16 November 2022

Supplementary Submission (question on notice):
Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth)

Thank you for the opportunity to give evidence at the hearing regarding the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth) on 15 November 2022.

Further to our submission and oral evidence, we provide the following response regarding a question taken on notice regarding data.

Why does data matter?

In order to evaluate the effectiveness of existing laws, processes and services and make evidence-based recommendations for reform, it is essential that data be collected in a way that is considered, thorough, and centred upon the experiences of migrant workers. To monitor and evaluate the effectiveness of any changes, ongoing capture of relevant data remains critical.

Examples of problems with current data capturing processes

We and others have encountered challenges with developing evidence-based proposals for reform, due to absent or incomplete data. For example:

- Unlike sponsored workers on a Temporary Skill Shortage visa or within the Pacific Australia Labour Mobility Scheme, many migrant workers (including international students and Working Holiday Makers) are not restricted to working for a particular employer. There has been very limited quantitative data collected on the labour market experiences of these workers, including the size of their employers, the industries in which they work,

as well as the overall nature and extent of exploitation they experience. Still less is known about how experiences vary between different visa cohorts, nationality groups or different industries.[1]

- The Australian Bureau of Statistics' Census of Population data does not distinguish between respondents according to visa status, only birthplace country. In one study on why international students were highly reluctant to engage with the Fair Work Ombudsman, we used certain parameters (e.g. 'Not Australian citizen', 'Arrived in last 4 years', 'Enrolled in full time study' and 'Aged 15 and over') to reduce the dataset to a group that has a high population of international students.[2] However, this dataset was over-inclusive, including secondary visa holders of permanent and temporary skilled migrant workers, recently arrived refugees, partner visa holders and Working Holiday Makers. Therefore, our analysis of this data only provided an indicative picture of international student engagement in the Australian workforce.

- FWO reports publicly in the aggregate on overall amount of wages recovered for migrant workers. FWO has shared its internal data with us, which provided annual figures on numbers of cases that were closed but the agency apparently does not systemically collect data on the treatment paths and outcomes for individual workers, reported against the quantum of the claimed underpayment by workers.[3]

As a result of this information gap, we have developed widescale surveys of temporary migrant worker populations to better understand the extent of exploitation and evaluate the effectiveness of processes and services.

Migrant Worker Taskforce recommendations regarding data

The Migrant Worker Taskforce Report (**MWT Report**) includes a specific recommendation regarding the collection of data. Importantly, it is recommended that the Government give priority to building an evidence base to understand the extent, nature and causes of exploitation and underpayment. It is also recommends that specific data be collected regarding international students and agricultural labour:

---

[1] See further Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Migrant Justice Institute, 2017), 5.
[2] Alexander Reilly, Joanna Howe, Laurie Berg, Bassina Farbenblum and George Tan, *International Students and the Fair Work Ombudsman* (2017).
[3] Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the Fair Work Ombudsman' (2017) *Australian Journal of Human Rights.*

Recommendation 22

It is recommended that the Government give a greater priority to build an evidence base and focus its existing research capacity within the Department of Jobs and Small Business on areas affecting migrant workers. It should do this to better understand the extent, nature and causes of any underpayment and exploitation migrant workers may experience. The department should work across departments where appropriate. Separately, and in addition:

a) *the Department of Education and Training should work with the Council for International Education and peak organisations to help identify mechanisms for providers to collect data about student visa holders' experiences of working in Australia*
b) *the Department of Education and Training should conduct regular surveys of overseas students that include workplace experience*
c) *the Government should support work being undertaken by ABARES, the science and economics research division of the Department of Agriculture and Water Resources to increase data collection in relation to agricultural labour.*

In addition, the MWT Report also recommends reviews of the Fair Work Ombudsman's resources, tools and powers (**MWT Rec 10**), small claims process (**MWT Rec 12**) and possible expansion of the Fair Entitlements Guarantee program (**MWT Rec 13**).

Implementing the Migrant Worker Taskforce recommendations regarding data

We endorse the recommendations of the MWT and recommend that all reforms should be based on data and evidence. Where this is unavailable, research and analysis should be undertaken, especially concerning the experiences and perspectives of migrant workers. This includes collecting first-hand data on those who attempt to make claims, and the vast majority of migrant workers who endure exploitation in silence. In any reform processes affecting migrant workers, migrant workers and the organisations working with them should have a seat at the table.

In order to achieve this, we recommend that detailed data collection frameworks be developed for each relevant government department, Court/Commission and statutory agency. For example, in respect of the Fair Work Ombudsman (**FWO**), we recommend that FWO KPIs should reflect outcomes for vulnerable workers and other meaningful measures of worker reporting, FWO assistance, and remediation outcomes. This should include collecting and releasing de-identified data on the number of migrant workers who contact FWO (disaggregated by visa type), nature of the inquiry, what assistance was provided (information only, assistance with calculations, mediation, investigation etc), outcome (including specifically what amount and percentage of money sought by the worker was recovered and whether any systemic obtained (e.g. an employer undertaking an independent audit to identify other cases of noncompliance)

and the outcome from those systemic remedies (e.g. how many workers were then repaid and what amount)), timeframes for resolution, de-identified settlement information (including the number and type of systemic remedies agreed to), applicant and respondent experience data, and demographic information regarding applicants including occupation. This data, including the specific outcomes of 'resolved' cases, should be presented in FWO annual reports.

Standardised KPIs / data collection points should be developed for other statutory agencies undertaking enforcement work including the Pacific Labour Facility. This would facilitate cross-institutional comparative work and the opportunity to develop and share best practice approaches across agencies.

Further, in respect of the Federal Circuit Court Small Claims Division and other Courts/Commissions, we recommend that de-identified data be collected and released regarding key metrics including the number of cases lodged (where possible disaggregated by visa type), nature of the application, timeframes for resolution, outcomes (including specifically what amount and percentage of money sought by the worker was ordered/ultimately recovered and whether any systemic remedies were obtained (e.g. an employer undertaking an independent audit to identify other cases of noncompliance) and the outcome from those systemic remedies (e.g. how many workers were then repaid and what amount), de-identified settlement information (including the number and type of systemic remedies agreed to), applicant and respondent experience data, and demographic information regarding applicants including occupation. Although some of this data is publicly available now for some institutions, (for example the Fair Work Commission has collected and released data on user experience,[4] timeframes for resolution etc), much data is missing, and standardised fields across institutions would provide useful insights and the opportunity to develop best-practice approaches.[5]

---

[4] See Fair Work Commission Client Experience Research & Feedback at <https://www.fwc.gov.au/about-us/strategy-and-research/research/client-experience-feedback-research>.

[5] For example, publicly available data on lodgement of applications has varied over the years. The FWC Annual Report shows that in 2020-2021, there were 13,281 unfair dismissal claims lodged at the FWC (Fair Work Commission Annual Report 2020-2021, 19). The Annual Report of the Federal Circuit Court shows that only 1,352 applications for all FW Act related matters in total filed in the Federal Circuit Court; Federal Circuit Court Annual Report 2020-2021, 43). There is no data in the Annual Report for 2020-2021 on the number of *small claims* applications made in that year. Senate Committee data indicates that, in 2018-2019, 496 small claims applications were made to the Federal Circuit Court (Senate Select Committee on Temporary Migration Report, 50). It would be very helpful for the Court to provide consistent and more detailed information about the number and type of claims lodged. More detailed data, which can also be compared across jurisdictions, would also be helpful in evaluating timeframes for resolution of applications. The Annual Report of the FWC provides the median time taken from lodgement to conciliation in unfair dismissal applications in 2020-2021 (which was 21 days) (Fair Work Commission Annual Report 2020-2021, 19). However, no data was provided on median time for matters proceeding to hearing. A Senate Committee obtained data indicating that the average wait time for first hearing of a case in the small claims jurisdiction in 2018-2019 was 2.2 months, and the average age of a case was 5.6 months (Senate Select Committee on Temporary Migration Report, 51), but no data was provided in the Federal Circuit Court annual report.

We would welcome the opportunity to work with Government and others to develop data collection fields and frameworks, both within and across departments and statutory agencies.

Sincerely,

Associate Professor Laurie Berg
UTS Faculty of Law
Co-Executive Director, Migrant Justice Institute
E: Laurie.berg@uts.edu.au

Associate Professor Bassina Farbenblum
UNSW Faculty of Law & Justice
Co-Executive Director, Migrant Justice Institute
E: B.farbenblum@unsw.edu.au

Catherine Hemingway
Legal Director, Migrant Justice Institute
E: catherine@migrantjustice.org