

Migration Amendment (Protecting Migrant Workers) Bill 2021

IMMIGRATION SOLUTIONS LAWYERS
SUBMISSION TO THE DEPARTMENT OF HOME AFFAIR
17 August 2021

1 INTRODUCTION

1. The Immigration Solutions Lawyers (the 'ISL') makes this submission to the Department of Home Affairs ('the Department') inquiry into the Australian Government's Migration Amendment (Protecting Migrant Workers) Bill 2021.

2 SUMMARY

2. The Department is proposing a number of legislative reforms in a Bill (Protecting Migrant Workers) to amend the Migration Act 1958. These are aimed at strengthening existing protocols to address worker exploitation involving non-Australian workers in Australia.
3. The proposed legislative changes are focused on addressing the following challenges:
 - a. Employers use the threat of visa cancellation to exploit workers. The threat of cancellation is used to coerce visa holders;
 - b. While there are bans in place to stop employers from sponsoring when they breach their obligations, currently, that same employer is still able to employ other migrant workers (who are not sponsored), giving the ban only limited deterrent capability;
 - c. Some employers continue to employ migrant workers without verifying their visa status and conditions prior to employment – employer obligations need to be clarified

- d. Existing penalty provisions for the contravention of work-related provisions in the Migration Act are not providing a sufficient deterrence for some unscrupulous employers
 - The work-related civil penalty provisions in the Migration Act currently attract a pecuniary penalty of 90 penalty units (for individuals) (about \$20,000). The civil penalty for breaching sponsorship obligations is set at 60 penalty units (about \$13,000)
4. The intention is to send a strong message to unscrupulous employers and labour-hire intermediaries that the exploitation of migrant workers as cheap labour is not acceptable. It is not only unfair to migrant workers, and to those employers who seek to do the right thing, but it also damages Australia's reputation as a destination of choice. The Bill also seeks to send a strong message to temporary migrant workers that the Government is committed to combatting migrant worker exploitation, supporting them to feel more confident and secure about working in Australia.
5. The ISL is pleased to have the opportunity to contribute to this discussion.
6. We commend the Department on the robust nature of this draft legislation but also suggest a new area of focus.
7. We submit the draft legislative amendment focused on ramping up sanctions and may also need a focus on the 'non-punishment principle'. We propose the Bill could provide support and clarity regarding:
 - a. Support for victims of labour exploitation
 - b. Potential visa's while they assist/await investigations;
 - c. Pathways to permanency
 - d. Quality Assurance Rating system for good employers

3 Non-Punishment Principle

8. The sole focus on ramping up sanctions may disregard the 'non-punishment principle' as these measures are strong in stating what will be done to the business that commits labour exploitation without providing for the victim impact.
9. The victims of unscrupulous employers are, not only, subject to exploitation but may also be forced to commit unlawful activities, as an incidental or direct consequence of their condition.¹ The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR Principles) recognised for the first time that human trafficking victims "shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in

¹ UN Special Rapporteur on Trafficking in persons, especially women and children, The importance of implementing the non-punishment provision: the obligation to protect victims, 30 July 2020, available at: <<https://www.ohchr.org/EN/Issues/Trafficking/Pages/non-punishment.aspx>>, last accessed 17 August 2021.

unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons”.² Since the publication of the OHCHR Principles, the non-punishment provisions for victims of human trafficking have been explicitly introduced in several international legal instruments against human trafficking.³

10. The non-punishment principle suggests a victim-centred approach, in order to respect victims’ dignity and human rights⁴ and to prevent re-exploitation.⁵ This principle aims to protect victims at an early stage from being charged or prosecuted⁶. However, a law enforcement approach is still prevalent, indicators of vulnerabilities are often not identified and victims are unduly criminalized.⁷
11. Following the ‘non-punishment principle’, it is suggested to consider the potential risk imposed to the visa holder when taking law enforcement to the unscrupulous employers and provide relevant provisions to secure the victims will be consequentially punished by the proposed sanctions.

4 Recommendation

12. We propose the Bill could provide support and clarity for the migrants workers regarding:
 - a. Support for victims of labour exploitation
 - b. Potential visas while they assist/await investigations
 - c. Pathways to permanent residency
 - d. Quality Assurance Rating system for good employers

² Office of the High Commissioner for Human Rights (OHCHR), Principles and Guidelines for Human Rights and Human Trafficking, 2002.

³ For instance, Council of Europe Convention on Action against Trafficking in Human Beings, No.197, Warsaw, 16.5.2005, available at: <<https://rm.coe.int/168008371d>>, last accessed 17 August 2021; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/HA, entered into force on 15.4.2011, available at: <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>>, last accessed 9 September 2020; ASEAN Convention Against Trafficking in Persons, Especially Women and Children, 22.9.2015, available at: <<http://agreement.asean.org/media/download/20160303122945.pdf>>, last accessed 8 September 2020.

⁴ Office of the Special Representative and Co-ordinator for Combating and Trafficking in Human Beings, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking', 2013, p. 9, available at: <<https://www.osce.org/files/f/documents/6/6/101002.pdf>>, last accessed 17 August 2021.

⁵ Maria Grazia Giammarinaro - Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims', p.4, para. 7.

⁶ Human Rights Council, 'Trafficking in persons, especially women and children', Report of the Special Rapporteur on trafficking in persons, especially women and children, 6.4.2020, p. 16, para. 66.

⁷ Human Rights Council, 'Trafficking in persons, especially women and children', Report of the Special Rapporteur on trafficking in persons, especially women and children, 6.4.2020, p. 6.

13. These measures in the proposed legislative amendments are strong in stating what will be done to the business that commits labour exploitation without consideration of the victim impact. The victims of labour exploitation are usually lacked sufficient support, for example, language barrier, insufficient or even misleading advice on migration options, lack of information on local labour market etc. It is recommended to provide more direct support for victims of labour exploitation despite the ramping up sanctions on unscrupulous employers.
14. As above mention, during the law enforcement process, the vulnerabilities of the migrant workers are often not identified and are unduly punished at the same time due to non-compliance with visa conditions. Despite the improvement on the scrutiny of unscrupulous employment, it is suggested to provide penitential visas for these migrant workers during the period they assist in/await investigation. They need a clearer guidance and a simpler skilled migrant scheme for their pathways to permanent residency as well.
15. We also propose that a Quality Assurance Grading system is implemented, not only as a measure indicating the unscrupulous employers but more focusing on encouraging the employer to positively support and protect the migrant workers. The employer who has high grading may receive awards or benefits. An example of this could be in the form of a preferred tender status for government and private sector contracts. There are many other sectors to which this quality assurance standard could be applied. However in our opinion it certainly warrants consideration and further discussion.

Yours faithfully,

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