Human Rights Law Centre

MIGRANT WORKERS CENTRE

ASRC
Asylum Seeker Resource Centre

Ending 'Permanent Temporariness'

Joint submission to the Joint Standing Committee Inquiry – *Migration, Pathway to Nation Building*

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Human Rights Law Centre, Migrant Workers Centre and Asylum Seeker Resource Centre

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Human Rights Law Centre

The Human Rights Law Centre is a community legal centre with offices accross Australia. We use strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

Migrant Workers Centre

The MWC is a non-profit organisation located in Carlton, Victoria, helping migrant workers understand their rights and get empowered to enforce them. Our goal is to end labour exploitation and fix our workplace system so that every worker, regardless of their migrant status, is treated with dignity and respect. The MWC works in partnership with trade unions, community and grassroots movements to uphold and protect the rights of migrant workers.

Asylum Seeker Resource Centre

Founded in 2001, the Asylum Seeker Resource Centre provides essential services to 7000 people seeking asylum in the community in Victoria and in detention nationally, or held offshore. Our services include casework, legal, housing, medical, education, employment and emergency relief. Based on what we witness through our service delivery, we advocate for change with refugees to ensure thier basic rights are met and they are treated fairly.

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1. Introduction & recommendations

We are a coalition of lawyers, trade unionists, service providers and advocacy groups with a shared commitment to addressing the effects of precarious and 'permanently temporary' visa status. We welcome this opportunity to contribute to the Joint Standing Committee's review of the migration program.

We work with people across the migration regime – from international students, to employer-sponsored and undocumented workers, refugees and people seeking asylum. We are uniquely placed to reflect upon the issues that characterise the migration regime as a whole. We believe that there are certain common experiences of Australia's visa system that affect all people irrespective of their visa status.

Australia's migration system is geared towards temporary and precarious visa status. It is characterised by delay, uncertainty and unnecessary complexity. Uncertain pathways to permanent residency mean that people living on visas in Australia spend longer and longer periods unable to reunite with their families, work or participate in community life on equal footing. Across our clients and members, it is common for people to live in Australia for ten years without permanent residency, or a clear pathway towards it.

In our view, the migration and asylum system has devolved to its current state because it operates in a manner that is primarily extractive: that is, it views individual migrants, and migration flows, as economic units, that might be leveraged or switched off at certain points for economic gain. In other words, migration planning is based on what can be *gained* from migrants and refugees, rather than their *rights and entitlements* as members of the community. As well as the inhumanity of that approach, it produces plainly perverse outcomes. For instance, research from the OECD demonstrates that the presence of a person's partner or spouse in the settlement country is associated with higher workforce participation and incomes.[1] This means that preventing migrants and refugees from being reunited with their partners and families – through prolonged temporary visa status, informal caps on family migration, backlogs and deliberate processing policies – fosters worse economic outcomes.

We must accept that all people, after a certain time, become part of the Australian community. That principle, once central to migration policy and planning, is now mostly lost to it. But the residue of the concept remains – for instance, in the prohibition on deporting a person who has lived in Australia for 10 years or more,[2] and the eligibility of children born in Australia for citizenship on turning 10 years old.[3]

The principle that a person's membership of the community should be reflected in their status and entitlements must be reintroduced to the migration system, and all people, irrespective of status, must be entitled to equal protection.

We recommend that:

1. **Visa uncertainty** is addressed through introducing standardised visa processing times; ending the punitive use of Bridging visas; abolishing the visa subclasses that are most closely associated with 'permanently temporary' status; extending permanent visas to all people found to be owed protection and winding back the visa cancellation framework.

2. Measures are introduced to ensure **equal protection** for visa holders to enforce their conditions at work. This involves removing unnecessary work restrictions on visas and

[1] OECD, *International Migration Outlook 2019* <https://www.oecd.org/els/mig/IMO-2019-chap4.pdf>.

[2] *Migration Act 1958* (Cth) s 201.

[3] *Australian Citizenship Act 2007* (Cth) s 12(1)(b).

introducing protections for temporary visa holders who experience exploitation at work – including a protection against visa cancellation, and a visa to remain in Australia while taking action against an employer.

3. **Family reunion** is protected through introducing a presumption of family unity in decision-making, restoring genuinely 'demand driven' family migration and allowing clear access to permanent residency.

We address these recommendations in turn below.

2. List of Recommendations

1	Introduce processing standards into the Act and establish a mechanism for complaint and redress if the standards are not met, including by way of refund of the visa application charge or compensation for defective administration.
2	Amend Bridging visa conditions to remove unnecessary restrictions, so that (at a minimum) all Bridging visas permit holders to work, study and travel
3	Amend ss 46A(2) and 46B(2) of the Act so that they exclude applications for Bridging visas and recommend that the Minister permanently 'lift the bar' at ss 46A(2) and 46B(2) to permit people deemed 'unauthorised maritime arrivals' or 'transitory persons' to make valid Bridging visa applications as of right.
4	Amend Bridging visa requirements, such that Bridging visas connected with an event that will take place at an unknown time in the future (such as Ministerial intervention, 'third country resettlement' or the conclusion of a court case) are granted with an indefinite stay period, and allow full permission to work and study.
5	Replace 'skills assessing' bodies with a practical, fair and vocationally-focused scheme for assessing skills, subject to annual public review.
6	Replace the current skilled and employer-sponsored migration schemes with an accessible, self-nominated temporary visa scheme in areas of identified skills shortage, with a clear pathway to self-nominated permanent residency after two years.
7	Amend the Act and Regulation to permit all people subject to 'fast track' processing to apply for RoS visas, without the interposed requirement to seek Ministerial Intervention.
8	Amend the Act to abolish the Immigration Assessment Authority and permit all Protection visa applicants access to merits review by the Administrative Appeals Tribunal.
9	Recommend that all people transferred from Australia to Nauru or Papua New Guinea be transferred immediately to Australia and offered access to permanent resettlement – including those in Australia.
10	Amend the Act and Regulations to remove the Temporary Protection visa framework and clarify that all people found to be owed protection in Australia will be entitled to permanent visas.

11	Amend the Act to introduce limits on the operation of visa cancellation powers relating to minors, people owed non-refoulement obligations and (in all cases) long-term permanent residents.
12	Amend the Regulations to remove work-related conditions such as 8104, 8105, 8547 and 8101 from temporary visas (including Bridging visas) and permit all visa-holders to work full-time.
13	Introduce a legislative instrument for the purposes of s 116(2) of the Act to prevent the cancellation of a visa held by a migrant worker who is pursuing action against their employer for a non-trivial breach of labour laws.
14	Introduce a short-term 'Workplace Justice visa' which allows permission to work and is available to migrant workers who take action against their employers for non-trivial breaches of labour laws.
15	Amend qualifying requirements for various temporary visas in the Regulations, so that holders of Employment Justice visas are taken to have 'substantially complied with conditions' of their previous visa in any future visa application and work undertaken on an Workplace Justice visa is counted towards qualifying employment requirements for permanent visas.
16	Resource Family Stream visa processing so that visas can be processed on a genuinely 'demand driven' basis, in accordance with reasonable processing times.
17	Increase resources for the MEOCT team to resolve all pending Family Stream applications previously affected by Direction 80 within one year. Establish a similar task force to clear all other Family Stream visa applications which have been pending for longer than two years.
18	Reduce the cost of Family Stream visa applications, or introduce a reduced- or no-cost application charge for families who are in financial hardship
19	Amend the Regulations to provide discretionary power for delegates to waive or postpone until arrival particular visa criteria (including health), where applicants are impacted by war, displacement or persecution.
20	Amend the Regulations to revoke PIC4020(2A) and revise Department guidelines on identity assessment.
21	Amend the Regulations to revise and expand the definition of 'member of the family unit' to include other relatives, including those who are adults and non-dependent but are nonetheless close members of the primary applicant's family.
22	Amend the Regulations to remove age-based limits in relation to children, limiting the assessment to whether the child is dependent upon the family head (irrespective of age).
23	Amend the Regulations to remove the 'study-related' requirement from all Child visas, recognising that it is an unnecessary conduit for the assessment of the child's dependency on the family head, and imposes an insuperable additional barrier to applicants in refugee-like situations.

24	Recommend that the Special Humanitarian Program be uncapped and additional to the annual humanitarian program planning levels. Discriminatory processing priorities should be removed.
25	Amend the Regulations to remove the 'genuine temporary entry' requirement from temporary visas for secondary applicants, or alternatively amend policy to ensure that the principle of family unity is taken into consideration when assessing applications made by family unit members of temporary visa holders.

3. Ending uncertain visa status

Across the migration regime, people experience inordinate delays in processing of their visa applications. A range of 'dead-end' visas exist, permitting the holder to remain in Australia for only a limited period with no future pathway. The migration system must be re-founded on minimum guarantees of certainty and stability for all.

3.1. Standardised processing times

There are no standard visa processing times specified in the *Migration* ***Act*** *1958* (Cth) or accompanying *Migration* ***Regulations*** *1994* (Cth).[4] In practice, this means that people can wait for an indefinite period for their legal status to be determined by a visa application. If they are in Australia, it means that they might linger for months, if not years, on Bridging visas with limited rights to work, relocate, travel, study or otherwise make a home.

While the law generally requires a visa application to be decided within a 'reasonable time,'[5] there is no way for that duty to be enforced other than by individuals taking action through the courts. It should not be necessary for people to take legal action to have their visa application decided, and to be able to plan for their future.

Processing delays across the migration and asylum system have recently reached record levels. So inordinate are the delays that, in some cases, the processing time exceeds the period of the visa sought. Below are examples of visa subclasses in relation to which the processing period approaches or exceeds the visa duration:

Visa Subclass	Visa Duration	Processing Time[6]
Temporary Graduate (Subclass 485) – Graduate Work Stream	18 Months	17 months
Visitor (Subclass 600) – Tourist Stream	3 months (each entry)	4 months
Prospective Marriage (Subclass 300)	9 to 15 months	37 months
Student (Subclass 500) – ELICOS Stream	Up to 12 months[7]	5 months

[4] Though we note that s 91Y of the Act previously required Protection (Subclass 866) visa applications to be processed within 90 days of lodgement.

[5] See for instance *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 at [12] (Beaumont J).

[6] Department of Home Affairs, Temporary Graduate visa (subclass 485), Visitor visa (subclass 600), Prospective marriage visa (subclass 485), Student visa (subclass 500) (web pages) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/> (accessed 14 December 2022). Processing times are for 90% of applications.

[7] Visa grant period correlates with duration of course – see cl 500.511 of Schedule 2 to the Regulations. ELICOS courses are generally between one to 52 weeks' duration. See eg English Australia, 'Understanding the Sector: How long to students study?' <https://www.englishaustralia.com.au/our-sector/understanding-the-sector>.

Delays have substantially worsened over time, even in visa categories for which the requirements have remained static. This suggests that the issue arises from under-resourcing and de-prioritisation of visa processing functions carried out by the Department. The below table sets out the processing times in relation to Skilled – Regional (Subclass 887) visas over the past decade. It shows that processing times have increased nearly six-fold, while the visa requirements have remained largely unchanged over the same period.[8]

Year	**10-11**	**11-12**	**12-13**	**13-14**	**14-15**	**15-16**	**17-18**	**18-19**	**19-20**
Days	83-146	75-124	108-259	251-407	172-574	171-371	192-354	321-528	542-692

Case Study – Karim – Protracted Visa Processing Times

Karim is a qualified Electrical Engineer from Egypt. He arrived in Australia in 2018 as the holder of a Skilled – Regional (Provisional)(Subclass 489) visa, nominated by the Northern Territory government. Soon after he arrived, he found full-time work on a project for the Northern Territory government, extending the electrical grid to communities living remotely from Alice Springs. While holding a Subclass 489 visa, Karim's daughter older Sana turned 5 and enrolled in school, but had to pay fees of $12,000 for her first year, because she was considered an international student. Because Karim's family was not eligible for a childcare subside, his wife had to remain at home full-time with their younger daughter. After Karim had been in the job for two years, he met the requirements for permanent residency by way of the Skilled Regional (Subclass 887 visa). He prepared and lodged his permanent visa application, complete with evidence that he met the two substantive requirements, by living in a regional area for 2 years, and working in that area for 1 year, while holding a Subclass 489 visa.

Karim's permanent visa application took 29 months to decide. During that time, his younger daughter turned five, meaning he had to pay international fees for both his children to attend school. As he continued to be a temporary visa holder, he was denied permission to leave and re-enter Australia under COVID-19 restrictions, so he could not visit his ailing father, who ultimately passed away.

Delays are particularly acute in relation to Protection visas. As at October 2022, 26,425 Protection visa applications remain undecided before the Department.[9] The standard processing time for reviews before the Tribunal relating to Protection visas is 1,924 days – that is, over five years.[10]

Processing delays do not merely signal dysfunction or lead to 'reputational damage' to Australia's migration regime. They have consequences in real, human terms. During these ever-extending periods, visa applicants remain in the community holding Bridging visas with limited rights to work, study and travel, sponsor family and access government benefits and subsidies – including Medicare and childcare rebates. The precarious situation of visa-holders is addressed in further depth at **section 3.2.** below.

There are currently more than 357,743 Bridging visa holders in Australia experiencing these types of uncertainty.[11] It is unacceptable that a significant segment of the community is subjected to years of

[8] Department of Home Affairs, Freedom of information request FA 22/06/00982 (Processing times for subclass 887 visas) <https://www.homeaffairs.gov.au/foi/files/2022/fa-220600982-document-released.PDF>.

[9] Department of Home Affairs, *Monthly Update: Onshore Protection (Subclass 866) Visa Processing – October 2022* <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-october-2022.pdf>.

[10] Administrative Appeals Tribunal, Migration and Refugee Division processing times (Processing times in calendar days for reviews finalised between 1/05/22 and 31/10/22 <https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times> (accessed 14 December 2022).

[11] Department of Home Affairs, *Temporary visa holders in Australia* (updated 25 November 2022) https://data.gov.au/dataset/ds-dga-ab245863-4dea-4661-a334-71ee15937130/details. The figure for Bridging visas in this dataset does not include people on Bridging Visa Es.

purgatory and heightened insecurity (including at work, as we return to below). The flow-on consequences of such arrangements for people's ability to settle and make a life in the country are obvious.

Recommendation – Introduce processing standards into the Act, and establish a mechanism for complaint and redress if the standards are not met, including by way of refund of the visa application charge or compensation for defective administration

3.2. Ending the punitive use of Bridging visas

It has become increasingly common for the Department to utilise Bridging visas as a means of managing certain visa applicants, particularly people who have sought asylum. Bridging visas enable holders to maintain their lawful status in Australia while a visa application is under consideration, they are engaged in merits or judicial review proceedings, or they are otherwise making arrangements to depart Australia. As their name suggests, Bridging visas were intended for short-term use. But because of the delay and dysfunction that characterises all aspects of the migration regime, it is now possible for people to remain on Bridging visas for years on end – and in the case of some asylum seekers, for over a decade.

Bridging visas represent the most precarious, limited visa status available under our migration regime. That is so both because of their uncertain duration, but also the various restrictions to which they are subject. Bridging visas may carry restrictions on work, study, residence and travel. Further, Bridging visas are uniquely vulnerable to cancellation – for instance, a Bridging E visa may be cancelled on the basis that the holder has breached the 'code of behaviour,'12 failed to report at a specified place and time,13 or been charged with a criminal offence.14

In addition to these formal restrictions, Bridging visa holders are subject to informal and discriminatory restraints based on the approach taken by landlords, employers, lenders and banks towards Bridging visa status. We commonly hear that our members have been denied employment, rental accommodation and loans on account of their Bridging visa status.

The restrictions on Bridging visas affect people seeking asylum particularly acutely. The prospect of being summarily detained following expiry or cancellation of their Bridging visa, or removed to the country where they face persecution, weighs onerously on people seeking asylum. People seeking asylum are also routinely deprived of the right to work or study based on rigid requirements in the Regulations and associated Departmental policy, which mandate that:

- work rights must not be granted to protection visa applicants who cannot demonstrate 'acceptable reasons' for delay in lodging their visa application (noting many claims are deeply sensitive and relate to severe trauma, and that there is currently no funded assistance for people to lodge visa applications); and
- protection visa applicants seeking judicial review must not be granted work rights if they did not previously have such rights while seeking merits review.[15]

12 Condition 8566 at Schedule 8 to the Regulations and s 116(1)(b) of the Act.
13 Condition 8401 of Schedule 8 to the Regulations; s 116(1)(b) of the Act.
14 Reg 2.43(1)(p)(ii) of the Regulations; s 116(1)(g).
15 For example, see Migration Regulations 1992 (Cth), Schedule 2, subclauses 050.211(8), 050.613A and 050.614.

Case Study – Benjamin – Denial of Work Rights to Asylum Seekers

Benjamin arrived in Australia on a student visa. He had fled his country of origin due to facing serious harm because of his sexuality, however he was unaware that he could apply for a protection visa on these grounds in Australia. Benjamin's mental health declined due to past experiences of trauma and ongoing threats he received from his ethnic community in Australia. He was unable to meet his student visa requirements and his student visa was cancelled. Benjamin was homeless at this time, extremely unwell and was unable to seek legal assistance. He was taken into detention and at this time he was connected with the ASRC who advised him about his legal rights.

Benjamin applied for a protection visa. Benjamin was granted a bridging visa E associated with his protection visa application without the right to work. He applied for work rights several times, however the Department of Home Affairs refused to grant him work rights because it did not consider that he had an 'acceptable reason' for his delay in applying for a protection visa (despite the extenuating circumstances). ***Benjamin waited over 5 years for his protection visa to be granted and could not work during this time. He was unable to access Medicare despite his complex health needs, and the delay in accessing timely medical care exacerbated his poor health.*** *Benjamin was ready and willing to work and could have financially supported himself through his protection visa application process if he had work rights.*

Even more concerningly, Bridging visas are arbitrarily *withheld* from certain cohorts of people seeking asylum. This includes people who arrived to Australia by sea who require the Minister to personally intervene and 'lift the bar' under the Act to enable them to validly apply for certain visas, including Bridging visas.[16] Concerningly, there has been an inconsistent approach to such 'bar lifts' over time – meaning that some people seeking asylum are deprived of lawful status part-way through the process. This most commonly occurs after a decision has been made under the 'fast track' process by the Immigration Assessment Authority – once their initial Bridging visa has expired, applicants are rendered unlawful as they pursue judicial review, due to the Minister's failure to 'lift the bar.' As the 'bar lift' powers at s 46A(2) and 46B(2) are personal and discretionary, people seeking asylum are left at the Minister's mercy to access bridging visas and lawful status, leaving them at risk of destitution and detention in the interim.

The Regulations also arbitrarily impose restrictions on people seeking asylum that render them substantially more vulnerable and insecure in their status. The **A**sylum **S**eeker **R**esource **C**entre has observed, over the past several years, an increasing tendency by the Department to refuse Bridging E visas to people seeking asylum on the basis that they fall within the disqualifying terms of r 2.20(17), which provides as follows:

> (17) This subregulation applies to a non-citizen if:
> (a) the non-citizen is an unlawful non-citizen; and
> (b) section 195A of the Act is not available to the Minister in relation to the grant of a visa to the non-citizen; and
> (c) the Minister is satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time.

Sub-regulation 2.20(17) is a drafting remnant of the arcane Bridging E visa regime created for people in immigration detention – divided between Subclass 050 and 051. It should have no logical application to people in the community seeking asylum who have an ongoing merits or judicial review proceeding on foot. Yet, several of the ASRC's clients have been refused Bridging E (Subclass 050) visas on the basis that they are covered by sub-regulation 2.20(17) – leaving them without lawful status and exposed to destitution for years.

[16] Migration Act 1958 (Cth), ss 46A, 46B.

Case study – Mahdi – Arbitrary Refusal of Bridging visa

Mahdi arrived in Australia in 2012 after fleeing his home country. He applied for a protection visa which was refused by the Department. Since this time, Mahdi has sought merits and judicial review of his case. He was successful at court, however the Administrative Appeals Tribunal affirmed the Department's decision again. Mahdi has sought judicial review for the second time; he is awaiting a final hearing date before the Federal Circuit and Family Court.

Since 2017, Mahdi has been attempting to regularise his unlawful status. The Department has refused several of his bridging visa applications on the basis of regulation 2.20(17) despite the fact that he has always had a merits review or judicial review proceeding on foot. ***For over 5 years, Mahdi has been denied access to his basic rights, including healthcare, accommodation, and the right to work. Mahdi has been homeless for years.*** *Living on the brink of destitution for several years has taken a significant toll on Mahdi's mental health. While the Department continues to misapply regulation 2.20(17), Mahdi faces several more years of these harsh conditions as he continues to seek asylum.*

The consequences of being deprived of lawful status and work rights are dire. People seeking asylum face the fear of re-detention, withdrawal of income support, loss of housing, and coercion into sub-standard employment. They also fear being forcibly returned to persecution, with no guarantee of their status in Australia. People seeking asylum are fearful of speaking out against dangerous work conditions as they may lose their jobs and do not have access to mainstream social support, meaning they are vulnerable to exploitation and severe mistreatment. Unsurprisingly, these circumstances have caused severe psychological distress for people seeking asylum and refugees, and undermine social cohesion and the well-being of our society.

Given the already onerous impact of precarious Bridging visa status, and noting that delays across the regime (from visa processing to merits and judicial review) mean that people now remain on Bridging visas for years on end, there is no justification for subjecting visa holders to restrictive conditions. Study and residence-related restrictions function to prevent Bridging visa holders from participating in the community on an equal footing for years on end. As we discuss at **section 4.1.** below, work-related restrictions do not in fact prevent Bridging visa holders from engaging in work – particularly given that they are deprived of all other forms of income support. Rather, such restrictions serve only to channel Bridging visa holders into informal and unregulated forms of work, in which they are at greater risk of being exploited and underpaid.

Recommendation – Amend Bridging visa conditions to remove unnecessary restrictions, so that (at a minimum) all Bridging visas permit holders to work, study and travel.

Recommendation – Amend ss 46A(2) and 46B(2) of the Act so that they exclude applications for Bridging visas and recommend that the Minister permanently 'lift the bar' at ss 46A(2) and 46B(2) to permit people deemed 'unauthorised maritime arrivals' or 'transitory persons' to make valid Bridging visa applications as of right.

Recommendation – Amend Bridging visa requirements, such that Bridging visas connected with an event that will take place at an unknown time in the future (such as Ministerial intervention, 'third country resettlement' or the conclusion of a court case) are granted with an indefinite stay period, and allow full permission to work and study.

3.3. Overhauling 'Short Term' Skilled Migration

Over the past two decades, successive governments have wound back self-nominated General Skilled Migration pathways, replacing these with employer-sponsored pathways to permanent residence. This has meant two things. First, the majority of temporary migrants must now depend upon their employers

for sponsorship in order to access permanent residency. Second, temporary visa holders no longer have clear, accessible pathways to permanent residency and the ability to plan for a future in Australia. Taken together, these factors lead to a vast power imbalance between temporary skilled migrants and their employers, which has fuelled worker exploitation: we return to address this in greater depth at **section 4** below.

Aspiring migrants are left to the vagaries of ever-changing skills lists or the whims of their employers. The result is that people are left to navigate between various temporary visas in the hope that they will eventually meet the evolving eligibility requirements for permanent residency.

Case Study – Arshdeep – Inaccessibility of Skilled Migration

Arshdeep is a 22-year-old from India. He came to Australia seven years ago to study a Bachelor in Information Technology, straight after completing high school. His family in India mortgaged their property and took loans to support his education costs in Melbourne, that were over $100,000. At the conclusion of his course, Arshdeep obtained a Temporary Graduate (Subclass 485) visa and enrolled in a professional year course in IT, at a cost of $20,000. After completing that course, he applied for over 200 jobs in his field and, despite his excellent grades, was consistently told by employers that they would only engage permanent visa holders. Without work experience, Arshdeep has no hope of obtaining the 'point score' required for General Skilled Migration as an IT professional.

The requirements for General Skilled Migration are opaque and overlapping. As well as the difficulties highlighted by Arshdeep's example, the requirements imposed by various skills assessing authorities are onerous and often discriminatory.

In order to be eligible through the General Skilled Migration program, applicants must hold the relevant registration requirements and obtain an assessment of their skills from a relevant professional body. Professional registration requirements, a stepping-stone towards skills assessment, often impose differential English language standards on applicants from different countries – even if their qualifications were undertaken in Australia.

Case Study – Discriminatory requirements for Paramedics

In order to obtain registration as a paramedic through the Australian Health Practitioners Registration Authority, all applicants must hold the equivalent of an Australian Bachelor of Paramedicine.

But in addition to that, applicants who have not completed all of their secondary schooling in Australia (or at least six years continuous study in a 'recognised country,' such as the US or UK) must also undertake an English test to prove their language skills. The test is required even if the applicant completed their qualifying Bachelor degree in Australia and otherwise meets the registration requirements.[16] This means that people who have undertaken the same degree to qualify for registration are subject to different English language requirements, depending exclusively on the passport that they hold.

Recommendation – Replace 'skills assessing' bodies with a practical, fair and vocationally-focused scheme for assessing skills, subject to annual public review

Because of the inaccessibility of General Skilled Migration, temporary migrants are forced to look towards the employer-sponsored framework to obtain permanent residency. But at present, there are a number of 'dead end' employer-sponsored visa pathways, that allow visa holders to remain in the country for a decade or more without any possibility of transitioning to permanent residency. These arrangements must be abolished and replaced with pathways to permanent residency which recognise that people who remain in Australia for several years become part of the community.

These 'dead end' pathways have long existed as a function of ever-changing visa requirements, meaning that applicants who once met the criteria for permanent residence no longer do as a result of visa requirements changing during their time in Australia. This was the fate of several thousand international students who were affected by sudden changes to the occupations on the 'Migration Occupations in Demand List' in 2010.[17] When enacting sweeping changes to the migration program, successive governments have given little to no regard to the rights of people who have already spent years building their lives in Australia based on previous visa requirements.

The skilled migration 'dead end' was made a feature of the migration system with the introduction of the Temporary Skills Shortage (Subclass 482) visa and its associated 'Short Term Skilled Occupation List' in 2018. As it was initially introduced, the 'Short Term Stream' of the TSS visa permitted holders to remain for up to two years, with the ability to apply for only another TSS visa – after which there was no further possibility of transition to permanent residency via the Employer Nomination Scheme (Subclass 186).[18]

The introduction of the Short-Term Skilled Occupation List meant that skilled workers in certain occupations – such as cooks, café managers and disability workers – could hold successive temporary visas without ever becoming permanent residents. The below table sets out the trajectory of a TSS visa holder who is qualified as a cook, based on processing times published by the Department.[19]

Student visa	**Bridging visa (485)**	**485 visa**	**Bridging visa (482)**	**482 visa**	**Bridging visa (482)**	**482 visa**
3 years	17 months	18 months	11 months	2 years	11 months'	2 years
Total time on Temporary visas – 11 years, 9 months						

While exemptions were introduced to the Regulations to allow certain 'short term stream' TSS visa holders to apply for permanent residence through the Employer Nomination Scheme, they are limited to 'specified' 457 visa holders and people who were in Australia for 12 months between 1 February 2020 and 14 December 2021.[20] People who have not previously held a 457 visa, or were not in Australia during the specified period – for instance, temporary visa holders who arrived after January 2021 – do not have access to these concessions and therefore cannot transition to permanent residency based on 'short term' occupations.

It is entirely possible for a skilled visa applicant to remain in Australia for over ten years and be specifically precluded from access to permanent residency. Indeed, that was the intention of the 'short term stream' of the TSS, when it was introduced in 2018. The 'Statement of Compatibility with Human Rights' with the instrument that introduced Subclass 482 baldly stated that:

> Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria. The aim of the skilled entry program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling permanent skilled migrants into occupations that have been identified to be in the long-term strategic

[17] Parliamentary Library, *Australia's Migration Program* (29 October 2010) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/AustMigration>.

[18] The operation of the TSS visa and its various 'streams' is summarised in the report of the Senate Standing Committee on Legal and Constitutional Affairs in its 'Review of the Effectiveness of the Current Temporary Skilled Visa System in Targeting Genuine Skills Shortages' <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/SkilledVisaSystem/Report/c02>.

[19] Department of Home Affairs, Temporary Graduate visa (subclass 485), Temporary Skill Shortage Visa (subclass 482) (web pages) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/> (accessed 14 December 2022).

[20] Legislative instrument LIN22/038 for the purposes of subreg 5.19 (5)(a)(iii), (6), (8)(b).

> interest of the Australian economy, and restricting short-term temporary skilled migrants to occupations that are currently in shortage but for which there may not be a long-term requirement.[21]

There is no mention in the explanatory statement of the interests or rights of visa-holders, as distinct from mechanistic economic considerations, and no mention of the social consequences of denying the same rights as others to a proportion of the Australian population. No explanation was given for the rationale of the 'short term' occupation list – indeed, the list has remained largely static since its first iteration four years ago, suggesting a 'long term' demand for the occupations on that list. And yet, visa holders qualified in those 'short term' occupations remain locked out from permanent residency – irrespective of how long they have lived in Australia.

Recommendation – Replace the current skilled and employer-sponsored migration schemes with an accessible, self-nominated temporary visa scheme in identified areas of skills shortage, with a clear pathway to self-nominated permanent residency after two years.[22]

3.4. Abolishing Temporary Protection

The introduction of temporary protection visas and the punitive 'Fast Track' process has made Australia's immigration system an international outlier. Temporary protection exacts an extraordinary toll: it denies visa-holders the right to invest in their communities, to reunite with their families, to find work and plan for a future on equal footing. The Albanese rightly acknowledged these harms in extending permanent residency to 19,000 people who had previously been subjected to the 'fast track' process. But that announcement arbitrarily excluded another 12,000 people subjected to 'fast track' assessment, approximately 1000 asylum seekers transferred from Nauru and Manus Island to Australia,[23] and another 165 people who continue to languish in those countries.[24] The amendments to the Act and Regulations left intact the framework of temporary protection – meaning that asylum seekers who arrive without a visa in the future, either by air or sea, will be extended only temporary protection. All vestiges of the temporary protection and 'fast track' regimes must be removed from our migration system once and for all, recognising that people who seek asylum are entitled to enduring safety and security.

3.4.1. Arbitrary Exclusion of People Subject to 'Fast Track'

Approximately 31,000 people seeking asylum are part of the Legacy Caseload; a cohort of people who arrived by sea to Australia and are only eligible for temporary protection visas due to their mode of arrival. Most of this cohort arrived in 2012 or 2013 and were subject to the Fast Track processing system; however, there are some who arrived in Australia prior to these dates. Within the Legacy Caseload, there are approximately 19,000 people living in Australia on Temporary Protection Visas (**TPVs**) and Safe Haven Enterprise Visas (**SHEVs**); 7,000 people who are still being processed under the Fast Track system at the Department, merits review or judicial stages; 500 people whose TPV/SHEVs have expired; and around 2,500 people whose applications were refused under the unfair Fast Track system and have exhausted all avenues for review.[25]

The Albanese Government's recent announcement that TPV and SHEV holders have a pathway to permanence and will either have pending re-applications converted to, or be permitted to apply for, a permanent visa, namely a Resolution of Status (**RoS**) visa, is a welcome change. However, thousands of people seeking asylum are still being forced through the flawed Fast Track process and can only seek

[21] Explanatory Statement to the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

[22] A qualifying period of two years was historically required of employer-sponsored Temporary Work (Subclass 457) visa holders and Skilled Regional (Provisional) (Subclass 489) holders in order to access permanent residency. That qualifying period has been progressively increased over time and should be restored to its original standard.

[23] These estimates are taken from figures provided by the Refugee Council of Australia, 'Offshore Processing Statistics,' accessed 5 April 2023 https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/#:~:text=How%20many%20are%20still%20on,the%20numbers%20left%20in%20PNG.

[24] Ibid.

[25] Statistics provided during Senate Estimates in February 2023.

merits review before the Immigration Assessment Authority (**IAA**), a body established within the Administrative Appeals Tribunal (**AAT**). Consequently, around 7,000 people do not have a guaranteed pathway to permanency because their visa applications are being processed under the slow and unjust Fast Track system.

The Albanese Government recognised the inherent flaws of the Fast Track process and the IAA, and committed to abolishing it and providing people seeking asylum with a fair status determination process.[26] The 'fast track' process attracted widespread criticism from the moment of its introduction.[27] Applicants subject to the process were deprived of the most basic procedural safeguards long associated with meaningful and robust merits review.[28] Importantly, public funding for legal representation was withdrawn, meaning that most applicants went through the assessment process either unrepresented or with migration agents of varying skill.[29] Reviews by the IAA are conducted 'on the papers' with limited exceptions.[30] The review authority limits itself to information already before the primary decision-maker, seeking and accepting new information in very limited circumstances.[31] Applicants are limited to five-page submissions addressing the primary decision.[32] These circumscribed processes have skewed the review outcomes generated by the IAA against review applicants. The table below compares the remittal rates of the IAA and AAT by nationality for the financial year 2022-2023:

Country	**AAT[33]**	**IAA[34]**
Sri Lanka	48%	6%
Iran	62%	16%
Pakistan	36%	3%
Bangladesh	20%	1%
Iraq	50%	14%

The government cannot recognise the flaws of the 'fast-track' system while allowing its continued operation. The government must provide immediate pathways for all people who were subject to the fast-track process – including those who received adverse outcomes through the IAA, are litigating those decisions in court, or are 'out of process.'

Case study – Jeeva – Seeking Asylum for a Decade

Jeeva fled her country in 2013 and sought asylum with her husband in Australia. Jeeva's husband applied for a protection visa and Jeeva was included as a dependent in his application. Jeeva was subjected to domestic violence by her husband and she was prevented from seeking independent legal advice. Jeeva and her husband eventually separated. Jeeva's case was refused by the IAA on the basis of her husband's protection claims; the IAA did not ask Jeeva if she had separate protection claims or if her circumstances had changed. Jeeva has sought judicial review of her IAA decision and is still waiting for a final court hearing date. She has been seeking asylum in Australia for almost a decade.

[26] Australian Labor Party, *ALP National Platform - As adopted at the 2021 Special Platform Conference*, 2021, https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf, p. 124.
[27] Kaldor Centre, 'Fast Track Refugee Status Determination' available https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief_Fast%20track_final.pdf.
[28] Townsend and Kerwin, 'Erasing the vision splendid? Unpacking the formative responses of the Federal Courts to the Fast Track processing regime and the 'limited review' of the Immigration Assessment Authority' (2021) 49(2) *Federal Law Review* 185-209.
[29] Leabeater and Wilks, 'Australian Asylum Law: Cuts to Funding a Threat to Access to Justice and a Burden on the System,' http://classic.austlii.edu.au/au/journals/UNSWLawSocCConsc/2014/7.pdf.
[30] Act, s 473DB.
[31] Act, s473DC, 473DF.
[32] Pursuant to Practice Direction 1 'Practice Direction for Applicants, Representatives and Authorised Recipients' given under s 473FB of the Act.
[33] Administrative Appeals Tribunal, 'Caseload Statistics 2022-2023' https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2022-23.pdf.
[34] Immigration Assessment Authority, 'Caseload Statistics 2022-2023' https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2022-23.pdf.

There are also 2,500 people who have exhausted their existing options under the fast-track system and are currently still in the country. There is no announcement on how this group of people, who have lived in the community for a decade with families in Australia, can apply for permanency. Concerning this cohort, the government stated: [35]

> there may also be cases where a previously unsuccessful applicant has new claims based on changes in personal circumstances or in the person's country of origin. In those circumstances, the Minister may choose to the lift [sic] the application bar in section 46A and section 48A [of the *Migration Act 1958* (Cth)] to allow another application for a TPV or SHEV to be made.

Seeking ministerial intervention is not new: it has existed throughout the Fast Track process and rarely results in a visa grant. The ministerial process is slow, burdensome and opaque, and produces drastically inconsistent results. Department statistics from 2021 indicate that there are over 3,000 people waiting for ministerial intervention, including over 500 people waiting for intervention under section 48B to be permitted to lodge a further protection visa application.[36]

There are also practical difficulties in lodging thousands of individual s 48B ministerial requests for Iranian and Afghan applicants who (in light of recent changed country conditions) are entitled to reassessment of their protection claims. The existing backlog of ministerial requests will exorbitantly increase, and consequently result in longer processing times and increased hardship to those affected.

Further, ministerial intervention that is limited to an opportunity to apply for a visa (as opposed to a visa grant) will result in further delays for people seeking asylum to have a final outcome. Given that people in this cohort have been waiting for over a decade for a final migration outcome, a ministerial intervention process followed by a further protection visa application process (noting these presently take nearly 3 years) is unacceptable. It is time to put an end to years of uncertainty and grant permanent visas to people seeking asylum who are part of the Australian community.

Recommendation – Amend the Act and Regulation to permit all people subject to 'fast track' processing to apply for RoS visas, without the interposed requirement to seek Ministerial Intervention.

Recommendation – Amend the Act to abolish the Immigration Assessment Authority and permit all Protection visa applicants access to merits review by the Administrative Appeals Tribunal.

3.4.2. Arbitrary Exclusion of People Subject to Offshore Processing

The offshore processing regime established in Nauru and Papua New Guinea is a blight upon Australia's migration system. The iniquities of that regime, and its cost in human terms, are too great to address here. Those matters have been extensively documented by the Australian Human Rights Commission,[37] Amnesty International[38] and several inquiries commissioned by previous governments.[39]

The Australian Government's punitive treatment of people who arrived by sea also involves an arbitrary approach to the visa pathways and legal status of people who arrived during the same period between 2012 and 2013. Some people seeking asylum were transferred to Regional Processing Centres (RPCs) in Nauru and Papua New Guinea. Within this cohort, some continue to be held offshore after almost a

[35] Minister for Immigration, Citizenship and Multicultural Affairs, *Explanatory Statement - Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023*, 13 February 2023, https://www.legislation.gov.au/Details/F2023L00099/Download, p. 14.
[36] Senate Standing Committee on Legal and Constitutional Affairs, Additional Budget Estimates, 14 February 2022, AE22-234.
[37] Australian Human Rights Commission, *'The forgotten children: national inquiry into children in immigration detention'* (2014).
[38] Amnesty International, 'This is breaking people: human rights violations at Australia's asylum seeker processing centre on Manus Island, Papua New Guinea' (11 December 2013) https://www.amnesty.org/en/documents/ASA12/002/2013/en/.
[39] Robert Cornall, Review into allegations of sexual and other serious assaults at the Manus Regional Processing Centre (September 2013); Robert Cornall, Review into the events of 16-18 February 2014 at the Manus Regional Processing Centre (23 May 2014); Philip Moss, Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (6 February 2015).

decade, while others were transferred to Australia for medical treatment and live in the Australian community yet do not have access to any visa pathway due the ministerial bar under s 46B of the Migration Act.[40]

By contrast, other people seeking asylum were permitted to apply for temporary protection in Australia via the fast track process, and those who became TPV/SHEV holders now have the opportunity to apply for permanent residency via a Resolution of Status Visa. This policy is illogical and unjust, and has wreaked havoc on people's lives.

Case study – Mohammad - Continuing Limbo in PNG

Mohammad is a Hazara man from Afghanistan who is in PNG. He entered Australia by sea in 2013; several of the men he travelled with were subject to the 'fast track' process and will shortly receive RoS visas. Mohammad has been recognised as a refugee in PNG. But is currently under severe strain he is worried about his family in Afghanistan who are living under Taliban rule. He is engaged in the Canadian resettlement process.

Mohammad has suffered in offshore detention in PNG for over 9 years. He has a multitude of untreated health conditions which makes it difficult for him to eat. He also suffers from depression. His doctor suggests he exercises, but Mohammad does not want to leave his house for fear of his safety.

"My hopes are to be with family, find work, stand on my own feet, feel independent and feel like a human. To have a peaceful life. Just do not forget us and hopefully, you can help us get out of this situation. We are stuck and cannot do anything to change our life for the better."

Recommendation – Recommend to the Australian Government that all people transferred from Australia to Nauru or Papua New Guinea be transferred immediately to Australia and offered access to permanent resettlement – including those in Australia.

3.4.3. Continuing Temporary Protection regime

The Albanese Government's TPV/SHEV conversion announcement did not remove the temporary protection framework within the Act. This means that refugees will be subjected to temporary protection in the future - this applies to refugees who arrive in Australia without a valid visa (e.g. people who arrive by sea or people who arrive by air and their visas are cancelled at the airport because they intend to seek asylum). In contrast, people who arrive in Australia with a valid visa, and then seek asylum are entitled to apply for a permanent protection visa.[41]

A person's mode of arrival to Australia must not determine their eligibility for permanent protection; this practice is discriminatory, arbitrary and deliberately punitive.

Temporary protection visas were first introduced in Australia in 1999 and were abolished in 2008 due to significant community pressure regarding their harmful impact. A 2006 Senate Inquiry confirmed that temporary protection causes immense suffering.[42] Mental health experts found that refugees on TPVs experienced increased anxiety, depression and post-traumatic stress disorder in comparison to

[40] This ministerial bar applies to 'transitory persons' who are defined as persons that have previously been taken to a Regional Processing Centre.
[41] Migration Regulations 1994 (Cth), Schedule 1, Item 1401.
[42] Senate Legal and Constitutional Affairs Committee, Inquiry into the Administration and Operation of the Migration Act 1958 (Cth), 2006, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2004-07/migration/report/index.

permanent protection visa holders.[43] Despite the overwhelming evidence indicating that temporary protection visas cause devastating outcomes and are bad policy, they were reintroduced by the Coalition Government in October 2013. The cruelty of temporary protection is heightened by restrictions that prevent family reunion for TPV and SHEV holders, including barriers on family sponsorship and overseas travel As a result, families are torn apart and separated for protracted periods of time, often being exposed to severe harm and persecution throughout this separation.

Permanent protection is essential to all refugees exercising their rights to live in safety with their families and to rebuild their lives with dignity.

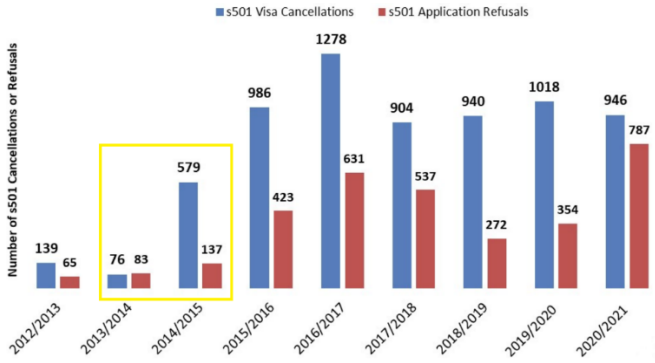
Recommendation – Amend the Act and Regulations to remove the Temporary Protection visa framework and clarify that all people found to be owed protection in Australia will be entitled to permanent visas.

3.5. Limiting Visa Cancellation

The visa cancellation framework has undergone a dramatic 'creep,' such that no visa status in Australia, including long-term permanent status, can be considered truly secure or unassailable.

Visa cancellation powers were dramatically expanded by the Coalition government in 2014. This included expansion of general cancellation powers under s 116 to allow for cancellation of a visa held by a person who, in view of the Minister's delegate, 'is *or may be*, would *or might be* a risk to the health, safety and good order of the community.'[44] The redrafted power is deliberately expansive and capable of capturing any apprehended risk – whether or not substantial or well-founded.[45] This was the controversial power under which the visa held by Novak Djokovic was cancelled in 2022.

Most importantly, the 2014 amendments introduced mandatory visa cancellation for persons serving a full-time sentence of imprisonment for 12 months or more, or in relation to a sexual offence against a child.[46] Visa cancellation decisions on character grounds have increased exponentially since the introduction of mandatory cancellation powers to the Act in 2014. The following graph depicts the immediate and exponential increase in cancellation decisions between 2013 and 2014:[47]



A person whose visa is cancelled becomes, upon that cancellation, an 'unlawful non-citizen'[48] who must, because of that status, be taken into immigration detention.[49] A person who has been subject to an

[43] Australian and New Zealand Journal of Public Health, Killedar, A & Harris, P, Australia's refugee policies and their health impact: a review of the evidence and recommendations for the Australian Government, Volume 4, Issue 41, https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.12663; Momartin S, Steel Z, Coello M, Aroche J, Silove DM, Brooks R. A comparison of the mental health of refugees with temporary versus permanent protection visas, Med J Aust, 2006, 185(7), https://pubmed.ncbi.nlm.nih.gov/17014402/.
[44] At s 116(1)(e) of the Act.
[45] *Gong v Minister for Immigration & Anor* [2016] FCCA 561.
[46] Act s 501(3A).
[47] Department of Home Affairs, 'Visa Cancellation Statistics' https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.
[48] Act s 15.
[49] Act s 189.

adverse decision under s 501 of the Act cannot validly apply for Bridging visa to secure their release from immigration detention.[50] The result is that people whose visas have been mandatorily cancelled must remain either in prison or immigration detention while they attempt to have their visa reinstated – regardless of their individual circumstances or how long they might have been in Australia before the cancellation decision was made. Because of the vast increase in mandatory cancellation decisions, the number of revocation requests to be decided by the Department has simultaneously increased, meaning that people are spending longer periods than ever in immigration detention, waiting for their visa to be reinstated. Around sixty percent of the people currently in immigration detention have been subject to a cancellation decision under s 501, and the current average period spent in immigration detention is 780 days.[51]

Visa cancellation on character grounds brings about some of the most draconian and long-term consequence known to our system of law. These include prolonged and potentially indefinite detention (say if a person cannot be removed from Australia) and permanent separation from family and community. People subject to visa cancellation on character grounds are permanently barred from re-entering Australia.[52] Families and communities are devastated by the permanent loss of their members. These pernicious consequences have become most readily apparent in recent cancellation decisions affecting First Nations people and their communities.[53]

There is, in our view, no justification for visa cancellation on character grounds. The character cancellation regime effectively establishes a parallel criminal legal process under which non-citizens are doubly punished for offending that has already been dealt with through the courts. That point was cogently made by the Parliamentary Joint Committee on Human Rights, in its recent scrutiny report (with our emphasis):[54]

> 1.11 …[I]n relation to the need to accommodate the risk posed by an individual to the Australian community, it would appear that this is a risk more appropriately managed by the courts in the sentencing process. It is not clear why a court's assessment of an appropriate sentence for an individual having committed one or multiple offences would not be sufficient to manage such risk, such that visa cancellation or refusal is also required. <u>If the risk posed by Australian citizens who have been sentenced to an aggregate term of imprisonment can be adequately managed in the community, such that they do not require further detention and removal from Australia following the completion of their sentence, it is unclear why similar measures could not adequately mitigate the potential risk posed by noncitizens, noting that it has not been demonstrated that non-citizens pose a greater risk to the community than citizens.</u>

There are no limits on the operation of the cancellation regime whatsoever. For instance, there is no prohibition on cancelling the visa held by a minor, a long-term resident or a person owed *non-refoulement* obligations. The absence of such limits means that all visas are vulnerable to cancellation – and in that sense, permanent residence does not constitute a protected visa status. In the case of people owed *non-refoulement* obligations, visa cancellation means the possibility of indefinite detention – given they must be detained upon cancellation, but cannot be removed from Australia.[55]

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[50] Act s 501E.

[51] Department of Home Affairs, 'Immigration Detention Statistics' 28 February 2023 https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-28-february-2023.pdf.

[52] Pursuant to Special Return Criterion 5001, applicable to all visas.

[53] Paul Karp, 'Labor drops Coalition bid to overturn high court ruling that indigenous Australians can't be aliens,' 28 July 2022 https://www.theguardian.com/australia-news/2022/jul/28/labor-drops-coalition-bid-to-overturn-high-court-ruling-that-indigenous-australians-cant-be-aliens.

[54] Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report (2 of 2023) https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2023/Report_2_of_2023.

[55] See *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [132].

The Department's statistics reveal that 504 holders of Protection or Humanitarian visas have been subject to visa cancellation under s 501 of the Act between 2010 and 2021.56

Since its introduction in 1958, the Act has always contained some form of power to deport non-citizens on the basis of criminal offending – but until relatively recently, those powers have had recognised and established limits.

The *Migration Amendment Act 1983* (Cth) introduced to then s 12 of the Act a limit on the deportation of long-term permanent residents who had remained in Australia for 10 years or longer. Introducing the amendments to parliament, then Minister for Immigration and Ethnic Affairs, Stewart West, remarked that:57

> In administering a large-scale immigration program, the government and the community must be prepared to accept some 'bad with the good.' The overwhelming majority of non-citizens who settle in this country are law-abiding members of the community and have a right to expect, after 10 years of lawful residence, that they will not be expelled.

In later committee debates, the Minister elaborated on the need for a 10-year limit on liability for deportation, explaining that:58

> Let us say that a 12-year-old Greek or Italian comes here and stays for 15 or 20 years. We will have moulded him. He will have been here for most of his life and will have been through our schools and universities and have lived under our social system. If at the end of that time he does something such as grow marihuana, do we then say: 'We do not want you. We will send you back from whence you came and that country or government can be responsible for you after we have been responsible for creating the type of citizen you are now?' That is not acceptable to us … [W]e have responsibility for these people after 10 years, whether we like it or not.

As Professor Michelle Foster has observed59

> This legislative background is highly significant as it indicates that the Parliament considered that there was indeed effectively a 'third class' of Australian residents formed by those who had 'become … constituent member[s] of the Australian community' and as such had a *right* not to be expelled — a kind of denizenship status.

Mandatory visa cancellation involves a drastic repudiation of the basic rights and recognitions previously afforded to long-term permanent residents. By treating alike all people irrespective of their connection to the community, mandatory cancellation powers influence the operation of the visa cancellation regime as whole. They must be wound back, as a matter of urgency.

Recommendation – Amend the Act to introduce limits on the operation of visa cancellation powers relating to minors, people owed non-refoulement obligations and (in all cases) long-term permanent residents.

4. Ensuring equal protection

All workers in Australia – irrespective of their visa status – must have access to the same workplace rights and protections. So much was recognised by Minister for Employment and Workplace Relations,

56 Freedom of Information Request FA 21/10/00396 available https://www.homeaffairs.gov.au/foi/files/2021/fa-211000396-document-released.PDF.
57 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1983, 1086.
58 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 236.
59 Foster, Michelle --- "An 'Alien' by the Barest of Threads' - The Legality of the Deportation of Long-Term Residents from Australia" [2009] MelbULawRw 18

Tony Burke, in moving amendments to the *Fair Work Act 2009* to extend its protections to temporary workers. In introducing those amendments to parliament just weeks ago, the Minister said[60]

> There are too many workers in this country being exploited by unscrupulous employers who rely on an incorrect view that workers on temporary or working visas have fewer workplace rights than other workers.
>
> This amendment is to protect workers like Kate Hsu, a Taiwanese national system worker who I have met with. I've spoken about Kate before—a worker who had come here from Taiwan. Her story has stayed with me since we spoke.
>
> Kate was engaged as a fruit picker in regional South Australia, getting paid $4 an hour to pick oranges. Just to survive, Kate was forced to sift through public rubbish bins to find food. Sadly, Kate's story is not a unique one in an industry in which some employers rely upon vulnerable overseas workers on temporary visas.
>
> This amendment closes a loophole for employers whose business model relies on the false assertion that workers on temporary or working visas have fewer rights than other workers.

All workers, irrespective of visa status, must have access to the same protections and entitlements at work. While clarifying this in the *Fair Work Act* is an important first step, those protections on paper will not be available to migrant workers if they remain unprotected by restrictive migration laws that privilege employers over workers.

In the experience of our organisations, current migration settings – including restrictive visa conditions, reliance on employer sponsorship and lack of visa security – encourage the exploitation of migrant workers, rather than the absence of workplace literacy or English language skills. Visa conditions and settings that create vulnerability to exploitation must be abolished, and protections must be created for migrant workers who take action against their employers.

4.1. Removing restrictive conditions

Temporary visa holders are subject to a number of conditions limiting their right to work. These include the 40-hour fortnightly work limit on Student visas,[61] the 6-month employment limit for Working Holiday makers[62] and the prohibition on work applied to Bridging C and E visa holders.[63]

The rationale for work-restricting conditions is, as far as we understand it, to prevent visa-holders from competing with 'local' workers for employment opportunities. But the reality is that temporary visa holders must work to support their own expenses. Temporary visa holders are (with limited exceptions) locked out from state-funded services such as Medicare, childcare subsidies and welfare benefits. The cost of living for temporary migrants also generally exceeds that of permanent visa holders or citizens – without local networks, temporary migrants are often left with high-cost rental housing options, must pay a premium for child-care and schooling and service unexpected costs relating to their visas – such as those associated with English language testing, skills assessment and application charges. Children of Bridging visa holders are liable to pay international fees to remain in school – at a cost of $12-$18,000 per year, depending on the child's year level.[64]

It is impossible for a Student visa holder to service astronomical tuition fees of up to $20,000 per year, and living expenses in major Australian cities, without working effectively full-time. Likewise, Working Holiday makers, who are young self-supported workers or students, must work full-time to support

60 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 2023, 17.

[61] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8105.

[62] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8547.

[63] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8101.

[64] See eg Victorian Government, *2022 Standard International Student Tuition and Non-Tuition Fees* <https://www.study.vic.gov.au/Shared%20Documents/en/StandardTuition-FeeRateCard.pdf>.

themselves. As we have explained above, people seeking asylum who are party to years-long court proceedings are excluded from government support and must find work to survive.

Case Study - Abigail and John – Cost of Living and the 40-hour Work Restriction

The following is a transcript of the statement made by Abigail and John, as members of the Support Network for International Students:65

> *We live in Melbourne with our three-year-old son Santiago. Like most young families we balance work and study with caring for our son though childcare. But as international students, we don't have the same entitlements as permanent residents - and that includes childcare subsidies, which is why we pay roughly around $150 per day for childcare. So for us, bringing back the 40 hours cap will really impact our day to day living. To add to that the cost of living has really gone up since we arrived in Australia. We know that there are lots of families like ours who are on Student visas and bringing back the working hours cap will severely impact us in a lot of different ways.*

Work-restricting conditions therefore serve only to ensure that visa-holders enter the labour market in precarious, unregulated forms of employment – for employers who are willing to openly flout migration laws by employing them. These are obviously the same employers willing to flout labour and taxation laws, and those most likely to underpay and otherwise mistreat their workers.

Work-related visa conditions function as a powerful disincentive to visa-holders reporting breaches of labour laws or other misconduct by their employers, because of the imminent threat of visa cancellation,[66] detention and removal from Australia.[67] There is a vast body of research that links under-reporting of wage theft by visa-holders with concerns regarding visa consequences.[68]

Case Study – Wei – Work Restrictions Prevent Redress

While studying in Sydney, Wei took up work at a 24-hour establishment, thinking that it would work well with her long study hours. The job was advertised as offering $30 per hour with penalties, which was above the minimum casual hourly rate at the time. When Wei commenced work, she realised that her employer paid staff monthly, did not keep an accurate record of their hours or pay penalty rates for overtime or weekend work. When Wei raised this, her employer said that he would 'fix up' the balance with backpay. Because of the irregularities, Wei found herself working up to 40 hours per week, just to ensure that she received a living wage. After six months, she realised that her employer was not going to 'fix up' the discrepancy in her pay. She took what evidence she had to a community legal centre and was advised that she had a reasonable claim for underpayment. But when she was advised that she might face cancellation of her visa, unless she was taken to be covered by the Fair Work 'Assurance Protocol,' Wei decided that she could not afford to take the risk. While she had lost up to $5000 to her employer, she noted that she had spent $50,000 on her course, and could not afford to lose that investment part-way through.

65 See https://www.facebook.com/profile.php?id=100064551620029.

66 Under s 116(1)(b) of the Act, for breach of visa conditions.

67 Freya Dinshaw and Susan Kneebone, *Labour in limbo: Bridging visa E holders and modern slavery risk in Australia*, November 2022 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/63699ff8f357294cefb84f88/1667866637322/HRLC_MSEI_LabourInLimbo_Report.pdf>.

68 Alexander Reilly, Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Understanding International Students' Professed Satisfaction with Underpaid Work in Australia' (2021) 46(3) *Monash University Law Review* 50; Migrant Justice Institute, 'International Students and Wage Theft in Australia' June 2020 available https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5ef01b321f1bd30702bfcae4/1592793915138/Wage+Theft+and+International+Students+2020.pdf; Migrant Justice Institute, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' October 2018 available https://www.migrantjustice.org/publications-list/report-wage-theft-in-silence.

In other words, work-limiting conditions serve to create a stable under-class of workers who are primed for exploitation by their employers. This in turn undermines the employment conditions and standards across entire industries in which temporary workers are employed. In this way, work-restricting conditions have a perverse effect that must be urgently addressed.

Recommendation – Amend the Regulations to remove work-related conditions such as 8104, 8105, 8547 and 8101 from temporary visas (including Bridging visas) and permit all visa-holders to work full-time.

4.2. Enshrining migrant worker protections

Migrant workers must be protected and encouraged to take action against their employers for labour law breaches. It is only through such action that employment practices affecting temporary workers will change over time, as employer will no longer be assured that their conduct will go undetected.

We collectively endorse the report of the Human Rights Law Centre and Migrant Justice Institute, titled *Breaking the Silence,* which is supported by 40 organisations across Australia and provides the blueprint for 'whistle-blower protections' for migrant workers who take action against their employers. Those protections take two forms: a **protection against visa cancellation** and a **short-term Workplace Justice visa** to allow workers to pursue action against their employers.

The details of the proposals are set out in the **enclosed** report, to which we commend the Committee. For reference, we have summarised the proposals below.

4.2.1. Protection against visa cancellation

Migrant workers who wish to take action against their employers have no legal protection against visa cancellation in circumstances where they may have breached their visa conditions. The 'Assurance Protocol' offered by the **F**air **W**ork **O**mbudsman[69] does not extend to action beyond the FWO. For instance, a Student visa holder who wished to pursue a discrimination complaint at the Human Rights Commission, or a police complaint for sexual harassment, would not have the benefit of the Assurance Protocol, and would therefore have no protection against visa cancellation or other adverse impact on their visa status resulting from their complaint.

Research shows that the threat of visa cancellation has a powerful chilling effect on temporary visa holders and prevents them from even considering whether to act on their workplace rights.[70] A guarantee against visa cancellation needs to be clear and reliable in order to encourage visa-holders to come forward. A limited protection – extended only in relation to matters investigated by the FWO – is nowhere near sufficient to address the power imbalance between visa-holders - who risk detention and removal from Australia - and employers who stand to benefit from this vulnerability.

Recommendation – Introduce a legislative instrument for the purposes of s 116(2) of the Act to prevent the cancellation of a visa held by a migrant worker who is pursuing action against their employer for a non-trivial breach of labour laws

[69] There were only 76 referrals made by the Fair Work Ombudsman to the Department of Home Affairs under the Assurance Protocol from its introduction in 2017 to 30 November 2021, despite the thousands of complaints from migrant workers during the same period: Department of Home Affairs, Freedom of information request FA 21/12/00662 <https://www.homeaffairs.gov.au/foi/files/2022/fa-211200662-document-released.PDF>.

[70] Laurie Berg and Bassina Farbenblum, *Wage theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017 <https://www.migrantjustice.org/publications-list/findings-national-temporary-migrant-work-survey>.

4.2.2. Providing visa security

There is currently no visa to allow migrant workers to remain in Australia while they attempt to take action against their employer.

Employer-sponsored visa holders are dependent upon their employer for their ability to remain in Australia, in a way that renders them uniquely vulnerable to exploitation. For instance, TSS visa holders looking to leave an exploitative employer have only 60 days to find and seek nomination from another employer. If they cease work for their sponsoring employer for a longer period, they will be in breach of their visa conditions, and vulnerable to cancellation.[71] TSS visa holders may have their visa cancelled if their employer has not complied with a sponsorship obligation[72] (eg to keep records, issue payslips). There is no effective way for a TSS holder to leave and take action against an exploitative employer without also jeopardising their visa and life in Australia.

A Working Holiday maker near the end of their visa period, whose wages are stolen while completing the work experience required for a second visa, has no way of extending their visa period to take action against their employer. The same is the case for a Student visa holder, nearing the end of their visa period.

Research shows that workplace complaints become effectively impossible to pursue once a person leaves Australia, as it becomes prohibitively difficult to produce evidence, seek out witnesses and communicate with lawyers. This means that temporary visa holders who do not have the visa security required to take action against their employers are forced to leave Australia without receiving their entitlements.

Recommendation – Introduce a short-term 'Workplace Justice visa' which allows permission to work and is available to migrant workers who take action against their employers for non-trivial breaches of labour laws

Recommendation – Amend qualifying requirements for visas, so that holders of Workplace Justice visas are taken to have 'substantially complied with conditions'[73] of their previous visa in any future visa application and work undertaken on a Workplace Justice visa is counted towards qualifying employment requirements for permanent visas[74]

5. Ending family separation

Family unity is an essential right recognised in both Australian and international law. Yet the migration system enforces family separation in a number of ways.

Since 2013, visa applications made from outside Australia by the family members of Protection visa holders who arrived by sea were given the lowest level of processing priority. This policy (Ministerial

[71] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8607(5).

[72] *Migration Act 1958 (Cth)* s 116(1)(g) and *Migration Regulations 1994* (Cth) r 2.43(1)(l).

[73] Various temporary and permanent visas require applicants to demonstrate that they have 'substantially complied' with the conditions of their previous visas. This requirement should be taken to be met for all Employment Justice visa holders so that they are not penalised in any future visa application for non-compliance with conditions which resulted from the conduct of their former employer.

[74] For instance, time spent by the holder of an Employment Justice visa working in their nominated occupation should be counted towards the three-year employment requirement, for the purpose of qualifying for permanent residency under the Employer Nomination Scheme (Subclass 186) visa.

Direction 80 and its predecessors) kept families apart for years, with almost no prospect of reuniting unless and until the visa sponsor obtained Australian citizenship. In June 2022, there were over 8,000 family visa applications impacted by Direction 80, many dating back to 2013.[75] Even now that the processing priority has been removed, thousands of applications remain pending with no end in sight. This is in part because of the massive backlog of unprocessed applications, and also in part because of the informal cap that the Department imposes on the number of family visas granted annually.

Uncertain visa status inherently prevents families from reuniting. People who hold Temporary protection visas and Bridging visa holders, cannot sponsor their family members. Other temporary visa holders often struggle to bring their family members to Australia because of the restrictive interpretation of certain visa criteria, such as the 'genuine temporary entrant' requirement.

Where the right to family reunion is limited, there is overwhelming evidence of harm to both children and adults. Medical and psychological research shows that prolonged separation from family members can cause acute and chronic mental health problems, and can have detrimental impacts on children's development and social adjustment.[76] This is particularly the case where people have experienced past trauma, persecution or displacement, which is then compounded by restrictive or punitive immigration policies which cause further separation and prolonged uncertainty.

In contrast, people who have the care and support of their families are better able pursue employment or education, develop new social and cultural connections, care for others, and recover from trauma or grief. Being with family helps people settle more easily into life in Australia,[77] and swift family reunion is associated with improved settlement outcomes.[78]

Keeping families apart is a unique form of cruelty. This has been recognised by the current government when promising to extend permanent visas to people living in Australia on Temporary Protection visas and Safe Haven Enterprise visas. It was again recognised when the government announced it would end the policy that has separated Protection visa holders who arrived by sea from their family members. The same principle of family unity must inform the operation of the migration regime as a whole.

5.1. Removing delays, caps and barriers

Family visas are intended to be 'demand driven' – that is, applications are to be processed and granted according to the number of eligible visa applicants, and not based on a limited supply of places available. This is expressed in the Act, which states that caps are not to be imposed on Partner or Child visas.[79]

[75] Auditor-General, *Management of Migration to Australia — Family Migration Program,* Report No 16 2022–23 (27 March 2023) (**ANAO Report**), [3.96] and fn 165; see also Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, October 2022, Home Affairs Portfolio, Question on Notice and answer OBE22-174 - *Family Reunion Visas - Direction 80*.

[76] Professor Louise Newman AM and Dr Sarah Mares, *Mental Health and Wellbeing Implications of Family Separation for Children and Adults Seeking Asylum* (April 2021) available at https://www.hrlc.org.au/family-separation-health-impacts; see also Fethi Mansouri and Stephanie Cauchi, "The Psychological Impact of Extended Temporary Protection", *Refuge Canada's Journal on Refuge* 23(2) (2006).

[77] Oxfam Australia, *Stronger Together: The impact of family separation on refugees and humanitarian migrants in Australia* (Report, 2019) available at https://www.oxfam.org.au/wp-content/uploads/2019/08/2019-AC-012-Families-Together_report_FA2-_WEB.pdf.

[78] Organisation for Economic Co-operation and Development, *International Migration Outlook 2019,* Chapter 4, available at https://www.oecd.org/els/mig/IMO-2019-chap4.pdf.

[79] *Migration Act 1958 (Cth)* ss 84 and 87.

Despite this, the Government and Department continue to observe an informal cap on the number of Partner visas available by way of annual programming levels,[80] which Departmental officials and members of Government often refer to erroneously as a 'ceiling.'[81]

There has always been broad public support for a 'demand driven' approach to family visas. This reflects the community's recognition of the fundamental importance of family unity. Parliament voted in 1989, and again in 1996-1997, to affirm the protection of uncapped family visa processing.[82] Facilitating family unity in a manner that is timely and accessible is an essential function of the migration system that must be restored.

In February 2022, the Government agreed to a proposal by the Department to manage the Partner visa program on an ongoing 'demand-driven' basis. The Department advised this would assist in mitigating growth in the application pipeline and processing times.[83] However, for 'planning purposes' 40,500 Partner visas are estimated for FY2022-23 – an estimate which is described as 'not subject to a ceiling'.[84] But whether the purported shift to a demand-driven model for Partner visas will bring the Government into compliance with s 87 of the Act will depend on what practical changes are made within the Department to respond to and accommodate actual demand. It is relevant that despite Child visas already operating on a 'demand driven' basis, processing times for this class of visa are as long as processing times for Partner visas. As the Auditor-General has pointed out, in practice the Child visa stream is planned and delivered in the same way as limited visa programs.[85]

Recommendation – Resource Family Stream visa processing so that visas can be processed on a genuinely 'demand driven' basis, in accordance with reasonable processing times

Family visa processing times have increased significantly over the past ten years. The recent performance audit of the family migration program by the Australian National Audit Office found that the Department of Home Affairs lacks sufficient procedures to identify and safeguard against periods of 'processing inactivity' and visa applications which have become unreasonably delayed.[86] It found that at 30 June 2022, 25% of Partner visa application on hand were older than three years.

[80] Department of Home Affairs, 'Migration Program planning levels' <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels> (accessed 14 December 2022).

[81] See eg., The Guardian, 'Turnbull says ministers, not cabinet, discussed migration numbers', 12 April 2018 <https://www.theguardian.com/australia-news/2018/apr/12/turnbull-says-ministers-not-cabinet-discussed-migration-numbers>.

[82] The concept of limiting classes of visas was first introduced into the Act by what is now s 84, which gives the Minister power to suspend processing of specified visa classes, via the *Migration Legislation Amendment Bill 1989* (Cth). Although the Government originally sought to create a power applicable to any visa class, the Senate forced the Government to amend the Bill to ensure the power would not apply to visa applications made on the basis that the person was the spouse, child or aged parent of an Australian citizen or permanent resident. When s 85 was first introduced by the *Migration Laws Amendment Bill 1992* (Cth), giving the Minister the power to 'cap' certain classes of visas, the equivalent of the current s 87 was also introduced to ensure consistency with the limits on the suspension powers that had previously been demanded by Parliament. A further attempt in 1996 to give the Minister power to cap all classes of visas was again rejected by the Senate, though the capping power was extended to aged parents.

[83] Auditor-General, *Management of Migration to Australia — Family Migration Program,* Report No 16 2022–23 (27 March 2023) (**ANAO Report**), [2.49].

[84] Department of Home Affairs, *Migration Program Planning Levels*, 16 August 2022, https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels.

[85] ANAO Report, [2.47].

[86] ANAO Report.

The below data shows that offshore Partner (Subclass 309) visa processing times have doubled over the decade:[87]

Year	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Months	4-11	5-11	6-13	7-14	7-14	6-15	6-16	6-17	9-20	7-23

Delays effect some groups more profoundly than others. The following table compares the standard processing times between Partner (Subclass 309) visa applications granted to applicants from Afghanistan as against the UK:[88]

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Afghanistan	456	540	429	364	446	646	607	835	1326
UK	206	252	283	224	160	190	251	297	296

Average processing times at certain processing offices have also been far beyond global averages – for example, the average processing time of Partner (Subclass 309) visa applications at the Dubai processing office in 2020 was 30 to 42 months.[89]

For some visa applicants, delays are exacerbated by administrative dysfunction that has seen visa applications mischaracterised, overlooked or lost altogether. For applicants from Afghanistan in particular, family visa applications have been transferred between multiple processing offices over the past three years, without clear communication to applicants. The process of centralising applications in the new Middle East Onshore Complex Team (**MEOCT**) has revealed deficiencies in record keeping at previous posts.

Recommendation – Increase resources for the MEOCT team to resolve all pending Family Stream applications previously affected by Direction 80 within one year. Establish a similar task force to clear all other Family Stream visa applications which have been pending for longer than two years.

The cost associated with Family Stream visa applications has also increased dramatically over time, making family reunion inaccessible, particularly for people on low incomes. In July 2012 the Partner visa application fee was $2,060. In 2022, the partner visa fee is $8,085 for the primary applicant and an additional fee of $2,025 or $4,045 per dependent child (depending on whether they are under or over 18 years of age). Other hidden costs associated with applications can include fees for immigration assistance, DNA testing, interpreting and translating, and the cost of police and health checks. Fees of this kind are sometimes incurred repeatedly due to extended processing delays, compounding the cost for families. Given the essential nature of family reunion, visas must be accessible to all people regardless of economic circumstances.

Recommendation – Reduce the cost of Family Stream visa applications, or introduce a reduced- or no-cost application charge for families who are in financial hardship

Impossible visa criteria and evidentiary requirements also pose barriers to family reunion for people from refugee backgrounds in particular.

[87] Department of Home Affairs, Freedom of information request FA 21/10/00542 https://www.homeaffairs.gov.au/foi/files/2021/fa-211000542-document-released.PDF.

[88] Department of Home Affairs, Freedom of information request FA 21/04/00110 https://www.homeaffairs.gov.au/foi/files/2021/fa-210400110-document-released.PDF.

[89] Department of Home Affairs, *FOI request FA 21/01/00319*, 2021, https://www.homeaffairs.gov.au/foi/files/2021/fa-210100319-document-released.PDF.

Visa applicants are required to provide identity documents, police background clearances, health checks and biometric data – documents and information which can only be obtained from functional governments and service providers. For applicants from Afghanistan, for example, it is not possible or is too dangerous to obtain such documents under Taliban rule. The Department has no solution for people whose visa applications have stalled due to these barriers.

Recommendation – Provide discretionary power for officers to waive or postpone until arrival particular visa criteria, where applicants are impacted by war, displacement or persecution.

Similarly, the Department's approach to identity assessment, which has become increasingly hostile and punitive over the last decade, is unreasonable and contributes to exorbitant processing delays.

Family visa applications, like citizenship applications, are increasingly used as a pretext to re-interrogate the identity of sponsors, particularly those who hold Protection visas. It is not uncommon for family visa applications to trigger visa cancellation processes for people who have lived in Australia for a decade or more.

Visa applicants themselves are also required to meet a high evidentiary threshold to establish their identity. The consequences of attempting but failing to do so are extremely serious. Public Interest Criterion (**PIC**) 4020(2A) requires a person applying for a visa to satisfy the decision maker of their identity. If the decision maker is not satisfied, the person is barred from applying for any further visas for a period of 10 years. It is not possible to waive this exclusion period.[90]

Proving identity requires significant formal documentation, generally issued by state authorities. This can be difficult or impossible for some refugees or family members of refugees to obtain. Documents may be lost or destroyed, a person may not be issued identity documentation due to discrimination, or record-keeping practices in other countries may be different to those of Australia. In 2021, scholar Ali Reza Younespour produced a report with the Refugee Council on Australia on the difficulties faced by Afghan nationals in accessing evidence of their 'identity.' After surveying the impact of decades-long conflict, decentralised administration and forced displacement on Afghan citizens' access to identity documents, the report concludes as follows (with our emphasis):91

> Since the fall of former Afghan Government on 15 August 2021, the 'interim' Taliban cabinet reportedly has stated that the former Afghan Government Tazkeras and passports are still valid. However, verifying these documents, and other identification documents from Afghanistan, is a huge logistical and political challenge for the holders of these documents and DHA because, as of now, Afghanistan has effectively two governing administrations: the 'interim' Taliban cabinet inside Afghanistan and officials of Islamic Republic of Afghanistan in Afghanistan's Embassies including in Canberra. Furthermore, the Taliban 'interim' cabinet, which is not yet officially recognised by any other state, has also commenced issuing of ETazkeras and e-passports in Afghanistan, but there are conflicting reports about what might have been changed on these documents. For example, there were some reports that they might use 'Islamic Emirate of Afghanistan' instead of 'Islamic Republic of Afghanistan' on the E-Tazkera and electronic passport. Amidst these uncertainties and heightened security risks inside Afghanistan, there is an urgency for DHA to give priority and assess existing and new visa and citizenship applications from Afghan applicants. Given the complex issues with identification documents from Afghanistan, DHA should further enhance its engagement with the existing Afghan communities and associations in Australia to help establish the true identity of visa and citizenship applicants.

The identity requirement and exclusion period in PIC4020 unfairly and disproportionately targets family members of people who are refugees or humanitarian migrants. The consequence for failing to provide sufficient identity documents is a further 10-year separation from loved ones. This disproportionate exclusion period should be repealed.

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[90] *Migration Regulations 1994* (Cth), Schedule 4, PIC 4020(2A) and (2B).

91 Ali Reza Yunespour, 'Documentation Problems for Asylum Seekers and Refugees from Afghanistan' October 2021 available https://www.refugeecouncil.org.au/wp-content/uploads/2021/10/Documentation-Problems-in-Afghanistan-AR-Yunespour.pdf.

Recommendation – Revoke PIC4020(2A) and revise Department guidelines on identity assessment.

For some people, the narrow interpretation of 'family' reflected in our migration laws means that no expense, and no amount of waiting, will ever allow them to reunite with their loved ones.

Family visas are available for partners, children, parents, carers, orphan relatives, aged dependent relatives and 'remaining' relatives. It is no longer possible to sponsor siblings, aunts or uncles, cousins, adult children or other extended or informal family members regardless of the crucial role they may play in family life or in caring for children.

Narrow definitions of 'family unit' and 'immediate family' in the Migration Regulations also exclude some people from the split family provisions of the Special Humanitarian Program, and prevent some families from applying for protection visas as a family unit (including where children turn 18 while waiting for a protection application to be processed).[92]

For refugee families in particular, vital family relationships often extend beyond the 'nuclear' or 'immediate' family unit. The impact of persecution and displacement means that "refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family… In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience."[93]

Many people remain separated from close relatives because of the inflexible and narrow concepts of family which determine visa eligibility. Our migration system must understand and account for the reality that families often extend beyond spouses and their children and include others who may or may not be related by blood, but are emotionally, socially and economically important members of a family.

Recommendation – Revise and expand the definitions of 'member of the family unit' to include other relatives, including those who are adults and non-dependent but are nonetheless close members of the primary applicant's family.

Visa criteria for children are also exacerbating family separation.

In 2016, the Coalition government amended the definition of 'member of the family unit' at r 1.12 to impose an arbitrary age limit of 23 in relation to dependent children. This has meant that, solely because of processing delays, children may 'age out' and become ineligible for the grant of the visa. To provide a practical example, both the 'time of application' and 'time of decision' criteria require secondary applicants for a Partner (Subclass 309) visa to demonstrate that they are 'members of the family unit' of the primary applicant. As set out at **section 5.1.** above, Partner visa applications by Afghan nationals typically take 5 or 6 years to decide. Accordingly, a child who was 18 at the time of application may turn 23 during processing. Irrespective of that child's circumstances, and whether or not they remain dependent upon the primary applicant (say, their mother or father) they will no longer be eligible for the grant of the visa, solely on account of the delay. It is entirely possible that, through a combination of processing delays and the age restriction at r 1.12(2)(b), an otherwise dependent child might be the only family member excluded from a Partner visa grant. In the case of refugee families, the anguish of this position should be obvious.

Likewise, Child visas are subject to an arbitrary age limit – seemingly based on a culturally specific assumption regarding the limits of a child's dependency on its parents. Applicants for Child visas must

[92] See *Migration Regulations 1994* (Cth), reg 1.12 and 1.12AA.

[93] UN High Commissioner for Refugees, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context* (June 2001) available at www.refworld.org/docid/4ae9aca12.html.

apply before they turn 25 years of age[94] – meaning that families with otherwise dependent children aged over 25 years are left without avenues to reunite with those children.

Further, all applicants over 18 years of age must demonstrate that 'within 6 months or a reasonable time' of completing their year 12 studies, they have 'been undertaking a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification.'[95] The study-related criterion is nothing more than a conduit for the assessment of a child applicant's dependence upon their parents. So much has been made repeatedly clear in the authorities regarding the criterion, such as the oft-cited decision of *Opoku-Ware v Minister for Immigration & Anor* [2015] FCCA 1638:

> [34] It is obvious from the nature of the visa and the criteria that the purpose of the Subclass 101 – Child visa is to provide a migration option for offshore children who are genuinely still dependent on their parents. This is evident from the primary criteria themselves, which require the child to demonstrate that he or she is a dependent child (cl.101.211) and to be sponsored by a parent or spouse of a parent (cl.101.212). It is also noted that it was introduced via the *Migration Amendment Regulations 1999* (No.13) 1999 (Cth), which amendments were intended, according to the Explanatory Statement, to *"create a revised and simplified structure of the Family stream of visa classes"*.

Yet the study-related requirement is not a neutral or objective vector for the assessment of dependency. The requirement is virtually impossible for families living in refugee-like situations to satisfy. For instance, it is impossible for Afghan refugees living without lawful status in Quetta, Pakistan to enrol in government-certified courses 'leading to the award of a professional, trade or vocational qualification.' The study-related requirement

Case Study – Juma – Arbitrary Criteria Leading to Family Separation

Juma is a 68-year-old man who was granted a Humanitarian visa and arrived in Australia in 2013. Prior to his arrival in Australia, Juma had lived with his wife and children as an undocumented Afghan refugee in Pakistan. Once he had saved enough money for the application fees, in 2016 he submitted a Partner visa application for his wife and 14-year-old daughter, and Child visa applications for his 20 year old sons. In 2019, his wife and daughter were granted visas and arrived in Australia. However, his sons' applications were refused as they could not meet the study-related requirement. While they had attempted to continue their studies after turning 18, they could not enrol in formal courses (leading to 'professional, trade or vocational qualifications' in Pakistan as they were not citizens of that country, and after they were deported to Afghanistan their father strictly forbade them from leaving the home. Juma is still battling to be reunited with his sons in Australia.

Recommendation – Age-based limits are removed from the Regulations in relation to children, limiting the assessment to whether the child is dependent upon the family head (irrespective of age).

Recommendation – The 'study-related' requirement must be removed from all Child visas, recognising that it is an unnecessary conduit for the assessment of the child's dependency on the family head, and imposes an insuperable additional barrier to applicants in refugee-like situations .

5.2. Re-opening humanitarian pathways to family reunion

The factors outlined above demonstrate the systemic barriers to family reunion within the Family migration program, particularly for people who sought protection in Australia. The 19,000 people holding temporary protection visas who will soon become permanent residents will also face these systemic barriers, and will increase demand for (and therefore delays in accessing) family visas. More accessible pathways to family reunion must be provided.

[94] Regulations, subcl 101.211(1)(b), subcl 802.212(1)(b).
[95] Regulations, subcl 101.213(1)(c), subcl 802.214(1)(c).

People holding Protection or other humanitarian visas are able to apply for family reunion through the Special Humanitarian Program, which provides a limited number of visas each year as set by the Minister. However, as with the former Direction 80, Departmental policy dictates that applications under the Special Humanitarian Program are to be processed according to a set order of priority. Applications proposed by people who travelled to Australia to seek asylum, either by boat or by plane, are the lowest processing priority.[96] In both FY2019-20 and FY2020-21, *zero visas* in the Special Humanitarian program were granted to applicants proposed by a family member who arrived in Australia by boat. In the same time period, fewer than five visas were granted to applicants proposed by a family member who held a protection visa of any kind.[97]

The number of visas available to facilitate family reunion through the Special Humanitarian Program each year are limited the overall planning 'ceiling' for the Humanitarian Program set by the Government. This annual quota is also filled by other offshore refugee and humanitarian intake, as well as onshore protection visas. However, this is contrary to the principle recognised in the Family migration stream that reunion with partners and children, at the very least, is an essential right which cannot be limited by visa caps.

Presently, demand for the Special Humanitarian Program and the discriminatory processing criteria make it an entirely ineffective method of reuniting with family members for most people who sought protection in Australia. Yet reforms to this program could restore realistic and accessible pathways to family reunion, avoiding many of the systemic barriers present in the Family stream.

Recommendation – The Special Humanitarian Program should be uncapped and additional to the annual humanitarian program planning levels. Discriminatory processing priorities should be removed.

5.3. Ensuring family unity for temporary visa holders

Temporary visa holders are either precluded from, or find it difficult to, reunite with their family.

Even if family members of temporary visa holders are able to make applications in their own right to come to Australia, the 'genuine temporary entrant' requirement presents a serious barrier. According to that requirement, visa applicants must show that they genuinely intend to return to their country origin. In assessing that requirement, decision-makers consider the strength of the family connections in Australia – meaning, perversely, that family members of temporary visa-holders in Australia find it extremely difficult to meet the requirement.

In practice, this means that temporary visa holders must remain separated from their family members until they obtain permanent residency. As we have explained, that may take a decade or more to achieve.

Recommendation – Remove the 'genuine temporary entry' requirement from temporary visas for secondary applicants, or alternatively amend policy to ensure that the principle of family unity is taken into consideration when assessing applications made by family unit members of temporary visa holders

[96] Department of Home Affairs, *Procedural Instruction: Offshore Humanitarian Program Management and Class XB (Refugee and Humanitarian) visa processing* (reissued 10 December 2019), s 3.3.
[97] Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, *Portfolio question number: AE21-389*, 22 March 2022, https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=6cb6dd30-85f4-4431-9c0a-0506a960fd17.

6. Conclusion

Despite the safeguards we have proposed above, the fundamental difficulty with the migration regime remains the inaccessibility of permanent status.

Across visa subclasses – from students, employer sponsored visa holders, refugees and people seeking asylum – visa holders are subjected to an open-ended period of uncertainty as they navigate ever-changing requirements that evolve without regard to their future or the lives that they have built in Australia.

The Australian community is opposed to a migration system characterised by uncertainty and temporariness, and supports the notion that people should be able to remain in Australia permanently after a number of years of residence.[98] The migration regime, as it currently operates, is drastically out of step with community standards.

For the extraordinary benefits that Australia reaps from migration, we must recognise that after a time, people have a right to remain. The immigration and asylum systems must be rebuilt on that basis.

[98] Human Rights Law Centre, 'Australians overwhelmingly support permanent residency for migrants' 2 February 2022 <https://www.hrlc.org.au/news/2022/2/1/Australians-overwhelmingly-support-permanent-residency-for-migrants>.

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Executive Summary

Migrant Justice Institute and Human Rights Law Centre have led a national coalition proposing immigration protections for migrant workers who take action against unscrupulous employers.

Our detailed proposal is endorsed by over 40 organisations including legal centres, ethnic community state and national peak bodies, unions, churches, and national service providers such as the Salvation Army, AMES and the Settlement Council of Australia.

The problem

Migrant worker exploitation is entrenched in numerous industries across Australia.

The vast majority of unlawful employer conduct goes unchecked. In our surveys of thousands of migrant workers, three quarters were paid less than the casual minimum wage and, among the underpaid workers, nine in ten told nobody.

Many migrant workers stay silent for fear that if they come forward they will put their visa and stay in Australia at risk or jeopardise a future visa. When migrant workers reach the end of their stay and could potentially safely pursue a labour claim without risk to their job or visa, they are required to swiftly return home. All intelligence about exploitative employers is lost and the worker never recovers the wages they are owed. The Fair Work Ombudsman (FWO) has limited enforcement capacity and takes a small number of cases each year.

Most migrant workers are extremely reluctant seek the regulator's assistance. In 2017, the Federal Government attempted to address this issue by implementing an Assurance Protocol.
Under this scheme, the Department of Home Affairs (DHA) commits to generally not cancel a worker's visa for breach of work rights if the worker is assisting the FWO with its inquiries.

The Protocol has not been effective, with only around 15 migrant workers using it each year.
Because of this regulatory failure, employers know they will not be held to account and underpayment of migrant workers has become a widely successful business model. In some industries, this makes employers that do the right thing uncompetitive. Businesses cannot detect wage theft (or modern slavery) in their supply chains because migrant workers will not report it to auditors or the regulator.

Our proposed reforms

Our proposal sets out two reforms that will help to bring these workers out of the shadows and hold exploitative employers to account:

- protection from visa cancellation for exploited migrant workers who have breached their visa but take action against their employer, and
- a short-term visa with work rights to pursue a claim before they leave Australia.

How do the protections work?

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 Fair Work Ombudsman or other government authority.

For the short-term visa:

- The Department of Home Affairs 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 increasing the likelihood that exploitation will come to light and they will be held 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;
- Increasing detection of exploitation among federal and state government agencies by requiring reporting of claims to those regulators;
- 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.

Who will benefit from the proposal?

These protections will benefit migrants on a range of temporary visas, as well as those who have overstayed a visa. For example:

- An exploited international student who has worked more than 40 hours a fortnight in breach of their visa (often to make ends meet on unlawfully low wages) would be willing to bring a claim against their employer and recover the wages they are owed because they have certainty that their visa would not be cancelled.
- A sponsored worker whose employer illegally demanded the migrant pay back the sponsorship fee could access a short-term visa to recover this unlawful payment, before finding another sponsor for a new work visa.
- An exploited backpacker who is about to leave Australia but didn't want to report sexual harassment during their fruit-picking job could access a short-term visa to stay for a short period to hold their employer to account before returning home.

The proposals will also benefit:

- Employers that pay their workers correctly and want a level playing field;
- Businesses that want to detect and address exploitation and modern slavery in their supply chains;
- Federal and state governments that want to strengthen enforcement of labour laws;
- Unions that seek to engage and recruit migrant workers;
- Consumers that want greater assurance that goods and services are not produced through exploitation of migrant workers; and
- All workers in Australia, when employment standards are more likely to be enforced and a race to the bottom is disrupted.

Next Steps

The federal government has announced that it will introduce reforms to address migrant worker exploitation in early 2023, and is currently considering the whistleblower protection proposal. We urge the government to introduce these protections as the cornerstone of its reforms, because increased criminalisation of employer misconduct and other reforms will have limited effect if exploitation remains undetected.

I. Introduction

Exploitation of migrant workers is pervasive and entrenched in workplaces across Australia and has been well-documented for years. To date, the vast majority of unlawful employer conduct has gone unchecked, in part because very few migrant workers report it and/or assert their rights.

Migration settings impede reporting and remedying exploitation in two key ways. First, many migrant workers are unwilling to address exploitation during their stay for fear of putting their visa and stay in Australia at risk, or jeopardising a future visa. In 2017, the Federal Government attempted to address this issue by implementing an Assurance Protocol between the Department of Home Affairs (**DHA**) and the Fair Work Ombudsman (**FWO**). This measure has been largely ineffective and used by only 76 migrant workers in five years.

Second, when migrant workers reach the end of their stay and could potentially safely pursue a labour claim without risk to their job or visa, most swiftly return home. All intelligence about exploitative employers is lost, the worker never recovers the wages they are owed, and the employer is never held to account. There is no visa that enables temporary migrants to remain in Australia in order to assert their employment rights against an unscrupulous employer.

Enhanced mechanisms are needed to address exploitation by ensuring government can gather intelligence about employer non-compliance and migrant workers who wish to pursue their rights are protected. This Research and Policy Guide proposes two new whistleblower reforms to enable migrant workers to safely take action against employers that violate Australian labour laws. These include (1) stronger legislative safeguards against visa cancellation for whistleblowers during a migrant worker's stay and (2) a new short-term visa to enable migrant workers who are at the end of their stay to remain in Australia to pursue a civil labour claim against their employer.

These proposals include safeguards to ensure these protections are only available for migrant workers who are taking action to address meritorious and non-trivial breaches of their workplace rights, which have been vetted and certified by a government agency, court, or specialist legal professional in a union or non-profit legal service provider. While it is not possible to entirely eliminate risks of misuse of the protections or other undesired outcomes, the prospect of making genuine systemic inroads into labour non-compliance in Australia justifies the mitigated risks. In the absence of these robust visa protections, labour enforcement in Australia will continue to be seriously compromised and exploitation of migrant workers will remain rampant as employers rely on migrant workers' silence.

II. The Problem: Why migrant workers suffer exploitation in silence and employers cannot be held to account

Wage theft and other forms of exploitation of migrant workers in Australia are widespread and endemic in industries with large migrant worker populations. Migrant Justice Institute's 2016 survey of 4,322 temporary visa holders found at least a third earned less than $12 an hour.[1] A subsequent large-scale survey by Migrant Justice Institute in 2019 produced similar findings.[2] It is clear that current measures to address exploitation are not working, and systemic exploitation continues to flourish because employers know they are unlikely to get caught.

The vast majority of migrant workers who experience wage theft and other forms of exploitation do not report it or seek remedies against their employer. During the term of the visa, they do not come forward because they fear they will jeopardise their visa and stay in Australia or put future visas at risk. When migrant workers reach the end of their visa and there are no longer risks associated with reporting exploitation, they immediately leave Australia, and it is almost impossible for them to pursue a claim overseas. Migrants' unwillingness and inability to come forward compromises the ability of government regulators like the FWO, Labour Hire Licensing Authorities, federal and state police and others to bring actions since they rely heavily upon self-reporting to obtain intelligence and identify cases of exploitation. This in turn creates a breeding ground for forced labour and modern slavery which remain undetected for the same reasons.

This brief presents reform proposals that overcome (1) barriers to reporting exploitation during a worker's stay in Australia, and (2) barriers to pursuing a claim at the end of the migrant worker's stay, prior to leaving Australia. To address these barriers, these reforms would implement Migrant Worker Taskforce recommendation 21 ('review the Assurance Protocol to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints').

We propose an expanded and stronger Assurance Protocol and a new Workplace Justice visa to enable a worker to remain in Australia to pursue a claim. If implemented, these reforms would allow, and encourage, far greater numbers of migrant workers to report exploitation and obtain remedies, including recovering wages they are owed. In turn, exploitative employers in Australia would no longer be able to rely on migrant workers' silence. Government would be far better placed to strategically hold offending employers to account and drive compliance with Australian law, while ensuring migrant workers recover the wages they are owed and obtain just redress for exploitation.

[1] Laurie Berg and Bassina Farbenblum, ***Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*** (2017), 5.
[2] Bassina Farbenblum and Laurie Berg, ***International Students and Wage Theft in Australia*** (2020), 8.

Further reforms are needed to ensure labour laws are enforced if whistleblower reforms are introduced and migrant workers become willing to report exploitation and pursue claims for wage theft and other contraventions. Future Research and Policy Guides will consider reforms needed in relation to labour law protections, wage claims forums, and enforcement processes to enable migrant workers to successfully pursue claims. As recognised by the Migrant Worker Taskforce, both sets of reforms are critical to addressing migrant worker exploitation.

A. Many migrant workers suffer exploitation in silence to avoid jeopardising their immigration status

The overwhelming majority of migrant workers suffer wage theft and other forms of exploitation in silence. In Migrant Justice Institute's 2016 survey, 91% of underpaid migrant workers took no action.[3] Migrant Justice Institute's 2019 survey of 5,968 international students found that 38% of those who experienced a problem at work did not seek help because they did not want 'problems that might affect my visa'.[4]

For international students, and workers on some other temporary visas, this is generally due to fear that detection of a visa breach will lead to cancellation of their current visa, or refusal of a future visa application on the basis that they have a record of non-compliance with visa conditions.

In many instances, migrant workers' visa breaches occur in the context of workplace exploitation. International students breach their visa if they work more than the 40 hours per fortnight permitted under visa Condition 8105 while their course is in session[5] (currently suspended, to be reinstated mid-2023). These students are frequently underpaid and work additional hours to make up the minimum wage. Employers of international students also often demand students work additional hours, and students risk losing their job if they refuse. If detected by the DHA, the student's visa may be cancelled under s 116(b) of the ***Migration Act 1958*** (Cth) (the **Migration Act**).[6]

Other migrants may breach their visa by working while holding a visa with a 'No Work' condition 8101, including Sponsored Parent visa-holders, Visitor visa-holders, and Bridging Visa C and E-holders. These workers are highly vulnerable to exploitation because reporting it will result in detection of their work and can lead to visa cancellation and removal.

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3 Bassina Farbenblum and Laurie Berg, ***Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*** (2018), 2.

4 Bassina Farbenblum and Laurie Berg, ***International Students and Wage Theft in Australia*** (2020), 10.

5 Secondary visa-holders are subject to Condition 8104 which is similar.

6 Where the breach is sustained and ongoing, there may alternatively be grounds for cancellation under subsections 116(1)(a) or (fa) of the ***Migration Act***, on the grounds that the grant of the visa was based on facts or circumstances which no longer exist, or its holder is not likely to be a 'genuine student'.

Unless the risk of visa cancellation and future consequences is removed for international students and these workers on visas with 'No Work' conditions, most will remain unwilling to report exploitation or pursue remedies against their employer during their stay in Australia regardless of information or assistance provided to them.

It is important to note that fear of immigration consequences is so acute that it is not confined to those who have actually breached their visa and are liable for visa cancellation. Migrant Justice Institute's research reveals that fear of contact with immigration authorities is so pervasive that it impacts the decisions of temporary migrants across all domains, even among temporary visa holders who have not breached their visa conditions. For example, Migrant Justice Institute's survey of 6,105 temporary visa holders, investigating experiences during the national COVID-related lockdown in 2020, found that close to a third (29%) of those who reported financial distress indicated they did not seek emergency support because they were worried that it might affect their visa.[7] In Migrant Justice Institute's 2019 survey of 5,968 international students, 82% wrongly believed that their student visa could be cancelled for failure to pay rent or other tenancy breaches.[8]

B. When migrant workers have nothing to lose at the end of their stay and could potentially safely pursue a labour claim, they return home and all intelligence is lost

The only time when many migrant workers feel safe to report exploitation and pursue a claim against their employer without jeopardising their job or their visa is when they are nearing, or have reached, the end of their stay in Australia. However, when a migrant worker's visa comes to an end, they are required to swiftly leave Australia and have no opportunity to pursue a claim. Migrant Justice Institute's research in Australia, and other jurisdictions, has confirmed that it is virtually impossible for a migrant worker to pursue a legal claim against an employer once they have returned home.[9]

Legal service-providers generally consider the fact that the employee is no longer in Australia to be a serious practical hurdle to running their case.[10]

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[7] Laurie Berg and Bassina Farbenblum, ***As If We Weren't Humans: The Abandonment of Temporary Migrants in Australia during COVID-19*** (2020).

[8] Laurie Berg and Bassina Farbenblum, ***Living Precariously: Understanding International Students' Housing Experiences in Australia*** (2019).

[9] Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) **Melbourne University Law Review** 1035, 1073; Bassina Farbenblum, **Migrant Workers' Access to Justice at Home: Nepal** (Open Society Foundations, 2014); Bassina Farbenblum, Eleanor Taylor-Nicholson and Sarah Paoletti, **Migrant Workers' Access to Justice at Home: Indonesia** (Open Society Foundations 2013).

[10] Interview by Laurie Berg and Bassina Farbenblum with Kingsford Legal Centre Lawyers (Sydney, 5 February 2016); Interview by Laurie Berg and Bassina Farbenblum with Legal Aid NSW Lawyers (Sydney, 8 February 2016).

Unions have also experienced great difficulties advocating for workers who have returned home.[11] This is especially the case for sponsored migrant workers, because a complaint against their employer can easily lead them to lose their job and sponsorship (and they have only 60 days to find alternative employer sponsorship or leave the country).[12]

For some visa holders, employer noncompliance can jeopardise the worker's ability to qualify for a further visa. For example, for Working Holiday Makers, labour noncompliance can result in their noncompletion of the 88-day requirement for a second-year visa (or 6 months for a third year).

Undocumented workers, who are the most vulnerable to exploitation, do not bring claims because they fear detection by the DHA, triggering their immediate detention[13] and removal from Australia as soon as reasonably practicable.[14]

When an undocumented worker is detected by DHA, it is not possible for them to bring a claim against an employer prior to their removal and the DHA does not have any process for screening for labour claims upon detection. As a result, all intelligence in relation to exploitation of undocumented workers, and potential related forced labour and modern slavery offences, is lost with their removal from Australia.

Unless measures are introduced to allow exploited workers to remain in Australia for a short period in order to pursue a complaint or legal action against their employer, the vast majority will leave without ever reporting their experience or recovering the wages they are owed.

As a result, their employers will continue to exploit a new cohort of migrant workers.

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[11] ACTU, ***Submission No 48 to Senate Education and Employment References Committee***, Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders (1 May 2015), 76.

[12] Employer-sponsored visa-holders face visa cancellation under conditions of employer noncompliance in a number of scenarios: a) The worker's breach of a work-related visa condition. This may include receipt of salary below the Temporary Skilled Migration Income Threshold for Temporary Skills Shortage visa-holders, working in an occupation other than the nominated occupation, or providing payment to obtain employer sponsorship; b) The employer terminates the employment relationship or sponsorship arrangement in retaliation for the worker's complaint against their employer; or c) The worker has lost their employer sponsorship because it has been terminated by the DHA as a result of the employer's breach of its sponsorship obligations (including paying less than the market rate for entitlements, accepting payment in return for sponsorship, and others).

[13] ***Migration Act***, s 189.

[14] ***Migration Act***, s 198.

III. Current interventions are ineffective

A. The Assurance Protocol between the Fair Work Ombudsman and the Department of Home Affairs has had almost no impact on worker reporting

In 2017, the Coalition Government sought to address migrant workers' unwillingness to report workplace exploitation to the FWO by introducing an Assurance Protocol between the FWO and DHA. The Protocol was intended to provide security to temporary visa holders by indicating that if they cooperated with the FWO, DHA would exercise its discretion to not cancel their visa due to their breach of a work-related condition, provided other conditions were met.

In principle, the Assurance Protocol was an innovative approach to migrant worker protection, acknowledging the need for visa safeguards to enable migrant workers to report exploitation. In practice, however, it has had virtually no impact. Between 2017 and 2021, it was used by only 77 temporary visa holders.[15]

Its ineffectiveness stems from several key shortcomings:

- It is not enshrined in law or policy, rather it is detailed on the FWO and DHA's websites and is set out in a Memorandum of Understanding between the agencies that is not available to the public, lawyers or migration agents.
- The Assurance Protocol extends only to temporary visa holders with work rights and excludes those who work on temporary visas without work rights (including Parent visa holders) as well as undocumented workers who are the most vulnerable to exploitation.
- Until recently, it has not been clear whether the Protocol protects against not only loss of the workers' current visa but also ineligibility for future visas (including permanent residency).
- It is available only to workers who are 'helping [the FWO] with [their] inquiries'.[16] It is therefore, apparently, not available for exploited workers in relation to whom the FWO is not making further inquiries due to inadequate evidence (especially for workers underpaid in cash), lack of agency resources or other reasons. As a result, availability of the Protocol is speculative and largely outside the worker's control. The Protocol is also not available to workers who wish to approach other agencies to report or seek assistance in relation to other workplace harms, including workplace health and safety breaches, sexual harassment or bullying, breaches of licensing conditions by labour hire firms, breaches of immigration laws or other abuses.

[15] Information provided by DHA pursuant to a Freedom of Information Request, FA 21/12/00662, 14 February 2022.

[16] Fair Work Ombudsman, 'Visa Protections – the Assurance Protocol' (accessed 17 October 2022) https://www.fairwork.gov.au/find-help-for/visa-holders-migrants/visa-protections-the-assurance-protocol.

- Visa protections are not available to workers who seek to address their exploitation through union action or a legal claim in a court or the Fair Work Commission.
- No protections are available for a visa holder whose employer reports the visa breach to DHA in retaliation against the worker's complaint or claim.

Expansion and formalisation of the Assurance Protocol can address these workers' reluctance to take action against exploitation due to fear of visa cancellation or future ineligibility for a further visa, on the basis of their breach.

Case Study

The inconsistent application of the Protocol by the FWO is evident from two case studies provided by Redfern Legal Centre (RLC). RLC assisted an international student named Fang,[1] who was working up to 60 hours a week, sometimes overnight as a receptionist for a 24-hour business and was paid a flat rate of $20 per hour.

Fang sought assistance from the FWO and the protection of the assurance protocol because she had breached visa condition 8105 and worked more than 40 hours a week while on a subclass 500 Student visa. Fang participated in the FWO's investigation and provided extensive evidence of her work patterns, although Fang's employer had not provided payslips.

The Fair Work Inspector determined that they could not form a reasonable belief that a contravention of a modern award occurred, i.e. that Fang was underpaid because she could not provide a complete record of her work hours, including a roster with start and finish times or payslips. The matter was closed and the FWO confirmed that Fang was not eligible to receive protection through the Assurance Protocol because no determination was made. Information about the Assurance Protocol on the FWO website does not indicate that a determination is required for workers to be eligible for the amnesty. Fang is now more vulnerable to visa cancellation than before reporting the non-compliance to the FWO.

In another matter, RLC acted for a client where a Fair Work Inspector also did not reach a reasonable belief that a contravention had occurred under the Fair Work Act 2009 (Cth) (FW Act). However, in this case, the Assurance Protocol was enlivened.

These two matters reflect the FWO inspectorate's inconsistent application of the Protocol. Yet no appeal is available, nor are clear definitions provided of the terms of the Protocol, in part because its legal status as a webpage is unclear.

B. There is no suitable visa that enables migrant workers to remain in Australia to report or seek redress against exploitation

At present, there is no visa specifically available to workers who wish to seek redress against their employer for labour noncompliance but are at the end of their stay in Australia.

Visa holders at the end of their visa validity period and looking to extend their time in Australia are eligible for Bridging 'E' visas. For a number of reasons, the Bridging 'E' visa is not a suitable mechanism to preserve the visa status of workers seeking to pursue redress against their employers.

Firstly, Bridging 'E' visas can only be granted on the confined grounds set out at Schedule 2 to the ***Migration Regulations 1994*** (Cth) – such as the holder making arrangements to depart the country, to apply for a visa or to remain in the country while that visa application is processed. The eligibility grounds do not extend to the commencement of legal proceedings against a current or former employer.

Even if the grounds for eligibility were extended, there are further difficulties with the use of Bridging 'E' visas in these circumstances. Bridging 'E' visas are typically granted with 'no work' condition 8101 – grant of the visa precludes workers finding another employer or supporting themselves while they pursue their claim against their exploitative employer or while they pursue other visa options. Provision of a visa with no work rights would afford workers no viable path to accessing justice. Furthermore, the grant of a Bridging 'E' visa precludes the possibility of making a further visa application in Australia. That is because most visas – importantly including Student, Temporary Skills Shortage or Employer Nomination Scheme visas – require the applicant to hold either a substantive visa or Bridging visa A, B or C.

In other words, the grant of a Bridging 'E' visa to a worker would prevent them from applying for any further visa and would thus deprive them of future visa security as a result of coming forward.

The only other visa option for workers experiencing exploitation is the Criminal Justice visa.[17] However, the grant of that visa is limited to persons assisting in a criminal prosecution and is subject to a number of onerous requirements. The applicant must be issued with a 'criminal justice certificate' by a relevant prosecuting agency, which must also undertake to pay all costs associated with their stay, and they must demonstrate a 'history of compliance with immigration laws'.

Criminal Justice visas are granted at the 'absolute discretion' of the Minister or his delegate, for a limited period (typically of several weeks) and are similarly subject to the 'no work' condition.

[17] ***Migration Act***, s 161.

Criminal Justice visas are not available for workers pursuing civil redress against their employers. Only a small minority of workers will be involved in prosecutions against their employers, and the visa does not provide these workers a sufficiently secure framework to come forward. The grant period is limited to what is required by the prosecuting agency, rather than being determined based on the interests of the applicant, and the 'no work' condition prevents the holder from supporting themselves independently or finding alternative employment while assisting the investigation or supporting the prosecution.

IV. Proposals for reform

A. Effective protections against visa cancellation for whistleblowers who pursue a meritorious labour claim

Given the seriousness of the risk of visa cancellation for migrant workers, they will only come forward against their employers if there are strong, express protections against visa cancellation and future adverse consequences. As such, the Assurance Protocol must be formalised into a protection against visa cancellation.

Protections against visa cancellation and future visa ineligibility should extend to migrant workers who pursue legitimate claims against an employer through a range of avenues beyond the FWO. It should be applied where:

1. A migrant worker has breached their work-related visa condition in connection with work for a specific employer;[18]
2. There are reasonable grounds to suspect that that employer has committed a non-trivial contravention of labour or immigration law in relation to that worker; and
3. The worker is a 'whistleblower', i.e. the worker has taken steps to address the contravention. This includes assisting a relevant government agency's investigation of the employer, engaging with a union in relation to the employer's alleged contravention or having retained a lawyer to pursue a legal claim.

The protections against visa cancellation and future visa ineligibility must be strong and clearly communicated.

An assurance expressed only in policy may not provide migrant workers with the certainty they need to come forward.

[18] It should not be necessary to demonstrate that the worker's visa breach was directly connected with, or caused by, the employer's labour violation as this would often be impossible. The purpose of the protections is to encourage migrant workers to report exploitation without fear of visa cancellation.

The most appropriate mechanism for the assurance is by way of Regulations issued pursuant to s 116(2) which provides that:

> ***The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.***

The Regulations do not currently prescribe circumstances in which a visa is not be cancelled, pursuant to s 116(2). Regulations may be issued, prescribing that a visa is not to be cancelled in circumstances where a worker has become a 'whistleblower,' in the circumstances described above.

Eligibility for protection against cancellation

An argument against strengthening the cancellation protections is that doing so may create an incentive to bring unmeritorious claims. This concern can be addressed by conditioning access to the protection against cancellation on:

1. Specified forms of evidence of the bona fides of the allegation against the employer;
2. Restricting protections to alleged contraventions by employers that are non-trivial; and
3. Specified forms of evidence that the visa-holder is a whistleblower.

However, the process for adducing this evidence and determining eligibility should be sufficiently simple that it is not a bar to migrant workers applying for protection, and not too resource-intensive or lengthy for the DHA and other government agencies to administer.

Evidence that whistleblower is pursuing a meritorious claim or complaint

Forms of acceptable evidence of the merits of the worker's allegation, and evidence that the worker is taking steps to seek redress, should be set out in an instrument, akin to the Family Violence provisions. Acceptable evidence should include:

1. Certification by a relevant enforcement agency that it is conducting inquiries or pursuing compliance measures in relation to the visa-holder's employment;
2. A court, tribunal or commission issuing a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
3. Certification by an employment law practitioner who holds specialist accreditation from their relevant society or is employed in a government-funded legal service, pro bono practice in a commercial firm, or a union. The legal practitioner must certify that there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law in relation to the visa-holder's employment, and that the worker is pursuing a legal remedy in relation to an alleged workplace contravention through negotiation with the employer or a legal application to an appropriate forum.

Relevant enforcement agencies should include the FWO, DHA, workplace health and safety authorities, the Australian Federal Police, state policing agencies, the Pacific Labour Facility, the Department of Employment and Workplace Relations, state Labour Hire Licencing agencies, and the Australian Human Rights Commission.

Accepting evidence from a range of enforcement agencies and courts is a substantial departure from the current operation of the Assurance Protocol, which is available only by referral from the FWO. Given the small number of investigations or inquiries into workplace exploitation undertaken by the FWO relative to migrant workers who seek the regulator's assistance, and the slow and cumbersome FWO processes for addressing complaints, it is not appropriate for the FWO to be designated the sole avenue for proof of a bona fide claim.

In addition, restricting eligibility to those assisting FWO inquiries substantially limits the forms of exploitation which may trigger visa protections since the FWO's jurisdiction extends only to certain contraventions of the ***FW Act*** and not, for example, occupational health and safety violations or sexual harassment.

In addition to government bodies, we recommend that certain expert employment legal practitioners be able to provide certification of the bona fides of the complaint or evidence that the worker is pursuing legal action. Prescribing a broader range of acceptable evidence, including from union lawyers, ensures that government agencies' resources, including the FWO's, are not depleted by a large number of requests for certification by workers who wish to benefit from this protection against visa cancellation.

Several integrity safeguards should be introduced to guard against false or inadequately substantiated certifications. First, eligibility for certification should be restricted to lawyers with current practising certificates who are subject to professional disciplinary oversight. Second, to avoid any possibility that lawyers bring unsubstantiated claims and to prevent inadvertent certification of unmeritorious claims, eligibility may be restricted to lawyers who hold accredited specialisation from their respective law societies or are employed by pro bono practices of commercial firms, in government-funded practices or in unions.

Expanding the range of actors who may certify a worker's pursuit of a legal remedy can substantially increase the government's access to intelligence to inform its enforcement activities.

To ensure this is the case, where the visa-holder is relying on a certification from an expert employment lawyer, the Procedures Advice Manual (**PAM3**) should require the visa-holder to evidence that they have also reported the noncompliance to a relevant government authority.

Types of employer contraventions that trigger protection

A Ministerial Direction should specify a list of workplace contraventions that give rise to protection against cancellation. These should include a range of civil remedy provisions under the ***FW Act***, as well as contraventions of the ***Migration Act***, workplace health and safety laws, labour hire licensing provisions, and laws proscribing sexual harassment and bullying, among others.

To ensure that these protections are available only to workers who have experienced non-trivial contraventions, the PAM3 or Ministerial Direction should also set out the threshold for 'non-trivial' contraventions. For instance, allegations of underpayment could amount to at least $2,000 in aggregate per worker.

B. A new Workplace Justice visa to enable a migrant worker with a legal claim against their employer to remain in Australia to pursue justice

Many employers enjoy impunity for exploitation of migrant workers because the worker leaves the country before they can report or pursue a claim against their employer and it is virtually impossible to pursue a claim from offshore. To substantially increase detection of exploitation and ensure employer accountability and workers' access to justice, migrant workers must be given an opportunity to pursue a claim before they leave.

The Senate Select Committee on Temporary Migration recognised the need for bridging arrangements and recommended that 'temporary visa-holders have their visas extended until their small claims matters are concluded'.[19]

We recommend that the best way to achieve this short-term stay is through a new Workplace Justice visa subclass. This would enable a temporary visa-holder or undocumented worker to remain in Australia for a short period to pursue a meritorious labour claim or complaint, or participate in an investigation by relevant authorities, in relation to their employer's labour or immigration contravention.

This visa should be available to workers whose visa would expire or be cancelled before their claim is resolved, or who are undocumented.

[19] See Senate Select Committee on Temporary Migration, ***Final Report*** (September 2021), xvii Recommendation 31.

International precedents

A number of foreign jurisdictions have introduced visas to address migrant worker exploitation but have done this in a partial way that does not effectively encourage a broad range of migrant workers to address exploitation at work.

In Canada the Vulnerable Worker Open Work Permit (**VWOWP**) program was introduced in 2019. The VWOWP is available for employer-sponsored workers who are, or are at risk of, being abused in relation to their job.[20] Abuse includes a range of physical harms or threats to safety at work as well as financial abuse including non-payment or underpayment of wages, among others. The VWOWP may be issued for up to 12 months, with work rights, and permits unlimited work in Canada so that the worker can leave their employer and find a new sponsoring employer. Assistance with government authorities' investigations is not required.

However, the program has been subject to criticism. Analysis by one migrant rights organisation of the written reasons given by immigration officers for grants and refusals of VWOWPs has revealed the application of inconsistent standards about what constitutes sufficient evidence of abuse and the scope and level of abuse which is considered sufficient for a grant of this visa.[21] Advocates also point to the complexity of demonstrating exploitation in order to obtain the VWOWP and the resulting drain on the resources of community-based legal service providers and unions supporting these workers.[22] In addition, workers are ineligible for the Open Work Permit when their sponsored visas have become invalid because they have already left their exploitative employer sponsor.[23]

New Zealand introduced the Migrant Exploitation Protection Work visa in 2021.[24] It is available for employer-sponsored workers who wish to quickly leave exploitative employment. In order to be eligible for this six-month visa, a worker must report their exploitation to Employment New Zealand and obtain a Report of Exploitation Assessment letter, which the agency usually provides within a couple of weeks.[25] Immigration New Zealand applies a low threshold for evaluating the claim, which must only be 'credible'. The visa is not available to workers who claim 'minor or insignificant breaches of labour standards that are un-sustained and easily remedied' (including inadvertent miscalculation or short-term failure to implement a statutory increase in minimum wage).

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[20] Government of Canada, '**Open Work Permit for Vulnerable Foreign Workers who are Victims of Abuse**' https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/permit/temporary/vulnerable-workers.html.

[21] Amanda Aziz, **A Promise of Protection? An Assessment of IRCC Decision-Making under the Vulnerable Worker Open Work Permit Program** (Migrant Workers Centre and the Law Foundation of British Columbia, 2022), 16.

[22] Ibid 12.

[23] The VWOWP is available only to workers who currently hold a valid employer-specific work permit.

[24] Immigration New Zealand, 'Information about: Migrant Exploitation Protection Work Visa' https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/migrant-exploitation-protection-visa.

[25] Interview with New Zealand Ministry of Business, Innovation and Employment (19 October 2022).

The inclusion of unlimited work rights in the New Zealand and Canadian visas is critical to their effectiveness and uptake. However, these visas are fundamentally designed to increase portability for employer-sponsored workers, enabling them to leave their jobs when they experience exploitation. They do not specifically encourage these workers to pursue claims or otherwise hold their exploitative employer to account. They do not protect workers other than those on employer-sponsored visas (e.g. they are not available for international students or Working Holiday Makers), nor any worker who participates in union action to address the exploitation.

In Hong Kong migrant domestic workers (who have only two weeks at the completion of their employment contract to find an alternative sponsoring employer or leave the country) may seek an extension of stay if they are pursuing a claim in the Labour Tribunal.[26] This extension is typically given for up to one month; it must be repeatedly renewed if the worker is to remain in Hong Kong long enough to attend a Labour Tribunal proceeding, which lasts around six months on average.[27] As this visa extension does not carry work rights, it is practically available to a very small number of workers, because the vast majority are unable to support themselves in Hong Kong without income, and humanitarian assistance for these workers is extremely limited.

In Malaysia, migrant workers may apply for a 'Special Pass' - a temporary pass issued to a person who wishes to remain in Malaysia 'for any special reason', including filing a wage claim against their employer.[28] The permit is valid for one month and may be extended at the immigration officer's discretion up to a maximum of three months.

In 2019, a Memorandum of Understanding entered into force between Nepal and Malaysia regarding migrant workers, which included a special arrangement requiring the Malaysian Government to provide Nepali workers, who they have filed a complaint, a Special Pass which regularises their stay until the labour dispute is settled.[29]

This may be of limited utility to migrant workers wishing to recover unpaid wages because the Special Pass is both limited in time and does not authorise employment, while court processing of wage claims may last 6 months or more.

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26 See New Condition of Stay, 1987.

27 Amnesty International, ***Hong Kong SAR: Submission to the United Nations Committee on the Elimination of Discrimination Against Women*** (Report, 2014), 11.

28 ***Immigration Regulations 1963***, reg. 14. Apparently, the phrase 'for any special reason' has been interpreted to include bringing a legal claim against an employer: see Michael Gay and Craig Bosch, ***Report on Review of Malaysia's Labour Dispute Resolution System*** (Report, March 2020) 73. See also Sabrina Kouba and Nilim Baruah, ***Access to the Labour Market for Admitted Migrant Workers in Asia and Related Corridors*** (Report, 2019), 32; ILO, ***Access to Justice for Migrant Workers in South-East Asia*** (Report, 2017).

29 ***Memorandum of Understanding between the Government of Nepal and the Government of Malaysia on the Recruitment, Employment and Repatriation of Workers***, signed 29 October 2018 art 6 https://www.ceslam.org/uploads/backup/GoN_2018_MoUNepalAndMalaysia.pdf.

This places migrants at risk of having to leave Malaysia before their case has concluded, being held in detention centres, and having to live without a regular income over this period. It is not known whether applications for the Special Pass are in fact being made or granted.

Our proposal builds on these overseas initiatives to provide a framework for a visa available to a broad range of migrant workers to address exploitation at work before they are required to depart Australia.

Eligibility requirements mirror protections against visa cancellation

Visa conditions should clearly incentivise workers to seek help and lodge complaints when they have a meritorious claim of non-trivial workplace non-compliance. Like the protection against visa cancellation, determination of applications for the visa must be swift and straightforward in order to be taken up by migrant workers.

A short determination process will also remove any incentive to lodge unmeritorious applications in order to remain in Australia during the visa determination process. The basic eligibility criteria for this visa should mirror the framework for protection against cancellation:

1. Available by application by a worker who is taking action to address a **non-trivial breach** of labour law or assist with an immigration compliance action against an employer - the definition for which may be provided in Regulations, instrument or policy, to mean a repeated or systemic breach, resulting in damage or loss over a particular threshold (e.g. $2,000, in the case of underpayment);
2. Evidence that the worker has a **meritorious claim** that a contravention has occurred and is taking action to address it. This can be demonstrated by:
    a. Certification by a government enforcement agency that it is conducting inquiries in relation to the visa-holder's employment;
    b. A court, tribunal or commission issuing a 'temporary stay certificate' certifying that a worker's ongoing presence in Australia is required for the conduct of its proceedings; or
    c. Certification by an employment law practitioner who holds specialist accreditation from their relevant society, or is employed in a union, a government-funded legal service or a pro bono practice in a commercial firm. The legal practitioner must certify that there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law in relation to the visa-holder's employment, or that the worker is pursuing a legal remedy in relation to an alleged workplace contravention through negotiation with the employer or a legal application to an appropriate forum.

The applicant is also required to evidence that they have reported the contravention to a relevant government authority.

Visa structure, duration and conditions

The Workplace Justice visa should be a substantive visa with the following features:

1. The validity period should be 6-12 months, at the delegate's discretion depending on the form, quality and content of evidence of the merits and progress of the investigation, complaint or claim. This enables a worker to participate fully in an enforcement action, union action or file a legal claim and remain present through the hearing. In 2020-21, 52% of cases in the Federal Circuit Court were finalised in more than six months.[30] One government authority shared that a period of no less than 12 months is required for a migrant worker's effective participation in an enforcement action. The visa should remain valid for the approved period regardless of whether a worker has settled a legal matter, because conditioning visa validity on the matter remaining on foot may discourage settlement. Policy should state that, if the delegate has concerns about the bona fides of the settlement, the delegate may require certification of the bona fides of the settlement from an employment law practitioner who holds specialist accreditation from their relevant society, or who is employed in a union, a government-funded legal service or a pro bono practice in a commercial firm.
2. The visa-holder may apply for a subsequent Workplace Justice visa if they can demonstrate that a legal process or investigation remains on foot (a higher threshold than for the initial visa). This is critical because providing access to this visa only once would enable an unscrupulous employer to unduly extend a negotiation or legal proceedings until the expiry of the visa, forcing the worker to depart without remedy.
3. The visa-holder is permitted to work. Without income obtained through work rights, most migrant workers would be unable to remain in Australia in order to pursue a claim. This would result in the visa either having very limited take-up (as has been the case with Malaysia's Special Pass), or visa holders would engage in unauthorised work to support themselves, thus compounding the problem which the visa is intended to address.
4. Condition 8516 should apply ('[t]he holder must continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa'). Policy should clarify that this Condition ensures that the visa-holder does not abandon the claim or cease to cooperate with authorities. This Condition ensures that the visa holder and employer are not complicit in labour contraventions to facilitate a worker's stay in Australia. However, the visa remains valid where the worker settles the claim (because the contrary position would disincentivise swift settlement of claims). If DHA believes the settlement could not reasonably be considered genuine, this could be construed as abandonment of the claim.
5. Where a migrant worker transitions from a substantive visa to a Workplace Justice visa, the Workplace Justice visa should have the same visa pathways as the previous substantive visa.

[30] Productivity Commission, ***Report on Government Services*** (2022), Part C, Section 7. The proportion of such cases for state Magistrates courts was between 20% and 67% in the same period.

Availability of the visa to undocumented workers, including upon detection

The visa should be available to an applicant whose previous visa has been cancelled,[31] as well as those who have been detected by DHA as in breach of their visa or who are subject to removal. We recognise this aspect of the proposal carries potential concerns. These include the potential for meritorious claims to be brought in order to avoid removal and the related need for legal services to support a potentially significant number of meritorious time-sensitive claims.

The availability of the visa post-detection might also be said to carry the potential for unmeritorious claims to be brought as an advance-planned defensive move against removal by unscrupulous agents, with the further possibility of a worker abandoning the claim and disappearing again.

There are several responses to these concerns. First, as set out above, the visa requirements involve a level of integrity assurance and it is highly unlikely that unscrupulous operators would be able to collate the evidence required readily or in advance. Secondly, and perhaps more importantly, undocumented workers are the most vulnerable to serious forms of exploitation and coercion and are therefore most unlikely to pursue remedies against their employers while undocumented.

This cohort is especially vulnerable to forced labour and modern slavery. If government wants to receive information from workers that enable it to prosecute wage theft, forced labour, modern slavery, and other offences, it must create the possibility and incentives for these workers to come forward – regardless of their motivation for doing so.

Over time, increased intelligence and enforcement in relation to these employers (and the increased prospect of this occurring) will disincentivise and reduce employment, and exploitation, of undocumented workers.

Though it could be argued that these workers ought to apply for the visa prior to detection, many would likely be unaware of the visa and would only learn of it upon detection. Others may be too afraid to pursue action against their employer while still working, particularly if they are in coercive situations or indebted and beholden to unscrupulous agents.

Encouraging these workers to pursue claims upon detection can bring further unlawful or criminal activity to light and can supplement government's enforcement resources.

[31] In other words, reg 2.12 should be amended to ensure that the s 48 bar does not apply to this visa.

On balance, if government is serious about breaking the cycle of migrant worker exploitation and detecting and prosecuting forced labour and modern slavery, hypothetical concerns about potential misuse of the visa are far outweighed by the significant systemic benefit of enabling undocumented workers to remain in Australia for a short period to bring claims upon detection. The potential for misuse can also be mitigated in several ways.

First, to address the risk of undocumented workers abandoning a claim, shorter initial stay periods (say 3 rather than 6 months) might be utilised. Second, the integrity safeguards discussed in the next section would mitigate against any concerns that might exist regarding false or fraudulent applications.

V. Ensuring integrity of these reform measures and mitigating downsides and risks

The proposed reforms contain a range of measures to protect the integrity of the migration system and minimise risks of misuse of the protections or other undesired outcomes. In addition to those discussed in relation to undocumented workers in the previous section, these include responses to the following downsides and risks:

1. False or unmeritorious claims brought to take advantage of protection from visa cancellation or obtain a short-term visa.

Eligibility criteria for protection against cancellation and the Workplace Justice visa are stringent with multiple layers of potential consequences for falsified or unmeritorious claims. These include: requirement of certification by a lawyer subject to professional discipline; restriction of eligible certifying lawyers to employment law experts in non-profit contexts (unions, government-funded lawyers, pro bono practices) with no financial incentive to bring claims; restriction of claims to non-trivial breaches with minimum threshold requirements; and for the visa, a condition that the claim is not abandoned, and the duration of the visa is contingent on the strength of evidence of pursuit and progress of a claim.

2. Large numbers of valid claims brought to obtain protection from visa cancellation in order to extend a worker's stay, which may exacerbate DHA visa processing backlogs.

If the objective of the immigration protections is to increase reporting of employer exploitation by migrant workers (and forced labour and modern slavery), the primary motivation for migrant workers bringing meritorious claims is irrelevant, and the government will benefit from incentivising more workers to come forward.

There are natural constraints on the number of migrant workers that will seek to engage the proposed protections. These include: the stringent eligibility criteria and certification requirements; the restriction to non-trivial contraventions; the difficulty and work involved in substantiating and and pursuing an employment complaint or claim; the short period of validity of the visa; and the risk that the DHA may not grant the worker the immigration benefit they are seeking.

3. Immigration benefits may incentivise workers to enter into, or stay in, exploitative work in order to establish a claim that can provide an immigration benefit.

For the reasons set out in (1) and (2), it is unlikely that migrant workers would subject themselves to non-trivial contraventions in order to obtain these immigration benefits. To the extent that this is hypothetically possible, the mitigation strategies for this prospect are outlined in the previous section.

4. Advance collusion between migrant workers and employers to manufacture a claim and either prolong the process or settle claims in order to manipulate immigration benefits.

There is a natural strong disincentive to an employer acting in this way: a condition of the immigration benefits is that the employer's contravention is reported to the relevant authorities. The safeguard against a prolonged process is the short duration of the visa and certification of the merits of the claim either by a government agency, a court or an expert employment lawyer with no financial incentive to pursue a protracted or unmeritorious claim.

It is not possible to completely eliminate risks. However, given the pervasive, entrenched nature of migrant worker exploitation, the prospect of making genuine systemic inroads into labour non-compliance in Australia justifies the mitigated risks outlined above. New incentive structures are necessary to reverse the strong incentives currently in place for migrant workers to stay silent.

VI. Conclusion

Current visa settings (including the operation of cancellation powers, the weakness of the Assurance Protocol and the lack of a purpose-built visa that enables a worker to stay in Australia to pursue a complaint) ensure that most labour noncompliance remains undetected. The Bridging visa E is currently the only avenue available to a worker to regularise their stay, but this does not provide sufficient security of stay to incentive reporting.[32]

[32] Alternatives would include the undesirable improper use of the Medical Treatment visa or the Protection visa process.

These reforms begin to break the entrenched cycle of exploitation and expand government's enforcement of labour law. They work to change employer behaviour by increasing the likelihood that exploitation will come to light and they will be held to account. This is because these new protections expand 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. These models also increase detection of exploitation among federal and state government agencies because migrant workers who use them are required to report claims to those regulators. They create 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.

Business' ability to detect and address wage theft and modern slavery in supply chains is enhanced by enabling migrant workers to more safely report it. At the same time, these reforms do not create any new red tape for businesses that do the right thing and comply with employment laws.

These models encourage migrants to join unions and assisting unions to organise and represent migrant workers. The protections benefit migrants on a range of temporary visas, as well as those who have overstayed a visa. For example:

- An exploited international student who has worked more than 40 hours a fortnight in breach of their visa (often to make ends meet on unlawfully low wages) would be willing to bring a claim against their employer and recover the wages they are owed because they have certainty that their visa would not be cancelled.
- A sponsored worker whose employer illegally demanded the migrant pay back the sponsorship fee could access a short-term visa to recover this unlawful payment, before finding another sponsor for a new work visa.
- An exploited backpacker who is about to leave Australia but didn't want to report sexual harassment during their fruit-picking job could access a short-term visa to stay for a short period to hold their employer to account before returning home.

The proposal also benefits employers that pay their workers correctly and want a level playing field, as well as businesses that want to detect and address exploitation and modern slavery in their supply chains.

Additional beneficiaries of this proposal include federal and state governments that want to strengthen enforcement of labour laws, unions that want to engage and recruit migrant workers and consumers that want greater assurance that goods and services are not produced through exploitation of migrant workers.

Finally, whistleblower reforms will benefit workers in Australia more broadly, when employment standards are more likely to be enforced and a race to the bottom is disrupted. In the absence of the robust whistleblower protections we propose, labour enforcement in Australia will continue to be seriously compromised and employers will reasonably expect migrant workers to remain silent in the face of systemic exploitation.