Human Rights Law Centre

MIGRANT WORKERS CENTRE

Putting Migrant Workers First

Joint submission to the comprehensive review of Australia's migration system

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Introduction & recommendations

On behalf of the Human Rights Law Centre and the Migrant Workers Centre, we welcome the opportunity to make a submission to this historic review of Australia' migration program.

Together with other partners, our organisations have made a separate submission to the review, offering solutions to the forms of 'permanent temporariness' created by the migration regime. Our partners in that submission include the leading organisations working on migrant and refugee rights across the country – we commend it to the review panel.

This submission focuses more squarely on the deficiencies of the international education, skilled and employer-sponsored migration schemes and offers a framework for them to be fundamentally re-made.

In summary, we recommend that the Federal Government:

1. **Fix international education**, starting by substantially increasing contributions to the Tuition Protection Service, which would allow for greater compensation to be paid to students adversely impacted by the conduct of their college or university.
2. **Overhaul skilled and employer-sponsored migration,** replacing it with an accessible, self-nominated system of temporary migration in areas of skills shortage, with permanent residency available after two years. An independent and publicly accountable tripartite body, including representatives of unions and labour experts, should be established to certify areas of shortage, set minimum wages for migrant workers and keep data about the extent of reliance on migrant workers in particular industries.
3. **Protect migrant workers** by creating a single set of employer obligations, applicable to all employers of migrant workers, and introducing robust 'whistle blower' protections for migrant workers who take action against their employers.

Restoring the 'social license' for the migration program must start with putting the rights and interests of migrant workers first.

1. A Complete Reset is Needed

Australia's migration system is in crisis. It presently prioritises mass temporary and employer-sponsored migration to the detriment of the migration program as a whole, as well as to migrants themselves. Widespread and systemic exploitation and insecurity are endemic to the current system, and to the specific visa categories we address below. Bold and fundamental reforms are needed to create a beneficial, sustainable and humane system that allows migrants to achieve economic security, social inclusion and political belonging. These systemic reforms must be migrant-centred, and create clear and viable pathways to permanency as the mainstay of Australia's migration system.

Crises in Australia's migration system are not new. Nor is the need for a major rethink and overhaul of existing visa categories and pathways in response to such crises. In Australia's history, review and reform of Australia's migration system has occurred in order to remedy the failure of existing migration policies; to provide genuine opportunities for migrant resettlement and integration; and to address the widespread exploitation of workers. For instance, in 1974, the Whitlam government implemented widespread migration reforms, including the removal of overt racial discrimination from Australia's migration laws and introduction of a new visa system that made travel to Australia more feasible. The government also initiated a migrant dispensation program, with the view to granting permanency to 'people who had been living in Australia illegally and might be suffering exploitation as a result'.[1] While the 1974 dispensation had a low uptake, it set the path for future similar initiatives that were both

[1] 'Dispensation for Illegal Immigrants' (1974) 45(2) *Australian Foreign Affairs Records* 114.

welcomed by the community and highly effective.[2] Indeed, past Immigration Ministers from both sides of government have acknowledged the need to 'clean the slate' and recognise that 'no matter how people got here they are part of the community'.[3]

These recent historical precedents demonstrate the ability of Australia's migration system to accommodate and benefit from bold reforms, which fundamentally value migrants and prioritise migrants' access to permanency. Historical initiatives and reforms to Australia's migration system also reinforce the importance of Ministerial and government leadership to systemically address patterns of migrant exploitation.

Creating a migrant-centred 'Migration System for Australia's Future' means that Australia's migration programs — and the people who access them — must be considered beyond frameworks of national economic benefit or economic growth. A purely extractive approach to migration program design, and to the lives and livelihoods of migrants and their families, will only further entrench the insecurity, exploitation and suffering for people living in the Australian community. Instead, Australia's migration program must value and accommodate the lives, aspirations and futures of the migrants who chose to come to Australia, whether on a permanent or temporary basis. Their goals, economic security and freedom from exploitation are essential for the success of any short-term and long-term reforms and of the migration system itself. Remedying the harms and exploitation that presently stem from within the migration program must be front and centre of any reforms. Not only for migrants seeking to come to Australia, but for the sustainability and efficacy of Australia's migration system into the future.

2. Fixing International Education

International education is repeatedly described as Australia's third largest 'export industry.'

Though it is trite to note that the industry does not trade in 'exports' – it leads to tens of thousands of temporary visa holders entering the country each year. Student visa holders have remained the third largest group of temporary visa holders – after New Zealanders and international tourists – for at least a decade. Rather than focusing on export income, it is incumbent on the government and community to focus on the welfare of the half million international students in Australia.

The rights of international students have not been the serious focus of government policy, despite endless media coverage of extortionary employment and rental practices targeting students and sub-standard education providers. The only protections developed for international students over the past decade have been the **A**ustralian **S**kills **Q**uality **A**uthority and the International Students **Ombudsman** – both created in 2011. Neither has meaningfully improved the quality of international education or the experience of students.

Case Study – SNIS Students[4]

Earlier this year, a group of students from the Philippines were supported by an advocacy group, the **S**upport **N**etwork for **I**nternational **S**tudents, to take action against Lawson College in Dandenong, Victoria. The students claimed that facilities and courses offered by Lawson College were seriously misrepresented to them before they arrived in Australia, that the college lacked instructors and basic

[2] This included broad-based, national regularisation programs to address, inter alia, migrant worker exploitation in 1976 and again in 1980: Sara Dehm and Anthea Vogl, 'Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns' (2022) 44(3) *Sydney Law Review* 381.

[3] 'New Amnesty for Illegal Immigrants', *The Canberra Times* (Canberra, 20 June 1980) 3.

[4] Herald Sun, 'Claims training college threatened to deport students' 15 May 2022 available https://www.heraldsun.com.au/subscribe/news/1/?sourceCode=HSWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.heraldsun.com.au%2Feducation-victoria%2Ftertiary%2Fstressed-students-claim-theyre-being-exploited-by-lawson-college%2Fnews-story%2F9c1f95c1fcbd84c8528248c8af03c783&memtype=anonymous&mode=premium&v21=dynamic-high-control-score&V21spcbehaviour=append.

facilities and they were threatened with 'deportation' if they sought to transfer out of their college within the first six months of their course.

Both the Ombudsman and ASQA declined to receive group complaints, and so individual complaints had to be lodged for each of the students, with free assistance provided by SNIS volunteers. Both the Ombudsman and ASQA took more than six months to process the students' complaints, by which time they were eligible to transfer out of the college. None of the students were able to recover fees for the first six months of their course from Lawson College.

Regulation of the international education industry cannot take place in a void. The industry is a direct by-product of Australia's dysfunctional skilled migration program. The ever-evolving and changing skilled occupation lists, and the opacity of 'points' requirements for skilled migration through the much-criticised SkillSelect program, mean that temporary migrants must return to study at various points in their migration journey – each time with less and less money and ability to insist on high-quality education.

Case Study – Sub-Standard International Courses

Arshad arrived in Australia from India as Student visa holder immediately after completed Year 12, enrolled to study a Bachelor of Information Systems at a major university, with a total cost of $60,000. His parents sold part of their property and mortgaged the remainder to cover his course fees.

Once he completed his degree, Arshad obtained a Temporary Graduate (Subclass 485) visa. However, because of his provisional visa status, Arshad found it impossible to obtain employment in his field – most job ads explicitly stated that positions were available exclusively to permanent residents. In order to improve his 'points score' to qualify for General Skilled Migration, Arshad enrolled in a professional year course, at a further cost of $10,000. Despite that, he received advice that he would not have the qualifying score required for GSM in his occupation – which was around 100 points.

Having spent four years and close to $100,000 on study and visa-related requirements, Arshad was committed to a future in Australia. He was advised by a friend to requalify as an early childhood educator; an industry experiencing serious skills shortage. With limited funds, Arshad was forced to enrol in a Diploma of Early Childhood education at a suburban college, with no physical campus and the same instructor for most subjects.

We address the necessary reforms to the General Skilled Migration regime below.

Recommendation – Significantly increase contributions to the Tuition Protection Service by providers offering courses to international students, proportional to the revenue derived from international enrolments, and use these additional resources to fund increased compliance activities against providers and provide reimbursement of course fees to students

3. Overhauling Skilled Migration

Australia's temporary migration program is characterised by widespread exploitation of migrant workers and the absence of clear pathways towards permanent residency; itself a phenomenon that promotes and exacerbates exploitation. The exploitative nature of temporary migration is the product of two decades of migration policy and planning; not an endemic feature of all temporary migration schemes, or temporary migrants themselves.

We believe that temporary migration can be redesigned so that the levers of exploitation are removed. That can be achieved through the education and induction of all temporary migrant workers, strong regulation of all employers of migrant workers (not just a select few approved sponsors), visa security

for workers who take action against their employers and permanent transition after a period of three years.

We consider that the only effective mechanism for raising stagnant wages across the economy is to permit all workers – irrespective of their visa status – to participate in collective bargaining and take action against their employers on an equal footing. Once the inhibiting features of temporary visas are removed, in the manner that we propose, there will be nothing to prevent temporary workers from taking collective action, with their visa-holding counterparts, to address wages and conditions in their place of work.

1.1. Increasing TSMIT is not a 'quick fix'

It is indisputable that the wage standard set by the **T**emporary **S**killed **M**igration **I**ncome **T**hreshold for employer-sponsored workers must be urgently reviewed, given that it has not been indexed to standard wages for the past decade.[5] Though, as we set out below, we believe this must be done in the context of a complete overhaul of the employer-sponsored migration regime, which is fundamentally geared towards suppressing migrant workers' wages.

We believe that raising TSMIT across the board, as an attempt to falsely implement a wage floor, or perhaps even discourage reliance upon migrant workers, will be both ineffective and likely to compound the vulnerability of migrant workers in particular industries. Raising the TSMIT to accord with average full-time weekly earnings at $90,916.80 will not, in fact, prevent employers from relying upon temporary migrant workers in industries where the market salary rate is significantly below the national average– most obviously, this includes the hospitality industry, which is endemically reliant on migrant workers, and the disability and early childhood sectors.

Increasing the TSMIT far above market salary rate in these industries (for instance, by $20,000 in the case of cooks[6]) will result in employers turning reliance upon groups of more transient temporary workers – including Student visa holders and undocumented workers. Intake of Student visa holders is shortly set to reach pre-pandemic levels in 2023.[7] Hundreds of thousands of temporary visa holders,[8] reliant on finding employment to service ever-rising living costs, will be forced to accept whichever jobs are on offer – whether or not they lead to eventual employer sponsorship.

Increasing TSMIT even to the lower proposed threshold of $70,000 would lock out some 35 percent of workers currently on Temporary Skills Shortage visas[9] - some 18,501 people.[10] Various proposals to raise TSMIT make no allowance for the thousands of previously sponsored workers left behind, who would be rendered particularly vulnerable by the by the proposed reforms.

It is not the TSMIT alone which determines the conditions under which employer-sponsored migrants work, or even their rates of pay. Wages and conditions depend upon a range of factors; including prevailing awards, levels of unionisation and impediments imposed by visa conditions which weaken visa-holders' bargaining power. Without addressing the inherent power imbalance created by employer-sponsored arrangements, raising the TSMIT will simply cause the stagnation of migrant workers' wages at the newly established threshold.

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[5] Grattan Institute, 'The Goldilocks wage threshold for temporary skilled migrants' https://grattan.edu.au/news/the-goldilocks-wage-threshold-for-temporary-skilled-migrants/.

[6] PayScale indicates that the average yearly salary for cooks ranges between $41-57,000 – see https://www.payscale.com/research/AU/Job=Cook%2C_Restaurant/Salary.

[7] WA Today, 'The barriers facing thousands of international students returning to Perth,' 12 December 2022 https://www.watoday.com.au/national/western-australia/the-barriers-facing-thousands-of-international-students-returning-to-perth-20221129-p5c28d.html.

[8] Department of Education, 'International student monthly summary and data tables' https://www.education.gov.au/international-education-data-and-research/international-student-monthly-summary-and-data-tables.

[9] Grattan Institute, above n 5.

[10] Noting that as at 30 September 2022, there were 52,860 TSS visa holders in Australia – Department of Home Affairs, 'Temporary resident (skilled) report 30 September 2022 Summary of key statistics and trends' https://www.homeaffairs.gov.au/research-and-stats/files/temp-res-skilled-rpt-summary-30092022.pdf.

As we detail in **section 3.3.** below, the task of setting minimum wage standards in industries employing migrant workers should be undertaken by a transparent, accountable, tripartite body, with representatives from unions and labour experts. This is a far more appropriate model for setting minimum standard wages for migrant workers, rather than a 'one size fits all' TSMIT increase which is likely to preclude vast groups of migrant workers from accessing permanent pathways.

1.2. The GSM Framework Creates Vulnerability

The current self-nominated **G**eneral **S**killed **M**igration framework is opaque and inaccessible. It contains multiple, discriminatory requirements – including in relation to English language proficiency and skills assessment – and renders migrants vulnerable to workplace exploitation. Landmark research undertaken by the Committee for the Economic Development of Australia demonstrates that a significant proportion of GSM visa holders do not end up securing employment to match their skills.[11] The system is fundamentally broken and must be re-built.

Vulnerability to exploitation is inbuilt within the GSM framework, as much as it is within employer-sponsored arrangements. Despite providing an ostensibly self-nominated visa pathway, in reality migration through the GSM program is fundamentally dependent upon employment.

Specifically, aspiring visa applicants must demonstrate that they have completed various periods of work in their nominated occupation in order to access a skills assessment in their nominated occupation. For reference, we have set out below the employment-related requirements in three of the top ten occupations nominated through the GSM program over the past 12 months:[12]

Software and Applications Programmers[13]	**Chefs**[14]	**Registered Nurse**[15]
1 year post-qualification employment (or completion of the Professional Year)	3 years' full time paid employment in directly related occupation (including 12 months in nominated occupation)	12 months' paid Australian work experience (20 hours per week)

While many skills assessing authorities now require evidence that the work experience undertaken was paid rather than voluntary (as used to be the case), and was undertaken in compliance with Australian labour laws, in practice aspiring GSM applicants must endure whatever conditions they are offered in order to complete their qualifying work requirements.

As well as for the purposes of obtaining a skills assessment, which is a threshold requirement under the GSM, applicants must also demonstrate Australian work experience in order to obtain the necessary number of 'points' to be invited to apply for a visa. Aspiring applicants must complete at least 12 months' Australian work experience in their nominated occupation in order to obtain the required points. The necessity of obtaining 'points' obviously leaves visa holders vulnerable to exploitation by their employers who hold the key to their future visa eligibility. While the *Migration Regulations 1994* (Cth) attempt to protect visa holders by providing that only work undertaken in accordance with Australian labour laws will qualify for points, in reality visa applicants have no incentive whatsoever to disclose their employer's non-compliance when the consequence would be the loss of qualifying employment-based points.

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[11] https://www.ceda.com.au/ResearchAndPolicies/Research/Population/A-good-match-Optimising-Australia-s-permanent-skil.

[12] Department of Home Affairs, '2021-22 Migration Program Report' available https://www.homeaffairs.gov.au/research-and-stats/files/report-migration-program-2021-22.pdf.

[13] Requirements for 'Pathway 2,' for applicants who have graduated with an Australian qualification. Australian Computer Society, 'Migration Skills Assessments' available https://www.acs.org.au/msa/information-for-applicants.html.

[14] Requirements for assessment through 'Pathway 2' of the 'Offshore Skills Assessment Program,' for applicants who hold an Australian qualification. Trades Recognition Australia, 'Trades Recognition Australia Offshore Skills Assessment Program Applicant Guidelines' available https://www.tradesrecognitionaustralia.gov.au/offshore-skillsassessmentprogram-osap/offshore-skills-assessment-program-applicant-guidelines.

[15] Australian Nursing and Midwifery Accreditation Council, 'Skilled Migration Services – Assessment Criteria' available https://www.anmac.org.au/skilled-migration-services/overview/assessment-criteria.

As well as its opacity and inbuilt employer-dependence, the skills assessment regime as a component of the GSM program contains arbitrary and discriminatory requirements. For instance, professional registration requirements, a stepping-stone towards skills assessment, often impose differential English language standards on applicants from different countries – even if their qualifications were undertaken in Australia.

Case Study – Discriminatory requirements for Paramedics

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

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

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

1.3. Creating Accessible Self-Nominated Pathways

Pathways to both temporary and permanent visas must be accessible and reliable. The migration program must be regeared towards permanent migration, recognising that people who spend several years in the Australian community become an inextricable part of it.

'Tied' employment arrangements, which link workers to a particular sponsor, are prone to abuse due to the fundamental power imbalance they create between the parties to the arrangement. That observation has been made repeatedly by unions and in academic research. The power imbalance created by employer-sponsored arrangements will not necessarily be ameliorated through multi-employer sponsorship models. While such models might allow free movement of workers between employers, they may make it substantially more difficult to enforce the employer sponsorship requirements under the Regulations.

We endorse the creation of a tripartite body, **J**obs and **S**kills **A**ustralia, to include representatives from unions, labour experts and industry heads to determine areas of skills shortage from year to year. JSA should perform the open and transparent function of certifying areas of skills shortage requiring migrant workers, set minimum standards of pay in those sectors and specify skills requirements. JSA should also collect data on the level of migrant worker reliance in particular industries. Crucially, JSA must not perform an obstructive or protectionist function, to prevent the entry of temporary migrants – doing so would, as we have explained above, not in fact prevent employers from relying on migrant workers, but instead promote reliance on vulnerable groups of temporary workers already onshore, such as Student visa holders or undocumented workers. The role of JSA must be to provide transparency and clarity regarding the requirements for skilled migration, so that temporary migrants may self-nominate for migration in areas of skills shortage.

Recommendation – Create a tripartite independent body, Jobs and Skills Australia, with representatives from unions, labour migration experts and industry, with the task of:

- certifying industries and occupations experiencing skills shortage on an annual basis
- setting minimum wages for migrant workers in those industries

[16] Paramedicine Board – AHPRA, 'English language skills' available https://www.paramedicineboard.gov.au/Professional-standards/Registration-standards/English-language-skills.aspx.

- collecting economy-wide data regarding the prevalence of migrant workers in particular industries and
- reviewing standards for 'skills assessment' of migrant workers annually, with public input

Recommendation – Replace employer-sponsored and GSM programs with reliable, self-nominated temporary visa pathways in occupations certified by JSA – with cognate self-nominated permanent visas available after completion of two years' employment[17] in the nominated occupation

4. Ensuring Worker Protection

The regulatory response to widespread migrant worker exploitation has, to date, been almost exclusively focused on increased enforcement and sanctions against employers. While penalising employers might seem superficially attractive, there are two key difficulties with an exclusively enforcement-based approach.

The first and most obvious difficulty is that, without protections for visa-holders against cancellation or other adverse outcomes, they have no incentive to come forward or cooperate with enforcement activities against their employers. Without protection for workers, irrespective of their visa status, agencies will never collect the evidence required to effectively regulate and enforce sanctions against employers.

The second difficulty with enforcement-based approaches is that they are almost always focused on 'approved employers' under the employer-sponsored migration regime; a relatively small fraction of employers of temporary workers.

1.4.One Standard for All Employers

Other than the few work-related penalty provisions under the Act,[18] there are no general obligations imposed on employers of migrant workers. For instance, there is no obligations on employers of Student visa holders, Working Holiday makers or Bridging visa holders. There is no obligation on these employers to cooperate with Fair Work inspectors, keep records of employment of migrant workers or ensure that migrant workers are offered equivalent terms and conditions as other employees.

This means that the regulation of employers of migrant workers outside the employer-sponsored regime is entirely reliant upon workers taking action and enforcing their rights. As evidence of the widespread exploitation of migrant workers makes clear, this approach is inadequate, and it is failing.

Recommendation – Extend certain employer obligations at Subdiv 2.19.1, Div 2.12, Part 21 of the *Migration Regulations 1994* (Cth) to all employers of migrant workers – specifically the obligation to keep records,[19] cooperate with inspectors,[20] ensure equivalent terms and conditions[21] and provide information on request[22]

Recommendation – Expand the obligations on sponsors of migrant workers, to include:
- An obligation to facilitate and keep records of pre-commencement inductions, including introduction to industry-based unions and support services, provided in appropriate languages

[17] A qualifying period of two years was historically required of employer-sponsored Temporary Work (Subclass 457) visa holders and Skilled Regional (Provisional) (Subclass 489) holders in order to access permanent residency. That qualifying period has been progressively increased over time and should be restored to its original standard.
[18] For instance, at Subdivision C, Division 12, Part 2 of the *Migration Act 1958* (Cth).
[19] Reg 2.82, *Migration **Regulations** 1994 (Cth).*
[20] Reg 2.78, Regulations.
[21] Reg 2.79A, Regulations.
[22] Reg 2.83, Regulations.

- An obligation to provide quarterly de-identified data on number of migrant workers employed to JSA

1.5. 'Whistle-blower' Protections

Our joint submissions address the need for dedicated protections for migrant workers who take action against their employers. Providing visa security to migrant workers is fundamental to ensure that they come forward to address the forms of exploitation that have become inherent in the temporary migration regime. It is a necessary and pressing first step.

As well as the detail of these proposals set out in our joint submissions, we refer the committee to the submission of the Migrant Justice Institute.

Recommendation – Introduce a protection against visa cancellation, to ensure that temporary visa-holders will not have their visa cancelled for breach of conditions which come to light because of action taken against their employer's breach of labour or other laws

Recommendation – Amend qualifying requirements for visas, so that holders of Employment Justice visas are taken to have 'substantially complied with conditions'[23] of their previous visa in any future visa application and work undertaken on an Employment Justice visa is counted towards qualifying employment requirements for permanent visas[24]

Recommendation – Introduce a 'Workplace Justice visa' available to temporary migrants who take action against their employer for breaches of employment or other laws, which allows the holder to remain in Australia and work full-time while their action against their employer continues

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

[24] For instance, assuming that the employer-sponsored migration scheme is not overhauled in the manner we recommend, time spent by the holder of an Employment Justice visa working in their nominated occupation should be counted towards the three-year employment requirement, for the purpose of qualifying for permanent residency under the Employer Nomination Scheme (Subclass 186) visa.