



15 December 2022

Submission: A Migration System for Australia's Future

We welcome the opportunity to make a submission in relation to this important review.

The Migrant Justice Institute uses strategic research, advocacy and legal action to achieve fair treatment and justice for migrant workers globally, and in Australia. Our research uncovers the reality of migrant worker exploitation and the operation of laws and systems in practice. We seek to drive systemic change by governments and business by charting evidence-based pathways to reform, grounded in migrants' experiences. We closely collaborate with migrant communities, civil society organisations and trade unions to amplify migrants' voices and support migrant worker empowerment.

The Migrant Justice Institute is led by law professors at UTS and UNSW. Incorporated in late 2021, it has grown out of a five-year collaboration between the two universities and retains close connections with both institutions.

The Migrant Justice Institute acknowledges the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation, and the Gadigal and Bedegal people of the Eora Nation. We acknowledge that sovereignty was never ceded.

Introduction

The Migrant Justice Institute welcomes the opportunity to provide input into this review and supports the commitment of the review to re-examine the purpose, structure and objectives of the migration system.

It is well known that exploitation of migrant workers is entrenched in certain industries across Australia and, as noted in the Discussion Paper, efforts to address this have been piecemeal and ineffective. Meeting this regulatory and enforcement challenge requires consideration of a range of reforms to migration settings. These include increasing portability of employer-sponsored visas (including increasing the 60 day period of visa validity after termination of employment, and 'industry-based sponsorship'), modifying eligibility requirements of employer-sponsored visas (including increasing the Temporary Skilled Migration Income Threshold) and strengthening pathways to permanence. We understand that others are directing submissions to these recommendations and other interventions necessary to protect migrants in

the workplace. Our submission is restricted to migration reforms that are necessary to enable migrant workers to report workplace exploitation and hold noncompliant employers to account.

The vast majority of unlawful employer conduct goes unchecked because migrant workers will not report it for fear of losing their visa or jeopardising a future visa. Migration settings impede reporting and remedying exploitation. The Assurance Protocol between the Department of Home Affairs (**DHA**) and the Fair Work Ombudsman (**FWO**) has not been effective, with an average of 15 migrant workers using it each year. We propose two forms of whistleblower protections that would help to break the cycle of exploitation, safeguard the integrity of the of the Australian labour market, and change employers' perceptions of temporary migrants as a silent exploitable second class of workers in Australia.

How do the whistleblower protections work?

This set of 'whistleblower protections' include:

1. **Protection from visa cancellation** for an exploited migrant worker who has breached their visa and takes action against their employer, and
2. **A short-term visa with work rights** to enable a migrant worker to pursue a claim against their employer before they leave Australia or transition onto a different visa.

We suggest that to be eligible for either protection, a migrant worker must:

1. Take action to address a non-trivial breach of their employment rights. This could include a claim through a government agency, union action against an employer, or a private legal action against the employer in a court or tribunal.
2. Demonstrate a meritorious claim either by:
 - Certification from a federal or state government regulator that it is inquiring into the allegation (for violations including wage theft, sexual harassment, workplace health and safety breach etc.); or
 - Certification of the claim by an accredited specialist employment lawyer or an employment lawyer in a community legal centre, union or pro bono practice. This protects against false or unmeritorious claims because there is no financial incentive to bring such a claim and these lawyers are experts who are subject to professional disciplinary oversight.
3. Report the case to the FWO or other government authority.

For the short-term visa:

- DHA will have discretion to issue the visa for several months or up to one year, depending on strength of evidence and progress of claim. The migrant worker could apply for a further short-term visa if necessary to pursue the claim.
- The visa will become invalid if the visa-holder abandons the claim (however they are permitted to genuinely settle the claim).

How will whistleblower protections contribute to reducing exploitation?

These reforms will begin to break the entrenched cycle of exploitation and expand government's enforcement of labour law by:

- Changing employer behaviour by putting employers on notice that there is a greater likelihood that exploitation will come to light and that there are new incentives for migrant workers to hold exploitative employers to account;
- Substantially expanding enforcement beyond the limited capacity of government agencies by enabling more employment lawyers and unions to pursue claims on behalf of migrant workers who would not otherwise come forward, without the need for a substantial increase in resourcing of enforcement agencies;
- Increasing detection of exploitation among federal and state government agencies by requiring migrant workers to report claims to those regulators to be eligible for the protections;
- Increasing business' ability to detect and address wage theft and modern slavery in supply chains by enabling migrant workers to more safely report it, while not creating any new red tape for businesses that do the right thing and comply with employment laws;
- Encouraging migrants to join unions and assisting unions to organise and represent migrant workers; and
- Creating new incentives for migrant workers to report forms of exploitation not currently covered by the Assurance Protocol, including workplace health and safety, sexual harassment and discrimination.

Further details of these measures, as well as the case for reform, are available in our research and policy guide, *Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation* which has not yet been publicly released. We would be happy to provide this document on a confidential basis if this would assist the review.

This proposal is endorsed by over 40 organisations across Australia including community legal centres, ethnic community state and national peak bodies, unions (UWU, AWU, SDA, TWU, Unions NSW and Victorian Trades Hall Council), churches, and national service providers (such as the Salvation Army, AMES and the Settlement Council of Australia) as well as the NSW Anti-Slavery Commissioner James Cockayne. This underscores the broad acceptance among the community sector that nothing short of these protective measures will be adequate to give migrant workers the confidence to report exploitation, including modern slavery, and pursue claims without fear of ramifications for their current or future visa. It also reflects a commitment by key service providers across the country to use these protections to assist and represent a far greater number of migrant workers to hold exploitative employers to account.

Consistency with simplification of the visa system

Finally, we support the government's intention to simplify the visa system, including reducing the number of visa categories. The proposed Workplace Justice visa is not inconsistent with this goal. The visa is

necessary to address workplace exploitation and there is no similar or related visa among current visa options that could serve its purpose of short term stay to pursue a meritorious labour claim. Declining establishment of this visa in order to reduce the number of visas would place form over critical regulatory function.

Conclusion

Enhanced visa protections for migrant workers who take steps to address exploitation reflect Australia's values as a diverse, welcoming and fair society. Current migration settings actively discourage migrant workers from taking action to address contraventions of labour laws. Whistleblower reforms are critical to changing this structure of incentives to ensure the integrity of the Australian labour market through increased threat of detection of exploitation through migrant worker reporting.

We would welcome the opportunity to discuss this submission with the review team, and look forward to working with the government to develop further reforms in 2023.

Sincerely,



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