

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Legal And Constitutional Affairs Legislation Committee
Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

23 February 2022

QoN Number: 03

Subject: Call for Firewall between Home Affairs and Fair Work Ombudsman

Asked by: Sarah Henderson

Question:

A number of submitters raised the need for a firewall to be implemented between the Department of Home Affairs and the Fair Work Ombudsman in dealing with migrant worker issues (see for example Australian Council of Trade Unions, Submission 9, p.4).

Does the department support or oppose such a firewall? For what reasons?

Answer:

A firewall would undermine the Government's collaborative approach to address migrant worker exploitation which is characterised by information sharing and joint operations to maximise the outcomes of compliance and enforcement efforts.

Under the Assurance Protocol between the Department of Home Affairs and the Fair Work Ombudsman (FWO), temporary visa holders who have breached a work-related condition of their visa will generally not have their visa cancelled if:

- They believe they have been exploited at work, have sought advice or support from the FWO and are helping the FWO with its inquiries;
- They commit to abiding by visa conditions in the future; and
- There are no other grounds for visa cancellation (such as national security, character, fraud or health concerns).

The Protocol thus relies on communication and exchange of information between the department and the FWO in order to provide support to visa holders to come forward and report exploitation.

The Fair Work Ombudsman will only refer a visa holder to Home Affairs under the Assurance Protocol after having obtained their informed consent and to date, no one referred under the Assurance Protocol has had their visa cancelled.

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Legal And Constitutional Affairs Legislation Committee
Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

23 February 2022

QoN Number: 04

Subject: Assurance Protocol

Asked by: Sarah Henderson

Question:

Why isn't the Assurance Protocol publicly available?

Answer:

Information relating to the Assurance Protocol is published on both the Department of Home Affairs (the Department) website (homeaffairs.gov.au/visas/working-in-australia/work-rights-and-exploitation) as well as the Fair Work Ombudsman (FWO) website (www.fairwork.gov.au/find-help-for/visa-holders-migrants). The Department and FWO have also published Assurance Protocol communications in news items and social media posts.

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Legal And Constitutional Affairs Legislation Committee
Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

23 February 2022

QoN Number: 05

Subject: Rationale for Departure from Existing Defences Framework

Asked by: Sarah Henderson

Question:

The AI Group (Submission 18 p.3) expressed concern about the departure from the existing defences framework in the Migration Act 1958 for the two new proposed offences sections 245AAA and 245AAB.

What is the rationale for this departure?

Answer:

The existing work-related offences in sections 245AB, 245AC, 245AE and 245AEA of the Migration Act deal with circumstances in which a person allows a non-citizen to work, or refers the non-citizen to another person for work, and that non-citizen either:

- is an unlawful non-citizen; or
- would be working in breach of a work-related condition of their visa.

In this context, each of subsections 245AB(2), 245AC(2), 245AE(2) and 245AEA(2) establishes a specific defence (or exception, in the case of the related civil penalty). The defence is available where a person can demonstrate they took reasonable steps at reasonable times to verify the non-citizen worker is not an unlawful non-citizen, or is not working in breach of a work-related visa condition. Use of the Visa Entitlement Verification Online (VEVO) system is prescribed as one such reasonable step. By using VEVO to verify that a non-citizen has the required permission to work, the person has taken appropriate action, consistent with the underlying policy intention of these provisions.

The new offences in proposed sections 245AAA and 245AAB are substantively different from the existing offences. The new offences target conduct that amounts to coercion or the exertion of undue influence or undue pressure on a non-citizen, intended to get the non-citizen to agree to an arrangement in relation to work. The focus is on the employer, or other person in the employment chain, having engaged in conduct of an exploitative character in relation to a non-citizen, in a work context. In the context of the offence in proposed section 245AAA in particular, the third physical element of the offence is that, as a result of the arrangement, the non-citizen breaches, or would breach, a work-related condition.

It would not be consistent with the intention of the proposed offences to make VEVO verification an available defence. If a person has used VEVO to verify that a non-citizen is subject to a work-related visa condition, and then proceeds to exert undue pressure to get the non-citizen to work in breach of that condition, this would be a significant concern.

In these circumstances, the fact that a VEVO check was conducted may go to proving the fault elements of the offence – for example, as a result of the VEVO check, the person knew the non-citizen was subject to a work-related visa condition and acted recklessly by coercing them into an arrangement that resulted in a breach of the condition. It would not be appropriate to make VEVO checking available as a defence.

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Senate Legal And Constitutional Affairs Legislation Committee
Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

23 February 2022

QoN Number: 06

Subject: Concerns around proposed threshold of influence being "undue" instead of "any" in new sections.

Asked by: Sarah Henderson

Question:

A number of submitters raised concerns about the threshold in proposed sections 245AAA and 245AAB that the pressure or influence must be 'undue'. For instance, the Law Council of Australia commented 'arguably, if the prospective employer knows that the proposed work arrangement will cause the visa holder to breach a work-related condition (or is reckless to that possibility), any degree of influence or pressure exerted to accept or agree to that arrangement could fairly be characterised (as a matter of policy) as being undue, and meritorious of criminal sanction.' Why don't the offences capture any degree of pressure or influence?

Answer:

The purpose of criminalising undue influence or pressure is to target conduct that has an excessive, unfair or exploitative character (such as, coercion). The inclusion of the term "undue" in the provisions makes this intention clear.

Relevantly, where other provisions on the Commonwealth statute book proscribe the use of influence or pressure to bring about an outcome, they typically refer to the use of "undue influence" or "undue pressure" – for example, section 344 of the *Fair Work Act 2009*, which deals with undue influence or pressure in an employment context. As such, omitting the qualifier "undue" in the proposed offences would be exceptional, and inconsistent with the approach in other Commonwealth laws.

Criminalising the application of *any* degree of influence or pressure in the employment context may set the bar for criminal culpability too low, and would not be consistent with the intended focus of the new offences.

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Legal And Constitutional Affairs Legislation Committee
Migration Amendment (Protecting Migrant Workers) Bill 2021 [Provisions]

23 February 2022

QoN Number: 07

Subject: Safeguards to ensure correct intermediaries are captured.

Asked by: Sarah Henderson

Question:

A number of submitters raised concerns that proposed paragraphs 245AAA(1) and 245AAB(1) could capture coercion, influence or pressure exerted by a person outside the employment chain. At the hearing, the department confirmed that it is not the 'intention of the bill' to capture all persons (Hansard, page 56).

What sort of safeguards would be put in place to ensure that only employers and labour hire intermediaries are captured?

Answer:

Use of the term 'person' in the proposed offences in subsections 245AAA(1) and 245AAB(1) is consistent with the drafting of the existing work-related offences under the Migration Act, and more broadly with the *Criminal Code* and other offences on the Commonwealth statute book.

The intention in framing the offences to apply to a 'person' is to ensure the offences cover the range of participants in the employment and labour-supply chain - employers, labour hire intermediaries, facilitators, agents and other participants in making arrangements for the performance of work by a non-citizen. The expression 'arrangement in relation to work' in the second element of the offences is also intended to ensure there is a work nexus. The offences are drafted in such a way that, for a person to coerce, or exert undue influence or pressure on a non-citizen to get them to agree to a work arrangement, the person would need to be in a position to offer the arrangement to the non-citizen. A colleague or friend, not in the employment chain, would generally not be in a position to make such an offer.

The Department maintains comprehensive policy and procedural instructions, standard operating procedures and training in relation to the Migration Act's Employer Sanctions framework. If the Bill is passed, the proposed new offences, civil penalty provisions and related matters would be similarly supported by policy instructions and guidance for officers of the Department and the Australian Border Force (ABF). The same safeguards would apply in relation to the investigation of any alleged offending against proposed sections 245AAA and 245AAB as currently apply in relation to the exercise of investigation powers by the ABF under Part 8E of the Migration Act.