Exploitation of International Students in the Workforce

Proposal for a new Ministerial Direction under s499 of the *Migration Act 1958*

Redfern Legal Centre

1. Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

2. RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and a dedicated international student legal service. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free legal advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC's work with International Students

3. RLC has been providing advice to international students through its international student advice service since October 2011.

4. We launched this service following an increase in the number of international students seeking advice over the previous few years. International students appear to be particularly targeted and vulnerable to exploitation in a number of areas including housing, employment, consumer scams and issues with their education providers.

5. A key feature of the service is access to both legal and migration advice. In our experience international students frequently have a visa issue associated with their legal problem and fears about their visa status can prevent international students from seeking advice or asserting their rights.

Combatting Exploitation of International Students in the Workforce

6. Redfern Legal Centre (RLC) wants to ensure the workplace rights of international students are implemented, complied with and enforced by facilitating safe and secure reporting of breaches of Australian law.

7. The RLC International Students and Employment Law practices regularly deal with international students who face serious exploitation at work but are constrained from taking action if they have worked over their 40 hour per fortnight visa condition, the breach of which is a clear threat to their visa status.

8. The focus of our proposal is to address unscrupulous employment practices and exploitation of vulnerable employees who are very unlikely to report breaches of workplace laws as they risk their visa status.

9. The Senate Report, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* ('the Senate Report'), released in March 2016, addressed this issue in detail at Chapter 8. The Report noted, at [8.45]:

    > … one of the key points emphasised by several submitters and witnesses were the draconian consequences under the Migration Act that flowed from a temporary visa worker breaching a condition of their visa. The severity of the consequences was seen as a structural incentive for an employer to entice or coerce a temporary visa worker into breaching a condition of their visa in order to gain leverage over the worker.

10. See also the Productivity Commission 2015 report *Workplace Relations Framework* regarding threats by employers to report migrants who have breached visa conditions, even where there has been coercion, as deterring complaints of exploitative work conditions. (Productivity Commission Inquiry Report No. 76, 30 November 2015, at 921.

11. We propose a decision making protocol which, in most cases, provides for a first and final warning so, if no further breach, a visa holder can continue with their studies and the integrity of workplace laws and conditions are maintained. This will also allow relevant agencies, including the DIBP, FWO and AFP, to be

apprised of unscrupulous employers and labour hire companies and so buttress current and ongoing workplace investigations. We propose that this decision making protocol be in the form of a Ministerial Direction as made under s499 of the Act.

12. We have drawn on the submission of Associate Professor Joo-Cheong Tham to the Senate Inquiry, in which he proposed an amendment to the *Migration Act 1958* (the Act) at section 116 and 235 (see the Senate Report at [8.56]ff). We propose that such provisions could be incorporated into a Ministerial Direction.

13. Section 499(1) of the Act empowers the Minister for Immigration and Border Protection (the Minister) to give written directions to a person or body having functions or powers under the Act, if the directions are about the performance of those functions or the exercise of those powers. These directions must be consistent with the Act and the Migration Regulations 1994, and they must be tabled in Parliament after they are given by the Minister. A Ministerial direction made under s499 is binding on a DIBP delegate as:
    a. s499(2A) provides that a person or body having functions or powers under the Act must comply with directions made under s499(1); and
    b. s496(1A) provides that persons to whom the Minister's powers under the Act have been delegated (under s496(1)) are subject to the directions of the Minister.

14. Given their nature, section 499 Directions are generally used where the performance of a function (or the exercise of a power) under the Act is of critical importance to the integrity of Government policy to ensure that all ministerial delegates consistently weigh or take into account relevant matters and/or that specified procedures are followed consistently by ministerial delegates.

15. While there are current DIBP instructions (referred to as PAM3 instructions) which delegates may use in visa decision making (including specific visa cancellation instructions) these PAM3 instructions do not hold the same weight as a Ministerial Direction, nor are they as transparent as a Direction, which is

required to be tabled in Parliament. For this reason, we propose that a new Ministerial Direction be issued to provide guidance as to appropriate matters to be taken into consideration in the exercise of the discretion whether to cancel a student visas for non-compliance with conditions 8104 or 8105. We would see great benefit in such a Direction on the basis that it:

a. Would provide greater transparency as to the visa cancellation process and the factors that a delegate will take into account within the context of exercising the legislative discretion whether to cancel the student's visa under s116(1)(b) of the Act; and
b. Would be binding at both primary decision and merits review decision level.

Basis of direction

16. Where the DIBP is apprised of a student's details in which there has been a breach of visa condition 8105, this will not trigger cancellation of the visa unless there has been serious non-compliance. In determining whether this is the case, the decision maker could have regard to factors such as:
    - whether the non-compliance/contravention occurred with knowledge of its unlawfulness on the part of the visa-holder;
    - the frequency of the non-compliance/contravention;
    - the gravity of the non-compliance/contravention;
    - whether the non-compliance/contravention was brought about by conduct of others, including employers; and/or
    - whether visa-holder previously warned by the Immigration Department in relation to the non-compliance/contravention. (Senate Report at [8.57])

17. Further, we propose the reference to 'conduct of others' would take into account the relative bargaining position of the parties, including importing accepted contractual considerations such as duress, legality, consent. This would allow for relevant considerations to incorporate socio-economic, cultural, educational and other factors influencing the capacity of the visa holder to have consented to the employment contract.

18. To effect this decision making process, we also refer to Associate Professor Tham's proposal for a warning system whereby a system of civil penalties modeled upon section 140Q(1) of the *Migration Act* is introduced. This provides for civil penalties when there is a failure to satisfy a sponsorship obligation by sponsoring employers. As the Senate Report notes, given a maximum of 60 penalty units applies to section 140Q(1), Associate Professor suggested a proportionate penalty for a breach by a visa-holder would be 5 penalty units.

Proposed decision making protocol structure

19. a. Decision at first instance: presumption is in favour of the visa holder maintaining visa status and a warning will be issued.
    - (i) The presumption will be rebutted at first instance only in cases of extreme non-compliance
    - (ii) A single breach does not amount to serious non-compliance.
    - (iii) Multiple breaches occurring in a continuing course of conduct will be deemed as a single breach.

    b. If a subsequent breach: cancellation where there has been serious non-compliance. The first warning is a relevant consideration – as per conditions set out above. See Senate Rec 23, ref [8.263], Senate Rec 22, ref [8.253], Senate Rec 24 [8.269]

Opening the Floodgates?

20. We have discussed this proposal with many individuals and organisations working in this field and have had unanimous support. In addition we have submitted the proposal to the Federal Government's Migration Review Taskforce and discussed the proposal with the Taskforce chair, Allan Fels.

21. We understand that there may be concerns on the part of government because of a perceived loosening up of the regime's objective to ensure students attend the requisite hours at their education institutions.

22. In our view, this proposal should not open the floodgates for international students to throw in the studies in favour of unconstrained employment. Contraventions will still be subject to regulatory action, including warnings and penalties and still a possibility of visa cancellation where there is a subsequent breach.

23. Further, non-attendance by students is strictly regulated by the *Education Services For Overseas Students Act 2000* and the *National Code of Practice for Providers of Education and Training to Overseas Students* (National Code). Student visa condition 8202 requires satisfactory course attendance and progress in the registered course.

24. The National Code requires education providers to have documented policies and procedures for recording the attendance and course progression of each international student. The students are expected to achieve a minimum of 70%-80% of the scheduled course contact attendance, with an additional early warning system in place, which notifies the education provider if the student has been absent for more than five consecutive days without approval.

25. Where there is a breach and the student cannot satisfy internal review processes, the education provider must report to the Secretary of the Department of Education the cancellation of the student's enrolment. Students are given an opportunity to explain their situation to the Department of Immigration, as well as an opportunity to enrol in an alternative course or return to their home country. A breach of student visa condition 8202 may result in cancellation of the student's visa.

26. We consider that our proposal in fact will discourage current extensive breaches of the visa regime by providing a safer framework for exploited workers to go on the record about their circumstances. It is more likely to ensure the workplace rights of international students are implemented, complied with and enforced, by facilitating safe and secure reporting of breaches of Australian law.