

Committee Secretary
Senate Legal and Constitutional Affairs Committee
By email: legcon.sen@aph.gov.au

8 October 2015

Dear Secretary,

Submission to the inquiry of the Senate Legal and Constitutional Affairs Committee into Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions]

I write this submission to assist the inquiry of the Committee into the Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions] (Cth) ('the Bill').

This submission is supported by the Ethnic Communities' Council of Victoria and the Western Community Legal Centre (which operates an Employment Project focused on migrant workers). It is also supported by the following labour migration specialists:

- Dr Martina Boese, Lecturer in Sociology, Department of Social Inquiry, La Trobe University;
- Dr Iain Campbell, Senior Research Fellow, Centre for Applied Social Research, RMIT University;
- Dr Joanna Howe, Senior Lecturer, Law School, Adelaide University;
- Peter Mares, Adjunct Fellow, Institute for Social Research, Swinburne University;
- Professor Nicola Piper, Professor of International Migration, Faculty of Arts and Social Sciences, University of Sydney;
- Associate Professor Alex Reilly, Law School, Adelaide University; and
- Dr Elsa Underhill, Senior Lecturer, Deakin Graduate School of Business, Deakin University.

Supporters of this submission have been copied in the email providing this submission to the inquiry.

The Bill proposes to deal with the issue of 'payment for visas' in three main ways:

- Criminal offences in relation to those who ask for or receive a benefit in return for a sponsorship-related event;¹
- Civil penalties in relation to those who ask for or receive a benefit in return for a sponsorship-related event and those who offer to provide, or provide a benefit in relation to a sponsorship-related event;² and

¹ Proposed ss 245AR (1)-(4) of the *Migration Act 1958* (Cth).

- Conferral on the relevant Minister the discretion to cancel visas when s/he is satisfied that the visa-holder:
 - asked for or received a benefit in return for a sponsorship-related event; or
 - offered to provide or provided a benefit in relation to a sponsorship-related event.³

As with any other area of law, the introduction of serious penalties like those proposed by the Bill require proper justification.

In the 2nd Reading Speech to the Bill, the Minister for Immigration and Border Protection stated that:

This bill will implement a key integrity recommendation of the independent review into integrity in the subclass 457 program: that it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome and that this be reinforced by a robust penalty and conviction framework.

‘Payment for visas’ conduct is not currently unlawful. This conduct is unacceptable to the government and the Australian people because it undermines the genuine purposes for which visas are intended to be granted. This bill will strengthen the integrity of Australia’s migration program by allowing action to be taken where ‘payment for visas’ conduct has occurred.⁴

The Explanatory Memorandum to the Bill also refers to the recommendation of the 2014 review of the subclass 457 program and further states that:

The Government considers that ‘payment for visas’ activity is unacceptable because it undermines the integrity of Australia’s visa programmes. It is not acceptable for sponsors, employers or other third parties to make a personal gain from their position in a ‘payment for visas’ arrangement and it is not acceptable for a visa holder to become an Australian permanent resident by engaging in ‘payment for visas’ behaviour. Applicants who have paid for their visa are more vulnerable to exploitation and extortion by their sponsor, behaviour which endangers workers and undermines Australian workplace law.⁵

The principal paragraph of the 2014 review of the subclass 457 program states that:
In our examination of compliance it has come to our attention that some sponsors have been paid by visa applicants for a migration outcome. This undermines the integrity of the programme and we consider sanctions

² Proposed ss 245AR (1)-(3), (5)-(6), 245AS of the *Migration Act 1958* (Cth).

³ Proposed sections 116(AC)-(AD) of the *Migration Act 1958* (Cth).

⁴ Commonwealth, *Hansard*, House of Representatives, 16 September 2015, 23, Peter Dutton MP, Minister for Immigration and Border Protection.

⁵ Explanatory Memorandum to the Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions] (Cth), 1.

including possible criminal sanctions should apply.⁶

Consequently, the review recommended that:

That it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome, and that this be reinforced by a robust penalty and conviction framework.⁷

Unfortunately, these key paragraphs fail to clearly articulate the purpose/s of the Bill:

- the 2nd Reading Speech to the Bill fails to explain why ‘payment for visas’ ‘undermines the genuine purposes for which visas are intended to be granted’;
- the Explanatory Memorandum fails to elaborate why ‘payment for visas’ are ‘not acceptable’; and
- the 2014 review of the Subclass 457 visa program fails to provide reasons why ‘payment for visas’ ‘undermines the integrity of the (457) programme’.

There are, in fact, three possible purposes for the Bill and the penalties it proposes:

- *Purpose One*: ‘Payment for visas’ should be penalized because it tends to result in sham applications;
- *Purpose Two*: ‘Payment for visas’ should be penalized because it results from sponsoring employers taking advantage of sponsored workers; and
- *Purpose Three*: ‘Payment for visas’ should be penalized because it produces more vulnerability on the part of the sponsored workers

With Purpose One, it is not clear whether ‘payment for visas’ tend to result in sham applications. In any event, the answer to this problem, if it exists, lies in rigorous assessments of applications that should result in the rejection of sham applications rather than criminal and civil penalties or the power to cancel visas. In addition, sham applications can be dealt with through the power to bar or cancel sponsorship when false or misleading information has been provided by the sponsoring employer to the Department of Immigration and Border Protection.⁸

Purpose Two is an important policy objective and stems from the significant power conferred upon employers in any employer-sponsored visa program like Subclass 457 visa scheme. In the terms of the Bill, sponsoring employers have the power to bring about the various ‘sponsorship-related events’. The result is a real risk that sponsoring employers will abuse this power by leveraging payments from workers they are to sponsor. This provides justification for subjecting conduct in *asking for and receiving* ‘payment for visas’ to appropriate penalties.

⁶ John Azarias et al, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Program: An Independent Review into Integrity in the Subclass 457 Program* (2014) 73.

⁷ *Ibid.*

⁸ *Migration Act 1958* (Cth) s 140L; *Migration Regulations 1994* (Cth) reg 2.90.

It does not, however, justify applying penalties to the vulnerable parties in this scenario – the visa-holders. The Bill recognizes the asymmetry between visa-holders and sponsoring employers (and third parties) by not applying criminal penalties to the former group. This is, however, insufficient - no penalties should be applied to the visa-holders who are making ‘payments for visas’. Applying penalties to visa-holders in this context is tantamount to punishing the victims.

The serious risk in relation to Purpose Two is that sponsoring employers will exploit the vulnerability of workers they are to sponsor. Purpose Three implies a quite different relationship between the ‘payment for visas’ and the vulnerability of workers: rather than the payments *resulting* from such vulnerability, it is said to *produce* such vulnerability. According to the Explanatory Memorandum to the Bill:

Applicants who have paid for their visa are more vulnerable to exploitation and extortion by their sponsor, behaviour which endangers workers and undermines Australian workplace law.⁹

The Explanatory Memorandum further states that:

Persons who have paid for sponsorship or nomination may be more vulnerable to exploitation and extortion such as unfavourable/unsafe/unhealthy working conditions, unfair pay, slavery/servitude/forced labour *due to the risk of having their visa cancelled if their employment ceases*.¹⁰

The italicized words, however, seem to reflect some confusion as to the source of vulnerability of sponsored workers. They refer to an inherent aspect of any employer-sponsored temporary visa program – the power of the sponsoring employer to bring about the cancellation of the work visa by terminating the employment of the worker. As the Deegan Review of the subclass 457 visa program observed:

Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.¹¹

This source of vulnerability, however, should not be conflated with ‘payment for visas’ – *it exists whether or not there is a ‘payment for visas’*.

In any event, even if it is true that ‘payment for visas’ *produces or increases* the vulnerability of visa-holders, it provides no justification for imposing penalties upon the visa-holders. As with Purpose One, subjecting visa-holders to penalties based on

⁹ Explanatory Memorandum to the Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions] (Cth) 1.

¹⁰ Explanatory Memorandum to the Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions] (Cth) 29 (emphasis added).

¹¹ Visa Subclass 457 Integrity Review, *Final Report* (Commonwealth of Australia, October 2008) 69.

Purpose Three is tantamount to punishing the victims.

The central recommendation of this submission is, therefore, as follows:

The Bill should be amended so that no penalties – including criminal offences, civil penalties and the prospect of visa cancellation – are imposed on visa-holders.

Implementing this recommendation will ensure that the Bill, as its Explanatory Memorandum asserts, ‘protects the rights of non-citizen workers’.¹²

I hope this submission has been of assistance to the Committee.

Thank you.

Yours sincerely,

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cc.

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- Dr Joanna Howe, Senior Lecturer, Law School, Adelaide University;
- Peter Mares, Adjunct Fellow, Institute for Social Research, Swinburne University;
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- Associate Professor Alex Reilly, Law School, Adelaide University; and
- Dr Elsa Underhill, Senior Lecturer, Deakin Graduate School of Business, Deakin University.

¹² Explanatory Memorandum to the Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions] (Cth) 34.