BEFORE THE SENATE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE

INQUIRY INTO THE IMPACT OF AUSTRALIA'S TEMPORARY WORK VISA PROGRAMS ON THE AUSTRALIAN LABOUR MARKET AND ON TEMPORARY WORK VISA HOLDERS

17 JULY 2015

OPENING STATEMENT AT PUBLIC HEARING ON BEHALF OF THE HUMAN RIGHTS COUNCIL OF AUSTRALIA

On behalf of the Human Rights Council of Australia, thank you for the opportunity for Dr Berg and I to appear today. The Council acknowledges the importance of the Committee's inquiry.

The Council's submission focuses upon those terms of reference of the inquiry concerned with the exploitation and mistreatment of temporary migrant workers, whether temporary work visa holders have access to the same benefits and entitlements as Australian citizens and permanent residents and whether systems for monitoring and enforcement are adequate.

Currently, between about 6% and 8% of the Australian labour market is comprised of temporary migrant workers.[1] For the most part, these workers fall into three categories: 457 visa holders; young Working Holiday visa holders; and international students.[2]

The 457 visa attracts professionals, managers and tradespersons. As at 30 June 2014, there were more than 35,000 employer-sponsors of 457 visa holders. That was almost double the number of employer-sponsors three years before in 2011 and for the several years prior to that. In 2014, 6% or 2,223 employers were monitored by the Department of Immigration and Citizenship for their compliance with visa program requirements. Three years before, in 2011, between 3% and 4% of employer-sponsors were monitored. In 2012, 40% of the small percentage of workplaces that were monitored by the Department, were found to be non-compliant with visa conditions in various ways.[3] Examples of non-compliance include underpaying temporary migrant workers or not paying them at all.[4]

Even if the rate of non-compliance among all employer-sponsors of 457 visa holders is not as uniformly high as 40%, the statistics are sufficiently high to demonstrate that not only are a significant number of Australian labour market participants temporary migrant workers but a significant portion of these workers are being denied enjoyment of work conditions that citizens and permanent residents take for granted.

Anecdotal evidence such as the recent Four Corners investigation involving migrant workers at a chicken meat processing facility being required to work excessive hours for very low wages without any overtime, tends to confirm that temporary migrant workers are and continue to be exploited in Australia.

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1 L Berg, *Migrant Rights at Work*, Forthcoming, 64.
2 L Berg, *Migrant Rights at Work*, Forthcoming, 62.
3 L Berg, *Migrant Rights at Work*, Forthcoming, 119.
4 L Berg, *Migrant Rights at Work*, Forthcoming, 120.

It is a matter of very considerable concern that temporary migrant workers appear to be being exploited at such a significant rate in a developed country such as Australia that, since Federation, has prided itself on the strength and importance of its labour laws. The evidence signals not only a need to recognise the problem but also a challenge to understand how and why temporary migrant workers are at risk of exploitation and whether law, systems and procedures can be improved to prevent it or, at least, to minimise the risk of the exploitation continuing to occur into the future.

The Human Rights Council of Australia proposes that the Migrant Workers Convention (the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*) be ratified. The Convention does not create any new substantive rights not already provided for in the *Universal Declaration of Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) or the *International Covenant on Economic Social and Cultural Rights* (ICESCR). Australia is already a party to or has ratified all of these major human rights treaties. The value of the Migrant Workers Convention is that it recognises that migrant workers are an especially vulnerable population who are at special risk of not having their human rights observed and protected.

In this way, the Convention is similar in its function to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). There can be no debate about the value of this treaty in advancing the interests of women. The CEDAW treaty recognised women to be vulnerable population and at sufficient risk of having their human rights breached to justify a specific purpose convention.

The Migrant Workers Convention is important for the same reasons. It picks up relevant well-established fundamental (in some cases, non-delegable) human rights, such as the prohibitions on slavery and holding a person in servitude,[5] and applies them to migrant workers. It does so because the United Nations General Assembly has acknowledged that migrant workers have not been sufficiently recognised and are deserving of international protection in relation to the risk of slavery and other rights set down in the Convention.

One area in which special protection is needed for temporary migrant workers relates to their access to legal remedies for employer breaches of labour laws. In a theoretical sense, the same labour laws apply to temporary migrant workers as citizens and permanent residents. The practical reality, however, is quite different.

Temporary migrant workers whose employment depends upon sponsorship of a single designated employer may, understandably, be very reluctant to seek redress against the employer-sponsor for being underpaid or other breaches of their employment conditions. Seeking redress is likely to place the continued sponsorship at very significant risk.

The requirement for 457 visa holders to leave Australia within 90 days of their employment being terminated makes it very difficult, if not impossible, for access to be obtained to unfair dismissal laws and laws that make provision for reinstatement where the termination of employment is harsh, unjust or unreasonable.

These examples illustrate that the practical and often invisible effect of visa conditions or requirements is to cause or promote an effective loss of both labour rights and human rights. When regard is had only to the legal coverage or application of labour laws, there would appear to be no discrimination. The

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5 ICCPR, Art 8(1), (2).

disadvantage felt by temporary migrant workers is hidden if the problem is approached only from this perspective. The discrimination is indirect. It is necessary for regard also to be had to visa conditions and requirements and their practical impact on the visa holder.

Working Holiday visa holders provide another example of those at risk of exploitation and denial of their rights. The requirement to work for three months as a pre-requisite to being permitted to continue to stay in Australia for a further 12 months, has the effect of compelling many to work for little or no pay to ensure that they can remain in Australia.

Temporary migrant workers are also likely have more limited access than citizens and permanent residents to complaint mechanisms provided for by the Australian Human Rights Commission. Migrant workers who depend upon ongoing sponsorship from their employer are unlikely to be motivated to complain about conduct of their employer that, for example, may be discriminatory on the grounds of their race or gender.

These examples show that the position occupied by temporary migrant workers is precarious. The precariousness is systemic. It is a product of the visa conditions such as, in the case of 457 visa holders, the requirement for patronage of a single employer. Ratification of the Migrant Workers Convention by Australia would signal recognition of the inherent or systemic nature of this precariousness and the problems with which it is associated. Ratification would emphasise the importance of the need for special measures to overcome the effective discrimination and disadvantage experienced by migrant workers.

The Human Rights Council proposes that, as well as the Convention being ratified, consideration be given to the following steps or measures:

(a) removal or relaxation of the requirement for 457 visa holders to be employed by a single employer in favour of greater mobility within a particular industry or between a number of potential employers within a specified industry sector;

(b) improved oversight of employer-sponsors and enforcement of employment terms and conditions among employer-sponsors;

(c) an audit of the interplay or relationship between employment laws and visa conditions with a view to identifying other practical barriers to temporary migrant workers being able to fully realise their rights.

Finally, may I acknowledge the considerable expertise of Dr Berg who is about to publish what I fully expect will become a seminal work about migrant workers rights, and Sanushka Mudaliar who, for the last several years, has been instrumental on behalf of the Human Rights Council in working with a broad coalition of civil society around the issue of ratification of the Migration Workers Convention.

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