Submission on the Exposure Draft of the draft Migration Amendment (Protecting Migrant Workers) Bill 2021

WESTJUSTICE COMMUNITY LEGAL CENTRE

SPRINGVALE MONASH LEGAL SERVICE

JOBWATCH INC

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This submission can be attributed to WEstjustice Community Legal Centre, Springvale Monash Legal Service and JobWatch Inc.

We note that the views expressed in this submission are those of WEstjustice Community Legal Centre, Springvale Monash Legal Service and JobWatch (who together deliver the International Students Employment and Accommodation Legal Service), not the Department of Jobs, Precincts and Regions.

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List of defined terms in this submission

ABN	Australian Business Number
AHRC	Australian Human Rights Commission
DHA	Department of Home Affairs
FW Act	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
ISEALS	International Student Employment and Accommodation Legal Service
Migration Act	*Migration Act 1958* (Cth)
Migration Regulations	*Migration Regulations 1994* (Cth)
OHS	Occupational Health and Safety
SMLS	Springvale Monash Legal Service
VEOHRC	Victorian Equal Opportunity and Human Rights Commission

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1. Our organisations

1.1 WEstjustice's Employment and Equality Law Program (EELP)

WEstjustice is a community legal centre that provides free legal help and financial counselling support to people living in the western suburbs of Melbourne. We service the legal needs in the West in a way that addresses the systemic nature of disadvantage. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services.

The WEstjustice EELP seeks to improve employment outcomes, community participation and social cohesion, and reduce disadvantage, for vulnerable workers including migrants, refugees, asylum seekers, international students and other temporary visa holders, young people and women who have experienced family violence. We do this by empowering target communities to understand and enforce their workplace rights through the provision of quality tailored legal education, advice and casework services, and by using evidence from this work to effect systemic policy or legislative change aimed at improving the lives of all workers.

To date our service has recovered over $550,000 in unpaid entitlements or compensation, trained over 2000 community members and agency staff, delivered seven roll-outs of our award-winning Train the Trainer program, and participated in numerous law-reform inquiries and campaigns.

Based on evidence from our work, and extensive research and consultation, WEstjustice released the Not Just Work Report, outlining 10 key steps to stop the exploitation of migrant workers.[1]

1.2 Springvale Monash Legal Service (SMLS)

SMLS aims to empower and support members of the community to understand and make use of the law and the legal system to protect their rights and to increase their awareness of their legal responsibilities. High proportions of our clients are from culturally and linguistically diverse backgrounds and have limited access to the legal system due to language barriers, lack of formal education and financial disadvantage.

SMLS has locations throughout the City of greater Dandenong, the City of Casey and the Shire of Cardinia. SMLS recognises that there is an ongoing need within our local community for free employment law assistance for workers. The complexities and constantly shifting nature of employment law is often difficult for our clients to navigate, particularly for clients from CALD communities. At SMLS we aim to empower clients to become better informed of their rights and of the legal avenues available to assert those rights. Our employment law service provides advice and assistance in relation to; unfair treatment in the workplace, unfair dismissal, workplace bullying, discrimination, disputes regarding unpaid or underpaid wages, unpaid leave, redundancy, sham contracting and other entitlements.

Out of 2447 clients we assisted between 2016 and 2020 regarding an employment matter, approximately:

- 11% were born overseas and arrived in Australia in the last 5 years

[1] Catherine Hemingway (2016) *Not Just Work: Ending the exploitation of refugee and migrant workers*, available at <https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-1.pdf and https://www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-2-(1).pdf> .

- 38% were born overseas and arrived in Australia in the year 2000 or thereafter
- 43% indicated their main language was a language other than English
- 8% required an interpreter
- 10% indicated they had a disability
- 7% were aged 25 years or younger
- 31% were over the age of 50
- 30% were visa holders
- 3% indicated they had experienced family violence
- 45 % identified as female
- 20% indicated they had dependent children or other dependents
- 7% indicated they were at risk of homelessness

In addition to our onsite employment law clinic, we operate a duty lawyer outreach service at the Fair Work Commission in partnership with Job Watch in response to ongoing need within our local community for free employment law assistance.

1.3 JobWatch Inc (JobWatch)

JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**)**;**
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 230,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time.

In the 2020-21 financial year, JobWatch assisted over 16,500 callers through the TIS. In addition, the legal practice gave legal advice and representation to over 500 clients. The vast majority of our callers and clients are not union members and cannot afford to get assistance from a private lawyer.

1.4 International Student Employment and Accommodation Legal Service (ISEALS)

Individually, the WEstjustice EELP, SMLS employment law service and JobWatch have assisted a wide range of temporary visa holders with employment law issues, including working holiday makers and asylum seekers.

Together, WEstjustice, SMLS and JobWatch deliver the ISEALS. Through the ISEALS, the centres provide free legal advice and ongoing casework to international students in Victoria with legal problems in relation to work or housing.

This submission focuses on our work with international students through this service, but is informed by our work with other vulnerable workers across Victoria (and Tasmania and Queensland for JobWatch).

2. Introduction

WEstjustice, Springvale Monash Legal Service and Jobwatch welcome the opportunity to make a submission on the Migration Amendment (Protecting Migrant Workers) Bill 2021 (the Bill).

The exploitation of Migrant workers in Australia is widespread. Possibly as many as half of all temporary migrant workers are being underpaid.[2] While we applaud the desire to address this exploitation, we have serious concerns about the effectiveness of this Bill. In addition, this Bill may contribute to negative consequences for workers.

If the government is aiming '*to send a strong message to temporary migrant workers that the Government is committed to combating migrant worker exploitation, supporting them to feel more confident and secure about working in Australia*', it must address the dangerous role certain visa conditions have in encouraging exploitation. Our current migration system creates and facilitates endemic exploitation. So long as it remains in its current form, we will continue to see alarming rates of migrant worker exploitation.

Migration status renders exploited migrant workers more likely to be deported with no pathway or support to make a claim in relation to exploitation. 'The preoccupation with migration status is undermining every concerted effort in Australia to effectively target the full remit of exploitation, including human trafficking, slavery and modern slavery more broadly, and to give workers the opportunity to share their experiences as a way of understanding and better targeting these operations.'[3] The limited work authorisation, limited right of residence, dependence on a third party for the right of residence, and limited access to services and social security, combined with financial pressures such as debt as a result of their migration pathway, distance from family support and a lack of familiarity with employment regulations all serve to contribute to systemic exploitation among migrant workers. These issues are exacerbated where there is low English language proficiency.

Current laws already prohibit knowingly employing someone in breach of their visa – but have overwhelmingly been used for visa cancellations (against workers) and not to enforce any penalty against employers. The limited pathways to permanency contribute to a culture of temporary workers being seen as disposable cheap labour.

We welcome the recent moves to lift current work restrictions for temporary visa holders in certain industries. This is the trajectory we need to continue on in the current economic and global health crisis. We strongly recommend permanently removing work limitations on visas, such as the elimination of condition 8105 for International Students, to reduce their vulnerability to exploitation. This would also remove an obstacle to international students taking legal action against wage theft. Employers would no longer be able to use the threat of visa cancellation over international students who complain of such conduct at work as a way of avoiding liability for wage theft. Some workers breach work rights because they are paid below minimum wage, and so feel they have to work more in order to have a liveable income.

Workers who have experienced exploitation must be given a visa pathway to ensure they will not be deported from Australia as a result of losing employment due to an employer becoming ~~prohibited or after they have rep~~orted exploitation. Employees who agree to provide evidence against their employers (or third parties, e.g. labour hire operators) should be able to remain in Australia for the duration of any proceedings and should receive amnesty from sanctions

[2] Joo-Cheong Tham 2019, We've let wage exploitation become the default experience of migrant workers, The Conversation, viewed 13 August 2021, <https://theconversation.com/weve-let-wage-exploitation-become-the-default-experience-of-migrant-workers-113644>.

[3] Segrave, M (2017) Exploited and illegal: The impact of the absence of protections for unlawful migrant workers in Australia. Melbourne: The Border Crossing Observatory and the School of Social Sciences Monash University. ISBN: 978-0-6481378-0-1

under immigration laws. As well as avoiding discrimination and injustice, such amendments will better achieve the policy aim of deterrence and compliance by encouraging employees to speak out about exploitation.

For women who are on a partner visa, the family violence provisions of the *Migration Regulations 1994* (Cth) (**Migration Regulations**) enable them to access permanent residency if a relationship breaks down due to family violence.[4] While there are serious flaws with this provision (for women who are not on this visa type– such as women not on temporary partner visas – there is no pathway available), a similar system could be implemented if a migrant worker experiencing exploitation depended on an employer for their visa and a pathway to permanency. This must be coupled with access to social security supports.

The close connection between the way in which we police our borders and how we manage the relationship between migrant workers and their employers is of great concern. In our experience, fear of contact with immigration authorities is pervasive among temporary visa holders. Augmenting the scope of DHA's involvement in policing migrant worker exploitation and coercion is highly likely to increase this fear and erode other FWO efforts and the Assurance Protocol. Instead, the difference between FWO and DHA must be emphasised to have any real positive impact for migrant workers. A key step to do this is through strengthening the Assurance Protocol.

We must also take this opportunity to call on the government to urgently extend coverage of the federal Fair Entitlements Guarantee program. This is an essential step in supporting migrant workers who have experienced exploitation.

Finally, the aims of this Bill will not be achieved without a concerted policy to enforce them. An appropriately resourced and empowered FWO would allow for the investigation and enforcement of breaches the law. Targeted enforcement and audit action, especially in key industries (including agriculture, construction, cleaning services and courier/distribution workers) is an important part of achieving systemic change to protect migrant workers from exploitation.

Overarching recommendations:
In order to achieve the aims of this Bill the Department must address the drivers of workplace exploitation for non-citizens by:

A. removing work restrictions on all international student visas;
B. providing a pathway to permanency for all temporary visa holders.
C. creating a limited firewall between the FWO and DHA so that vulnerable migrant workers can report workplace exploitation without fear of deportation;
D. strengthening the Assurance Protocol;
E. extending coverage of the Fair Entitlements Guarantee program to temporary visa-holders;
F. providing access to social security benefits for temporary visa holders;
G. providing visa protections to ensure exploited workers are not deported and can effectively enforce their rights.

[4] Segrave, M (2017) Temporary migration and family violence: An analysis of victimisation, vulnerability and support. Melbourne: School of Social Sciences, Monash University.

3. Table of recommendations

#	Recommendation
Overarching recommendations	
	In order to achieve the aims of this Bill, the Department must address the drivers of workplace exploitation for non-citizens by: A. removing work restrictions on all international student visas; B. providing a pathway to permanency for all temporary visa holders. C. creating a limited firewall between the FWO and DHA so that vulnerable migrant workers can report workplace exploitation without fear of deportation; D. strengthening the Assurance Protocol; E. extending coverage of the Fair Entitlements Guarantee program to temporary visa-holders; F. providing access to social security benefits for temporary visa holders; G. providing visa protections to ensure exploited workers are not deported and can effectively enforce their rights.
Part 1 – New employer sanctions	
1	We support the introduction of the new criminal offences and civil penalty provisions in proposed sections 245AAA and 245AAB**.** However, these measures must be supported by a proactive approach to compliance and enforcement in order to be effective.
Part 2 – Prohibited employers	
2	Provide additional rights and benefits to temporary visa holders to ensure they are not doubly disadvantaged by workplace exploitation. In addition to our overarching recommendation to extend social security benefits to temporary visa holders, this includes: a) an alternative visa which provides a pathway to permanent settlement is made available to temporary visa holders who: i) are on an employer-sponsored visa; and ii) cease working for their sponsor as a result of, or in connection with, being the victims of workplace exploitation (including if their employer is declared a prohibited employer); and b) establishing an accessible and effective mechanism through which migrant workers can report non-compliance with workplace laws and obtain remedies without fear of immigration consequences.
3	The grounds for a person being considered a 'prohibited employer' must be expanded to ensure that employers cannot continue to exploit non-citizens without consequence, by: a) amending subclauses 245AYA(2) and 245AYD(4) of the Bill such that the grounds for a person to be declared a 'prohibited employer' include circumstances in which: i) an employer has been subject to multiple compliance notices issued by the Fair Work Ombudsman; or ii) an employer has been subject to any other regulatory action indicative of a pattern of exploitation. b) amending proposed sections 245AYA(2) and 245AYD(4) of the Bill to expand the grounds on which a person to be declared a prohibited employer to include circumstances in which an employer has breached other workplace laws (including anti-discrimination laws and laws that govern OHS).
4	Amend proposed section 245AYD of the Bill to require that the Minister notify the FWO of an intention to declare an employer a prohibited employer, and

	provide the opportunity to the FWO to make submissions about why the decision should/should not be made.
5	We support the imposition of record-keeping requirements for formerly prohibited employers. However, in addition to the requirement that prohibited employers provide DHA with information about the identity, type of work to be performed, and visa conditions of non-citizens to be employed, we recommend that the Bill be amended so that: a) Formerly prohibited employers are also required to provide the FWO with the following information: i) The rate of pay that the non-citizen will be paid (including relevant penalty rates); ii) Evidence that the non-citizen has in fact been provided with these rates of pay; iii) The award, enterprise agreement, or other industrial instrument that provides the minimum terms and conditions of the non-citizen's employment (if any); iv) A statutory declaration: 1) indicating that they have complied with all workplace laws; and 2) outlining the steps they have taken to ensure that they have done so. b) The FWO is empowered to investigate and/or audit formerly prohibited employers to ensure their compliance with workplace laws.
6	The FWO must be adequately funded to conduct the investigations and audits in recommendation 5 b).
Part 3 – Use of computer system to verify immigration status	
7	Employers should be required to check the immigration status of all workers - not just those presumed to be non-citizens.
8	In addition to the requirement that required system users personally check the immigration status of non-citizen employees, we recommend that: a) the Bill be amended to mandate that required system users provide a statutory declaration to the Fair Work Ombudsman at the end of each financial year in which they are a required system user: i) indicating that they have complied with all workplace laws; ii) outlining the steps they have taken to ensure that they have done so; and b) the Fair Work Ombudsman be empowered (and funded) to investigate and/or audit required system users to ensure their compliance with workplace laws.
Part 4 – Aligning and increasing penalties for work-related breaches	
9	The quantum of penalties for work-related breaches should be increased to align with the serious contravention provisions in the FW Act.
Part 5 – Enforceable undertakings for work-related breaches	
10	We support the introduction of Enforceable Undertakings. However, these measures must be supported by proactive approach to compliance and enforcement in relation the work-related offences and work-related provisions of the Migration Act.
11	Provide additional resourcing to the FWO to investigate and act upon the exploitation of non-citizen workers.
12	Establish a new wage theft tribunal and make current court processes quicker and simpler.

Part 6 – Compliance notices for work-related breaches	
13	Agencies must improve cultural responsiveness frameworks including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.
14	Resource community legal centres to deliver dedicated employment law assistance and migration assistance to vulnerable migrant workers.

These recommendations are set out in detail in our full submission below.

4. Part 1 – New employer sanctions

Part 1 of Schedule 1 of the Bill proposes new criminal offences and civil penalty provisions to better protect migrant workers from exploitation. Section 245AAA makes it an offence for a person to coerce or exert undue influence or pressure on a non-citizen to breach a work-related visa condition. Section 245AAB makes it an offence for a person to coerce or exert undue influence or pressure on a non-citizen to agree to work in order to avoid an adverse effect on their immigration status or that would otherwise result in the non-citizen being unable to satisfy a work-related visa requirement. Each of these new offences has a parallel civil remedy provision for which it is not necessary to prove a person's state of mind.

We largely support these proposed amendments, noting that they are in line with recommendation 19 of the Migrant Workers' Taskforce Report (published in March 2019). We agree that our legal framework must do more to dissuade unscrupulous employers and related parties from inducing visa holders to either breach their visa conditions or work in dangerous or unfair workplaces in order to comply with the migration rules.

We note that apart from these new additional provisions, section 245AC of the *Migration Act 1958* (Cth) already makes it an offence for a person (e.g., an employer) to allow a visa holder to work in breach of their visa conditions unless that person took reasonable steps to verify that the worker was not in breach of their visa conditions. However, we are of the view that there are too few prosecutions under this provision and the few successful cases that do exist have not resonated strongly with employers or labour hire operators. Each of our centres continues to assist many international students every year who have, with the employer's knowledge and inducement, worked outside their visa conditions. The current provision of s245AC is clearly not enough of a deterrent. We are concerned that the two new offences and civil penalty provisions will similarly fail to deliver on the intended aims of better protecting temporary visa holders, unless a concerted effort is made to educate employers and labour hire operators about their legal obligations; to conduct prosecutions and to widely publicise any successful results.

Recommendation 1:
We support the introduction of the new criminal offences and civil penalty provisions in proposed sections 245AAA and 245AAB**.** However, these measures must be supported by a proactive approach to compliance and enforcement in order to be effective.

5. Part 2 – Prohibited employers

Part 2 of Schedule 1 of the Bill proposed to establish a framework for the Minister to declare certain employers to be 'prohibited employer' including where they are:

- convicted of a work-related offence under the Migration Act;
- The subject of a civil penalty order in relation to a work-related provision of the Migration Act;
- the subject of an order for contravention of certain civil remedy provisions under the FW Act in relation to the employment of a non-citizen.

While we are supportive of penalising employers for non-compliance with workplace laws, we are very concerned that the proposed framework for declaring certain employers to be "prohibited employers" may unfairly prejudice temporary visa holders who have been the victims of workplace exploitation. In particular:

a) We are concerned that temporary visa holders – who these provisions are designed to protect – will be inadvertently punished if they lose their job because their employer is declared a prohibited employer. The risk of this occurring may also prevent workers from complaining about workplace exploitation.
b) Workers whose visas are tied to their employers (e.g., visa subclasses 482, 186, 187 or 494) are particularly vulnerable to continuing work with exploitative employers. These workers should not face deportation if they can no longer fulfil the work conditions of their visa because their employer has been declared a prohibited employer (or have otherwise engaged in exploitative workplace conduct).

In our view this framework for prohibiting certain employers from employing additional non-citizens **must** be accompanied by additional rights and supports for temporary visa holders who have been exploited, if the Bill is to achieve its aims to enhance migrant worker protections, address exploitative behaviours in the workplace, and create an even playing field for employers who follow the law.

In addition, this framework must be expanded to reflect the reality of non-citizen's experiences of workplace exploitation.

5.1 Provide adequate supports for temporary visa holders who lose work because their employer is declared a prohibited employer

The Bill as drafted does not contain adequate safeguards to prevent a temporary visa holder whose employer has broken the law from being subject to visa cancellation. Our 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 has been of limited utility to our clients.

CASE STUDY: KRISHNA

Krishna is an Indian migrant who was working as an Indian cook on a sponsored visa. After realizing that his employer was not making the required superannuation contributions, he asked his employer about this and he was told words to the effect of: "I don't have funds to pay your super; it's you people that are supposed to be paying me." Krishna's employer went onto making several verbal requests for money, saying he needed money to pay tax and other debts. Krishna said he didn't have any money available and the employer immediately stopped paying his fortnightly wages. Krishna felt he had no choice but to continue working his full-time hours even though he was receiving no pay. Whenever he asked his employer about his pay, he was told "Pay me the amount that I am asking and I will pay your wages into your account." Eventually the employer threatened to tell the ATO that Krishna hadn't been working there in a bid to force Krishna to pay him. Krishna only sought legal assistance when his employment was terminated and he was extremely stressed about the impact of his dismissal on his ability to stay in Australia.

The family violence provisions of the Migration Regulations provide a pathway to permanent settlement for visa holders whose visa is tied to their spouse or partner, but whose relationship has ended because of family or domestic violence. A similar model should be applied in the employment space.

In addition, as the law currently stands, if an international student lost work because their employer was declared a prohibited employer, they would not be eligible for government support. During the COVID-19 pandemic, students commonly told us that they knew their work conditions were exploitative or inadequate, but they could not quit because they were ineligible for government support (including JobKeeper and JobSeeker). International students and other temporary visa holders who lose work because their employer has exploited them or others should be provided with an adequate safety net.

CASE STUDY: DAVI

Davi was engaged to work for $10 an hour at a delicatessen located in a fresh food market. She generally worked a maximum of 32 hours per fortnight, though there was one fortnight at the start of her university semester where she believed that she may have inadvertently worked in breach of her visa.

Her former employer did not pay her in full, even at the very low rates she had agreed to. After many months of trying to resolve the matter directly with her former employers, Davi sought help from an ISEALS lawyer. At that point, Davi was in severe financial hardship and was struggling to pay her rent and school fees.

Davi told her former employer that she had spoken to a lawyer and wanted him to pay her the money she was owed. Her former employer told her "if you speak to a lawyer, I will have you deported". Despite having been provided with migration law advice (including as to the effect of the Assurance Protocol), Davi remains too frightened about the possibility that her visa could be cancelled to report her former employer to the FWO.

Recommendation 2:

Provide additional rights and benefits to temporary visa holders to ensure they are not doubly disadvantaged by workplace exploitation. In addition to our overarching recommendation to extend social security benefits to temporary visa holders, this includes:

a) an alternative visa which provides a pathway to permanent settlement is made available to temporary visa holders who:
    i) are on an employer-sponsored visa; and
    ii) cease working for their sponsor as a result of, or in connection with, being the victims of workplace exploitation (including if their employer is declared a prohibited employer);
b) establishing an accessible and effective mechanism through which migrant workers can report non-compliance with workplace laws and obtain remedies without fear of immigration consequences; and
c) broadening the grounds for declaring a person to be a prohibited employer.

As noted above, the exploitation of migrant workers is a widespread issue. Our international student clients are rarely working in workplaces in which they are the only migrant worker. We agree that an employer who has breached workplace laws in respect of one type of visa-holding worker should not be permitted to engage other temporary visa holders.

While we support, we support the proposal to prohibit certain employers from employing additional non-citizens (noting our comments above that non-citizens must be protected from the adverse consequences of any such prohibition), these provisions alone will not prevent the exploitation of non-citizen workers. In particular, we consider it is necessary to expand the grounds on which the minister can declare a person to be a 'prohibited employer'.

CASE STUDY: PRISHA

Prisha was paid $12 an hour to work in an Indian restaurant. She brought a claim against her former employer, who eventually agreed to settle her matter. After this, Prisha heard that her former employer was still employing (and underpaying) temporary visa holders. When an ISEALS lawyer offered to speak with other underpaid employees, she told us that the employees in question could not complain, because they were being sponsored by her former employer.

Recommendation 3:

The grounds for a person being considered a 'prohibited employer' must be expanded to ensure that employers cannot continue to exploit non-citizens without consequence.

Accordingly, we recommend the following.

(a) *Prohibition on the grounds of regulatory compliance action*

The proposed provisions permit the Minister to declare an employer a "prohibited employer" if (among other things), they are subject to an order under the *Fair Work Act 2009* (Cth) (**FW Act**) for contravention of a civil remedy provision in respect of a non-citizen.

Obtaining an order that an employer has contravened a civil remedy provision under the FW Act sets very high bar which many vulnerable migrant workers will not be able to pass. Litigation to obtain such an order can take may take years, and we have seen many international students who have not been permitted to remain in the country long enough to obtain judgement.

CASE STUDY: VALERIA

Valeria worked as a cleaner for nearly three years, including throughout the COVID-19 pandemic. She was one of a number of migrant workers engaged at her workplace. Valeria as engaged as a part-time employee, but was not provided with any paid annual or carer's leave, and was paid below the minimum Award rates. Valeria's employment was terminated when her employer lost a significant amount of business as a result of the pandemic. The effect of suddenly being without income meant that Valeria had to drop out of her course and urgently return to her home country

An ISEALS lawyer assisted Valeria to calculate that her former employer owed her approximately $40,000. However, as she was no longer in Australia, it would be extremely difficult for her to bring a claim in court to recover that money. Even with the assistance of an ISEALS lawyer, the chances of obtaining an order that her former employer had breached a civil penalty provision of the FW Act were extremely low.

In addition, bringing such a case requires significant legal support and will remain inaccessible for most international students while funding to Community Legal Centres remains low. As a result, many of our clients opt to engage instead with the FWO (in the hope of having a compliance notice issued or litigation undertaken on their behalf).

Many international students are also too afraid of retribution by their former employer to make anything other than an anonymous complaint (see, e.g., Gloria and Reyna's case study below). The limited scope of the Bill as currently drafted would not permit the Minister to take into account this kind of engagement with the regulator – even if the FWO had received multiple credible or substantiated complaints from non-citizen workers or had issued compliance notices after making a finding that an employer had breach relevant workplace laws.

Recommendation 3(a):

Amend subclauses 245AYA(2) and 245AYD(4) of the Bill such that the grounds for a person to be declared a 'prohibited employer' include circumstances in which:

(i) an employer has been subject to multiple compliance notices issued by the Fair Work Ombudsman; or

(ii) an employer has been subject to any other regulatory action indicative of a pattern of exploitation.

(b) Prohibition on the grounds of breach of workplace laws, other than the FW Act

The poor treatment and exploitation of migrant workers is much broader than the conduct covered by the civil remedy provisions of the FW Act specified in the Bill. Our clients on temporary visas are also vulnerable to unsafe working conditions, sexual harassment, and discrimination at work. Of the 370 international students who have been provided with advice or assistance through the ISEALS program since 2019:

- 25 sought assistance with issues relating to OHS;
- 27 sought assistance with WorkCover;
- 25 sought assistance with workplace bullying;
- 27 sought assistance for discrimination; and
- 16 sought assistance for sexual harassment.

We consider these issues – in particular, bullying, discrimination, and sexual harassment - are likely to be significantly underreported by international students, who may not know that such behaviour is prohibited under Australian law, or may not want to take any action in respect of the conduct. Clients with these types of legal problems often only present to our service with other issues (for example, if they have lost their job, or not been paid).

While not necessarily a breach of the FW Act, such conduct on the part of an employer still constitutes a significant breach of Australian law and community expectations of the treatment of vulnerable workers. Employers who engage in these behaviours should not be permitted to continue to engage temporary visa holders.

CASE STUDY: MARTINA

Martina was engaged as a sham contractor working in a warehouse packing medical supplies during COVID-19. She was not only significantly underpaid, but, due to insufficient OHS protections in her workplace, suffered a serious injury requiring multiple surgeries. Many of her former colleagues are temporary visa holders, but under the current exposure draft of the Bill even very serious breaches of OHS laws could not be considered by the Minister in deciding whether to declare her former employer a prohibited employer.

CASE STUDY*: *GLORIA AND REYNA

Gloria and Reyna were collectively underpaid nearly $100,000 while working as essential workers in fresh food retailing during the COVID-19 pandemic. Both were subject to significant breaches of a wide range of workplace laws during their employment. Gloria experienced extremely serious bullying and racial and sex-based discrimination, while Reyna suffered a back injury due to insufficient OHS training and processes. Both were very scared of what their former employer would do to them if they made complaints. They instructed us that the other employees at their former workplace were a mix of international students and workers on "sponsored" visas. Despite the quantum of their underpayment and the seriousness of the other contraventions, only Gloria was willing to make a complaint to the FWO on a "non-anonymous" basis. Reyna told us that she was too scared of facing her former employer to make a complaint. Because of the strength of the evidence and the seriousness of the breaches, the FWO issued the employer a Compliance Notice on the basis of Gloria's complaint.

Even if the FWO issued further compliance notices in respect of Reyna's underpayment, and other regulators (e.g., WorkSafe or the VEOHRC) took action in respect of the employer's

other breaches of workplace laws, under the current framing of the Bill, the Minister could not declare Gloria and Reyna's former employer a prohibited employer unless or until a court order was issued. Both Gloria and Reyna want to return to their home country, and do not have the time or legal resources to bring a claim in court.

Recommendation 3(b):

Amend proposed sections 245AYA(2) and 245AYD(4) of the Bill to expand the grounds on which a person to be declared a prohibited employer to include circumstances in which an employer has breached other workplace laws (including anti-discrimination laws and laws that govern OHS).

5.2 Provide FWO with an opportunity to make submissions to the Minister regarding proposed declaration that a person is a "prohibited employ

Pursuant to proposed section 245AYD, in order for an employer to be declared a "prohibited employer", the Minister must first notify the employer in writing of the intention to make this declaration, and provide the employer with an opportunity to make submissions about why the minister should not make such a decision. The Minister must also have regard to any criteria prescribed by regulations, which are yet to be published.

However, as outlined above:

a. Our clients often report to us that the exploitation of non-citizens is widespread in the workplace; and
b. For a number of reasons, including fears of deportation or other negative repercussions, our clients are rarely willing to make formal reports regarding their workplace issues.

Given the difficulty of detecting the workplace exploitation of temporary visa holders (even when it is widespread), we are concerned that under the proposed framework, the Minister's decision-making process will be based on information that is skewed in favour of the employer in question.

On the other hand, the FWO has an extensive database of intelligence on exploitative employers which they collect through workplace investigations, requests for assistance and anonymous complaints. Indeed many of our more vulnerable clients (often those who are on temporary visas) are not willing to pursue a wage claim, but request that we make an intelligence report to the FWO in the hopes that it will take action in the future to protect other workers.

Given this, and given the FWO's experience in addressing workplace exploitation, we consider that the FWO must be provided with an opportunity to make submissions in relation to the Minister's decision to declare a person to be a prohibited employer.

Recommendation 4:

Amend proposed section 245AYD of the Bill to require that the Minister notify the FWO of an intention to declare an employer a prohibited employer, and provide the opportunity to the FWO to make submissions about why the decision should/should not be made.

5.3 More rigorous record-keeping requirements for formerly prohibited employers

Proposed section 245AYG of the Bill imposes additional record-keeping requirements on prohibited employers. We are generally supportive of the imposition of additional requirements on those that have previously broken the law. However, we consider that the

current drafting is a missed opportunity to impose meaningful oversight over a targeted cohort of high-risk employers.

In our experience, it is not uncommon for employers to continue to underpay and otherwise exploit vulnerable migrant workers, even after the employer has been subject of:

a. an order for contravention of a civil remedy provision under the FW Act,
b. regulatory compliance action from the FWO; or
c. civil penalties pursuant to the FW Act.

CASE STUDY: ROSA

Rosa worked as a cleaner during the COVID-19 pandemic. She was engaged in a sham contracting arrangement and was underpaid wages and superannuation. In addition, she felt uncomfortable by the way that her boss, Gary, treated her. Gary would approach Rosa from behind and hug her, and would repeatedly tell her how "beautiful" she was, that he "loved" her and was sure that they would "be together someday". Rosa blamed herself for Gary's behaviour and did not know that it was prohibited under Australian law.

When she was eventually fired from her job, she sought assistance from an ISEALS lawyer as her final invoices had not been paid. The ISEALS lawyer discovered that Gary had previously been ordered to pay a civil penalty of more than $50,000 following regulatory action taken by the FWO in respect of non-payment of international students. Despite this, more than 6 years later, he continued to engage in underpayment, sham contracting, and sexual harassment of our international student client.

Recommendation 5:

We support the imposition of record-keeping requirements for formerly prohibited employers. However, in addition to the requirement that prohibited employers provide DHA with information about the identity, type of work to be performed, and visa conditions of non-citizens to be employed, we recommend that the Bill be amended so that:

a) Formerly prohibited employers are also required to provide the FWO with the following information:
    - The rate of pay that the non-citizen will be paid (including relevant penalty rates);
    - Evidence that the non-citizen has in fact been provided with these rates of pay;
    - The award, enterprise agreement, or other industrial instrument that provides the minimum terms and conditions of the non-citizen's employment (if any);
    - A statutory declaration:
        - indicating that they have complied with all workplace laws; and
        - outlining the steps they have taken to ensure that they have done so.

b) The FWO is empowered to investigate and/or audit formerly prohibited employers to ensure their compliance with workplace laws

Recommendation 6:

The FWO must be adequately funded to conduct the investigations and audits in recommendation 5(b) above.

6. Part 3 – VEVO verification

Part 3 of Schedule 1 to the Bill proposes to include civil penalty provisions which require an employer to use VEVO to determine whether a prospective non-citizen employee has the necessary permission to work.

This part also provides that a non-citizen's immigration status and work-related conditions must be checked on VEVO before an employer can avail themselves of a defence to the existing work-related offences in the Migration Act relating to allowing or referring a non-citizen for work.

6.1 Mandate verifying immigration status for starting to allow, or referring, all workers for work

We strongly support requiring employers to take reasonable steps to verify a worker's immigration status before they are able to rely on a defence that they did not know they had engaged the worker in breach of their work conditions.

However, we are concerned that, as currently drafted, the requirement to verify a worker's immigration status only applies to non-citizens. This may have a number of unintended consequences, including that:

a. employers may be able to avoid the requirement to verify potential employees' immigration status simply by asking employees to make a false declaration declare that they are not non-citizens; and
b. employers may opt to only employ citizens (or those they presume to be citizens) to avoid the administrative burden of verifying a potential employees immigration status.

This situation could be avoided by not limiting the requirement to verify the immigration status to non-citizens. As in Mateo's case study below, we regularly see employers pressure international students to make declarations that are untrue so that employers can more easily avoid their legal obligations.

CASE STUDY: MATEO

Mateo worked for approximately two and a half years for a transport company. During that time, he was paid beneath the minimum Award rate and was not paid any superannuation. He was fired when he asked to be paid superannuation.

Mateo was engaged as an independent contractor, despite the fact that his boss provided him with all equipment and tools to do his job, required him to wear a uniform, directed him how, when, and where to do his work, and included his photo on the company's website and social media.

When Mateo first started working for the removalist company, his boss told him that he was going to send an email "offering" him a job as a casual employee, but told Mateo that he would only be able to give him the job if he rejecting that offer, and wrote that he preferred to work as an independent contractor with an ABN. Mateo did as he was told because he needed the job.

There is also a risk that limiting this requirement to those who are (or might be) non-citizens will lead to discrimination against prospective employees on the basis of race, colour, descent, national origin or ethnic origin. Many of our international student clients report to us that they are regularly the subject of discriminatory recruitment practices and struggle to compete for jobs with their local counterparts. Negative experiences at work make our clients feel unwanted and unwelcome, and our clients have often expressed feelings of disillusionment in relation to their experiences studying in Australia. As one client said to us recently:

> "*I am tired of this country and I just want to make it clear that I suffered racism for being an immigrant and abuse of work, they put me in a position where I was stuck with my work and could not leave, it was the worst moment of my life.... many entrepreneurs exploit students like me, they know that we need money so they put us to work 10 15 hours a day to get $100 bucks only"*

In order for Australia to remain a country of choice for international students to study abroad, laws must minimise the risk of discrimination against temporary visa holders.

Recommendation 7:
Employers should be required to check the immigration status of all workers - not just those presumed to be non-citizens.

6.2 More rigorous record-keeping requirements for required system users

Section 245APB provides for persons to be "required system users" - either because they have been a prohibited employer within the past twelve months, are part of a determined class of persons, or have been specifically declared.

We are supportive of the imposition of additional requirements on those that have previously broken the law or are in industries with a high risk of exploitation of temporary visa holders.

However, we consider that the current drafting is a missed opportunity to impose meaningful oversight over a targeted cohort of employers.

Recommendation 8:
In addition to the requirement that required system users personally check the immigration status of non-citizen employees, we recommend that:

a) the Bill be amended to mandate that required system users provide a statutory declaration to the Fair Work Ombudsman at the end of each financial year in which they are a required system user:
    a. indicating that they have complied with all workplace laws; and
    b. outlining the steps they have taken to ensure that they have done so; and
b) the Fair Work Ombudsman be empowered (and funded) to investigate and/or audit required system users to ensure their compliance with workplace laws.

7. Part 4 – Penalties for breach

Part 4 of Schedule 1 to the Bill proposes to increase the amount of work-related civil penalties under the Migration Act to 240 penalty units to align with penalties for breach of sponsorship provisions.

We are generally supportive of increased penalties. We recognise the value of ensuring that all work-related penalties align. The Exposure Draft Context Paper states that '*For financial penalties to have a deterrent effect, they must be set at a level that actually deters people from contravening and offending.*' However, these increased penalties may not have the desired impact unless combined with other significant changes to support migrant workers. For example, enhancing the enforcement powers of the FWO, increased powers for VEOHRC and AHRC, and greater resourcing to the Community Legal Sector to assist vulnerable workers. Many of these recommendations are discussed in our submission to the Select Committee on Temporary Migration (2020).

We are concerned that these increased penalties will not lead to significant change or repercussions for exploitative employers.

We note that the proposed increased financial penalties remain lower than penalties for corporations who contravene the civil penalty provisions under the FW Act, and significantly lower than the penalties payable by individuals and corporations for "serious contraventions".[5]

We are concerned that prescribing lesser penalties in the Migration Act sends the message that these types of breaches are not considered as serious as breaches of the FW Act.

Work-related offences in the Migration Act have severe consequences on individual migrant workers, and are widespread in Australia.

Recommendation 9:
The quantum of penalties for work-related breaches should be increased to align with the serious contravention provisions in the FW Act.

[5] Fair Work Ombudsman, 2021, https://www.fairwork.gov.au/about-us/compliance-and-enforcement/litigation

8. Part 5 – Enforceable Undertakings

Part 5 of Schedule 1 to the Bill proposes to establish a framework for the Minister, or the Minister's delegates to enter into enforceable undertakings with employers or other parties who have not complied with the work-related provisions of the Migration Act.

8.1 Enforceable undertakings for work-related breaches

The Exposure Draft Context Paper refers to the impact *'the actions of a few unscrupulous employers or labour hire intermediaries can have on Australia's reputation as a destination of choice.*' This is a serious underestimation of the problem. Research in this field has consistently demonstrated that exploitative practices, such as wage theft, are endemic among temporary visa holders.[6] The effectiveness of enforceable undertakings will be limited without stronger labour enforcement and genuine safeguards for visa holders to report exploitation and seek help without fear of jeopardising their current or future visas.

While we are supportive of the implementation of Enforceable Undertakings, we are concerned that without more effective law enforcement, employers will continue to act with impunity.

Recognising that migrant workers are not always able to bring a complaint themselves, agencies must be adequately resourced to identify systemic issues and respond proactively.

Recommendation 10:
We support the introduction of Enforceable Undertakings. However, these measures must be supported by a proactive approach to compliance and enforcement in relation the work-related offences and work-related provisions of the Migration Act.

Recommendation 11:
Provide additional resourcing to the FWO to investigate and act upon the exploitation of non-citizen workers.

8.2 Accessible justice pathways for migrant workers

There is currently no effective pathway providing access to justice for individual migrant workers to recover their wages that is timely, affordable and easy to understand. As set out above, it is often the case that our clients must return to their home countries before they are able to progress their wages claims to hearing.

We recommend establishing a new wage theft tribunal, facilitating individual wage recovery via mediation and enforceable orders, based on the applicant-led model for bringing unfair dismissal claims at the Fair Work Commission. We refer to Laurie Berg and Bassina Farenblum's submission to this inquiry on behalf of the Migrant Worker Justice Initiative (Submission 33) and refer the Department to recommendation 15 and in lieu of that recommendation 16. We support these recommendations.

Recommendation 12:
Establish a new wage theft tribunal and make current court processes quicker and simpler.

[6] See for example, Bassina Farbenblum and Laurie Berg, 2020, International Students and Wage Theft in Australia 8.

9. Part 6 – Compliance Notices

Part 6 of Schedule 1 to the Bill proposes to provide a framework for authorised offices to issue compliance notices in response to breached of work-related provisions of the Migration Act.

9.1 Improve cultural responsiveness frameworks

We are broadly supportive of additional compliance tools to respond to the exploitation of migrant workers. However, if we are going to be giving these powers to DHA, it is important that the Department understand and take steps to address the various barriers workers face in accessing legal and other services. We also reiterate our comments above that migrant workers must be provided with adequate mechanisms for reporting workplace exploitation without fear of deportation.

As a result of low rights awareness, language, literacy, cultural and practical barriers, migrant workers rarely contact mainstream agencies for help. When they do make contact, meaningful, complex assistance is needed. Agencies and commissions must take further steps to ensure that they are more accessible and responsive. This includes regulators having sufficient funding and powers to address non-compliance and promote systemic reform. In order to make any enhanced enforcement powers effective, agencies will require additional resources. We have assisted many clients who were turned away from FWO and were unable to enforce their rights without support.

We recognise that numerous government agencies including the FWC and FWO have undertaken work to target services at newly arrived communities. However, as demonstrated by the prevalence and persistence of the employment problems faced by these communities, it is evident that further action is required. Even once workers are made aware of a service, and are comfortable enough to contact it, resource constraints or communication difficulties mean that they may not receive sufficient assistance to articulate their complaint.

In our experience mainstream agencies like the FWO have not been able to provide the assistance required to explore or assist clients to identify further issues and articulate the full extent of their complaints. Only the issues correctly identified and evidenced by the complainant will be pursued. This means that vulnerable workers often cannot enforce their rights, and some of the worst forms of abuse are allowed to continue undetected. Our clients generally require active assistance from making a complaint through to mediations, and formally settling their dispute. The imbalance of power inherent in many of these disputes makes independent assistance for vulnerable workers crucial for efficient resolutions. Without direct assistance many newly arrived and refugee clients who have had their workplace rights breached will not be able to enforce them. Even if workers learn enough to know that something is wrong, and manage to contact an agency, without ongoing assistance, they are often unable to achieve justice.

Recommendation 13:
Agencies must improve cultural responsiveness frameworks including specific protocols and checklists for Infoline staff, engaging dedicated staff and participating in and resourcing education and engagement programs.

9.2 Free legal assistance for migrant workers experiencing exploitation

Without legal assistance, vulnerable workers cannot enforce their work rights and employers can exploit with impunity. The Federal Government must provide recurrent funding for community legal centres with specialist employment law expertise to provide targeted employment law assistance and education programs for vulnerable workers, including temporary visa holders.

Given the intersectional nature of migration status and employment, it is essential that migrant workers experiencing exploitation have access to tailored legal assistance for both migration and employment law. In addition to the work rights legal service provided by WEstjustice, JobWatch, and SMLS, ISEALS clients have a high level of unmet legal need for migration law services. The ISEALS service has organised a pro bono partnership with migration agents – from 2019 to present pro bono lawyers have donated a significant amount of their time to give advice to vulnerable clients. An initial consultation with a migration agent can cost hundreds of dollars – and this is money that clients who have been persistently and seriously underpaid do not have.

Recommendation 14:
Resource community legal centres to deliver dedicated employment law assistance and migration assistance to vulnerable migrant workers.

10. Part 7 – Other amendments

We support the proposed amendments in Part 7.