

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

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Grace Grace, Minister for Education and Minister for Industrial Relations, make this statement of compatibility with respect to the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill amends the Criminal Code, the *Industrial Relations Act 2016*, the *Magistrates Courts Act 1921* and the *Queensland Civil and Administrative Tribunal Act 2009*. The amendments will:

- allow the prosecution of wage theft as an offence of stealing by amending a number of aspects of the definition of *stealing*;
- provide that stealing or fraud by an employer towards an employee attracts an increased maximum penalty; and
- facilitate the pursuit of civil claims for unpaid wages through the Industrial Magistrates Court.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Rights engaged

Clauses 3 to 6 of the Bill which relate to the criminalisation of wage theft engage the following human rights:

1. the right to recognition and equality before the law (section 15);
2. the right to freedom from forced work (section 18);
3. property rights (section 24); and
4. the right to liberty and security of person (section 29).

The right to recognition and equality before the law is promoted. Migrant workers or otherwise socially disadvantaged people are disproportionately affected by wage theft. These clauses in the Bill strengthen the criminal framework that applies when employers breach their obligations.

The right to freedom from forced work is promoted. The amendments recognise that stealing of wages is a criminal offence and increases available penalties for that conduct, thereby acting as a deterrent against such conduct.

Property rights are promoted by these clauses in the Bill. The amendments to stealing recognise that wages and entitlements are the property of workers and the amendments remove barriers to prosecuting wage theft as stealing under the Criminal Code. The amendments promote the rights of workers not to be arbitrarily deprived of their property.

The right to liberty and security is limited, in the case of individuals (not corporations) because the amendments broaden the conduct to which stealing applies and the increase in maximum penalties to both stealing and fraud expose individuals to potentially more severe periods of imprisonment.

Clauses 7 to 21 of the Bill, which relate to amendments to the civil process of wage recovery, engage the following human rights:

1. the right to recognition and equality before the law (section 15);
2. the right to freedom from forced work (section 18);
3. property rights (section 24); and
4. the right to a fair hearing (section 31).

These amendments will make it clear that where a worker has a claim under the *Fair Work Act 2009* (Cwth) (FW Act), including a small claim to which the ‘small claims procedure’ applies, it can be brought before an Industrial Magistrate. This option will promote the rights of workers who are seeking to recover their lawful entitlements.

As outlined above, there are indications that migrant workers and other socially disadvantaged people are disproportionately affected by wage theft. The changes to clarify the civil law framework for wage recovery, coupled with supporting administrative proposals to provide greater information and education about the processes available to assist with recovery, are intended to promote the right to recognition and equality before the law by making wage recovery processes more accessible generally.

Increased availability of the FW Act’s small claims procedure for claims of not more than \$20,000 will make the civil process for recovering wages, faster, simpler and more cost-effective, thereby promoting greater access to justice and promoting the right to a fair hearing. A more expeditious small claims process will also benefit employers.

Facilitating the use of the Industrial Magistrates Court for wage recovery matters in Queensland promotes the human right not be arbitrarily deprived of property in the form of wages and entitlements, particularly where the small claims process provides a more accessible, low cost and low formality process for recovery. This framework will support individual workers in recovering compensation or entitlements that correspond to the value of their labour.

The amendments will broaden a worker’s options for representation under the FW Act small claims process to industrial organisations with the leave of the court.

The FW Act small claims process only enables representation by industrial organisations, with the leave of the court, if enlivened by State legislation. This exists in addition to the FW Act's right to legal representation with the leave of the court. Given the Bill has the effect of broadening a worker's entitlements to representation under the FW Act, it is not seen as limiting the right to equality before the law and the right to a fair hearing.

Rights limited

The right to liberty and security will be limited by the amendments to the Criminal Code. The right will be limited due to the increased likelihood that individuals will be arrested and detained as a result of the amendments.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Right to liberty and security of the person

(a) the nature of the right

The right entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. The Bill limits the right as it may result in individuals being arrested and detained for the offence of wage theft. Individuals may also be liable for longer terms of imprisonment for fraud or theft relating to wage theft than were previously provided for under the Criminal Code.

The right is only limited to the extent that an individual (corporations do not have human rights) who engages in wage theft, as defined in the offences of stealing and fraud in the Criminal Code, will expose themselves to criminal sanction. All existing procedural provisions that apply to criminal proceedings, including the requirement for proof beyond a reasonable doubt and the defences and excuses available in the Criminal Code, will apply to offences that apply to wage theft conduct.

(b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation of the right to liberty of the person is to deter and punish wage theft and to protect the rights of workers not to have their wages and entitlements stolen. Wage theft is a substantial and pressing social concern. On 16 November 2018, the Education, Employment and Small Business Committee tabled its report '*A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland*' (the report). The report found that wage theft is endemic across Queensland, affecting 437,000 workers and costing them approximately \$1.22 billion in wages and \$1.12 billion in unpaid superannuation each year.

The Bill aims to protect workers by deterring employers from engaging in wage theft, particularly those who engage in it as a business model. It is also designed to reflect the seriousness of such conduct and punish those employers who are found to have engaged in wage theft either dishonestly or intentionally. A perceived imbalance also exists between the current capacity to more harshly punish ‘stealing as a servant or clerk’ (i.e. where an employee steals from their employer) but there being no equivalent capacity to impose an increased penalty where an employer steals the wages of their employee. The amendments allow for some correction to this perceived imbalance, providing an equivalent maximum penalty for both employees and employers and by allowing employers to also be prosecuted for stealing. As a result, the Bill will likely increase the confidence of the community in the fairness of the criminal justice system.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

There is a rational connection between the limitation on the human rights and the purpose of that limitation.

The general deterrence of criminal sanction achieves the purpose of protecting the rights of workers by making it less likely that employers will engage in wage theft and providing for greater maximum penalties when they do.

The amendments to the offence of stealing will address the perceived imbalance between the application of offences to employees stealing from employers and employers stealing from employees. The increase in the punishment that is available in cases of wage theft, whether as fraud or stealing, is also necessary to signal the seriousness of the offending and to deter wage theft.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

There are no other less restrictive and reasonably available ways to achieve the purpose of the Bill.

The requirement for there to be evidence beyond a reasonable doubt, the defences and excuses available in the Criminal Code and all the usual procedural provisions that apply to criminal proceedings will apply to offences of wage theft. The offence will also not capture employers who pay their workers incorrectly because of an honest mistake.

The increase in the punishment that is available in cases of wage theft, whether by fraud or stealing, is necessary to signal the seriousness of the offending and to deter wage theft. Given wage theft is endemic in Queensland this suggests existing penalties and vehicles for prosecution have not been effective in deterring wage theft.

The only way to address the perceived imbalance, as between stealing by employees and stealing by employers, is to amend stealing in the way proposed in the Bill so as to allow it to be a vehicle to prosecute both employees and employers and also for equivalent maximum penalties to apply in relation to the offences of stealing and fraud where the conduct is committed during an employment relationship.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Given the importance of protecting the rights of workers who are the victim of wage theft, who are often already socially disadvantaged and face a number of barriers in seeking redress through the courts, the limitation on the liberty of individual persons who intentionally or dishonestly engage in wage theft is justified.

Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act

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