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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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To the Committee Secretary, Senate Legal and Constitutional Affairs Committee

RE: Migration Amendment (Strengthening Employer Compliance) Bill 2023 [Provisions]

Thank you for the opportunity to make a submission regarding the *Migration Amendment (Strengthening Employer Compliance) Bill 2023*. Scarlet Alliance understands the Bill prioritises the establishment of new criminal offences and increased civil penalties for employers and third party providers who misuse visa programs to exploit temporary migrant workers. We note the Bill also aims to create Ministerial regulatory guidance over visa cancellation for some migrant workers. As such the Bill would be implementing some of the twenty two recommendations of the 2019 *Report of the Migrant Workers' Taskforce* by the Department of Employment and Workplace Relations.

Scarlet Alliance, Australian Sex Workers Association is the peak national body for sex worker organisations, projects and individuals in Australia. Through our work, and the work of our member organisations and projects, we have the highest level of contact with sex workers in Australia of any agency; government or non-government. Our work in the field of support for migrant sex workers is unparalleled and respected within trafficking, HIV, health, migration and human rights sectors. Our engagement with Asian-background migrant sex workers throughout Australia across a range of workplace types is facilitated by long running programs employing bilingual peer educators who lead outreach and advocacy on behalf of their community.

Scarlet Alliance Asian and the Scarlet Alliance Asian Migrant Sex Worker Advisory Group are available to give evidence if/when the Committee is holding hearings.

Yours sincerely,

Mish Pony
Chief Executive Officer

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Recommendations to the Committee

1. Australia must become a signatory of the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**.

2. Sex work must be fully decriminalised in each state and territory of Australia.

3. Anti-discrimination protections must be implemented for sex workers and migrants in all jurisdictions as an **urgent** human rights issue.

4. Safe migration pathways must be accessible for sex workers. This includes providing migrant sex workers with access to translated information, accessible migration avenues that **do not require workers to use the assistance of a third party** and more secure visas that recognise sex work as skilled labour.

5. **Introduce a reliable guarantee against visa cancellation for migrant workers taking action against exploitation** and lift visa restrictions that intensify potential for migrant workers to be exploited.

6. Financially **support community-based migrant organisations** to facilitate access to justice. Scarlet Alliance is seeking funding to run projects and provide peer education by and for migrant sex workers. This strengthens the human, civil and political rights of migrant sex workers, increases our autonomy, agency and self-determination, and is the most effective way to address exploitation in the sex industry.

7. Implementation of a Justice Visa that **does not necessitate engagement with the Department of Home Affairs in order to access justice**. Allow migrant workers with outstanding claims for workplace entitlements to remain in the country with working rights until their claim has been settled.

8. **Replace the ‘assurance protocol’** with a ‘firewall’ between the Fair Work Ombudsman and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out against exploitation or industrial issues.

9. Support the model outlined in the 2023 **Breaking the Silence** report by the Migrant Justice Institute and the Human Rights Law Centre.

10. Migrant community groups and unions should be resourced to be a safe place for legal advice, referral and access to the proposed Justice Visa.

Options not being considered by the Bill

Scarlet Alliance notes that the [Report of the Migrant Workers Taskforce](#) produced 22 recommendations that work together to improve the rights of migrant workers. Concurrent with expanding criminal and civil penalties for employers, the Australian Government should clarify in legislation that temporary migrant workers working in Australia are entitled at all times to workplace protections under the Fair Work Act 2009 (recommendation 3), and expanded the Fair Entitlement Guarantee to all temporary visa holders in Australia (recommendation 13). These two changes are examples of expanding migrant workers' labour rights to make them more comparable to other workers in Australia.

The Bill instead focuses only on a punitive approach of punishing employers with new penalties. As such, this Bill is a missed opportunity by the government to pursue a more complimentary suite of options. This gap is apparent when reading the Bill; the [second reading](#) elucidates the connection between lack of labour rights and exploitation of migrant workers. For example, that employers threaten migrant workers they will call Border Force on them and get them deported if they complain about workplace conditions to government authorities. As stated in the second reading by Minister Giles, "no worker should be penalised for speaking up," and that some businesses are gaining "unfair advantage" by paying lower (illegally lower) wages.

The Bill does not address or resolve key points made by Minister Giles in the second reading. In the experience of Scarlet Alliance, increased penalties for employers will not improve workplace compliance. It may drive some of these practices more underground, inadvertently isolating migrant workers in ways not seen before in Australian workplaces. This risk could be addressed by adding measures that expand and recognise migrant workers labour rights into the Bill.

Migrant workers want solutions to workplace exploitation, not more problems

The Australian Government must take steps to avoid solely criminalising workplace practices, and instead equally pursue policies that deliberately advance the labour rights of migrant workers.

Despite compelling evidence of its limitations and potential harms, Scarlet Alliance has witnessed decades of reactive criminal-justice police and immigration interventions into migrant sex worker workplaces, under the guise of disruption of exploitation, and without equal pursuit of labour rights for the very same workers. Expanded criminal penalties has resulted in public funding and policy attention being channelled into policing and surveillance of migrant sex worker workplaces by Commonwealth agencies, to the detriment of rights based and prevention approaches. For the migrant sex worker community this has come at enormous cost to human rights, with no evidence whatsoever as to its effectiveness at improving workplace conditions. There are experienced officers at Australian Border Force whose work includes finding and identifying migrant sex workers whose workplace are committing breachers of labour rights. When networking with Scarlet Alliance they describe that even after years of visiting those workplaces there is still a lack of trust from migrant sex workers. Scarlet Alliance believes this is because of the authoritative power held by Border

Force officers and fear of visa cancellation. Migrant sex workers do not trust government authorities with information about workplace breaches.

Trafficking, slavery and slavery-like offences are described in Divisions 270 and 271 of the Criminal Code Act 1995 (Cth), and associated in the public consciousness with migrant sex work. Scarlet Alliance has observed over many decades that criminalisation results in the workplaces of Asian migrant sex workers being targeted by law enforcement agencies *even when these offences are not evident*. For example between January 2004 and December 2011, the Australian Federal Police Transnational Sexual Exploitation and Trafficking Team (now the Human Trafficking Team) undertook over 327 investigations into allegations of trafficking and slavery related offences. These assessments led to just over 40 matters being referred to the Commonwealth Director of Public Prosecutions for matters related to sexual servitude, slavery and other labour exploitation.¹ Scarlet Alliance believes there has been an undue focus by authorities on migrant sex worker workplaces because of racism, stigma and misunderstanding about the crime type.

The most effective approach to address workplace breaches is to promote education to the impacted community using preferred languages. This education should prioritise their needs, recognise their agency and promote self-determination in the workplace. Government policies should promote industrial rights and create civil remedies to statutory compensation without fear of deportation. Criminal penalties unaccompanied by civil prevention efforts, training for front-line staff or human right measures is counterproductive, erodes trust between migrant workers and enforcement agencies and does not resolve the risks of exploitation of migrant workers.

Expanding the current criminal justice approach without meaningfully expanding the human rights of migrant workers will not address exploitation and likely contribute to further harm. The Commonwealth criminal justice approach to migrant sex work has resulted in enforcement agency targeting and raids of workplaces, increased police and immigration surveillance, harassment, arrest and deportation of migrant sex workers. Commonwealth agencies claim they 'visit' migrant sex worker workplaces to 'disrupt' trafficking. Migrant sex workers report **these same actions** as 'raids' or violent 'undercover stings'. There is no benefit to sending the same teams of Commonwealth agents in to check, monitor, enforce and assess exploitation in other workplaces where migrant labour predominates.

The strict immigration and anti-trafficking policies comprising Australia's 'border control' approach are selective, difficult to navigate, inaccessible to many people. Academics describe modern immigration systems as "designed to allow a state sanctioned traffic in the labour-power of migrant workers but at the same time prevent those workers from accessing the rights and protections formally assured to worker citizens"², such as access to labour rights and services such as Centrelink and Medicare. Nothing in the bill challenges that paradigm; there is no attempt to expand labour rights protections for migrant workers, even though the second reading speech and related media by the Minister is quite aspirational.

¹ Anti-People Trafficking Interdepartmental Committee. (2012). Trafficking in Persons: The Australian Government Response, 1 July 2011- 30 June 2012. The Fourth Report of the Anti-People Trafficking Interdepartmental Committee.

² O'Connell Davidson, J. N. (2016). [De-canting 'Trafficking in Human Beings', Re-centring the State](https://doi.org/10.1080/03932729.2016.1121685). *International Spectator*, 51(1), 58-73. <https://doi.org/10.1080/03932729.2016.1121685>

The decriminalisation of sex work is proven to create the most enabling environment to ensure that migrant sex workers are afforded workplace rights³. The criminalisation of sex work, or regulation by complex licensing frameworks, generates additional vulnerabilities to labour exploitation, and impedes the reporting and investigation of crimes against sex workers. These frameworks are currently in place in most Australian states and territories. Commonwealth anti-trafficking laws have inadvertently criminalised the workplaces of migrant workers and impeded, not improved workplace rights for our community.

Anything short of a guaranteed firewall is not enough

Currently in Australian labour law there is a lack of genuine protection for migrant workers who have experienced unfair breaches of workplace conditions. Migrant workers who have experienced workplace breaches must be safe to seek support without fear of visa cancellation. This can only be achieved through access for migrant workers to redress mechanisms such as Fair Work, WHS authorities, and legal aid; and the creation of a 'firewall' between these bodies and the Department of Home Affairs to protect migrant workers from visa-related repercussions when they speak out about industrial issues. These protections must exist regardless of whether a prosecution or a substantive case eventuates. We note that provisions in the Bill to allow for discretionary visa protections are unreliable and convoluted. Empowering a delegate of the Minister to decide which information can (and cannot) be applied when deciding whether to cancel an exploited worker's visa (or not) is an untrustworthy method, is a recipe for privacy breaches and has no relationship to expanded labour rights for migrant workers in Australia. This method will prolong visa uncertainty for migrant workers and create yet another barrier to migrant workers coming forward to report workplace breaches and seek redress.

Chilling effect

The introduction of *Migration Regulations* would risk continuing the silence surrounding workplace breaches, due to migrant workers' fear of visa cancellation if speaking out. The Assurance Protocol currently provides that the Fair Work Ombudsman will not communicate certain information about a visa-holder to the Department of Home Affairs *if* that visa-holder is assisting with an ongoing investigation by the Fair Work Ombudsman. The *Migration Regulations* discussed in s 116(1A) would apply to the general powers to cancel temporary visas and intend to direct the Ministers' delegate to give weight (or not) to certain issues. Neither of these approaches proactively extend the labour rights of migrant workers and both are insufficient to garner trust from community organisations or (we suggest) migration lawyers.

Section 116(2)

Scarlet Alliance supports calls to introduce a reliable guarantee against visa cancellation for **migrant workers taking action against exploitation through government agencies**,

³ Pearson, Elaine, et al. "Decriminalisation and Legalisation of the Sex Industry Reduces Exploitation." *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, Global Alliance Against Traffic in Women (GAATW), Bangkok, 2007, pp. 51–52.

trade unions, nonprofits and/or specialist lawyers. This model was set out in the *Breaking the Silence* report, which we support, and was also endorsed by more than 40 other organisations across Australia. It proposed that the most appropriate way to provide this guarantee is by way of regulations issued pursuant to s 116(2). Unlike s116(1A), which is the subject of this Bill, s116(2) *prohibits* the Department of Home Affairs from cancelling a visa under circumstances set out in regulations.

Without this, our organisation would not feel confident to advise migrant workers to rely on this protection as a basis for reporting exploitation. We believe at best the amendment would be unlikely to have any impact, and at worst it would erode trust with migrant workers experiencing workplace breaches.

Effective approaches to address labour breaches must be undertaken through a focus on prevention, industrial rights, occupational health and safety, civil remedies, statutory compensation, labour-rights-based non-criminal justice pathways, and equitable access to visas, migration channels and support.

Access to civil avenues of redress must be developed to protect the labour rights of migrant workers. Migrant workers need access to industrial mechanisms to claim compensation, redress exploitative working conditions and access legal aid and support **without fear of deportation** or negative impact on future permanent residency applications.