The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions]

November 2015

ISBN 978-1-76010-319-4

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LP, QLD) (Chair)

Senator Jacinta Collins (ALP, VIC) (Deputy Chair)

Senator Catryna Bilyk (ALP, TAS)

Senator Joanna Lindgren (LP, QLD)

Senator Dean Smith (LP, WA) (from 12.10.2015)

Senator Nick McKim (AG, TAS)

Former member

Senator Linda Reynolds (LP, WA) (until 12.10.2015)

Substitute members

Senator Alex Gallacher (ALP, SA) to replace Senator Jacinta Collins (ALP, VIC) (from 12.10.2015)

Senator Sarah Hanson-Young (AG, SA) to replace Senator Nick McKim (AG, TAS) (from 12.10.2015)

Secretariat

Ms Sophie Dunstone, Committee Secretary

Mr Joshua Forkert, Senior Research Officer

Mr Tasman Larnach, Senior Research Officer

Ms Jo-Anne Holmes, Administrative Officer

Suite S1.61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

Table of contents

Members of the committee ..... **iii**

Recommendations ..... **vii**

Chapter 1

Introduction **1**

Referral 1

Conduct of Inquiry 1

Acknowledgement 1

Background 1

Key provisions and purpose of Bill 3

Consideration of the Bill by other committees 5

Chapter 2

Key issues **7**

Sponsors and visa holders 7

Definitions 12

Appropriateness of powers 14

Committee view 15

Dissenting report from the Australian Greens **17**

Appendix 1 - Public submissions **19**

Recommendations

Recommendation 1

2.39 The committee recommends that a comprehensive consultation process is established and implemented with current and potential visa holders, employer groups and the migration advice profession to ensure that the changes proposed in this Bill are well understood.

Recommendation 2

2.42 The committee recommends that the Bill be passed.

Chapter 1
Introduction

Referral

1.1 On 17 September 2015, the Senate referred the provisions of the Migration Amendment (Charging for a Migration Outcome) Bill 2015 to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 10 November 2015.[1]

1.2 The proposal to refer the Bill in the Selection of Bills Committee report requests that the committee 'further investigate potential and unintended consequences of the Bill'.[2] The committee has also been asked to investigate more fully the extension of the 'grounds upon which a visa may be cancelled to include situations in which the Minister is satisfied that a benefit was asked for by the visa holder from another person in return for a sponsorship related event (regardless of whether this sponsorship occurs)'.[3]

Conduct of Inquiry

1.3 Details of the inquiry, including a link to the Bill and associated documents, were placed on the committee's website.[4] The committee also wrote to 151 organisations and individuals, inviting submissions by 8 October 2015. Submissions continued to be submitted after that date.

1.4 The committee received 11 submissions for the inquiry. The list of submissions and additional information received by the committee is listed at Appendix 1.

Acknowledgement

1.5 The committee thanks those organisations who made submissions.

Background

Employer sponsored temporary and permanent visa programmes

1.6 The Temporary Work (Skilled) (Subclass 457) visa programme was introduced by the Australian government in 1996 in order to enable 'Australian employers to address workforce needs by sponsoring skilled workers to fill vacancies where an appropriately skilled Australian citizen or permanent resident cannot be found to fill the position'. This programme has been underpinned by two principles:

---

1 *Journals of the Senate*, No. 118—17 September 2015, p. 3146.

2 Senate Selection of Bills Committee, *Report No. 12 of 2015*, 17 September 2015, Appendix 1.

3 Senate Selection of Bills Committee, *Report No. 12 of 2015*, 17 September 2015, Appendix 2.

4 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Visa_for_payments_Bill

- to enable a business to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and
- to ensure that the working conditions of a sponsored visa holder are no less favourable than those provided to an Australian worker and that overseas workers are not exploited.[5]

Independent Review of the 457 visa programme (2014)

1.7 In February 2014, the then Assistant Minister for Immigration and Border Protection, Senator the Hon Michaelia Cash, commissioned an independent panel to review the Temporary Work (Skilled) subclass 457 visa programme (independent review). The terms of reference for this comprehensive review required the panel to:

> …recommend a system that, operating in the national interest, was sound and resistant to misuse (the 'integrity' goal), and at the same time, flexible and able to respond quickly to economic and business changes (the 'productivity' goal).[6]

1.8 The panel issued a report of their findings in September 2014 with a series of recommendations. In response to its findings 'that some sponsors have been paid by visa applicants for a migration outcome' and that this 'undermines the integrity of the programme', the panel recommended:

> 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]

Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions]

1.9 On 16 September 2015, the Migration Amendment (Charging for a Migration Outcome) Bill 2015 was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (Minister).

1.10 In his second reading speech, the Minister noted that the Bill is a direct response to the independent review and its recommendation:

> 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.[8]

---

5 Department of Immigration and Border Protection, *Submission 10*, p. 3.

6 John Azarias, Jenny Lambert, Professor Peter McDonald, Katie Malyon, *Robust New Foundations. A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme*, September 2014, p. 6, http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf (accessed 2 October 2015).

7 See: Recommendation 10.7, *Robust New Foundations*, p. 73.

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

Key provisions and purpose of Bill

1.11 The Bill seeks to amend the *Migration Act 1958* to:

> [I]ntroduce a new criminal and civil penalty regime that will make it unlawful for a person to ask for, receive, offer or provide payment or other benefits in return for a range of sponsorship related events. The bill also allows visa cancellation to be considered where the visa holder has engaged in such conduct, referred to as 'payment for visas' conduct.[9]

1.12 The Bill is comprised of one schedule with the following key provisions.

Definitions of benefits

1.13 Proposed section 245AQ sets out a number of definitions including the prohibited types of payments or other benefits to be exchanged for visas.[10] This section would add a definition of benefits which includes:

- a payment or other valuable consideration; and
- a deduction of an amount; and
- any kind of real or personal property; and
- an advantage; and
- a service; and
- a gift.[11]

Definitions of sponsorship activities

1.14 Proposed section 245AQ also contains definitions for the prohibited types of conduct between a sponsor and a visa applicant or visa holder 'at any point in the visa application process or throughout the duration of the visa' that may be classed as being 'payment for visa'.[12]

Types of visas affected

1.15 This Bill would affect a range of visa classes including:

- Subclass 457 (Temporary (Skilled)) visa;
- Subclass 401 (Temporary Work (Long Stay Activity)) visa;
- Subclass 402 (Training and Research) visa;
- Subclass 420 (Temporary Work (Entertainment)) visa;
- Subclass 488 (Superyacht Crew) visa;
- Subclass 186 (Employer Nomination Scheme) visa;

---

9 *House of Representatives Hansard*, 16 September 2015, p. 23.

10 Explanatory Memorandum, pp 7–10.

11 Explanatory Memorandum, p. 7.

12 Explanatory Memorandum, pp 7–10.

- Subclass 187 (Regional Sponsored Migration Scheme) visa.[13]

1.16 The Bill would also retain the flexibility to allow for changes to the 'class and subclass numbers and titles of the visas and sponsor classes' to be 'amended from time to time' through the use of regulations.[14]

Criminal and civil penalties

1.17 The Bill prescribes a range of criminal and civil penalties for sponsors, visa applicants or holders, or any other third party convicted of exchanging a payment or benefit for a visa.[15]

1.18 Prohibition on asking for or receiving a benefit in return for the occurrence of a sponsorship-related event is defined in proposed sections 245AR and 245AS. In both of these sections, the evidentiary burden or onus of proof is reversed and placed on the defendant. The Explanatory Memorandum notes that this is because 'the information as to whether the benefit constitutes a reasonable fee for a professional fee is uniquely within the knowledge of the defendant'.[16]

1.19 Criminal penalties would apply to sponsors and other third parties who are deemed to have contravened proposed section 245AR. The maximum penalties are 'imprisonment for 2 years or 360 penalty units [currently $64 000] or both'. Criminal penalties would not apply to visa holders.[17]

1.20 Civil penalties would apply to sponsors, visa holders and third parties who are deemed to have contravened proposed sections 245AR and 245AS. The maximum civil penalty would be 240 penalty units or $43 200 for an individual or $216 000 for a body corporate.[18]

1.21 Additional criminal and civil penalties are defined in proposed sections 245AT and 245AU for an executive officer of a body corporate who committed a sponsorship related offence (as defined in proposed sections 245AR and 245AS). Executive officers are deemed to be a chief executive officer, chief financial officer or the secretary of a body corporate. The Bill would also provide for additional offences whereby:

- the officer knew that, or was reckless or negligent as to whether, the sponsorship-related offence would be committed; and
- the officer was in a position to influence the conduct of the body in relation to the sponsorship-related offence; and

13 Explanatory Memorandum, p. 8.

14 Explanatory Memorandum, p. 8.

15 Explanatory Memorandum, pp 7–10.

16 Explanatory Memorandum, pp 10 & 11.

17 Explanatory Memorandum, p. 10.

18 Explanatory Memorandum, pp 10–12.

- the officer failed to take all reasonable steps to prevent the sponsorship-related offence being committed.[19]

1.22 In addition to extending penalties to other corporate executive officers, the Bill would also seek to capture unincorporated associations. Proposed section 245AY provides that penalties may 'apply to an unincorporated association as if it were a person' whereby each member of the committee of management is deemed to have committed the offence.[20]

1.23 Further, proposed sections 245AR and 245AS may be deemed to be contravened 'even if the sponsorship related event does not take place'.[21]

1.24 In addition to the penalties outlined above, item 18 of the Bill would introduce 'a new discretionary power to consider visa cancellation, where any person engages in "payment for visas" conduct'. Any person subject to a visa cancellation would be able to 'seek merits or judicial review of that decision'.[22]

1.25 Consequential regulatory amendments would also 'allow for the cancelling and barring of a sponsor who engages in "payment for visas" conduct' and 'strengthen sponsorship obligations' to improve the Department of Immigration and Border Protection's (department) ability to verify sponsor's records.[23]

Extraterritorial jurisdiction

1.26 Proposed section 245AW of the Bill provides for criminal and civil penalties to apply if the 'payment for visas' conduct occurs wholly or partially in Australia. The EM explains:

> For example, if a person in Country X sends a letter to a person in Australia asking for, offering or transmitting a benefit in return for the occurrence of a sponsorship-related event, the conduct is taken to have occurred partly in Australia for the purposes of section 245AW of the Act.[24]

Consideration of the Bill by other committees

Scrutiny of Bills

1.27 On 14 August 2015, the Senate Standing Committee for the Scrutiny of Bills sought the Minister's advice on the following aspects of the Bill:

- merits review of the Minister's discretionary power to consider cancellation of a temporary or permanent visa under item 1, proposed subsection 116(1AC);

---

19 Explanatory Memorandum, p. 12.

20 Explanatory Memorandum, pp 21–22.

21 Explanatory Memorandum, pp 9 & 12.

22 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 16 September 2015, p. 24. See also: Explanatory Memorandum, p. 27.

23 Department of Immigration and Border Protection, *Submission 10*, p. 10.

24 Explanatory Memorandum, p. 20.

- trespass on personal rights and liberties—abrogation of privilege against self-incrimination in items 5, 14 and 15;
- trespass on personal rights and liberties—evidential onus in item 6, proposed subsections 245AR(3), 245AR(6) and 245AS(4);
- trespass on personal rights and liberties—evidential onus in item 6, proposed subsection 245AW(5); and
- trespass on personal rights and liberties—strict liability in item 6, proposed subsections 245AR(5) and 245AS(1).[25]

1.28 At the time of drafting, the Senate Standing Committee for the Scrutiny of Bills had not published the Minister's response.

Human Rights

1.29 The Parliamentary Joint Committee on Human Rights (PJCHR) concluded that the Bill does not appear to give rise to human rights concerns.[26]

25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2015*, 14 August 2015, pp 20–25.

26 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-ninth report of the 44th Parliament*, 13 October 2015, p. 2.

Chapter 2

Key issues

2.1 The majority of submissions supported the Bill's objective to protect vulnerable workers and uphold the integrity of the skilled migration scheme. However, some submitters expressed concerns about the following measures:

- the application of penalties to sponsors (and other third parties) and visa holders:
- definitions; and
- appropriateness of powers.

2.2 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (Minister), noted that:

> '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.
>
> 'Payment for visas' conduct may occur through an employer offering to sponsor a visa applicant in return for a payment or benefit. It may occur before the applicant applies for a visa or during the visa holder's stay in Australia. Evidence obtained through monitoring sponsors indicates that the sponsor and applicant are complicit in the majority of 'payment for visas' activity. Employers may also exploit an employee by requiring payment in return for an ongoing sponsorship.
>
> A strong response is required to ensure that this practice, which has continued under successive governments, does not continue.[1]

Sponsors and visa holders

2.3 Many submitters were supportive of the policy objective to prevent 'payment for visas'. The Migration Institute of Australia (MIA) noted that 'the criminal and civil penalties specified in this Bill send a clear message to those who engage in exploitative behaviour and undermine Australian workplace and migration law'.[2] The Australian Council of Trade Unions (ACTU) agreed 'that the practice of "payment for visas" needs to be stopped'.[3] Similarly, the Ai Group submitted that 'this practice [of

---

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

2 Migration Institute of Australia, *Submission 3*, p. 3.

3 ACTU, *Submission 4*, p. 6.

payment for visas] is unacceptable and undermines the integrity of the skilled migration system'.[4]

2.4 Many of the concerns that submitters raised with the current system relate to the extent to which some visa holders are being exploited by employers and other third parties. Some cases 'have involved employers seeking payments of up to $50 000 or more'.[5] The MIA provided further examples of exploitation:

> Over the years the MIA has heard anecdotal reports of payment for visa models, from, at the most basic level, requiring the visa applicant to pay the sponsor's costs for 457 sponsorship, up to payments of $250,000 per year which included an amount to [be] 'recycled' back as a high income salary that allowed the visa holder to bypass the English language requirement.[6]

2.5 In other cases, the committee heard that 'employers have charged migrant workers large sums of money for enrolment in what are presented as legitimate "courses" to secure work or student visas or gain skills'.[7]

Penalising visa holders

2.6 All submitters agreed that sponsors and other third parties should be punished in the event that the provisions of this Bill are contravened. For example, the ACTU stated in its submission that:

> We support the Bill insofar as it makes it unlawful for employers and other third party agents to solicit and receive payments from overseas workers in return for sponsorship and other visa outcomes. This is a long overdue law reform that addresses a known problem and it is something the ACTU has been calling for, for some time.[8]

2.7 However, submitters suggested that the proposed penalties outlined in the Bill, including the cancellation of visas, disproportionately impacts on vulnerable visa applicants and holders. The ACTU highlighted that in many cases, employers, rather than applicants, are chiefly responsible for engaging in 'payment for visas' conduct:

> The Bill appears to rest on the mistaken assumption that employers, agents and workers are all equally responsible for, and complicit, in the practice of payment for visas, when all the available evidence suggests it is virtually always the employer/agent who is pressuring the worker in these cases.[9]

---

4 Ai Group, *Submission 7*, p. [1].

5 ACTU, *Submission 4*, p. 6.

6 Migration Institute of Australia, *Submission 3*, p. 3.

7 Law Institute of Victoria, *Submission 9*, p. 5. See also: Federation of Ethnic Communities' Councils of Australia, *Submission 11*, p. 2.

8 ACTU, *Submission 4*, p. 3. See also: Migration Institute of Australia, *Submission 3*, p. 2; Law Institute Victoria, *Submission 9*, p. 3.

9 ACTU, *Submission 4*, p. 7.

Vulnerability of visa holders

2.8 Submitters raised concerns about the vulnerable position of visa holders relative to an employer or migration agent. The Federation of Ethnic Communities' Councils of Australia (FECCA) submitted that:

> Temporary visa holders are among the most vulnerable in the workplace and tend to be concentrated in the sectors of the job market which create a potential for exploitation. Lack of knowledge about the Australian workplace relations scheme, including their workplace rights and entitlements, lack of support networks, social isolation, and language barriers all contribute to this vulnerability.[10]

2.9 In its submission, the Law Institute of Victoria (LIV) noted that 'migrant workers [are] a vulnerable group already subject to exploitation and poor treatment in the Australian workforce'.[11] Similarly, Ernst and Young observed that 'temporary visa holders are vulnerable to exploitative employers and can be coerced into breaches of the law which cements the exploitative situation'. Ernst and Young attributed the vulnerability of visa applicants or holders to exploitation to them having:

> …limited knowledge of Australian law and business culture and com[ing] from cultures where it may common practice to provide a "benefit" of some kind in return for job placement or other services.[12]

2.10 Submitters noted that 457 visa holders, due to their reliance on their employers for the continuation of their visas, are particularly vulnerable to exploitation.[13] Associate Professor Joo-Cheong Tham of the University of Melbourne School of Law highlighted that the final report of the then government's 2008 Integrity Review into 457 Visas found that:

> 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.[14]

---

10 FECCA, Submission 11, p. [1].

11 Law Institute of Victoria, *Submission 9*, p. 3. See for example, ABC Four Corners investigation 'Slaving Away' exposing exploitation and slave-like conditions on farms supplying Australian supermarkets; the case of a 457-visa holder trafficked to Australia and held in slave-like conditions in a restaurant for 16 months reported in the Sydney Morning Herald; and the recent Fairfax and Four Corners investigation revealing widescale abuse of workers by 7-Eleven franchisees.

12 Ernst and Young, *Submission 6*, p. 4.

13 FECCA, *Submission 11*, p. [2].

14 Associate Professor Joo-Cheong Tham, *Submission 2*, p. 4. See also: Commonwealth of Australia, *Visa Subclass 457 Integrity Review: Final Report*, 2008, p. 69, https://www.border.gov.au/Trav/Work/Work/Subclass-457-Integrity-Review#d (accessed 13 October 2015).

2.11 The ACTU highlighted that the experience of exploitation is common among temporary visa holders:

> A recurring theme with these cases is the vulnerable situation the temporary visa holders were in, whether that was influenced by their desire to stay in Australia or achieve permanent residency, the fear of retribution if they spoke out, their lack of knowledge of their workplace rights, their poor English, the spectre of a debt hanging over them, or a combination of all these factors. In many cases, it is their direct employer who is taking advantage of them, but in others it is an agent of some description based in Australia or the home country of the visa holder. In some cases, employers and agents are acting together in organised scams which are more akin to labour trafficking and even slavery. In all cases, workers are left disillusioned with their experience of working in Australia.[15]

2.12 Some submitters suggested that the Minister be granted greater discretion to consider the extent of a visa applicant or holders' vulnerability when determining civil penalties or visa cancellations.[16]

Civil penalty provisions

2.13 As a result of this vulnerability, some submitters argued that it would be disproportionate to apply the same penalties to visa holders as those applied to employers and other third parties. Further, employers and other third parties are aware of Australian law and custom and, in the majority of cases, are the ones who primarily facilitate and financially benefit from the 'payment for visas' and as such should be held to a higher standard than visa holders and applicants. LIV suggested that the penalties proposed in the Bill may act as a disincentive for visa holders to report exploitative actions by employers:

> It is paradoxicial [sic] that this Bill seeks to protect migrant workers from exploitation and at the same time includes severe penalties for migrant workers who may be at risk of exploitation. The LIV is concerned that the high penalties contained in this Bill may have the practical effect of deterring migrant workers in exploitative situations from coming forward, for fear that they may have their visa cancelled or be subject to civil penalties.[17]

2.14 These submitters recommended amendments to the Bill that would ensure that the proposed penalties would not apply to visa holders.[18] For example, Associate Professor Tham suggested that 'the Bill should be amended so that no penalties—

16 Ernst and Young, *Submission 6*, p. 4.

17 Law Institute Victoria, *Submission 9*, p. 4. See also: Federation of Ethnic Communities' Councils of Australia, *Submission 11*, p. 2.

18 See: ACTU, *Submission 4*, p. 3; The Law Society of South Australia, *Submission 8*, p. 1.

including criminal offences, civil penalties and the prospect of visa cancellation—are imposed on visa holders'.[19]

2.15 The department noted that it 'takes a tiered approach to unlawful conduct, with stronger responses and more serious outcomes reserved for more serious conduct' meaning that penalties would be applied in a manner befitting the magnitude of the infringement. The department further clarified that all allegations of 'payment for visas' conduct would be subject to an investigation by appropriately delegated Australian Border Force Officers.[20]

Cancellation of visas

2.16 Submitters raised concerns about the provisions allowing the Minister to cancel visas of visa holders found to be engaging in 'payment for visa' conduct. In particular, the Law Institute of Victoria expressed concern that the cancellation may apply whether or not a sponsorship event actually happened.[21]

2.17 Submitters also argued this provision presents an 'unacceptable risk' to victims of human trafficking.[22] A joint submission from the Salvation Army, Uniting Church, National Union of Workers and Harris Wake argued that the provision may act as a disincentive for reporting human trafficking, forced labour or slavery:

> With the threat of cancellation of a visa, it is likely to have the perverse outcome of assisting those engaged in human trafficking and egregious workplace exploitation by further deterring victims of such crimes from reporting the crimes against them if they have been offered a sponsorship related event.[23]

2.18 These submitters suggested that the Minister should not be granted the authority to cancel the visa of a person who is subject to human trafficking, or where an investigation is underway into such allegations.[24]

2.19 In its submission, the Department of Immigration and Border Protection (the department) clarified that that:

> [C]onsistent with other cancellation powers in the Act, the visa holder would be afforded procedural fairness during the cancellation process. In considering whether to exercise the discretion to cancel, the Minister or delegate would consider a range of factors including the visa holder's complicity in the 'payment for visas' conduct, the extent of the 'payment for visas' conduct, and whether a benefit was obtained as a result of the 'payment for visas' conduct. Other considerations would include the

19 Associate Professor Joo-Cheong Tham, *Submission 2*, p. 5.

20 Department of Immigration and Border Protection, *Submission 10*, p. 8.

21 LIV, *Submission 9*, p. 5.

22 The Law Society of South Australia, *Submission 8*, p. 1.

23 Uniting Church in Australia, The Salvation Army, National Union of Workers and Harris Wake, *Submission 5*, p. 4.

24 *Submission 5*, p. 1.

> strength of the visa holder's ties to Australia and contribution to the Australian community, as well as Australia's international obligations such as the best interest of children, family unit and non-refoulement obligations.[25]

2.20 The department further clarified that all visa cancellation decisions would be subject to review:

> A person whose visa is cancelled by a delegate would have the ability to seek merits review of that decision. Where the cancellation decision is made by a Minister, the person would be able to seek judicial review.[26]

Consultation and transition arrangements

2.21 The MIA highlighted that the changes proposed in this Bill need to be effectively communicated to vulnerable visa holders, particularly those from non-English speaking backgrounds:

> Applicants from non-English speaking backgrounds may be among the most vulnerable to this exploitation. The MIA recommends that widespread media campaigns be conducted to inform potential sponsors and visa applicants to inform them of their obligations and rights. The MIA also recommends that the information be provided in common community languages.[27]

2.22 The MIA noted that the provision of widespread media campaigns using a range of common community languages would empower visa holders to know when they are being taken advantage of and to report it.[28]

2.23 The committee agrees that the department should instigate a consultation process with current and potential visa holders, employer groups and the migration advice profession to ensure that these changes are well understood.

Definitions

2.24 Submitters expressed concern that the definitions set out in proposed section 245AQ were either too broad, or too narrow, including:

- what constitutes a benefit;
- what is considered a sponsorship related event; and
- executive officers.

Benefits and advantages

2.25 Ernst and Young submitted that the definition of 'benefit' in the Bill was 'unnecessarily broad' and that 'in particular the term "an advantage" may be broadly interpreted by immigration department officers, tribunals and courts'. Ernst and Young

---

25 Department of Immigration and Border Protection, *Submission 10*, p. 9.

26 Department of Immigration and Border Protection, *Submission 10*, p. 9.

27 Migration Institute of Australia, *Submission 3*, p. 3.

28 Migration Institute of Australia, *Submission 3*, p. 3.

suggested that the provision of benefits that would 'ordinarily arise out of lawful employment' should be excluded from this definition or in the form of policy guidance.[29]

2.26 The MIA also expressed concern 'that the difference between receiving a benefit from a sponsorship related event and paying for professional migration advice' is not clearly distinguished in the Bill.[30] The Ai Group also highlighted the Bill's unintentional capture of legitimate work related benefits such as advancing salary or wages to assist a visa holder with relocation and establishment costs prior to commencement of employment.[31]

2.27 Ernst and Young argued that greater clarity is required as to what is considered a reasonable amount:

> The Bill places the evidentiary burden on a defendant to prove that a "benefit" is a payment of a reasonable amount for a professional service, that is, at market rates. The question that arises is how and by whom it will be determined that the service was provided at market rates. Fees for immigration services, for instance, vary significantly across the market which encompasses a wide range of providers from sole traders to global law firms. Commercial in confidence information regarding fees charged by competitors may not be available to a defendant and is unlikely to be available to a delegate of the Minister. There is therefore scope for a delegate to erroneously find that a fee charged for a legitimate professional service is not "a reasonable amount"…
>
> Clear policy guidelines must also be developed to direct delegates to take into account a wide variation in fees for legitimate professional services.[32]

2.28 Similarly, Ai Group expressed concern that some legitimate payments from visa holders to sponsors may be defined as 'benefits', such as reimbursements to the sponsor of an advanced payment on the visa holder's salary to help pay for accommodation or other living expenses.[33]

2.29 The Explanatory Memorandum notes that the Bill provides for a specific defence for persons receiving a benefit payment under proposed section 245AR and 245AS of the Bill. This provision allows a defence for what might be contested as a reasonable amount for professional services. In its submission, the department noted:

> Legitimate business practices would not constitute conduct that involves asking for or receiving a benefit to enter into a "payment for visas" arrangement. Therefore, it is not considered that the new offence and civil penalty provision would apply to professional services such as the provision of immigration assistance or recruitment advice, or to benefits received by

29 Ernst and Young, *Submission 6*, p. 2.

30 Migration Institute of Australia, *Submission 3*, pp 3–4.

31 Ai Group, *Submission 7*, p. 1.

32 Ernst and Young, *Submission 6*, p. 3.

33 Ai Group, *Submission 7*, p. 1.

> an employer by way of business profits or other routine business benefits that flow from employing or engaging a person.[34]

Sponsorship-related event

2.30 Concerns were also raised about whether the definition of sponsorship related events is sufficiently broad enough to capture all types of 'payment for visas' activities that are likely to occur. The ACTU highlighted examples which the Bill may not capture, such as:

> …the potential for employers to seek a benefit in return for providing a working holiday visa holder the 88 days' work that can lead to a second year working holiday visa extension.[35]

2.31 The ACTU further expressed concern that other related 'events', such as advertising of positions with the 'lure' of migration outcomes may not be included in the definition:

> We would also like to see a ban on job ads that target positions for overseas workers with the lure of various migration outcomes; for example, job ads that advertise only for working holiday visa holders or that use the inducement of a second year working holiday visa.[36]

Executive officers

2.32 The ACTU argued that the definition of 'executive officer' should be broadened beyond the definition set out in section 245AQ 'as directors, CEOs, CFOs and secretaries' of corporations. The ACTU asserted that 'there is a case for extending this liability to others with relevant authority outside these confined categories'.[37]

2.33 The department advised that the Bill reflects best practice corporate governance which provides for directors, CEOs, CFOs and secretaries of corporations to be the ones ultimately responsible for the culture and actions undertaken within a company.[38]

Appropriateness of powers

2.34 Proposed sections 245AR and 245AS of the Bill define the offence of 'offering to provide or providing a benefit' and 'asking for or receiving a benefit in return for the occurrence of a sponsorship-related event'. In both sections, a person is deemed to have contravened these sections even 'if the sponsorship-related event does not occur'. In both cases the 'request for, or offer to provide 'payment for visas' is deemed to be an offence.[39]

---

34 Department of Immigration and Border Protection, *Submission 10*, p. 6.

35 ACTU, *Submission 4*, p. 9.

36 ACTU, *Submission 4*, p. 9.

37 ACTU, *Submission 4*, p. 9.

38 Department of Immigration and Border Protection, *Submission 10*, p. 6.

39 Explanatory Memorandum, pp 9 & 12.

2.35 The Queensland Council for Civil Liberties (QCCL) submitted that these sections 'make the presumption that the person is guilty and has the burden of proving his/her own innocence'. QCCL notes that the reversal of the onus of proof in these sections of the Bill is in violation of Article 11 of the United Nations Universal Declaration of Human Rights that protects the presumption of innocence until proven guilty in a court of law.[40]

2.36 The Explanatory Memorandum explains that the reversal of the onus of proof is a 'necessary' measure: :

> It is necessary to reverse the onus of the burden of proof in relation to this matter because the information as to whether the benefit constitutes a reasonable fee for a professional service is uniquely within the knowledge of the defendant. The applicant for a civil penalty order would still be required to prove that the benefit was asked for or received in return for the occurrence of a sponsorship-related event.[41]

Committee view

2.37 Most submissions to this inquiry supported the findings of the 2014 independent review that 'payment for visas' is an area of migration policy requiring reform.[42] The committee recognises that by designating 'payment for visas' as an unlawful action, this Bill would help to reduce the exploitation of visa applicants and holders. The Bill's range of criminal and civil penalties for 'payments for visas' would also be a useful disincentive to those who consider engaging in these activities.

2.38 It is the committee's view that whilst this Bill is tough on those who participate in 'payment for visas' activities, it has a number of review mechanisms to ensure that vulnerable visa holders would not be disproportionately affected. The committee is confident that the range of penalties available to the department ensures that penalties are applied in proportion to the alleged offence. The department should ensure that the changes proposed in this Bill are communicated through a consultation process with current and potential visa holders, employer and employee groups and the migration advice profession.

Recommendation 1

2.39 The committee recommends that a comprehensive consultation process is established and implemented with current and potential visa holders, employer groups and the migration advice profession to ensure that the changes proposed in this Bill are well understood.

---

40 Queensland Council for Civil Liberties, *Submission 1*, pp [1–2].

41 Explanatory Memorandum, p. 11. See also, p. 12.

42 John Azarias, Jenny Lambert, Professor Peter McDonald, Katie Malyon, 'Robust New Foundations. A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme', September 2014, p. 6, http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf (accessed 2 October 2015).

2.40 The committee notes that the reversal of the onus of proof in this Bill only relates to determining a professional fee; the onus for proving that a benefit was asked for or received (or offered to provide or provided) still rests with the department and the Minister. The Statement of Compatibility with Human Rights notes that 'in most cases, professional services would not constitute [payment for visas] conduct'. It is also noted that the reversal of the onus of proof has been included 'as a safety net to cover unusual circumstances that might arise in the course of work legitimately undertaken by migration agents or recruitment agents that might inadvertently constitute' payment for visas conduct.[43]

2.41 The committee is satisfied that this Bill achieves the right balance with regard to definitions for 'benefit', 'sponsorship related event', and 'executive officers'. The definitions are sufficiently broad to capture the broad spectrum of activities that constitute 'payment for visas' whilst providing opportunities for review for those who deem their actions to be legal. These review mechanisms provide migration and recruitment agents, and visa applicants and holders opportunities to provide information that may assist the department in determining the legality of their actions. The committee therefore recommends that the Bill be passed.

Recommendation 2

2.42 The committee recommends that the Bill be passed.

Senator the Hon Ian Macdonald
Chair

43 Explanatory Memorandum, Attachment A, p. 32.

Dissenting report from the Australian Greens

1.1 The Senate Inquiry into the Migration Amendment (Charging for a Migration Outcome) Bill 2015 (the Bill) received eleven submissions from lawyers and experts in migration. The vast majority of these submissions raised serious concerns over the manner in which this Bill targets visa applicants / holders as well as employers / sponsors.

1.2 Despite the evidence provided and concerns raised by these experts, the Chair's report has recommended that this Bill be passed.

1.3 The Australian Greens broadly support legislation that makes it unlawful for unscrupulous employers / sponsors to solicit vulnerable workers in exchange for visas and associated payments and take advantage of them in their applications for skilled or permanent visas. This was a concern acknowledged by majority of stakeholders in their submissions. Like the majority of these stakeholders, however, the Australian Greens have serious concerns regarding this Bill.

1.4 The Government claims that the Bill has been drafted in response to a recent independent panel's review into the Temporary Work (Skilled) subclass 457 visa programme[1] (the independent review), specifically the recommendation:

> 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.[2]

1.5 Firstly, the Bill goes far beyond the independent review's recommendations by penalising visa applicants and holders (rather than just employers / sponsors as the report's recommendation suggests). Visa applicants should not be penalised; many visa applicants / holders are vulnerable and have limited or no English language skills. They may not even know that they have engaged in conduct that is improper or unlawful; it is therefore essential that a mental element be included in any offence seeking to penalise visa applicants / holders.[3] The Bill may also extend to particular vulnerable workers coerced into a scheme against their knowledge or will, such as those subjected to human trafficking.[4]

1.6 Secondly, the Bill affords the Minister unreasonable and broad discretion by imposing strict liability offences – meaning that the mental element of the visa

---

1 John Azarias, Jenny Lambert, Professor Peter McDonald and Katie Malyon, *Robust New Foundations: A Streamlines, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme*, September 2014, https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf (accessed 5 November 2015).

2 *Robust New Foundations*, Recommendation 10.7, p. 73.

3 For further discussion of this concern, see for example Ernest & Young, *Submission 6*, p. 4.

4 For further discussion of this concern, see, for example Uniting Church in Australia, The Salvation Army, National Union of Workers and Harris Wake, *Submission 5*, p. 4.

applicant / holder is not relevant to the Minister's consideration as to whether they have engaged in an offence. The Minister merely has to be 'satisfied' that a certain factual event has occurred. This is a dangerously low threshold for an exercise of power that will have significant and detrimental effects on the visa holder.[5] The Chair's report states that it is 'confident that the range of penalties available to the department ensures that penalties are applied in proportion to the alleged offence'.[6] In the context of a trend towards greater Ministerial discretion and fewer opportunities for meaningful oversight of these decisions in the migration space, the Australian Greens considers it inappropriate to rely on non-compellable discretions as an appropriate safety net to counter the legitimate concerns raised by experts in their submissions.

1.7 Finally, we note that the Bill affords the Minister broad discretionary power to cancel a visa regardless of whether or not the sponsorship event in question actually took place.

Conclusion

1.8 The Australian Greens are concerned that the Chair does not appear to have appropriately responded to and addressed the concerns raised by the vast majority of experts regarding this Bill. The Australian Greens recommend that the Bill be rejected by the Senate.

Recommendation 1

1.9 The Australian Greens recommend that sections (1AC), (1AD) and 245AR of the Bill be omitted.

Recommendation 2

1.10 If the Bill is not amended, as per Recommendation 1, the Australian Greens recommend that it be rejected by the Senate.

Senator Sarah Hanson-Young
Australian Greens

5 The Law Institute of Victoria, *Submission 9*, p. 6.

6 *Robust New Foundations* p 15, 1.28.

Appendix 1

Public submissions

1	Queensland Council for Civil Liberties
2	Associate Professor Joo-Cheong Tham
3	Migration Institute of Australia
4	Australian Council of Trade Unions (ACTU)
5	Uniting Church in Australia, The Salvation Army, National Union of Workers and Harris Wake
6	Ernst & Young
7	Australian Industry Group
8	The Law Society of South Australia
9	Law Institute of Victoria
10	Department of Immigration and Border Protection
11	Federation of Ethnic Communities' Councils of Australia (FECCA)