28 Jan 2022

Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee) for the inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

1. Introduction

1.1. The Migrant Workers Centre (hereafter the MWC) welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding the proposed amendments to the *Migration Act 1958* (hereafter the Act).

1.2. The MWC is a non-profit organisation located in Carlton, Victoria, that helps migrant workers understand their workplace rights and get empowered to enforce them. Although the MWC advocates for all workers who were born overseas and work in Australia, regardless of their migration status, we hereby refer to only workers on temporary visas as 'migrant workers' for the purpose of this submission.

1.3. Australia heavily relies on migrant workers. The COVID-19 pandemic shed a light on the critical gaps in our economy and society migrant workers have been filling. Without migrant workers, hospitals cannot function; children and the elderly receive no care; and tables are left empty of food.

1.4. Regrettably, most migrant workers work under extreme stress and exploitative conditions in Australia. We recently investigated on migrant workers' visas and job market experiences through a survey and in-depth interviews. Two thirds (65 per cent) of the survey respondents have been underpaid while working in Australia. The research also showed that an absolute majority (79 per cent) felt unable to speak up when they were mistreated at work. They are forced to work extreme overtime, on public holidays and even when sick.[1] Meal breaks, bathroom breaks, and annual leave are too often denied.

1.5. Insecure migration status, lack of support services/networks, and limited understanding of workplace rights are found to be contributing to keeping migrant workers silent and helpless against labour exploitation.

1.6. The Migration Amendment Bill 2021 (hereafter the Bill) aims to protect migrant workers from labour exploitation. And yet, it exclusively focuses on punishing employers who have breached the Act and does not address any of the aforementioned factors that render migrant worker vulnerable to exploitation. Owing to its limited scope, we believe the Bill will have limited effect on protecting migrant workers.

[1] MWC. 2021. "Lives in Limbo: The experiences of migrant workers navigating Australia's unsettling migration system".

1.7. In this submission, we focus on Part 1 (New employer sanctions) and Part 2 (Prohibition on certain employers allowing additional non-citizens to begin work) of the Bill and recommend further amendments to the Act to the effect of better detecting breaches of the Act and workplace laws, minimising the impact of the breaches on migrant workers, and practically contributing to protecting migrant workers from exploitation and adverse migration outcomes.

2. Summary of Recommendations

Recommendation 1. We recommend adding measures to promote migrant workers' workplace rights to the Bill. Eliminating visa conditions that restrict one's work rights should be prioritised.

Recommendation 2. Migrant workers should be protected from the possibility of being punished with adverse immigration consequences when their employer is found guilty of contraventions. Especially, when the employer's standard business sponsorship approval is cancelled, the Government should grant their employees on employer sponsorship a replacement visa for the original duration of the sponsored visa or give them more time to find an alternate sponsoring employer.

Recommendation 3. We recommend adding measures to encourage and protect whistle blowers. The Department of Home Affairs and the Fair Work Ombudsman should prioritise reviewing the Assurance Protocol and strengthen safeguards for migrant workers who report their employer for migrant labour exploitation.

Recommendation 4. We recommend creating a new bridging visa with work rights to help regularise whistle blowers' stay, when needed, until they complete ongoing legal processes or medical treatments. The visa should be regarded as a qualifying substantive visa when the whistle blower applies for another visa afterwards.

Recommendation 5. We recommend that the Department of Home Affairs collaborate with the Fair Work Ombudsman and trade unions to regularly monitor prohibited employers. Migrant workers who have been unknowingly engaged by a prohibited employer should be protected from any adverse immigration outcome owing to the engagement.

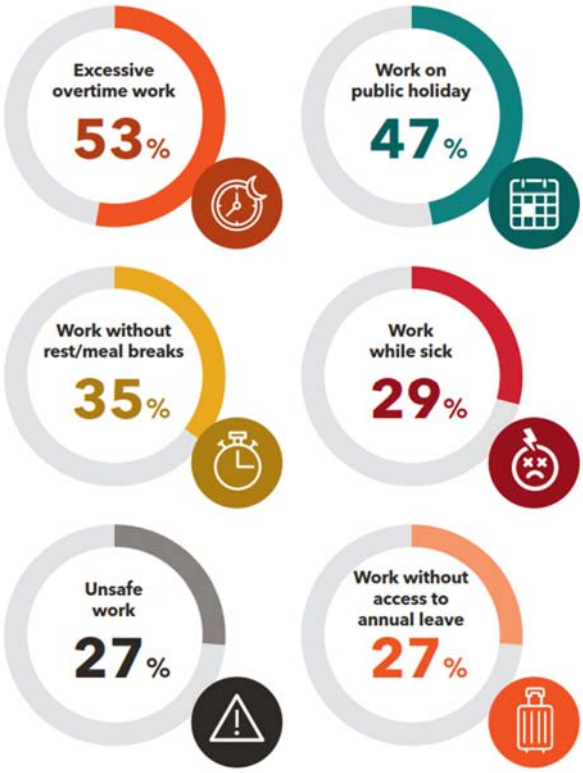
Recommendation 6. We recommend stipulating in the Act the principle that the standards under the *Fair Work Act 2009* apply to every worker equally, both citizens and non-citizens, and that the Department of Home Affairs should provide information about workplace rights in community languages each time it issues a visa with work rights.

3. Improving Migrant Workers' Workplace Rights

3.1. Insecure migration status is migrant workers' greatest source of stress, according to our research.[2] As their life in Australia is built on the temporary visa they hold, it is many migrant workers' top priority to progress to a permanent visa or secure the next temporary visa to extend their stay.

3.2. The level of status-related stress goes up as their visa gets more restrictive and harder to renew. We found that migrant workers on temporary employer sponsorship suffer from the highest level of stress (9.66 out of 10).[3] Figure 1 shows that over half (53 per cent) of those on employer-sponsored visas are forced to undertake excessive overtime work and 27 per cent cannot say no to unsafe work.

Figure 1. Sponsored workers' experience of labour exploitation (multiple responses)



Source: MWC. 2021. "Lives in Limbo: The experiences of migrant workers navigating Australia's unsettling migration system". p.38.

3.3. Migrant workers do not feel protected in Australia. Monitoring of breaches of workplace laws is inadequate, and uncovering the breaches does not result in improved working conditions for migrant workers. On the contrary, migrant workers are encouraged to keep

[2] MWC. 2021. "Lives in Limbo: The experiences of migrant workers navigating Australia's unsettling migration system".
[3] ibid.

their silence because their residency could be negatively affected when authorities learn about their employers' breaches. Case study 1 below well illustrates why:

Case study 1. Contravention report resulting in adverse immigration outcome

Hana (pseudonym) came to Australia on a student visa and received training to become a chef. With diplomas in hand, she could soon find a sponsoring employer for a temporary work visa (Subclass 457).

The employer turned out to be exploitative and deceitful. Hana was forced to work almost 60 hours a week. Besides, the employer demanded that she pay back part of her wage in exchange of the visa sponsorship. Hana quit and looked for another sponsoring employer, but the same thing repeated with the second employer.

Her third workplace seemed to be trouble-free. It was a big hospitality group, employing over 700 workers, and had an enterprise bargaining agreement. However, the employer did not respect the enterprise bargaining agreement and did not pay migrant workers overtime rates. Hana did not complain, and her employer rewarded her with sponsorship for a permanent visa (Subclass 186).

After her permanent residency application was made, Hana learned that some of her former colleagues reported the employer to the Fair Work Ombudsman for underpayment. Soon, the Fair Work Ombudsman started investigating the workplace and interviewed existing workers including Hana. She did not cooperate with the investigation for fear it would negatively affect her permanent residency application.

The Fair Work Ombudsman established that the employer stole wages from dozens of former employees, mostly migrant workers, but did not find much against existing employees.

Months later, Hana was notified that the Australian Border Force canceled her employer's standard business sponsorship approval. It not only meant that her pending permanent visa application would no longer be processed but also that she needed to find another sponsoring employer to remain in Australia.

The incident put an end to Hana's decade-long life in Australia as she failed to find a new sponsor. On the other hand, her former employer was not affected beyond receiving court penalties as the business thrived as usual. Hana could not understand why she was being punished for the breaches her employer made.

3.4. Case study 1 is based on actual events that occurred to one of the migrant workers who contacted us. It reveals how challenging it is for migrant workers to exercise their workplace rights. It also highlights the limitations of the current regulatory regime in providing protection and assistance to migrant workers.

3.5. We believe the Bill will bring little change to how migrant workers feel about exercising their workplace rights because it focuses on punitive sanctions against employer contraventions and includes nothing about promoting migrant workers' workplace rights. Punishment does not automatically lead to deterrence of recommitment. To effectively deter

migrant worker exploitation, we need to introduce heavy sanctions against it, increase the likelihood of its detection, and most importantly, eliminate the factors making migrant workers vulnerable to exploitation.

3.6. We recommend expanding the scope of the Bill and adding measures to promote migrant workers' workplace rights. Eliminating restrictive visa conditions is the place to start. Disadvantaged by the restrictive visa conditions, migrant workers find it extremely difficult to secure a job and often accept whatever terms of employment laid out by their employer. For example, workers on employer sponsorship are allowed to work only for sponsoring employers; workers on Student visas can work up to 40 hours per fortnight only; and workers on working holiday visas are required to change workplaces every six months. Fewer work-related visa restrictions will help migrant workers feel less insecure and increase the chances of migrant workers' reporting employer contraventions.

4. Penalising Exploitative Employers

4.1. Many migrant workers complain that the current regulatory system has lost balance in responding to contraventions made by businesses and migrant workers. Visa condition breaches may lead to migrant workers' visa cancelation and deportation, but their employer—who has coerced or encouraged the breaches—is hardly punished.

4.2. In this context, we welcome the Bill to introduce penalties for the employer who "coerces, or exerts undue influence or undue pressure" on migrant workers to accept a work arrangement in breach of visa conditions (Subsection 245AAA) or in expectation or for fear of certain immigration outcomes (Subsection 245AAB). Contraventions under Subsection 245AAA can be made against migrant workers with restrictive work rights—such as student visa holders and working holiday visa holders—whereas contraventions under Subsection 245AAB are more likely to affect those on employer sponsored visas and those in pursuit of one.

4.3. However, merely amending the Act would hardly be effective because contraventions could continue without being detected by authorities. The proposed amendment should be followed by a plan for better monitoring of business practices so that employers are discouraged from exploiting migrant workers in exchange for visa sponsorship or documents for visa applications.

4.4. More importantly, the amendment should be accompanied by measures to encourage migrant workers to report contraventions. As discussed in the previous section, reporting their employer to authorities for breaching the Act may have adverse effects on the migrant worker's visa status and potentially harm their settlement plan. In particular, victims of the contraventions under Subsection 245AAA might have to acknowledge they have breached their visa conditions. On the other hand, victims of the contraventions under Subsection 245AAB might lose a pathway to permanent residency because they no longer have a sponsoring employer.

4.5. Suppose an employer coerced a migrant worker on a temporary visa to pay them in exchange for sponsorship for a Temporary Skill Shortage (Subclass 482) visa. If the worker

paid the employer, the worker no longer meets the visa eligibility criteria that states one has "not contravened 'paying for visa sponsorship' legislative provisions". If the worker did not pay the employer and still reported them to authorities, the employer would lose their sponsorship approval, leaving the worker in need of finding a new sponsor.

4.6. We recommend further amendments to Part 1 of the Bill to prevent workers from being punished with adverse immigration consequences when their employer is subject to a civil penalty order or convicted of contraventions of the Act. When the employer's standard business sponsorship approval is cancelled, the Government should grant their employees on employer sponsorship a replacement visa for the original duration of the sponsored visa or give them more time to find an alternate sponsoring employer.

4.7. There also should be a measure to encourage whistle blowers. The Department of Home Affairs and the Fair Work Ombudsman should prioritise reviewing the Assurance Protocol and strengthen safeguards for migrant workers who report their employer for migrant labour exploitation. Besides, no whistle blower should be made subject to a visa eligibility criterion "Have complied with previous visa conditions" in their lifetime in Australia.

4.8. For whistle blowers who do not have a way to extend their stay while their case is heard by the Fair Work Commission or by court, they assist the Fair Work Ombudsman with an ongoing investigation, or they receive medical or psychological treatment, we recommend creating a new bridging visa with work rights to help regularise their stay. The bridging visa should enable the whistle blower to remain in the country, when needed, until they complete ongoing legal processes or medical treatments. The visa should be regarded as a qualifying substantive visa when the whistle blower applies for another visa afterwards.

5. Preventing Further Exploitation by Prohibited Employers

5.1. The MWC supports the principle of Part 2 of the Bill that aims to protect potential victims from employers who have records of migrant worker exploitation. We also welcome the definition of a "prohibited employer" to encompass both a body corporate and a natural person who "has a material role" in making the decision to engage additional migrant workers.

5.2. The Bill introduces penalties for a prohibited employer who engages additional migrant workers despite migrant worker sanctions. However, it does not include measures to protect migrant workers from the prohibited employer breaching the sanctions. The Bill suggests it is migrant workers' responsibility to avoid prohibited employers by regularly checking the information published by the Department of Home Affairs. Given that many migrant workers fall prey to exploitation due to an information gap about Australia's industrial relations, it is impractical to expect the publication of prohibited employer list suffices to protect migrant workers from potential exploitation.

5.3. An effective way to stop prohibited employers from exploiting additional migrant workers is to actively monitor them. We recommend that the Department of Home Affairs collaborate with the Fair Work Ombudsman and trade unions to regularly check on prohibited employers. We also recommend adding to the Bill the principle of protecting migrant

workers who have been unknowingly engaged by a prohibited employer from any adverse immigration outcome owing to the engagement. Based on the principle, for example, no future amendment to the Migration Regulations 1994 should be made to the effect of not allowing a migrant worker to count the work they carried out for the prohibited employer toward meeting their visa or career requirements.

5.4. Lastly, we would like to bring the Committee's attention to the possibility of prohibited employers' "phoenixing" their businesses into new ones to circumvent a migrant worker sanction and continue exploiting migrant workers. Phoenixing is already a practice popular among exploitative employers to avoid taking responsibility for their business debts and unpaid wages. In order to prevent them from abandoning the old business that is declared a prohibited employer and opening a new business to access migrant labour, we need to hold the owners, shareholders, or members of a body corporate declared prohibited employer personally liable for corporate debts and obligations.

6. Conclusion

6.1. The MWC is convinced, based on our expertise, that protecting migrant workers from exploitation cannot be achieved solely by punishing exploitative employers. We also believe that punishing the employers is not feasible when migrant workers are not assured of their security.

6.2. Giving migrant workers power to defend themselves against exploitation, discrimination, and harassment is the fundamental solution to migrant labour exploitation. Eliminating visa conditions that restrict one's work rights should be prioritised.

6.3. We recommend stipulating in the Act the principle that the standards under the *Fair Work Act 2009* apply to every worker equally, both citizens and non-citizens, and that the Department of Home Affairs should provide information about workplace rights in community languages each time it issues a visa with work rights. The Government should also facilitate follow-up education for migrant workers upon their arrival by funding trade unions and community legal centres to offer workplace rights workshops in community languages.

6.4. Should the Committee conduct hearings into the Bill, we would be eager to provide further evidence.