Immigration Advice and Rights Centre

30 July 2020

Committee Secretary
Department of the Senate
PO Box 6100
Canberra ACT 2600

By email: temporarymigration.sen@aph.gov.au

Re: Senate Select Committee on Temporary Migration

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in Australian immigration and citizenship law. IARC's core practice includes assisting temporary visa holders experiencing family violence, people seeking family reunion, and people seeking asylum. IARC, in partnership with Unions NSW, also provides a legal service called "Visa Assist". The purpose of Visa Assist is to:

- provide free legal advice and assistance to union members in relation to migration issues with a focus on skilled migration/work visas and the exploitation of temporary visa holders; and
- promote a fairer immigration system through community education, law reform and advocacy on behalf of temporary migrants.

IARC welcomes the opportunity to provide a submission to the Committee's inquiry into the impact temporary migration has on the Australian economy, wages and jobs, social cohesion and workplace rights and conditions.

The focus of our submission is on the exploitation of temporary migrants which, in our experience, is directly linked to the power imbalance towards employers that is created by Australia's immigration law and policy. In our experience, many visa holders are held to the behest of their sponsors/employers prior to the application of certain visas (e.g. through the false promise of permanent residency (**PR**) by employers), during the application process (e.g. using the visa renewal/application process to coerce visa applicants to obey unreasonable demands) and even as visa holders through the possible cancellation of their visas (e.g. withdrawal of sponsorship as a form of bullying and/or workplace harassment). To address this imbalance, IARC recommends the following measures:

1. the removal of condition 8105 (40-hour work fortnight) from Student visas;
2. amending condition 8607 to allow for at least 90 days for a visa holder to find a new sponsor with the possibility of a waiver of this condition where there is evidence of workplace bullying/harassment/exploitation; and
3. there be a PR pathway created whereby holders of 457 visas or TSS visas working in their nominated occupation for a period of three years or more are automatically eligible to apply for a subclass 189 or 190 visa (without having to lodge an expression of interest and be invited to apply).

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Our recommendations are discussed further below.

Visa conditions

Most temporary visas are subject to certain conditions which either impose restrictions or requirements on a visa holder. If a visa holder does not comply with a condition, their visa may be cancelled under s 116 of the *Migration Act 1958* (Cth) (**Act**). It is IARC's experience that in many cases where a visa holder is being exploited in their workplace, they will also be breaching a condition imposed on their visa. The two visa conditions that tend to be the most problematic are:

- condition 8105 – imposed primarily on the subclass 500 Student visa (**Student visa**). This condition imposes 40-hour work fortnights on students while their course is in session; and

- condition 8607(6) – imposed on the subclass 482 Temporary Skill Shortage visa (**TSS**). This condition imposes a requirement for a visa holder, who loses their job, to find a new sponsor within 60 days.

Condition 8105

The Department's policy regarding condition 8105 notes that "student visa conditions are designed to ensure that international students act in a manner that is consistent with the purpose for which their visa is granted, for example maintaining enrolment in a registered course of study." However, in our experience, this is rarely the effect of this condition. Instead, students are often underpaid by their employers and are then forced to work over the 40-hour fortnight threshold to pay for their basic costs of living. Once students discover they are being underpaid they are afraid to speak out about their work conditions due to fear of possible visa cancellation for working over the 40-hour fortnight threshold. Some employers will also use this visa condition and possible visa cancellation as a control mechanism to ensure that students do not speak up about their work conditions.

Student visa example

Ramesh came from India on a student visa in 2016. He is studying a Masters in Engineering at UNSW. He found a job at a local convenience store where other international students were also working. When Ramesh started his job, he was told by his employer that the "going rate" was $8 an hour. Not knowing this was under the minimum wage requirements and eager to work in Australia he accepted the position. Ramesh did not sign an employment contract nor any tax forms and was paid in cash.

To pay for his cost of living in Sydney, on such a small wage, Ramesh had to start working more shifts (in excess of the allowable 40 hours a fortnight). He talked to his Australian friend about this, who told him he was being underpaid and overworked and he should speak to his boss. Ramesh did just that and was told by his boss that if he ever raised this issue again, he would "report him to immigration and get him sent back to India".

Students are also often unable to find better working conditions due to condition 8105, as employers require flexibility regarding an individual's working hours (i.e. may require someone for more than 40 hours one fortnight then less the following fortnight, which is against Department policy and a breach of their visa conditions) and/or are nervous about breaching a Student visa holder's conditions and any possible ramifications for them.

If the intention of this condition is to ensure that Student visa holders are genuine students and maintain enrolment, we consider that condition 8202 already fulfils that function. According to Department policy condition 8202 is designed to ensure a Student visa holder:

- is enrolled in a full time, registered course;
- achieves satisfactory course progress; and
- achieves satisfactory course attendance.

Recommendation: Condition 8105 be removed from Student Visas.

Condition 8607

The Department's policy notes that condition 8607 is imposed on the TSS visa so that visa holders work in the occupation for which the visa was granted. Therefore, if a visa holder loses their employment, they will have 60 days to:

- find a new job in the same occupation with an employer who is willing to take over the sponsorship of the existing TSS; or
- find a new job in a different occupation with an employer who is willing to nominate them. The visa holder will also have to apply for a new TSS and meet all requirements for the grant of that visa; or
- apply for a different visa.

In our experience, where visa holders are experiencing workplace harassment, bullying and/or exploitation by their employer, their employment may be terminated suddenly and it is not possible to find a new job and have a new nomination lodged within the 60 days required.

Workplace harassment example

Miranda arrived from the UK to Australia in 2017 with her husband and two children. She was working as an ICT Business Analyst sponsored by an Australian company on a 4-year TSS visa. For the first couple of years of her employment, she enjoyed her work and got along well with her manager. That manager left and was replaced by a new manager. One day she picked up on a mistake made by her new manager, fixed it and let her new manager know.

From that day, she started receiving complaints about her performance from her manager and senior management. She would also overhear people gossiping about her in the office. She approached her manager about the complaints and gossiping and was told that it was up to her to fix her performance. She lodged a formal complaint with senior management. Following this, she started to receive threats from her manager at her home against her and her family.

Miranda found it harder and harder to go to work as a result. She was told by senior management that if she cannot do the job, they will have to let her go. Her employment was terminated with immediate effect. A week later she received an email from the Department of Home Affairs saying that they have been notified that she is no longer working for her sponsor and cannot cease employment for more than 60 days. She was in shock and did not know what to do. She tried to contact her employer but they refused to talk to her. It has been over two months since she worked and she is concerned her visa (and that of her family) will be cancelled.

Recommendation:

- **increase the 60-day requirement imposed by condition 8607 to at least 90 days; and**
- **provide for a waiver of condition 8607 where there is evidence of workplace bullying/harassment/exploitation.**

The permanent residency fallacy

Some temporary skilled visas, for example the TSS in the medium-term stream and the (now defunct) subclass 457 Temporary Work (skilled) visa (**457 visa**), offer potential pathways to PR through the Employer Nomination Scheme subclass 186 visa (**ENS**). This PR pathway is heavily contingent on the existing sponsor nominating the employer for the ENS. Often, in order to obtain this opportunity, a TSS visa holder or a 457 visa holder would have to remain in the employ of the sponsor for 3 years

(possibly 2 years if subject to the 457 visa transitional arrangements).

We have experienced, through our work with Visa Assist, employers sponsoring visa applicants (and their families) from overseas on 457 visas with the promise that in a few years they would sponsor them for PR. We have been told by 457 visa holders that they move with their families to Australia and often to regional Australia based on that promise. During the term of the 457 visa, visa holders will approach their sponsors and ask about sponsorship for PR only to be told that they cannot sponsor them right now and then are later told (closer to the expiry of their visa) that their employer will not be sponsoring them for PR. Employers will often cite financial reasons due to the costs associated with sponsoring individuals for PR (e.g. SAF levy and legal costs) and/or will make unfounded allegations of poor performance about the visa holder when no previous warnings have been received to refuse PR sponsorship.

In this situation, visa applicants will have a negligible chance of obtaining PR. Their visas are also often close to expiry, meaning that no other employer will be willing to take over their sponsorship. These visa holders may be able to lodged an expression of interest for a subclass 189 Skilled Independent visa, subclass 190 Skilled Nominated visa and the subclass 491 Skilled Work Regional (Provisional) visa, which are not employer sponsored, however, depending on the amount of points they have and the appetite for their occupation by the State or Australian Government, this option may not result in the invitation to apply for a visa before their current visa expires or at all.

Regional Nurses example

Linda is a registered nurse who lives in the Philippines with her husband and three children. Linda was offered a position as a nurse at a regional hospital in NSW. The hospital offered to sponsor her and her family on a 457 visa.

Before moving, Linda asked her potential employer about possible PR sponsorship for her and her family and the hospital told her that they would sponsor her if she remained employed with them closer to the expiry of her 457 visa. Linda accepted the position and moved her entire family to regional NSW.

A year before the expiry of her visa she asked her employer whether they could sponsor her for PR. They said they would get back to her. About 6 months before her visa expiry, Linda approached her sponsor again. They told her they would not sponsor her for PR and claimed that she had been underperforming even though no warnings about her performance had been received.

Linda has no realistic prospects of a new sponsor, no PR and is facing having to move her family back to the Philippines.

In addition to the above, IARC has also seen instances where individuals on TSS visas are experiencing workplace exploitation and bullying/harassment but feel compelled to stay with their employer in order to be possibly eligible for ENS/PR sponsorship by their employer.

Recommendation:

- **There be a PR pathway created whereby holders of a 457 visa or TSS visa working in their nominated occupation for a period of 3 years or more are automatically eligible to apply for a subclass 189 or 190 visa (without having to be invited to apply after lodging an expression of interest).**

We again thank you for the opportunity to comment and would welcome the opportunity to expand on any aspect of our submission.

Yours sincerely,

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