

27 October 2023

Submission: Independent Review of the National Legal Assistance Partnership (NLAP)

Acknowledgment of country

We acknowledge the Traditional Owners and Custodians of the lands on which we work, including the Wurundjeri people of the Kulin Nation and the Gadigal, Gamaragal and Bedegal people of the Eora Nation, and acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We acknowledge that sovereignty was never ceded and we support the self-determination of Aboriginal and Torres Strait Islander peoples.

Overview

The Migrant Justice Institute welcomes the opportunity to make a brief submission to the Independent Review of the National Legal Assistance Partnership (**NLAP**). We do not provide legal services and have never received Commonwealth funding under the NLAP. We have received other Commonwealth government funding, for example, a grant under the National Action Plan to Combat Modern Slavery to conduct a new national survey on migrant worker exploitation in 2024.

Migrant Justice Institute is a nonpartisan law and policy organisation dedicating to addressing exploitation of migrant workers and how best to overcome structural barriers to improve access to justice. As set out in this submission, our research, conducted over many years has revealed widespread exploitation of migrant workers in Australia and the vital necessity of community-based employment assistance programs to address this injustice. There is significant unmet need for legal help.

We recommend that the NLAP ensure there is dedicated, recurrent funding for Legal Aid Commissions (**LACs**) and Community Legal Centres (**CLCs**) to deliver much needed employment (including wages and entitlements, dismissals, sexual harassment and bullying) and equality law assistance to vulnerable workers across Australia.

Key findings and recommendation

This submission sets out key findings from a number of research studies regarding migrant worker exploitation and the need for community-based legal services. We have provided references to our substantive research reports and can provide further summaries, briefings or copies of our materials upon request.

Workplace exploitation is widespread

Our 2016 survey of over 4000 temporary visa holders found at least a third earned less than \$12 an hour.¹ Another national survey conducted three years later revealed that the rate of exploitation had continued unabated.²

Wage theft not only harms temporary migrant workers (about 7% of our workforce),³ it also drives conditions down for Australian workers and undercuts businesses who are doing the right thing. Systemic exploitation of migrant workers also creates conditions for forced labour and modern slavery.

Workers face systemic barriers and rarely take action to enforce their rights

Despite having a legal right to pursue a wage claim against their employer, our research reveals that nine in ten underpaid migrant workers suffered wage theft in silence and took no action.⁴ Only 3% of those who were underpaid had contacted the Fair Work Ombudsman (**FWO**). A single worker had made a court claim and received nothing.⁵

Our research has uncovered a range of structural barriers that prevent migrant workers from enforcing their rights.⁶ These barriers include:

¹ Laurie Berg and Bassina Farbenblum, [Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey](#) (Migrant Justice Institute, 2017).

² See for example our 2019 survey of international students' information needs in relation to exploitation at work and in housing: Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Migrant Justice Institute, 2020).

³ Will Mackey, Brendan Coates and Henry Sherrell, [Migrants in the Australian Workforce: A Guidebook for Policy Makers](#) (Grattan Institute, May 2022) 155.

⁴ Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018) 5.

⁵ Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018) 44.

⁶ See for example, Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018); Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Migrant Justice Institute, 2020); Laurie Berg, Bassina Farbenblum and Sanmati Verma, [Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation](#) (Migrant Justice Institute and Human Rights Law Centre, February 2023).

- visa settings inhibit workers reporting exploitation;⁷
- workers fear losing their job if they complain, which is especially acute in the context of insecure work;
- regulators have insufficient resources and fail to detect and punish labour law noncompliance;
- vulnerable workers rarely contact regulators and often cannot utilise the ‘self-help’ models of service delivery they offer;
- vulnerable workers do not pursue claims against employers because legal processes for resolving claims are inaccessible, slow and ineffective;
- there is significant unmet need for targeted legal help, and without legal help, workers cannot take enforcement action;
- workplace laws are premised on the concept of direct employment relationships, and fail to incentivise compliance in complex supply chains, where the direct employer fails to remedy a contravention and;
- there is no other safety net when businesses liquidate or refuse to pay wage claims.

More specifically in relation to pursuing wage recovery through the small claims process, our forthcoming report⁸ finds that many migrant workers (and other vulnerable employees) are impeded from pursuing underpayment claims against an employer because they do not know:

- that Australian labour laws apply to them;⁹
- whether they are an employee or contractor;
- whether an Award or enterprise agreement applies to them;
- cannot identify their legal wages and other entitlements under the *FW Act* or the applicable Award or enterprise agreement, because they do not know whether they are casual or permanent or what the classification and base rate of pay should be;
- whether and when allowances, penalty and overtime rates may be payable because they do not know which hours are designated overtime; and
- whether any wage deductions are lawful.

If they overcome these obstacles, many cannot identify the legal identity of their employing entity, or how to serve court documents on them, especially when employers engage vulnerable workers

⁷ See Laurie Berg, Bassina Farbenblum and Sanmati Verma, [Breaking the Silence: A Proposal for Whistleblower Protections to Enable Migrant Workers to Address Exploitation](#) (Migrant Justice Institute and Human Rights Law Centre, February 2023).

⁸ Migrant Justice Institute, Small Claims Report (forthcoming).

⁹ In our 2019 survey of 5,968 international students, around one third of international students believed they were not entitled to the same wage as Australians or were not sure if this was the case: Bassina Farbenblum and Laurie Berg, [International Students and Wage Theft in Australia](#) (Migrant Justice Institute, 2020) 11.

through complex commercial arrangements and trusts. Many workers also find it difficult to undertake the complex calculations required to quantify and set out their claim, and find it prohibitively difficult to complete formal court documentation without assistance.

Drawing on extensive consultations and observation of over 20 small claims hearings, our small claims report documents that, even if an unrepresented worker manages to make it to court, they then frequently find it difficult to understand, comply with, and fully participate in court processes.

Under the current system it is not rational for an underpaid migrant worker to report exploitation to pursue a claim against their employer: the immigration risks and burdens of taking action are high, and the prospect that the worker will recover their wages in a timely way is very low. The overwhelming majority of workers are not prepared to risk their employment, visa, time, energy and money for a slow and difficult legal process with a speculative outcome. The very low likelihood that an underpaid migrant worker will take action, and the low probability of detection by the FWO, gives employers security that they can underpay these workers without consequence.

Community-based employment law services help workers to enforce their rights, but more funding is needed

This situation is not inevitable. Our data shows that with the right reforms, workers will take action. In fact, almost half of underpaid migrant workers in our survey reported that they are open to taking steps to recover wages in the future.¹⁰ Of those workers who took action to recover their wages, outcomes were best for workers who were members of unions or who received assistance from a CLC.

There is significant unmet need for employment law assistance for vulnerable workers. The labour-intensive nature of many employment matters (e.g. calculating an underpayment) means that it is not commercially viable for private firms to assist. Although unions can help their members, many temporary visa holders, and other vulnerable workers (including young people), are not yet a member of their union. For cultural or other reasons, they may not understand the role of a union in Australia, or feel safe to join a union at this time. For these workers, community-based employment law services can provide a critical role in facilitating access to justice.

As documented in our review of the small claims system (forthcoming), for the most vulnerable workers, including many migrant workers, tailored, ongoing, practical assistance in employment law matters is required from the beginning to the end of a matter. At first, legal help is needed to inform

¹⁰ Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018) 7.

vulnerable communities of their rights and responsibilities at work in a way that is accessible and understood. This information enables workers to identify when they have a legal problem and know where to get help.¹¹ Legal help is then needed to address any legal problems that arise. Ideally this help would be provided early – to resolve disputes before they escalate, and promote ongoing employment. To promote early intervention, legal help needs to be provided by services that vulnerable workers feel safe to contact – the services must be trusted and embedded in community.

If a dispute cannot be resolved, legal assistance is necessary to identify and then navigate the correct legal system(s) – this often requires specialized advice regarding choice of jurisdiction. For example, if a client has been injured at work, discriminated against at work, dismissed and underpaid, it may be necessary to bring claims in four different jurisdictions. In Victoria alone, if pursuing a discrimination claim, a worker may opt to commence a process in the Victorian Equal Opportunity and Human Rights Commission, Victorian Civil and Administrative Tribunal, Federal Court of Australia, Federal Circuit and Family Court of Australia or the Fair Work Commission. Legal help is then necessary to ensure: that any application and evidence is complete, accurate, filed and served in accordance with court/Commission Rules; that the matter can be progressed effectively and efficiently; that the worker can understand and participate meaningfully on the day of court; and that assistance is available to take enforcement action if an employer does not comply with court/Commission orders. While some workers are able to access information on websites, follow instructions and ask for further information where required ('self-help'), for the most vulnerable workers, tailored, ongoing, practical assistance in employment law matters is required from the beginning to the end of a matter. This is resource intensive, but necessary to ensure accessibility, efficiency and justice.

CLCs and MWCs have a strong track record of providing targeted information and education to communities about workplace laws, including minimum entitlements¹² and the role of unions.¹³ Because they have the trust of the community, community-based services are accessible to vulnerable workers and can provide meaningful legal assistance and advice. This includes

¹¹ See for example, the WEStjustice Employment and Equality Law Program education program – which includes a Train the Trainer program, information sessions for community members, and training for professionals who work with target communities so they can identify when their clients have a claim and make appropriate referrals. WEStjustice has also developed a suite of infographic materials to assist clients to understand complex legal advice: WEStjustice, [Migrant and Refugee Employment Law – Infographics Project](#).

¹² Brendan Coates, Trent Wiltshire, Tyler Reysenbach, [Short-changed: How to stop the exploitation of migrant workers in Australia](#) (Grattan Institute, 23 May 2023) 88.

¹³ Many newly arrived workers are not yet members of a union. However, our research shows that the migrant workers who received help from a union had the best outcomes, with 30% recovering all, and 40% recovering some, of their unpaid wages: Bassina Farbenblum and Laurie Berg, [Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia](#) (Migrant Justice Institute, 2018). The ILO has also recognised the important role that unions play in enforcing migrant worker claims for wage theft (particularly those in insecure and informal forms of work): Katerine Landuyt, Sophia Kagan and Eliza Marks, [Guidance Note: Wage protection for migrant workers](#) (ILO, 2023) 18.

calculating underpayments, contacting and negotiating with employers, drafting letters of demand, preparing court documents, serving documents and preparing affidavits of service, appearing at court, and ensuring compliance with additional, complex court processes and procedures. They also provide critical assistance with enforcing a judgment, when an employer does not comply with a court order. This continuity of assistance (rather than a piecemeal approach where assistance is provided only at various touchpoints) is necessary to ensure efficiency and make sure that vulnerable workers do not fall through the cracks (for example, if a lawyer is not on the record a worker may receive correspondence from the court but not understand it nor bring it to anybody's attention).

Yet CLCs report that they are unable to meet demand for their services. For example:

- Redfern Legal Centre reports that for every two employment law advices they provide, they refer approximately one client away. They refer away 54% of callers because they cannot meet demand.¹⁴
- South-East Monash Legal Service reports that their appointments for employment matters are frequently booked out and appointments usually book out the day they are made available to the public.¹⁵
- WEstjustice and South-East Monash Legal Service report that 'JobWatch, a community legal centre specialising in employment matters, cannot meet 57% of demand for telephone assistance (even fewer receive casework support and the most vulnerable will not utilise a telephone service). Justice Connect, a community organisation that helps facilitate pro bono referrals, reports that employment law is one of the top four problems that people request assistance for, however only around one fifth of matters receive much needed help. In Victoria, Legal Aid does not provide assistance with employment matters (except where discrimination is involved) and frequently refer matters to other services. Apart from WEstjustice and SMLS, there are no other targeted employment law services for newly arrived, refugee or asylum seeker communities in Victoria, and our services are frequently inundated.'¹⁶

Given the highly specialised and time-critical nature of this work (some causes of action have a 21

¹⁴ Email from Sharmilla Bargon, Senior Solicitor, Employment Law Practice, Redfern Legal Centre (October 2023).

¹⁵ Consultation with Ashleigh Newnham, Director of Advocacy and Development, South-East Monash Legal Service (May 2023).

¹⁶ WEstjustice Community Legal Centre and South-East Monash Legal Service, [Joint Submission to Victorian Inquiry Into Sustainable Employment for Disadvantaged Jobseekers](#) (2019) 9. See also Eloise Cox et al, [The Challenge of Recovering Underpaid Wages: Empirical Insights from South-East Monash Legal Service Inc](#) (South-East Monash Legal Service, 2022) 9; and South-East Monash Legal Service, [Submission to Inquiry into employers and contractors who refuse to pay their subcontractors for completed work](#) (2023) 7.

day limitation period), it is essential that multi-year (ideally 7 years), recurrent, dedicated funding be allocated to community-based employment law services. Such funding is needed for both specialist CLCs, and for generalist community-based employment law services, and the funding should not be tied to particular client groups or projects. This would enable CLCs to target services to the needs of their local region. Critically, funding should cover delivery of legal services, but also service design, monitoring and evaluation, legal supervision and community education and engagement. Funding must cover all areas of workplace law including employment law, discrimination, sexual harassment, and workplace safety. Without this assistance, most vulnerable workers simply will never make it to court.

Recommendation: Dedicated, multi-year, recurrent funding for employment law help

We recommend that the Government provide dedicated, multi-year, recurrent funding for Legal Aid Commissions and Community Legal Centres to provide employment law assistance (both community legal education, legal advice and ongoing casework as well as program design, monitoring and evaluation) to vulnerable workers. This assistance should include all aspects of employment and equality law, including (but not limited to) wages and entitlements, dismissals, sexual harassment, bullying, equality law (anti-discrimination and general protections) and victimisation.

Conclusion

Thank you for the opportunity to make this submission.

Our evidence-based recommendations will improve access to justice for Australia's most vulnerable workers – a group that has been overlooked for too long.

We would welcome the opportunity to discuss this submission with you.

Sincerely,



Associate Professor Laurie Berg
UTS Faculty of Law
Co-Executive Director, Migrant Justice Institute
E: laurie@migrantjustice.org



Associate Professor Bassina Farbenblum
UNSW Faculty of Law & Justice
Co-Executive Director, Migrant Justice Institute
E: bassina@migrantjustice.org



Catherine Hemingway
Legal Director, Migrant Justice Institute
E: catherine@migrantjustice.org