

DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation

21 August 2023

QoN Number: 1

Subject: Permanent Ban on working with Temporary Visa Holders

Asked by: Paul Scarr

Question:

Senator SCARR: Is there power to permanently ban someone from dealing with or having any role ever again in relation to dealing with temporary visa holders, so they are taken out of that situation, because they can't be trusted?

Mr David GAVIN: There's a few parts to this, under other relevant legislation around whether someone can be a company director or hold a certain role...

Senator SCARR: Mr Gavin, could you take that on notice, and I'm really concerned to know in terms of individuals, and how this bill responds and fits in with other legislation in terms of trying to address this issue of individuals who do the wrong thing so that they can be taken out of the system altogether to prevent them from doing egregious conduct again and again.

Mr David Gavin: The second part of the answer to that is the prohibition power does have that power to prohibit someone for an extended period of time.

Answer:

The prohibition measure enables the Minister to declare a person to be a prohibited employer for a specified period of time. Under this measure, the term 'person' includes an individual, a body corporate and a body politic, pursuant to section 2C of the *Acts Interpretations Act 1901*.

Where the prohibited employer is an individual, that individual is prohibited from having a material role in a decision made by a body corporate to allow a non-citizen to begin work (other than the holder of a permanent visa). This is intended to cover circumstances where a person may have management roles in several businesses and it helps to mitigate the risk of 'phoenixing' in an attempt to circumvent the prohibition.

The Bill does not specify a minimum or maximum period for which the person may be declared to be a prohibited employer. The duration of the prohibition will depend on the circumstances of the case.

Recognising that the prohibition measure may be triggered by some of the most serious offences of exploitation under the *Criminal Code* (including cases of modern slavery), the Minister may consider an extended prohibition appropriate in the most serious cases (such as human trafficking or modern slavery).

- Note, under a similar scheme in Canada, there are employers who have been permanently banned from hiring temporary workers.

These measures strengthen the legislative framework under the Migration Act to protect vulnerable migrant workers from serious, repeated or deliberate non-compliance. More broadly, there are several pieces of legislation that set out employer obligations and seek to address issues of non-compliance. This includes both Commonwealth and state and territory laws. Some of the key areas of focus include addressing phoenixing behaviours through the use of unique Director IDs, sham contracting, and the regulation of Labour Hire Intermediaries.

- Under the *Corporations Act 2001* (section 206B), a person is automatically disqualified from managing corporations if the person is convicted of:
 - certain offences on indictment (which could include committing an offence against proposed section 245AYL of the Migration Act concerning the prohibition on allowing additional non-citizens to begin work); or
 - any offence against the *Corporations Act* that is punishable by imprisonment for a period greater than 12 months (which could include an offence against section 184 concerning good faith, use of position and use of information by directors, other officers and employees); or
 - any offence involving dishonesty and is punishable by imprisonment for at least 3 months (which could include range of deception, fraud and theft offences under Commonwealth, state and territory laws).
- The automatic disqualification starts on the day the person is convicted and ends 5 years after the day on which they are convicted or, if the person serves a term of imprisonment, 5 years after the day on which they are released from prison.

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PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation

21 August 2023

QoN Number: 2

Subject: Full Explanation of Subsection 245AAB 1(c) - Concerns of Coercion or Undue Influence

Asked by: Paul Scarr

Question:

Senator Scarr: an issue has been raised in relation to 245aab 1(c), so a person contravenes this subsection if the first person coerces or exerts undue influence or undue pressure on another person or agree to an arrangement in relation to work, and the worker is an unlawful non-citizen and c, the arrangement provides for the work to be done by the worker in Australia whether for the first person or someone else. The concern is that the addition of those words provides for the work to be done would operate in such a way that excludes matters from consideration such as sexual harassment claims, issues around unsuitable accommodation, bullying, and that that needs to be considered in the drafting. Are you aware of that concern? Happy for you to take it on notice.

Mr David GAVIN: The main intent of this new penalty is around employers that are using that position to coerce or unduly influence the worker to either breach a condition of their visa or to threaten them with a consequence. They generally relate to the employer-employee relation under the Migration or Fair Work Act rather than other types of acts that could apply that kind of coercion. Happy to take on notice the full explanation.

Answer:

The intent of proposed paragraph 245AAB(1)(c) is to specify that the event occurs in Australia. It is about the jurisdiction in which the offence occurs.

The offences were carefully crafted to give effect to the overarching policy intent, that is, to create a criminal offence for using migration rules to exploit temporary migrant workers through coercion, undue influence or undue pressure in an employment relationship.

In terms of the arrangement in relation to work:

- The first offence (245AAA) is in relation to work done or to be done in Australia by a **lawful non-citizen** who is or would be in breach of a work-related condition of their visa if they do the work in accordance with the arrangement.
 - This offence is about the work performed and that work resulting in a breach of visa conditions. For example, being pressured to work more than the number of hours allowed under a person's visa conditions. It responds directly to the recommendation from the Report of the Migrant Workers' Taskforce, and in doing so, it addresses the issues raised by the 7 Eleven case.
- The second offence (245 AAB) is also in relation to work which is to be done in Australia by an **unlawful non-citizen** in circumstances where they believe that, if they do not accept or agree to the arrangement, there will be an adverse effect on their continued presence in Australia.
 - This offence is about exploiting unlawful non-citizens. It would capture a range of behaviours of concern.
 - For example, if the employer subjects a worker to **sexual harassment**, or demands a **sexual favour**, or requires the person accepts **substandard accommodation**, or **withholds a passport**, or otherwise **bullies the person**; and the person believes that if they do not accept or agree to the arrangement, there will be an adverse effect on their continued presence in Australia, an offence is committed.
 - The critical components involve using a person's temporary status in Australia to coerce, unduly influence, or unduly pressure them into the arrangement.
 - Specifically, proposed paragraph 245AAB(1)(d) provides that the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement, there will be an adverse effect on the worker's continued presence in Australia (i.e. they will be subject to detention and removal).
- The third offence (245AAC) is also in relation to work to be done in Australia by a **lawful non-citizen**.
 - This offence is about exploiting lawful non-citizens. It would also capture a range of behaviours of concern.
 - Again, this would cover a range of exploitative behaviours such as **pressuring a person to accept unsuitable accommodation** as part of the work arrangement, or **sexual harassment** (which is also a breach of other laws, including the *Sex Discrimination Act 1984*).

- The critical components involve using a person's temporary status in Australia to coerce, unduly influence, or unduly pressure them into the arrangement.
- Specifically, proposed paragraph 245AAC(1)(d) provides that the first person's conduct mentioned in paragraph (a) results in the worker believing that, if the worker does not accept or agree to the arrangement: there will an adverse effect on their status as a lawful non-citizen (e.g. they will have their visa cancelled); or they will be unable to provide information or documents about work they have done in Australia that they are required under Migration laws to provide in connection with their visa or an application for a visa (e.g. they will not be able to meet the requirements for the grant of a future visa).

From a drafting perspective, the policy objective of giving the offences broad application is intentional.

Appropriate coverage of exploitative behaviour is best achieved by not defining 'an arrangement in relation to work'. If the Bill were to define the 'arrangement in relation to work', there is a risk that some kind of exploitative conduct may be inadvertently excluded.

Lawful behaviour is excluded through the use of the terms coercion, undue influence and undue pressure.

- Coercion may involve compelling a non-citizen to agree to a work arrangement by use of force or threat, through conduct that may be unlawful, illegitimate or unconscionable.
- Undue influence or undue pressure may involve unwarranted, unjustified or excessive action, harassment or oppression to impel a non-citizen to act in a particular way.

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PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation

21 August 2023

QoN Number: 3

Subject: Law Council of Australia Submission - Section 245AAB and 245AAC - Criminalising Intention

Asked by: Paul Scarr

Question:

Senator SCARR: We had a very senior member of the profession in relation to criminal law provide their view in relation to 245aab and 245aac, where they considered the focus should be shifted to criminalising the intention of the perpetrator, forcing the worker to believe they should agree to the arrangement as opposed to the belief of the worker themselves, and that it is more usual practice to look at the intention of an alleged perpetrator rather than the belief of the victim. Happy for you to take that on notice, it's in paragraph 59 of the Law Council of Australia submission.

Mr David GAVIN: A brief comment on that... I might just take that one on notice.

Paragraph 59 of the Law Council of Australia's submission:

The Law Council suggests thought be given to how proposed sections 245AAA, 245AAB and 245AAC, if amended in the manner that the Law Council suggests, would apply as civil penalty provisions.

Recommendation:

- Proposed sections 245AAA, 245AAB and 245AAC be amended so they no longer contain an initial limb which includes the qualifier 'undue'.
- Proposed section 245AAA, be amended to remove the word 'undue' from proposed paragraph 245AAA(1)(a).
- Proposed sections 245AAB and 245AAC, be redrafted so they are directed to criminalising the intention to cause the worker to believe that they must agree to the arrangement to avoid an adverse outcome, rather than whether the belief actually arises.

Answer:

Undue

The purpose of criminalising *undue* influence or *undue* pressure in these offences, rather than mere influence or pressure, is to target conduct that, similar to coercion, may be characterised as excessive, unfair or exploitative.

In the context of negotiating an arrangement in relation to work, some level of appropriate incentive is usually offered to a prospective worker to induce them to accept the job. This may also apply in the context of staff retention.

The inclusion of the qualifier 'undue' is therefore important to ensure that the new provisions clearly signal the intention that it should only capture conduct of a kind that is unwarranted, unjustified or excessive in the circumstances of the particular case.

The inclusion of the qualifier 'undue' is also expected to assist in building strong evidence-based cases for consideration by the courts, with reasonable prospects of success.

Belief

Proposed sections 245AAB and 245AAC refer to the worker's belief that failing to accept or agree to the arrangement will result in an adverse outcome for them in relation to their immigration status / future status / presence in Australia (e.g. their visa will be cancelled, they will not be able to meet the requirements of a future visa, they will be removed).

- The first limb (a) of both offences sets the level of seriousness – to ensure that the most serious and egregious forms of migrant worker exploitation are captured. That is, where the offender intentionally *coerces*, or exerts *undue* influence or *undue* pressure.
- The second and third limbs (b) and (c) set the scope of the offences – to migrant workers where the arrangement in relation to work provides for the work to be done in Australia and where the offender knows or is reckless to these matters.
- The fourth limb of both offences (d), which refers to the migrant worker's belief, is drafted to ensure that all relevant conduct is captured. Importantly, the subject of this limb is the *offender's* knowledge or recklessness as to the worker's belief regarding the specified matters. This limb, together with the first limb, goes to the heart of each offence, which is to deter or punish those who exploit migrant workers by preying on their beliefs (whether correct or not) regarding their immigration status or continued presence in Australia.

Neither offence requires the prosecution to establish the migrant worker's actual belief, i.e. whether the belief was actually held, or whether the belief was reasonable/accurate (in the sense that the relevant adverse event would or even could occur).

- Instead, the prosecution would need to establish for limb (d) that the offender knew that (or was reckless as to whether) the offender's relevant conduct (coercion, etc.) results in the worker's belief that the relevant adverse event would occur if the worker did not accept or agree to the arrangement.
- In essence, limb (d) focusses on the knowledge or recklessness of the offender as to the effect that their coercion, etc., has in drawing on the worker's fear, not whether that fear is in fact held by the worker.

DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation

21 August 2023

QoN Number: 4

Subject: Assurance of Proposed Language in Subsections 245AAA (1), 245AAB (1), and 245AAC (1)

Asked by: Paul Scarr

Question:

Senator SCARR: Our friends from the Uniting Church, I'll read out their paragraph, happy for you to take it on notice, "We ask that the committee gain assurance from the Department of Home Affairs that the proposed language arrangement to work, in subsections 245aaa (1), 245aab (1) and 245aac (1), are broad enough to cover known exploitative conditions to which migrant and temporary workers have been subjected. Are all those sorts of issues covered by arrangement in relation to work from the Department's perspective?"

Mr David GAVIN: From our perspective they are covered.

Senator SCARR: And how do we know that? Is there a definition of that or law for what is an arrangement in relation to work?

Mr David GAVIN: Happy to take on notice, there will be information in the explanatory memorandum, but we will review that to see if we can find further clarity.

Answer:

The proposed language 'arrangement in relation to work' in subsections 245AAA(1), 245AAB(1) and 245AAC(1) is intended to be broad enough to cover known exploitative conditions to which migrant and temporary workers have been subjected.

For instance, the offences are intended to cover Working Holiday Makers being pressured to submit to sexual harassment or sexual acts, as well as substandard accommodation and the withholding of passports, to receive their employer's sign-off for 'specified work' to gain an extension on their visa.

The offences in subsections 245AAA(1), 245AAB(1) and 245AAC(1) were developed to holistically respond to the forms of exploitation identified by the Report of the Migrant Workers' Taskforce (the Report), including those identified at Page 33 of the Report, such as:

- wage underpayment, or 'cash-back' arrangements
- pressure to work beyond the restrictions of a visa — e.g. student visa work limits
- up-front payment or 'deposit' for a job
- failure to provide workplace entitlements such as paid leave, superannuation
- tax avoidance through the use of cash payments to workers
- unpaid training
- working conditions that are unsafe
- unfair dismissal
- misclassification of workers as independent contractors instead of employees
- unfair deductions from wages for accommodation, training, food or transport
- threats to have a person's visa cancelled by authorities
- withholding of a visa holder's passport
- requiring migrant workers to use and pay for sub-standard on-site accommodation.

Importantly, if the first person (e.g. employer) intentionally coerces, etc., the non-citizen to submit to any of the above forms of exploitative arrangements in relation to work, in Australia, in order to induce them to breach a work-related condition, or where the worker believes that if they reject that arrangement there will be an adverse effect on their presence or immigration status in Australia, then an offence has been committed under relevant sections 245AAA, 245AAB or 245AAC.

To illustrate this point, the Department notes the offences were designed to specifically address issues of sexual harassment, including as outlined in the following hypothetical scenario:

<i>Scenario – New Employer Sanction – section 245AAC</i>

<p>Heidi has just finished school and has travelled to Australia on a working holiday maker visa. During her stay, Heidi decides she would like to stay longer in Australia. She travels to a remote area to spend some time working on a farm in order to meet the 'specified work' requirements to support her application for a second working holiday visa. While working on the farm, she is sexually harassed, including being directed to perform tasks in inappropriate clothing. Heidi's employer indicates that he may not sign-off on evidence that she has been working on the farm if she does not cooperate. Heidi feels unduly pressured into performing these tasks in inappropriate clothing, as she is approaching the end of her current working holiday visa and needs this evidence as a requirement for her second working holiday visa application.</p>
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<p>Heidi's employer has contravened the section 245AAC work-related offence provision relating to a non-citizen who believes, or there are reasonable grounds to believe, that the</p>
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non-citizen must accept or agree to the arrangement to satisfy a work-related visa requirement.

NOTE: While the case study focuses on the contravention of the new criminal offences, this wouldn't preclude court proceedings under other relevant state or commonwealth laws.

Similarly, an employer who coerces, etc., an unlawful non-citizen to accept cash payments (e.g. avoiding tax, superannuation and other entitlements) by threatening an adverse effect on their continued presence in Australia, would be subject to the offence at section 245AAB.

Other reported examples include employers who offer international students a combination of 'legitimate' paid work alongside additional unpaid cash-based work, beyond the conditions of the student's visa. The employer threatens termination or reporting to authorities unless the worker accepts this arrangement. The employer would be subject to penalties for committing the offence at section 245AAA.

The Department of Home Affairs' submission to this inquiry provides other examples such as an employer who coerces, etc., a skilled migrant to engage in a work arrangement in Australia that involves a work health and safety risk, while threatening to withdraw sponsorship for permanent residence. In this instance the employer would be subject to penalties for committing the offence at section 245AAC.

In effect, the expression 'an arrangement in relation to work' has been drafted broadly and is not specifically defined in the Bill. The intention is that it should capture the full spectrum of behaviours or practices that may arise for a migrant worker. The Bill does not include a definition of an 'arrangement in relation to work' because it does not wish to unintentionally exclude a behaviour that may reasonably be considered exploitative.

Lawful and reasonable directions are not be captured by the new offences and related civil penalty provisions as such directions would not involve 'coercion, undue influence or undue pressure'.

The new offences and related civil penalty provisions of the Bill will be part of the Migration Act's established Employer Sanctions Framework.

- As such, where the new offences refer to the term 'work', this has the same meaning as elsewhere in Subdivision C of Division 12 of Part 2 of the Migration Act – which sets out the Employer Sanctions Framework, work-related offences, civil penalties and related provisions.

- 'Work', in this context, means any work, whether for reward or otherwise. This is intended to be a broad definition and may include, for example, paid work, voluntary work or work done in return for accommodation, food or any other benefit.
- This broad definition is also needed to capture situations where persons may work in conditions of sexual servitude without receiving any remuneration.

Outside of the national workplace relations framework there are also a range of other laws that address exploitation and seek to protect workers.

- Human trafficking (for instance, debt bondage) and modern slavery (for example, servitude and forced labour) are addressed under the Criminal Code Act 1995.
- Similarly, there are a range of other laws, such as Work Health and Safety laws, discrimination, tax laws and state and territory based legislation that regulate employers in Australia.

This Bill seeks to complement existing laws inside and outside of the national workplace relations framework by building on those laws to address the particular vulnerabilities faced by migrant workers. In doing so, it responds to recommendations made by the Migrant Workers' Taskforce to address concerns around the misuse of our visa programs to exploit migrant workers, in particular temporary visa holders.

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21 August 2023

QoN Number: 5

Subject: Updates to Explanatory Memorandum following Feedback

Asked by: Nita Green

Question:

Senator GREEN: Is there plans to update the explanatory memorandum, given the feedback that it is not quite clear what is included, and there is such a broad range of conduct that migrant workers are exposed to. We'd really miss our chance if it wasn't covered by these provisions.

Mr David GAVIN: We'll definitely take that on notice and consider further explanatory material that might assist in this regard.

Answer:

The Government will consider all of the feedback in the submissions and review the feedback provided through the public hearing and in the Committee's report to consider any necessary amendments to explanatory material, ensuring the provisions of the Bill are well understood and have the intended effect.

DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal and Constitutional Affairs Legislation

21 August 2023

QoN Number: 6

Subject: Concerns of Proposed Language around Conduct and Behaviour outside the Working Relationship

Asked by: Nita Green

Question:

Senator GREEN: My colleague Senator Scarr raised concerns from the Uniting Church regarding certain conduct and behaviour, perhaps you could take on notice as well, in particular to sexual harassment, whether that's captured by the definition. You say that it is Mr Gavin but its one of those ones that can operate outside of a work relationship.

Mr David GAVIN: We'll take that on notice, and just make the point that the purpose of the new offences is to address instances where the employer is trying to coerce or unduly influence a person to break a visa related condition. Where the nature of the undue influence is harassment or other conduct relates to trying to force the person to break a visa condition or deny them access to a visa remedy, or meet a criteria, where the behaviour relates to that intent, things like sexual harassment or misconduct would be captured. I do note that there are other commonwealth and state laws that relate to these offences.

Answer:

The underlying intent of this Bill is to address the behavior of unscrupulous employers who might seek to use a temporary migrant's immigration status – or their unlawful status – to exploit them in a work arrangement. This involves misusing migration rules to engage in coercion, undue influence or undue pressure.

As noted in the response to QoN 4, the expression 'an arrangement in relation to work' has been drafted broadly and is not specifically defined in the Bill. The intention is that it should capture the full spectrum of behaviours or practices that may arise for a migrant worker. This ensure's the expression is not inadvertently narrowed through a definition.

There are existing laws for a range of behaviours that occur both inside and outside a work context. Notably, this includes the *Sex Discrimination Act 1984*, within which section 28A defines sexual harassment. Sexual harassment is illegal in Australia.

Also noted in QoN 4, this Bill seeks to complement existing laws inside and outside of the national workplace relations framework by building on those laws to address the particular vulnerabilities faced by migrant workers. In doing so, it responds to recommendations made by the Migrant Workers' Taskforce to address concerns around the misuse of our visa programs to exploit migrant workers, in particular temporary visa holders.