

WEstjustice

14 December 2022

Dr Martin Parkinson AC PSM, Dr Joanna Howe, and Dr John Azarias
Eminent Persons Panel - Review of Australia's Migration System
co/ Department of Home Affairs

Submitted online

Dear Dr Parkinson AC PSM, Dr Howe and Dr Azarias

A Migration System for Australia's Future

Thank you for the opportunity to make a submission to inform the Government's review of Australia's migration system and your drafting of the *Strategy: A Migration System for Australia's Future*.

WEstjustice would like to take this opportunity to provide recommendations in relation to the prevention of migrant worker exploitation, including in relation to international students.

Migrant worker exploitation is entrenched in many industries across Australia and our experience providing legal advice to migrant workers is that unlawful employer conduct goes undetected and unpunished, because migrant workers will not report it for fear of losing their job, their ability to stay in Australia, or jeopardising a future visa and employment opportunities. Migrant workers (and migrant business owners) are often unaware of workplace rights and entitlements, including whether and how Australian employment law applies to non-citizens.

In this environment, Australia's migration settings impede reporting of workplace exploitation. This review provides an excellent opportunity to revisit and remedy the systemic barriers that contribute to exploitation of migrant workers, and create new pathways and programs to support migrant workers finding and remaining in safe, decent and fair work.

About WEstjustice

[WEstjustice](#) is a community legal centre providing free legal help, financial counselling and support to people in the Western suburbs of Melbourne, Victoria. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, and a growing Aboriginal and Torres Strait Islander community.

WEstjustice believes in a just and fair society where the law and its processes do not discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services.

The Employment and Equality Law Program at WEstjustice was established in 2014, primarily to provide free legal advice to migrant workers (including refugees and humanitarian entrants), and since then has continued to offer legal and work rights education to international students, young people, migrants and refugees, and people experiencing family violence. The majority of our employment law clients are migrants, international students or from multicultural backgrounds.

Migrant worker protections

On 5 December 2022, WEstjustice made a joint submission with JobWatch Inc, South-East Monash Legal Service and the University of Melbourne Student Union Legal Service to the Employment Taskforce on its Employment White Paper Terms of Reference. This submission included recommendations relating to migration settings and access to legal education and assistance which we consider relevant for the Department of Home Affairs' migration system review.

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We submitted that systemic barriers in our legal system must be removed to prevent exploitation of migrant workers. We must ensure that migrant workers are:

- Protected from deportation or visa cancellation (and threats of deportation by employers are punishable)
- Supported to report wage theft, underpayments and other breaches of the *Fair Work Act 2009* (Cth) (**FW Act**), and
- Encouraged to take action to recover wages and entitlements owed to them.

Our key recommendations to prevent migrant worker exploitation are as follows:

1. Permanently abolish condition 8105 of the Migration Regulations 1994 (Cth)

This condition prevents international students from working more than 40 hours per fortnight when their course of study or training is in session. It is regularly used by employers to exploit workers (including wage theft, discrimination, bullying and sexual harassment) and is used as the basis for threatening deportation of a worker for exercising their workplace rights and/or complaining about workplace conditions and entitlements. Condition 8105's suspension during the pandemic has worked well and its abolition would continue to assist during this time of economic recovery by encouraging international students to return to our shores.

2. Extend the Fair Entitlements Guarantee (FEG) to all workers, including those on temporary visas, and ensure it covers superannuation.

Despite paying taxes and performing work alongside Australian citizens, temporary migrant workers are excluded from many basic entitlements including access to the FEG and social security. Many of our clients, including international students, are not eligible for FEG purely due to their temporary visa status. This discrimination must be addressed – all employees that support the Australian economy should be able to access the FEG.

3. Amend the FW Act and the Racial Discrimination Act 1975 (Cth) (RD Act) to include protection from discrimination based on nationality and visa status.

The current use of 'race' in Federal anti-discrimination law is narrow and out of step with modern human rights-based protections against racial discrimination of all forms and provides loopholes for racial discrimination to occur. While there is protection for discrimination based on national origin and immigrant status, this does not cover the spectrum of discriminatory experiences of migrant workers.

WEstjustice recommends that the FW Act and RD Act should be amended to clarify that they include protection from discrimination on the basis of 'visa status' and 'nationality'. This could be done by adding new attributes or clarifying the existing definition of 'race'.

4. Provide effective visa and whistle-blower protection for migrant workers seeking redress from workplace exploitation.

Migrant workers must be protected from deportation or visa cancellation when they act against exploitative employers or report unlawful conduct. This includes protection when reporting wage theft or underpayments, and when seeking recovery of underpayment of wages and entitlements through a complaint made to Fair Work Ombudsman (FWO) or claim made in the courts.

WEstjustice refers to the submission of the Migrant Justice Institute in relation to this Migration review and endorses their recommendation for a "Workplace Justice Visa", available to temporary migrants who take action against their employer for non-trivial breaches of employment or other laws, which allows the holder to remain in Australia and work full-time for a short period while pursuing their legal action or government investigation against their employer.

5. Strengthen the Assurance Protocol between FWO and the Department of Home Affairs.

Our Employment White Paper submission refers to previous advocacy efforts in relation to the Assurance Protocol and recommends that it be strengthened. WEstjustice clients are very commonly unwilling to report workplace exploitation due to the threat of deportation and in our experience, the Assurance Protocol between the FWO and the Department of Home Affairs has been of limited utility to our clients. They remain too frightened about the possibility of visa cancellation to seek to enforce their workplace rights and are unwilling to share information with the FWO about them breaching their visa conditions.

WEstjustice refers again to the submission of the Migrant Justice Institute in relation to this Migration Review and endorses their recommendations to introduce effective protection against visa cancellation for temporary visa-holders who take action against their employer.

The Assurance Protocol is not available for exploited workers in relation to whom the FWO is not making inquiries due to lack of agency resources or any other reason (such as the claim being made in the courts or about a matter to which the FWO has no jurisdiction, such as anti-discrimination law). As a result, availability of the Protocol is not assured and entirely outside the worker's control.

The Assurance Protocol must therefore be strengthened to ensure there is no risk of deportation or visa cancellation when a disclosure of a visa breach is made when a worker is taking action against their employer's non-trivial breach of employment, anti-discrimination or migration law.

6. Increase funding for community based legal assistance & education

It is well established that migrant workers face significant barriers to accessing safe, fair and decent work, obtaining legal help, and achieving rights enforcement. This includes fear of authority, language barriers, low rights awareness, fear and misunderstanding about the role of regulators and lawyers, limited options for help, and fear of loss of employment and deportation.

Action research by WEstjustice in our reports [Not Just Work \(2016\)](#) and [Ignorance is NOT Bliss \(2022\)](#) has found that that educating workers on workplace rights removes some of those barriers and empowers them to speak up for their rights against exploitative working conditions. Targeted assistance from a trusted service further assists those clients take action to enforce their rights. However, there is inadequate funding for community legal centres to meet the needs of the community.

The Federal Government and/or the FWO should therefore provide greater (and recurrent) funding to community legal centres to ensure that migrant workers are able to obtain legal advice and progress their claims to completion.

The Federal Government should provide recurrent or ongoing funding for specialist work rights education programs to raise awareness of workplace laws, rights, entitlements, and build trust and accessibility of services. CLCs are well-placed to deliver this training given their strong links to multicultural communities. Moreover, work rights training must be incorporated into schools, TAFE and university induction programs, and made accessible for international students.

Other recommendations

In addition to the above changes required to protect migrant workers, we strongly recommend:

- the *Migration Act 1958* (Cth) and the FW Act are amended to clarify that labour protections (including the FW Act and all anti-discrimination and anti-vilification laws) apply to migrant workers, including those on temporary visas.
- The FWO and Department of Home Affairs must take responsibility to ensure that all migrant workers are informed of their workplace rights on arrival in Australia, including the availability of workplace rights education, free, confidential legal advice from community legal centres, and free access to the Fair Work Ombudsman and anti-discrimination Commissions for information.
- The FWO, and any other Federal regulator that in future may be charged with investigating and/or prosecuting wage theft or recovery of underpayment of workplace entitlements, must be properly funded and resourced to take a proactive role in enforcing Australia's labour laws.

More information

For more information, including case studies and detailed explanation of our recommendations, please see our previous submissions made on migrant worker exploitation and related topics:

- [Joint Submission to the Employment Taskforce \(Treasury\) on the Terms of Reference for the Employment White Paper, 5 December 2022](#)
- [Joint Letter to the Minister for Employment, 20 July 2022](#)
- [Joint Submission by WEstjustice, SMLS and JobWatch on the Exposure Draft of the Migration Amendment \(Protecting Migrant Workers\) Bill 2021, 16 August 2021.](#)
- [Joint submission by WEstjustice, SMLS and JobWatch to the Senate Select Committee Inquiry on Temporary Migration, 30 July 2020](#)
- [Joint submission by WEstjustice, Migrant Employment Legal Service and Redfern Legal Centre to the Senate Standing Committee on Economics Inquiry into unlawful underpayments of employees' remuneration, March 2020](#)
- [Joint Submission by WEstjustice and SMLS to the Victorian Legislative Assembly Economy and Infrastructure Committee on the 2019 Inquiry into Sustainable Employment for Disadvantaged Jobseekers, August 2019](#)
- [WEstjustice submission to the Inquiry into the Victorian On-Demand Workforce, February 2019](#)

Please contact me on (03) 9749 7720 or by email jennifer@westjustice.org.au if you would like further information or would like to discuss our recommendations.

Yours sincerely



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