Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Bill)

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (**LAQ)** welcomes the opportunity to make a submission on the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* (**the Bill**). LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives.

Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of *"giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way"* and is required to give this *"legal assistance at a reasonable cost to the community and on an equitable basis throughout the State"*. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts, commissions and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services (**CJS)** lawyers and First Advice Contact Team lawyers provide advice and representation to clients about employment law matters including underpayments of wages and entitlements in addition to other breaches of the *Fair Work Act 2009* (**FW Act**).

The CJS also conducts an external advice clinic in partnership with the Fair Work Commission (**FWC**) through the national Workplace Advice Service providing preliminary advice to eligible applicants employed by National System Employers (**NSE**) who have started or are considering proceedings in the FWC.

LAQ represents NSE applicants in the FWC as well as in the Federal Circuit Court of Australia (**FCC**) and Federal Court of Australia (**FCA**) (collectively the **Federal Courts**) claiming:

(a) breaches of the General Protections provisions of the FW Act;
(b) breaches of their Awards;
(c) breaches of the National Employment Standards (**NES**);
(d) other breaches of the FW Act
(e) that they have been unfairly dismissed;
(f) that they have been bullied in the workplace; and
(g) underpayment of wages and entitlements in addition to the matters listed above.

We note that the objectives of the Bill are to:

(a) enable the prosecution of wage theft as stealing under the Criminal Code;
(b) increase the maximum penalties in the Criminal Code for the offences of stealing and fraud relating to wage theft; and
(c) facilitate the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of not more than $20,000 under section 548 of the FW Act.

Enabling the prosecution of wage theft as stealing under the Criminal Code.

LAQ is concerned about the following in relation to the criminalisation of wage theft:

(a) the cost and complexity of prosecuting will have the likely effect that the prosecutory authorities will be unable to adequately investigate and prosecute offenders without additional training and resourcing;
(b) criminally prosecuting offenders may unintentionally contribute to unemployment;
(c) criminalising the conduct is unlikely to alter the behaviour of offenders; and
(d) successful prosecutions will not ensure that employees are paid and does not address, on a coordinated and national basis, the systemic issues impacting wage theft.

However, if the Bill is enacted in its current form, we are of the view that it is important that:

(a) a definition of *"employer"* is included; and
(b) the definition includes particular classes of offenders such as directors and shadow directors of companies that engage in the practice of "phoenixing" and creating companies that have faux directors in place.

Cost and complexity of prosecution

Criminalisation of wage theft will require the Queensland Police Service and the Director of Public Prosecutions to have specialised training and resourcing to ensure staff have the capacity and knowledge to undertake forensic investigations in this area.

The difficulty of proving beyond reasonable doubt that an employer either deliberately or recklessly engaged in the conduct envisaged in the Bill is exceptionally high. It is the experience of LAQ that a significant number of companies have in place automated wage systems or use external accountants to facilitate wage payments. There would be a significant amount of forensic evidence required in addition to ascertaining the appropriate offender to prove intent beyond reasonable doubt. As such, it is difficult to see how the criminalisation of the conduct will materially affect the behaviour of potential offenders.

Unintended consequences of criminal prosecution

While it is acknowledged that underpayments of wages are endemic, it is the experience of LAQ that most employees are not necessarily seeking the indictment of their employers, but simply the correct payment of their wages.

There is a danger that indicting offending employers, particularly in the case of small businesses, would cause unintended consequences of small businesses closing down which would in turn, result in increased unemployment. This is particularly relevant in regional communities where unemployment is statistically higher than in the urban metropolitan communities.

Behaviour of offenders

LAQ submits that criminalising wage theft will not have the desired effect on adjusting the behaviour of offending employers. Offending employers may instead adopt increasingly complex business structures or practices to avoid criminal liability. LAQ supports a coordinated and national approach to address systemic issues impacting wage theft.

The definition of "employer"

The Bill does not provide a definition of an *"employer"* for the purposes of identifying offenders who could be prosecuted under the Bill. As explained above, companies may have in place a number of mechanisms that contribute to the payment of employee wages. As such, while an employer may be under paying its staff, it may not be the employer that is the operative mind behind the underpayment, whether it be wilful or reckless.

This could also be relevant in the case of labour hire arrangements where a host company pays the labour hire company who in turn pays the employee who, for the purposes of privity of contract, is employed by the labour hire company but not the host company.

LAQ submits that the Bill is vague in identifying who an employer is. A definition should be included and that definition should include those discussed in the section below.

Classes of offenders to be included in the definition of "employer"

Any definition of *"employer*" should include companies and individual directors who engage in "phoenixing". It is LAQ's experience that companies regularly liquidate to avoid the cost of and inconvenience of lengthy litigation or correctly paying its employees.

Any definition of *"employer"* should also encompass complex company structures that involve *"shadow directors"* who do not appear in any official company documentation but are in fact the operating minds of those companies. It is the experience of LAQ that a number of companies have in place *"puppet directors"* who have no material input in the operation of the companies but only act as scapegoats for the shadow directors in the case of any legal liability.

As an example, it is the experience of LAQ that there are prevalent issues in migrant communities where individuals target new migrants from culturally and linguistically diverse (CALD) backgrounds to make them faux directors of companies. The companies will exist for a few years before being liquidated and another individual is then identified and made the director of a new company. The liquidation may occur sooner if an issue arises. The employees of the companies and their day to day duties do not change nor do the operating minds or shadow directors however these shadow directors seldom if ever appear on any form of official documentation.

Increasing maximum penalties in the Criminal Code for the offences if stealing and fraud relating to wage theft

LAQ submits that in circumstances where an employer is found to be both criminally and civilly liable for wage theft, there may be unintended economic consequences resulting in bankrupting of individual employers and insolvency of businesses which will have significant impacts, particularly for small communities where unemployment is already statistically higher and these communities struggle to retain business activity in their regions.

Criminalisation does not address the systemic issues that are causing underpayment of entitlements. LAQ submits that the objectives of the Bill may be better achieved by either creating a regulator with increased powers to investigate and resolve disputes similar to the Australian Financial Complaints Authority (**AFCA**). LAQ is not suggesting conferral of powers to AFCA, but the formation of a regulator that has similar powers that would work alongside the Fair Work Ombudsmen (**FWO**) to identify and work to resolve the systemic issues causing the underpayment and non-payment of wages.

Facilitate the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of note more than $20,000 under section 548 of the FW Act

LAQ supports the increase of the Industrial Magistrates Court's jurisdiction in this area. Currently the FCC and Queensland Magistrates Court also have jurisdiction to hear these matters.

The explanatory memorandum accompanying the Bill sets out the reasons why the Industrial Court of Queensland (**Industrial Court**) and the Queensland Industrial Relations Commission **(QIRC**) could not be considered to achieve the policy objectives.

Section 12 of the FW Act sets out what is meant by an *"eligible State or Territory court"* that would, for the purposes of Part 4-1 of the FW Act, be conferred with the necessary jurisdiction to hear matters and make orders in relation to civil remedy provisions under the FW Act.

Section 12 relevantly provides:

> "eligible State or Territory court" means one of the following courts:
>
> (a) a District, County or Local Court;
>
> (b) a magistrates court;
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> (c) the Industrial Relations Court of South Australia;
>
> (ca) the Industrial Court of New South Wales;
>
> (d) any other State or Territory court that is prescribed by the regulations.

Section 12 goes on to provide that a *"magistrates court"* means:

> (a) a court constituted by a police, stipendiary or special magistrate; or

(b) a court constituted by an industrial magistrate; or

(c) the Local Court of the Northern Territory.

(Emphasis added)

Part 3 of the *Industrial Relations Act 2016* (Qld) (**IR Act**) provides for the Industrial Magistrates Court of Queensland which is an "eligible State or Territory Court" for the purposes of the FW Act while the Industrial Court and the QIRC are not as they are not contemplated by the FW Act.

We note that the *Fair Work Regulations 2009* do not prescribe either the Industrial Court or the QIRC as eligible State or Territory Courts.

Furthermore, as identified in the explanatory memorandum, the QIRC is constitutionally precluded from being recognised as a court of competent jurisdiction.

The Magistrates' Court of Queensland is for the purposes of the FW Act, also an eligible State Court. This is presently recognised through the Magistrates Court's current procedure dealing with wage and entitlement matters worth up to $150,000.

It is unclear from the Bill, whether it is the intention of the legislature to transfer this procedure to the Industrial Magistrates Court or to maintain the Magistrates Court's current procedure and provide an additional process with which to pursue wage and entitlement claims.

It is likely that given that the Magistrates Court's jurisdiction to hear these matters is conferred by the FW Act, the State legislature would not be able to remove this.

LAQ submits that:

(a) the Bill should be amended to encourage Queenslanders to use the Industrial Magistrates Court jurisdiction in preference to other available jurisdictions. The statutory limit for small wage claims for the Industrial Magistrate Court should be increased to include amounts of up to $150,000 so as to cover the majority of claims for underpayments;
(b) other than when an agreement is reached, any discussions held in conciliation take place on a without prejudice basis; and
(c) the Industrial Magistrates Court be given powers to compel parties to participate in a conciliation conference.

Attractiveness of the jurisdiction

There are a number of forums that are presently available for parties bring wage related disputes. These include:

(a) the FCC's Small Claims Procedure for claims not exceeding $20,000; and
(b) the Magistrates Court's process for employment entitlement claims for up to $150,000.00.

The current process envisaged in the Bill appears to duplicate the processes that are already available. The addition of a further avenue may confuse both applicants and respondents. It is LAQ's experience that applicants are already confused and overwhelmed by the current systems that are in place. The additional choice in forum does not offer parties any added benefit in engaging in this process when compared to those already available.

Increasing the "Small Claims Procedure" amount

Increasing the amounts covered by the "Small Claims Procedure" where the process is less formal would enable and encourage a wider scope of applicants to come forward and make claims. It is LAQ's experience that many vulnerable and less sophisticated applicants have underpayment claims exceeding $20,000 that have occurred over protracted periods of time and who are intimidated by the thought of engaging in a claim either in the Magistrates Court or in the General Division of the Federal Courts.

Confidentiality of conciliation conferences

The Bill seeks to insert a section 507I into the IR Act. The section allows the use of admissions made during a conciliation conference in "another civil proceeding". While the section provides for this only on agreement between the parties, LAQ submits that the section:

(a) may adversely affect parties' willingness to participate in conciliations; and
(b) where parties do participate, adversely affect parties' willingness to engage in frank discussions on a "without prejudice" basis in an effort to resolve the dispute.

While the section does specify that a civil proceeding does not include one "founded on fraud alleged to be connected with, or to have happened during the conciliation conference" the section is vague in setting out what is in fact envisaged by a civil proceeding.

Compulsion to attend conciliation conferences

The Bill seeks to insert section 547C into the IR Act which provides for voluntary conciliation conference. The voluntary nature of conciliation conferences envisaged by this section limits the utility of the creation of an additional avenue with which to pursue entitlement claims. It is the experience of LAQ that in matters before the FWC where conciliation conferences are not compulsory, employers will often not consent to attending. Where this is the case, the amendment denies an applicant the opportunity to engage in a conciliation in good faith and potentially resolve the dispute without requiring a hearing to decide the issues in dispute.

The FWO presently offers employers and employees the opportunity to engage in voluntary mediation to resolve wage related disputes.

The alternative processes available through the FWO, the Magistrates Court and the FCC present as more appropriate forums where matters are more likely to be resolved. This is because in those forums, conciliations and mediations are conducted on a "without prejudice" basis where any disclosures made during those processes cannot be relied on in any subsequent civil proceedings. The process envisaged in the Bill appears to disincentivise genuine bona fide participation in any conciliation by employers due to the risks that flow from disclosures they may make in this process.

Any powers given to the Industrial Magistrates Court to refer a matter to conciliation should include a power to compel parties to attend and participate in a conciliation conference. While LAQ supports the legislature empowering the Court or the Commission to compel parties to participate in the process, the risks of potential civil and criminal liability inherent in participating would likely result in employers not participating in a conference in good faith.