bailment Agreement Terms and Conditions* expressly provides that the agreement does not create a relationship of employment.

Notwithstanding, a taxi owner who bails their vehicle clearly intends the driver to perform work. Indeed, some bailment agreements calculate payment for the use of the vehicle as a proportion of the driver's fares. For example, clause 1 of the *Taxi Council of Queensland's Standard Bailment Agreement* provides that "the fee paid…shall be based on a percentage of [the] gross take whilst plying the taxi-cab for hire."

In these circumstances, the department considers it appropriate that the offences apply to taxi owners who knowingly or recklessly lease their taxi cabs to persons who are not entitled to work in Australia. The inclusion of proposed paragraph 245AG(2)(c) ensures that the offences will apply in this context.

Taxi owners would be able to avoid committing any of the offences by checking a prospective driver's work entitlements where there is a substantial risk the driver is an illegal worker.

Apart from the new offences, there are a number of other reasons why taxi owners may benefit from checking the work entitlements of their drivers. As already noted, some taxi bailment agreements calculate payment for the use of the vehicle as a proportion of the driver's fares. If a taxi owner inadvertently leases their vehicle to an illegal worker, they run the risk of reduced income if the driver is detained by the Department midway through their shift.

The department is also working closely with State and Territory licensing authorities to ensure taxi driver licences are only granted to non-citizens with work entitlements. For example, the NSW Ministry of Transport has been registered to use Entitlement Verification Online (EVO) and has checked the work entitlements of over 830 licence applicants. These arrangements are helping to reduce the numbers of illegal workers in the taxi industry and also shift some of the burden of checking work rights from taxi owners to government licensing authorities.

Workplace conditions of illegal workers

This section of the submission provides information on the work conditions of illegal workers to address the second area of inquiry that the Senate Legal and Constitutional Committee ("the Committee") has flagged for consideration.

It should be noted that the department does not generally collect information about the work conditions of illegal workers as these inquiries fall outside its statutory responsibilities. Nonetheless, anecdotal evidence obtained from interviews with illegal workers suggests that illegal workers may be exposed to a range of exploitative work practices, particularly when the work is arranged by labour supply companies as part of organised employment rackets.

Restrictions on movement

Some illegal workers in the agricultural industry claim that the labour suppliers who arranged the work only allowed them to travel to local towns once a week. Before embarking on these visits the workers claim they were told they would have to pay the organiser $2000 if they were located by the department.

Hidden fees

Some illegal workers claim that upon arrival in Australia they are told they will have to pay the organiser substantial fees for finding them work.

Threats to notify the department

Some illegal workers claim their organisers threaten to call immigration to have their visas cancelled if they ever complain about their working conditions. Others maintain their organisers provide the department with information about their location to avoid paying accumulated unpaid wages.

Occupational health and safety

The department is aware of allegations made by the Construction, Forestry, Mining and Energy Union (CFMEU) that illegal workers are frequently not paid award wages and may be engaged in workplaces that do not adhere to Occupational Health and Safety (OH&S) practices. There is a case where an illegal worker died following an accident at a construction site. By helping to reduce the incidence of illegal work, the proposed offences may play a role in preventing these types of accidents where there is a link between illegal work and poor OH&S practices.

Trafficking and sexual servitude

Some of the most troubling workplace conditions in which illegal workers are located involve cases of suspected sexual servitude where women have been trafficked to work in the sex industry.

Between 1999 and 31 March 2006, the department referred 174 suspected victims of trafficking to the Australian Federal Police (AFP) for assessment and further investigation. Of these cases, 158 were in relation to the sex industry. The threshold for referring cases to the AFP is low and includes, for example, where there are allegations of restricted freedom of movement, verbal admissions or internal locks on doors at premises.

The proposed aggravated offences will complement the slavery, sexual servitude, deceptive recruiting and trafficking in persons offences in the Criminal Code. The aggravated offences will provide a significant deterrent to employers, particularly in the sex industry, from employing illegal workers who are being exploited through forced labour, sexual servitude or slavery. The higher penalty reflects the increased vulnerability of an illegal worker who has been exploited. It is a more serious crime to employ an illegal worker if the worker is a victim of this type of exploitation.

The aggravated offences will support the offences in the Criminal Code where a person who employs a victim of exploitation was not themselves involved in the exploitation. For example, a trafficker may control a group of women to provide services to employers such as brothel owners. The conduct of the brothel owner might not always amount to an offence under the Criminal Code, such as slavery or sexual servitude, but if the brothel owner was reckless as to whether the illegal worker is being exploited, their conduct will be caught by one of the aggravated offences.

What onus would the proposed offences place on employers to identify unlawful non-citizens or persons working in breach of visa conditions?

This section of the submission provides information on level of works rights checking that would be required by the proposed offences to address the Committee's third area of inquiry.

In the department's view, the proposed legislation would not place an undue burden on business.

For example routine work rights checking by employers would not be required under the proposed offences. Employers would only need to consider doing a work rights check where there is a substantial risk that a job applicant is an illegal worker. The Bill makes it clear that an employer who engages an employee unaware of the substantial risk that the employee is an illegal worker is not intended to be caught by the offences.

Where there is a substantial risk that a job applicant is an illegal worker, employers can quickly and easily check work entitlements by using one of the free services provided by the department. These include the internet based Entitlement Verification Online (EVO) and the Fax Back Facility.

Because of the ease with which these checks can be performed, the department would seek to encourage businesses to adopt the best practice of checking the work entitlements of all new employees even though this level of checking is not required by the legislation. One benefit of this approach is that it would help to avoid any loss of productivity that can occur when illegal workers are removed from the workplace. The department believes that the few minutes it takes to check a prospective employee's work entitlements will ultimately be less costly for business.

It is expected that, as a matter of policy most first-time offenders would be given a written warning instead of being referred for prosecution. Employers who engage large numbers of workers over a short period of time would also be likely to be given a 48 hour grace period to perform any work rights checks. That is, employers who conduct a check within 48 hours of an employee commencing would not be prosecuted provided the employee is dismissed as soon as any checks indicate he or she is not entitled to work in Australia. This policy would ensure that the normal work of the business (for example harvesting of crops) is not disrupted.

The department notes that the strict liability offences and infringement notice penalties recommended by the 1999 *Review of Illegal Workers in Australia* are not included in the Bill. Offences of that kind would mean that an employer would be guilty of an offence regardless of their state of knowledge about an employee's entitlement to work in Australia, and would effectively require, amongst other things, that all employers in Australia conduct work rights checks.

The proposed legislation will allow action to be taken against employers of most concern, namely those who are deliberately doing the wrong thing by knowingly or recklessly engaging illegal workers. For example, several employers in the sex industry have been given numerous Illegal Worker Warning Notices and yet continue to engage illegal workers without checking their work entitlements.

Would charitable organisations that engage voluntary workers be subject to any of the proposed offences?

This section of the submission clarifies how the proposed offences would apply to charitable organisations that allow an illegal worker to perform unpaid activities such door-knocking, working in homeless shelters or assisting with children's sporting activities.

Persons who allow illegal workers to participate in such charitable or community activities would only commit an offence if they did so in one of the circumstances or relationships described in paragraphs 245AG(2)(a) to (d).

In particular, there would need to be a contract of service, that is an employment relationship, between the two persons (paragraph (2)(a)), or a contract for services (other than in a domestic context), that is, a relationship of independent contractor (paragraph (2)(b)).

In the Department's view, it would be highly unlikely that either of these relationships would exist where an unpaid volunteer was engaged in activities such as door-knocking for charities, working in homeless shelters or assisting with children's sporting activities.

Furthermore, proposed sections 245AC and 245AE require that the non-citizen worker holds a visa that is subject to a condition restricting the work that the worker may do in Australia. The visa conditions that restrict the work that a visa holder can perform are set out in Schedule 8 of the *Migration Regulations 1994* ("the Regulations") and are attached to visas in accordance with the provisions of Schedule 2. For this purpose, "work" is defined by regulation 1.03 to mean (unless the contrary intention appears) "an activity that in Australia, normally attracts remuneration".

In the Department's view the charitable and community activities mentioned above would not normally attract remuneration and therefore would not constitute "work" for the purposes of the Regulations and in particular for the purposes of determining that a non-citizen was in breach of a condition restricting the work that the non-citizen may do in Australia.

It follows that allowing a person to perform such activities, even if it were to fall within proposed section 245AG(2), could not be an offence under sections 245AC(1) and 245AE because the person could not be in breach of a condition restricting the "work" that the holder may do in Australia.

Implementation

If the proposed legislation becomes law, the department would use the six month period before the offences commence to build upon its existing Employer Awareness Campaign so that employers and labour suppliers are aware of their rights and responsibilities under the new offences. Part of this campaign would focus on raising awareness of the new offences in regional Australia and would include advertisements in industry publications.