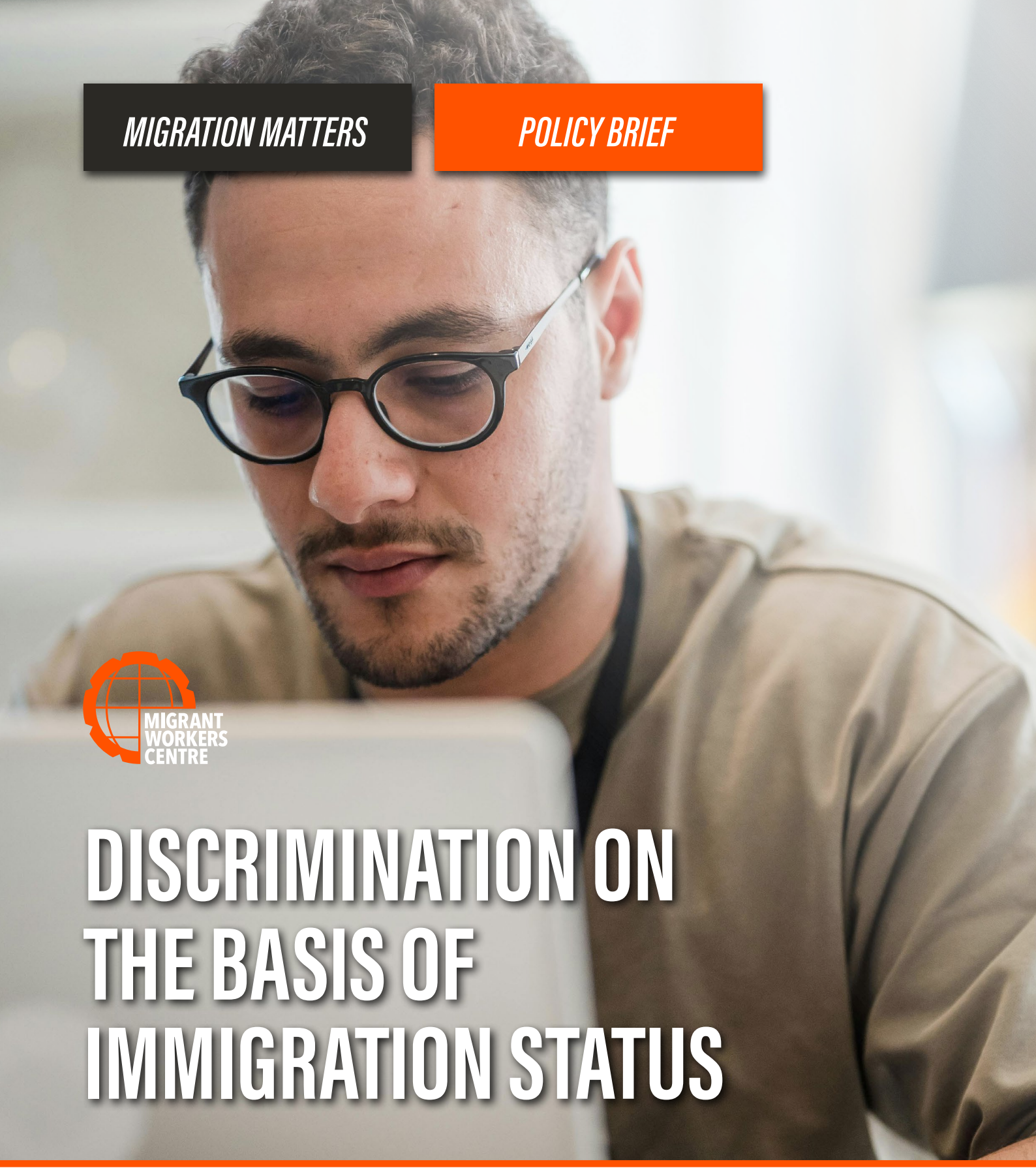


MIGRATION MATTERS

POLICY BRIEF

MIGRANT WORKERS CENTRE

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

THE MIGRANT WORKERS CENTRE

The Migrant Workers Centre Ltd (MWC) is a community legal service that empowers migrant workers in Victoria to understand and enforce their workplace rights. Our activities include free employment law services, education programs to raise awareness of workplace rights, and an advocacy program to amplify and support migrant workers' voices through research and policy development. Since we were established in 2018, we have been working closely with government, unions, and civil society organisations to advance the rights of migrant workers in Australia.

ACKNOWLEDGEMENT OF COUNTRY

The Migrant Workers Centre respectfully acknowledges the Wurundjeri people of the Kulin Nations, the traditional owners and custodians of this land on which we work. We pay our respects to their elders past and present and acknowledge that sovereignty was never ceded.

VICTORIA State Government

The Migrant Workers Centre is supported by the Victorian Government.

MIGRANT WORKERS CENTRE

MIGRATION MATTERS

APRIL 2026

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

OVERVIEW

'Immigration status' is not a term formally defined in law, but it is commonly used to describe a person's visa status, including whether they have a valid visa or not,[1] and whether their permission to remain in Australia is temporary or permanent. As a *legal category*, visa status determines the conditions to which non-citizens are subject to while residing in Australia, including access to work rights and services.

Beyond the powers exercised through migration law to regulate and control non-citizens, 'immigration status' as a *social category* also shapes how people are treated in the labour market and in public life. **Discrimination on the basis of immigration status is widespread** and is often used to exclude temporary visa-holders from engaging in areas of public life — particularly employment — even where their visa conditions lawfully permit participation. Immigration status is also used to justify mistreatment at work, with employers assuming temporary visa-holders will tolerate poor conditions rather than risk their visa status. Despite this, 'immigration status' is not explicitly recognised as a protected attribute under federal or state and territory anti-discrimination law, with the Australian Capital Territory (ACT) being the sole exception.

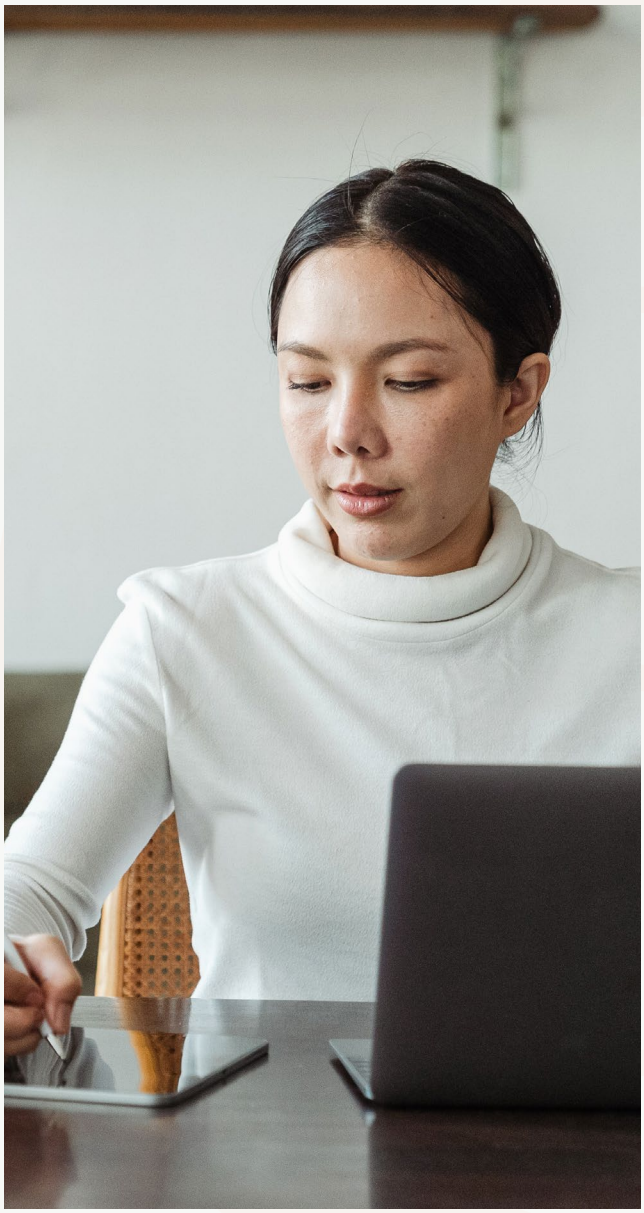
As a result, migrant workers are often locked out of applying for certain roles, including those they have trained and built experience in. Many employers conflate permanent residency (PR) with work rights and long-term employability and consequently refuse to consider applications from temporary visa-holders. This pushes many into insecure, lower-paid, or informal work, where they are less able to assert their rights and are more likely to be exploited. Such exclusions also undermine the policy rationale of temporary migration program, which is premised on workers being able to participate meaningfully in the labour market.

The harms caused by this kind of discrimination are especially severe for people who reside in Australia for prolonged periods without a clear pathway to PR. Some workers can spend up to five years in Australia on temporary visas, and often longer, before getting permanent status.[2] Others may remain 'permanently temporary' indefinitely, with no realistic prospect of resolving their temporary status. They are subject to exclusion for far longer than others, which, over time, compounds the effects of precarity, underemployment, deskilling, and economic insecurity.

Currently, neither anti-discrimination law nor employment law adequately addresses this form of exclusion. Recognising 'immigration status' as a protected attribute would give workers a clear legal avenue to challenge this kind of discrimination, while also establishing a normative standard that such exclusion is unacceptable.

RECOMMENDATIONS

1. Incorporate 'immigration status' as a standalone protected attribute under state and territory anti-discrimination law, subject to appropriate statutory exceptions. Recognition under anti-discrimination law will have flow-on effects for employment law protections.
2. Amend sections 772(1)(f) and 351 of the *Fair Work Act 2009* (Cth) to include the additional ground of 'immigration status.'



EVIDENCE BRIEF
KEY POINTS

- Discrimination based on immigration status is widespread. Many temporary visa-holders report being denied job opportunities, and many are excluded from roles even where they hold valid work rights.
- Immigration status is not a protected attribute under most Australian anti-discrimination or employment law, leaving migrant workers without effective legal recourse when they face discrimination.
- This discrimination pushes temporary visa-holders into insecure, low-paid, and exploitative work, with compounding effects on health – particularly for those living under conditions of permanent temporariness.
- Existing protected attributes such as race, national origin, and national extraction do not adequately capture immigration status discrimination, and attempting to bring claims under these grounds is conceptually and evidentially difficult.
- We recommend that immigration status be recognised as a standalone protected attribute under both state and territory anti-discrimination legislation and the *Fair Work Act 2009* (Cth), subject to appropriate statutory exceptions.

1. BACKGROUND

In this Brief, we use 'immigration status' to refer to a social category that is *shaped* by migration law and policy, but whose effects extend beyond the formal legal status it is often used to describe. This wider meaning is important for understanding how this type of discrimination happens.

Discrimination on the basis of 'immigration status' is widespread in Australia yet remains largely unaddressed in existing law. Research consistently shows that 'immigration status' is routinely used to justify unequal treatment at work and exclude temporary visa-holders from employment, even where they hold lawful work rights.[3]

Under Australian migration law, the Commonwealth has broad statutory power to regulate the entry, stay and departure of non-citizens, including by imposing and enforcing visa conditions. These legal distinctions have broader social and economic effects. As Carrick observes, the laws and policies that attach to 'immigration status' mark a person as an 'outsider' and "[assign] them a particular label and identity".[4] In the Australian labour market, 'immigration status' that includes *temporary stay* as a condition of residence has become a marker of perceived instability or undesirability.

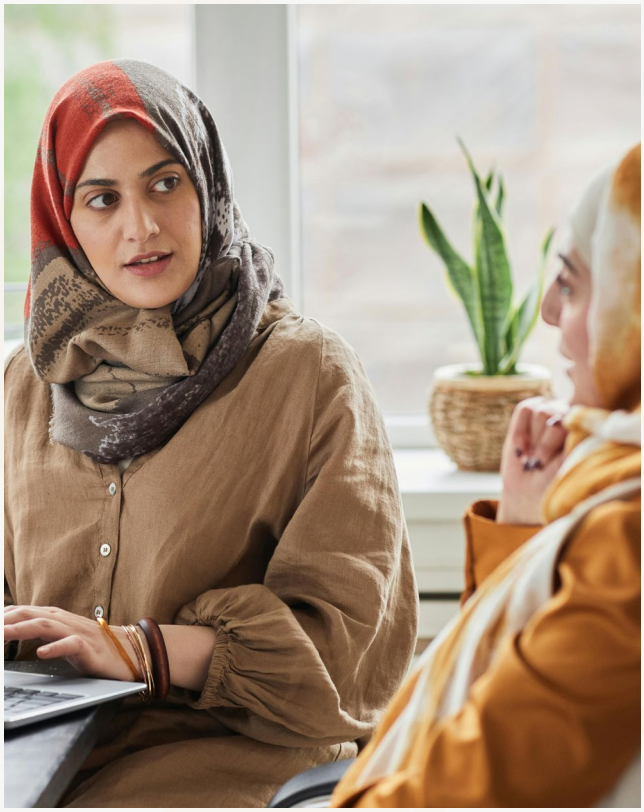
Australian law addresses exclusion in employment primarily through anti-discrimination law and the general protections provisions under the *Fair Work Act 2009* (Cth) (FWA). However, as this Brief explains, neither framework currently provides an effective response to the discrimination that temporary visa-holders experience.

2. CURRENT EVIDENCE
DISCRIMINATION IN EMPLOYMENT AND HOUSING

Survey-based research illustrates the scale of this problem. In our survey of more than 1,200 migrant workers, 39% reported being denied job opportunities because of their visa type, while 37% indicated they had been paid, or offered, a lower salary on this basis.[5] These findings are reflected in a separate survey conducted by Unions NSW of 1,000 workers, which found that 35% of workers surveyed had been paid, or offered, a lower salary because of their visa status. The impacts are particularly pronounced for international students, with 43% reporting wage discrimination linked to their visa type.[6]

Lack of local experience and Australian qualifications are often cited as barriers to job-seeking for temporary visa-holders. However, our research shows that even where temporary visa-holders hold Australian qualifications and relevant local experience, their immigration status alone is enough to get them rejected.[7] This exclusion is frequently racialised – employers may use immigration status as a stand-in for assumptions about race, cultural background, and English language proficiency.[8]

International students often struggle to find work because of this discrimination (see **Case Study 1**) and are pushed into jobs that are exploitative or unsafe. Employers assume that workers on temporary visas will put up with mistreatment because they fear jeopardising their visa status. This creates conditions where underpayment, harassment, and other forms of mistreatment are normalised.



MIGRATION MATTERS

CASE STUDY 1

"I FEEL LIKE I AM A CASH COW FOR AUSTRALIA, USED TO EARN INCOME VIA EDUCATION THEN DUMPED WITHOUT GIVING ME PROPER OPPORTUNITIES TO SURVIVE."

Lavanya (not her real name) arrived in 2024 on a Student visa (subclass 500) and is currently in her final year of a Master's degree. She has approximately four years of prior work experience in her profession and hoped to secure part-time work to support herself during study, followed by a graduate role after completion.

Lavanya has found it difficult to secure work that matches her skills and experience. Professional part-time roles are scarce, and many graduate positions explicitly exclude applicants who are not Australian citizens or permanent residents. Due to limited job opportunities, Lavanya is financially dependent on her family to meet basic living costs, despite having invested more than $100,000 in Australian education.

In non-professional roles, visa status was often raised informally during recruitment, with employers expressing concern about her ability to remain long-term due to the temporary nature of the visa. Reflecting on these experiences, Lavanya explained: "*[It] feels defeating because we are given the Temporary Graduate Visa to allow us to get experience, but when graduate roles are not for us, [it not only makes it harder] but the visa feels useless*".

Lavanya also described how visa status shapes the conditions under which international students are offered work. She recalled one role in which she worked nine hours continuously without access to a toilet or lunch break, only receiving relief after a supervisor intervened. Many of her peers were pushed into cash-in-hand work to survive, often earning below minimum wage. She expressed caution about applying for part-time and casual roles: *"It's always the weekend or after-hours shifts that are given to international students — basically the work hours that locals don't want. It feels exploitative at times, because we want a breather too."*

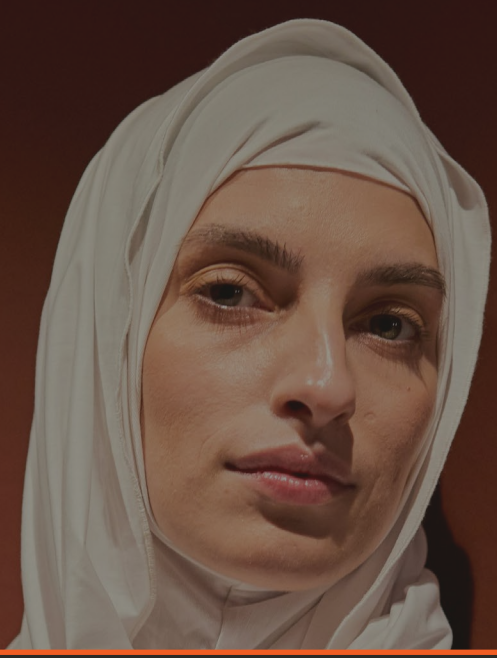
Lavanya feels deeply disillusioned with Australia's international education system. While she understands the temporary nature of student migration, she felt that the absence of a clear and accessible post-graduate employment pathway leaves international student vulnerable: "*That two-year post-study experience is crucial [...] It's meant to put the skills we learn at university to use. But when job postings require only citizens or permanent residents, studying here feels worthless."*

Discrimination based on immigration status goes beyond employment and affects other areas of life, including housing.[9] Recent research found that temporary visa-holders face compounded barriers in the rental market. Because immigration status often limits access to stable employment, many are unable to provide proof of regular income.[10] This exposes them to screening practices that use immigration status as an indicator of tenant risk (see **Case Study 2**). Fears about visa security also discourages renters from asserting their rights or making complaints.[11]

As **Case Study 2** shows, these experiences of discrimination are often intersectional and do not affect people in the same way. The interaction between immigration status and other attributes may compound vulnerability and, in some cases, strengthen the legal basis for a complaint. Women, young people, racialised communities, people with disability, and those with limited English proficiency may face compounded forms of exclusion that make it harder to report exploitation and access support.

Because 'immigration status' is not a protected attribute under most Australian anti-discrimination laws, these forms of exclusion are rarely captured in formal complaints, meaning their true scale and impact is largely unknown.

MIGRATION MATTERS



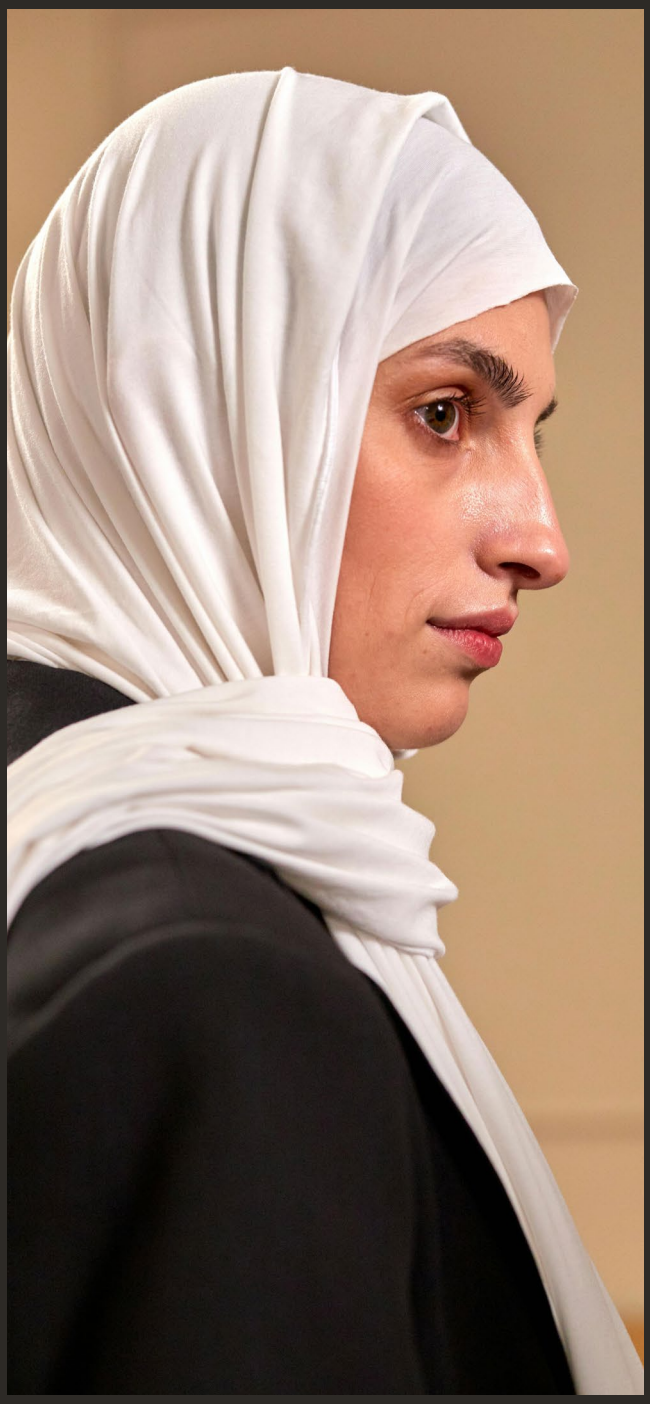
CASE STUDY 2

INTERSECTIONAL EXPERIENCES OF DISCRIMINATION

Aisha (not her real name) is an international student living in Melbourne. Her visa conditions limit her work hours, and she has been unable to secure stable, better-paid work because employers exclude temporary visa-holders from applying. Due to increasing living costs, Aisha can no longer afford to live in on-campus accommodation. With limited income from casual employment and no rental history in Australia, she struggled to find housing through formal channels. Real estate agents repeatedly asked about her visa status and employment stability. She was overlooked in favour of rental applicants perceived to have "more secure" residency and income. She eventually turned to informal platforms such as Facebook and Gumtree to find housing.

Through one of these listings, Aisha secured a room in a shared property under an informal agreement. During initial discussions, the landlord, who also lived in the house, commented on her appearance and made sexualised remarks, laughing them off as jokes. He told her the arrangement was "flexible" given her visa status and said that if she created "issues," he could easily increase the rent or ask her to leave. Needing a place to stay, Aisha agreed.

The house was overcrowded and poorly maintained. When she raised concerns about mould and a broken lock on her bedroom door, the landlord dismissed her complaints and reminded her that rent could go up at any time. The sexual comments continued, often when they were alone in the kitchen. Afraid of losing her accommodation, Aisha kept quiet.



MIGRATION MATTERS

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

DISCRIMINATION IN RECRUITMENT

Recruitment is one area where exclusion is often most explicit. A cursory review of job advertisements indicates that many roles explicitly restrict eligibility to "Australian citizens or permanent residents". For example, a search of a widely used job search website for the phrase "permanent resident" in job listings located in Victoria returned 422 results (search conducted on 22 January 2026). Of these, 15 advertisements expressly stated that temporary visa-holders **should not apply** or required applicants to have at least two years remaining on a temporary visa. This means that a range of temporary visa-holders would be excluded from applying. A more systematic analysis of job advertisements would be needed to accurately assess how widespread this form of discrimination is.

Importantly, these exclusions are not based on the presence or absence of work rights, but on 'immigration status' as a categorical filter. That is, the exclusion is about status, not about legal entitlement or ability to do the job. **Figures 1** and **2** show screenshots from job advertisements, illustrating how this exclusion is typically framed as an eligibility requirement. The roles advertised do not involve high-level security clearances or statutory citizenship requirements of the kind that apply to some public sector or national security positions, where eligibility may legitimately be restricted to citizens or permanent residents.

Employers' use of 'immigration status' as a screening tool is reinforced by compliance requirements that make employers responsible for monitoring visa conditions. Government guidance advises employers to regularly check the Department's visa information portal (Visa Entitlement Verification Online, or VEVO) 'every three months' to ensure ongoing work rights. To fulfill this requirement, some employers collect detailed migration status information from job applicants. Rather than managing ongoing compliance, however, employers adopt the pre-employment screening practices detailed above that exclude temporary visa-holders from applying at all.

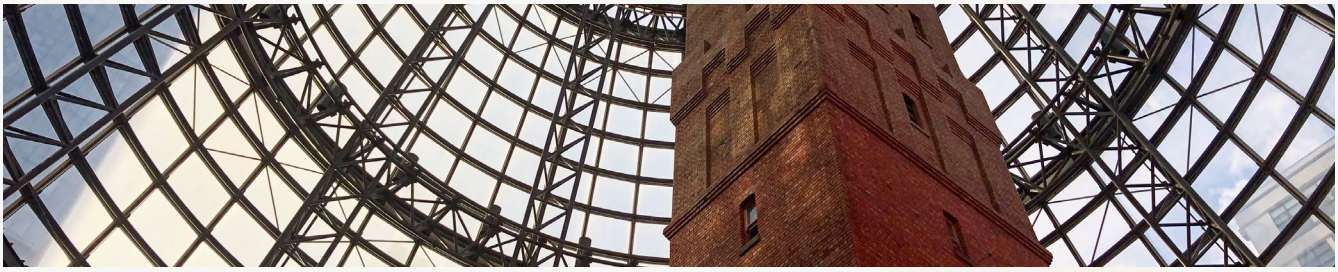
In some cases, restrictions based on visa duration may be reasonable or justifiable. Some may reflect a genuine inherent requirement of the role (direct discrimination), and others may be justifiable as reasonable in the circumstances (indirect discrimination), such as where the length of the role is shorter than the time remaining on an applicant's visa. We discuss how direct and indirect discrimination would apply in this context, and what defences and exceptions should be available, in **Section 4**. Direct and indirect discrimination are defined in **Section 3**.

FIGURE 1.
FULL-TIME DIGITAL MARKETING ROLE ADVERTISING A SALARY OF $70,000-90,000

> *Please **do not apply** for this role if you are not able to commute to our office, are on a temporary Visa, or require sponsorship to work in Australia.*

FIGURE 2.
PART-TIME OFFICE ADMIN ROLE WITH FLEXIBLE HOURS, $30-$35 PER HOUR

> Who can apply:
> To apply for this position you must be an Australian Permanent Resident or Australian citizen.



MIGRATION MATTERS

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

EFFECTS OF DISCRIMINATION

Safe and decent employment is a key social determinant of health. A substantial body of research shows that economic insecurity, social exclusion, and discrimination — whether perceived or directly experienced — have significant effects on migrants' physical and mental health.[12] These include increased psychological distress, higher rates of substance use, poorer self-reported health, and greater difficulty adjusting to life in a new country.[13]

Visa insecurity is a key way these harms are produced. Discrimination carries direct health risks, but it also interacts with other barriers to limit access to secure employment (see **Case studies 1** and **2**). As a result, migrant workers are channelled into precarious forms of work that are insecure and associated with higher rates of exploitation. While precarious employment is bad for health and wellbeing across the workforce generally,[14] migrant workers are concentrated in these kinds of jobs at higher rates and may face greater health risks as a result.[15]

Some of these effects may be mediated by workers' previous experiences, including exposure to insecure work in their country of origin, which can affect how people perceive and tolerate risk, exploitation, and instability. While there is limited longitudinal research that specifically tracks health outcomes for migrant workers, sustained exposure to precarious work is generally associated with declining mental health over time.[16] As harm accumulates with duration, people who are structurally confined to long-term precarity are likely to experience compounding negative effects. This includes those who remain in Australia for extended periods under conditions of 'permanent temporariness', where visa insecurity is not short-term but ongoing.[17]

Qualitative research conducted in Australia also shows that the conditions associated with precarious work are experienced as chronic stressors, particularly amongst temporary visa-holders. Exploitation, and the barriers that prevent people from reporting it, contributes to feelings of powerlessness, fear, and psychological distress.[18] Importantly, these harms do not stem only from poor job quality, but from the interaction between labour market precarity and visa-related discrimination, which together shape perceptions of belonging, security, and future prospects in Australia.[19]

The exclusion of migrant workers has "corruptive effects" that extend beyond individual wellbeing.[20] Over time, exclusion can push people further into informal or insecure work, normalising exploitation in particular parts of the labour market and prolonging exposure to precarity. It also contributes to skills wastage and downward occupational mobility, as migrant workers who are otherwise qualified and willing to work are unable to access roles that match their skills and experience. Australian economic analysis has estimated that improving how migrant skills are utilised could deliver gains of up to $70 billion over the next decade.[21] Addressing labour market discrimination has been identified as critical to achieving this. The exclusion of migrants therefore not only entrenches financial hardship and undermines wellbeing, but represents a significant loss of productivity, skills, and human potential for the broader economy.[22]

3. CURRENT PROTECTIONS

Anti-discrimination law and employment law operate in parallel. Anti-discrimination law is made up of a combination of Commonwealth and state and territory legislation, which prohibit discrimination on the basis of protected attributes in specified areas of public life. Under the general protections provisions (Part 3-1), s 351 of the FWA prohibits an employer from taking adverse action against an employee or prospective employee on the basis of a protected attribute. The operation of s 351 is tied to anti-discrimination law, applying only to attributes that are recognised under applicable Commonwealth, state or territory anti-discrimination legislation. This means that if immigration status is not recognised as a protected attribute in the jurisdiction in which the action is taken, it will not be captured by s 351 either.

Section 772 of the FWA provides a separate but related protection, prohibiting an employer from terminating an employee's employment on the basis of certain prohibited grounds, including on the basis of attributes such as race, national extraction, and social origin.

Despite this dual framework, immigration status is not recognised as a protected attribute under most Australian anti-discrimination laws, nor is it covered by the FWA. This means that many forms of unfair treatment experienced by migrant workers fall outside the reach of legal protection.

EMPLOYMENT LAW

The FWA provides limited protection against discriminatory treatment through its general protections provisions. Section 340 prohibits an employer from taking adverse action to prevent an employee from exercising a workplace right, while s 351 prohibits adverse action against an employee or prospective employee because of certain protected attributes.

Adverse action is defined broadly and covers a wide range of conduct, including dismissal, refusal to employ, and discriminatory treatment in the terms and conditions on which employment is offered.[23] Once adverse action is established, the burden of proof shifts to the employer to show that the action was not taken for a prohibited reason. This reduces the evidentiary burden on applicants, but only where the conduct falls within the scope of the prohibited reasons set out in Part 3-1 of the Act.

Discrimination on the basis of 'immigration status', including job advertisements that exclude temporary visa-holders, will generally fall outside the scope of s 351 because it is not a protected attribute under anti-discrimination law, except in the Australian Capital Territory (ACT). Section 772 similarly provides no protection where immigration status is the reason for termination. Although 'race', 'national extraction' and 'social origin' are expressly protected under both ss 351 and 772, they have been interpreted narrowly by the courts and are unlikely to capture discrimination based on immigration status (see **Table 1**).

Table 1. Interpretation of protected attributes

ATTRIBUTE	INTERPRETATION IN CASE LAW
National extraction	Refers to distinctions based on a person's place of birth, ancestry, or foreign origin, including national or linguistic minorities, naturalised citizens, and descendants of foreign immigrants. It concerns the nation or nationality from which a person is derived, whether by birth or by self and community identification, and does not extend to visa status or temporary residence.[24]
Social origin	Refers to a person's class, caste, or socio-economic background at birth. It does not extend to broader social position, employment status, or other contemporary social characteristics.[25]
Race	Refers to a person's race in a biological or ethnic sense, including physical characteristics or shared ethnic origins. It does not extend to nationality, citizenship, visa status, or migration category. Courts have been reluctant to treat immigration-related distinctions as racial discrimination unless race is a substantial and operative reason for the adverse action.[26]

While exclusion based on immigration status may overlap with protected attributes such as race, national extraction, or social origin, the adverse action must have been taken 'because of' the protected attribute. The court must determine the actual reasons behind the decision and whether the protected attribute was an operative reason for it.[27] It is enough that the prohibited ground was a 'substantial and operative' reason for the action, even if it was not the sole reason.[28]

ANTI-DISCRIMINATION LAW

Commonwealth and state and territory anti-discrimination statutes prohibit discrimination in specified areas of public life. While the scope varies between jurisdictions, these areas commonly include employment, education, the provision of goods and services, accommodation, access to public places and facilities, and membership of clubs and other associations.

Two types of discrimination are recognised under Australian anti-discrimination law. Direct discrimination occurs when a person is treated less favourably because of a protected attribute. Indirect discrimination occurs when a condition or requirement that applies to everyone nonetheless disadvantages people who share a protected attribute. Direct discrimination generally cannot be justified, while indirect discrimination may be defensible where the condition or requirement is reasonable in the circumstances.

Consistent with international human rights law,[29] both federal and state and territory legislation define the protected attribute of 'race' broadly and non-exhaustively. The definition typically includes *'nationality,' 'national origin,'* and *'ethnic origin'* as cognate attributes (see **Table 2**). Depending on the circumstances, discrimination on the basis of race may therefore include aspects that are not mentioned in the definition.

The Northern Territory (NT) and Tasmanian Acts include a similar definition of race, but with the added words 'status of being, or having been, an immigrant' (Tasmania), and 'that a person is or has been an immigrant' (NT). Section 5 of the *Racial Discrimination Act 1975 (Cth)* (RDA) extends the operation of certain provisions so that discrimination occurring "by reason that a person is or has been an immigrant" is unlawful.

The ACT is the only jurisdiction to recognise 'immigration status' as a standalone protected attribute in its anti-discrimination legislation. It is not treated as part of the definition of race.

Each of these attributes, and the scope of their application, is discussed below. We conclude that recognising immigration status as a standalone attribute, rather than as part of the definition of 'race', best captures the scope of immigration status to be protected, subject to appropriate exceptions.

Table 2. Protected attributes across jurisdictions

LEGISLATION	GROUNDS OR PROTECTED ATTRIBUTES				
	Nationality	National origin	Ethnic origin	Being an immigrant	Immigration status
Racial Discrimination Act 1975 (Cth)	-	s 9(1); s 10(1)	s 9(1); s 10(1)	s 5; s 9	-
Anti-Discrimination Act 1977 (NSW)	s 4	s 4	s 4	-	-
Equal Opportunity Act 2010 (Vic)	s 4	s 4	s 4	-	-
Anti-Discrimination Act 1991 (Qld)	sch 1	sch 1	sch 1	-	-
Equal Opportunity Act 1984 (WA)	s 4	s 4	s 4	-	-
Equal Opportunity Act 1984 **(SA)**	s 5	s 5	s 5	-	-
Anti-Discrimination Act 1998 (Tas)	s 3	s 3	s 3	s 3	-
Anti-Discrimination Act 1992 (NT)	s 4	s 4	s 4	s 4	-
Discrimination Act 1991 (ACT)	s 7(1)(q); s 2 (dictionary definition of 'race')	s 2	s 2	-	s 7(1)(i); s 2

MIGRATION MATTERS

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

'NATIONALITY' OR 'NATIONAL ORIGIN' OR 'ETHNIC ORIGIN'

All state and territory discrimination statutes include 'nationality' in their list of protected attributes by placing it within their definitions of 'race' (see **Table 2**). Most jurisdictions also include 'national origin' and/or 'ethnic origin' within the scope of race (see **Box 1**).

The RDA prohibits discrimination "by reason of race, colour, or national or ethnic origin", but it does not extend to discrimination on the ground of 'nationality.' The RDA gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which does not apply to distinctions made between citizens and non-citizens.[30] Differential treatment based solely on citizenship will therefore not necessarily contravene the RDA, provided it is not directed at a particular race or a cognate ground such as national or ethnic origin.

BOX 1. EXAMPLES OF DEFINITIONS OF 'RACE' IN ANTI-DISCRIMINATION LEGISLATION

***Equal Opportunity Act 2010* (Vic)**

race includes—

(a) colour;

(b) descent or ancestry;

(c) nationality or national origin;

(d) ethnicity or ethnic origin;

***Equal Opportunity Act 1984* (WA)**

race includes colour, descent, ethnic or national origin or nationality and the fact that a race may comprise 2 or more distinct races does not prevent it being a race for the purposes of this Act;

Courts have drawn a clear distinction between nationality and national and/or ethnic origin. In *Macabenta v Minister for Immigration and Multicultural Affairs*,[31] which considered 'national origin' under the RDA, the Full Court affirmed that 'nationality' is generally "synonymous with citizenship, but different from 'national origin'".[32] Nationality refers to a person's formal legal membership of a nation state, a "sometimes transient legal status" that may change over time (for example, by naturalisation).[33] By contrast, national origin and ethnic origin are concerned with ancestry rather than legal status and are generally immutable.[34]

This distinction has also been adopted in state and territory cases.[35] In *Sydney University Postgraduate Representative Association (SUPRA) v Minister for Transport Services*, the Tribunal considered the meaning of 'nationality' under the definition of 'race' in the *Anti-Discrimination Act 1977* (NSW).[36] The applicants were international students who challenged NSW public transport concession rules that limited eligibility to Australian citizens and certain categories of permanent residents, arguing that the exclusion of most temporary visa-holders amounted to unlawful race discrimination on the ground of nationality. The Tribunal held that excluding temporary visa-holders from transport concessions did not constitute discrimination because the distinction was based on visa subclass and residency status, not nationality or country of citizenship. The eligibility criteria applied uniformly to all persons within particular visa classes, regardless of their nationality.

Protection is therefore likely to be engaged where discrimination can properly be characterised as being on the ground of nationality (under state and territory legislation) or national or ethnic origin (under the RDA). Where the distinction is framed by reference to visa status or temporary residency, courts have generally treated this as a distinction based on legal status rather than nationality or national and/or ethnic origin. Accordingly, discrimination directed at temporary visa-holders will ordinarily fall outside existing race-based protections, unless visa status is being used as a cover for racial discrimination. For example, an employer who uses visa status as a screening tool may in practice be excluding workers from particular national or ethnic backgrounds. However, as the case law shows, this is difficult to prove.

MIGRATION MATTERS

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

'BEING OR HAVING BEEN AN IMMIGRANT'

The NT and Tasmania extend their definitions of race to include immigrant status (see **Box 2**). There appear to be no reported or readily accessible unreported decisions that have substantively interpreted these provisions. The absence of judicial authority, and the positioning of the provisions within the 'race' ground, create uncertainty as to their scope. There is also little discussion in the relevant parliamentary materials clarifying legislative intention as to how these provisions were intended to operate.

BOX 2. 'BEING OR HAVING BEEN AN IMMIGRANT' AS A COGNATE OF 'RACE'

Anti-Discrimination Act 1992 **(NT)**

race includes—

(a) the nationality, ethnic or national origin, colour, descent or ancestry of a person; and

(b) that a person is or has been an immigrant.

Anti-Discrimination Act 1998 **(Tas)**

race includes—

(a) colour; and

(b) nationality; and

(c) descent; and

(d) ethnic, ethno-religious or national origin; and

(e) status of being, or having been, an immigrant;

The NT and Tasmanian provisions appear to have been drafted to broadly align with the RDA. Section 5 of the RDA extends the operation of certain provisions so that discrimination occurring "by reason that a person is or has been an immigrant" is unlawful. This extension operates only in relation to ss 11-15 and 18 (including specified subsections), which prohibit discrimination in defined areas of public life. This includes access to places and facilities, the provision of goods and services, land, housing and accommodation, and employment. It does not amend the general prohibition in s 9, nor does it create a freestanding ground of discrimination based on 'immigrant status'. Instead, it operates as a limited interpretive extension within specified statutory contexts.

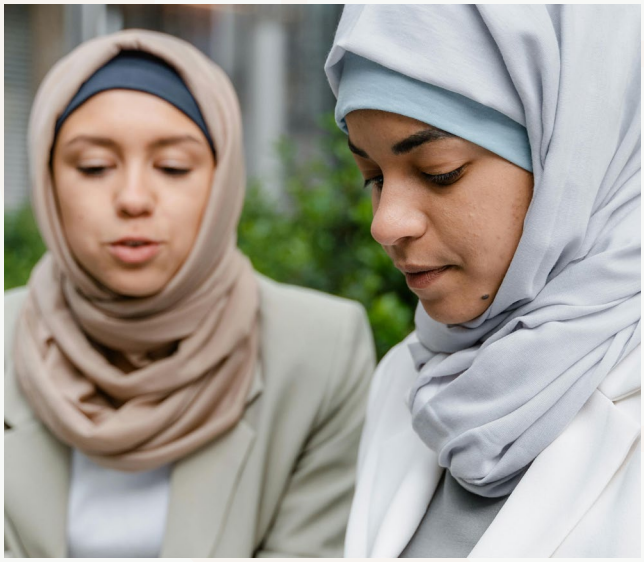
Judicial interpretation of the RDA provision has likewise been limited. On its ordinary meaning, the protections may be engaged where discrimination is directed at immigrants as a class – for example, an employer stating that they "do not hire migrants". A reading of parliamentary materials suggests that the intention behind the inclusion of this provision is to protect migrants who were discriminated against because they are "born overseas".[37] It is unlikely that these provisions would extend beyond the fact of migration (of being, or having been, an immigrant) to encompass discrimination based on visa or temporary status.

'IMMIGRATION STATUS'

The ACT is the only Australian jurisdiction to expressly prohibit discrimination on the basis of 'immigration status', under s 7(1)(i) of the Discrimination Act 1991 (ACT). Immigration status is defined to include "being an immigrant, refugee, or asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth)".[38] It extends to "immigration status that the person has or has had in the past, or is thought to have had in the past".[39] The protection is subject to an express statutory limitation. Section 57P provides that discrimination on the ground of immigration status is not unlawful where it is "reasonable, having regard to any relevant factors", which can include the "effect of the discrimination on the person discriminated against".

Section 7(1)(i) has been considered in a small number of decisions. To engage the protection, an applicant must establish that their immigration status was a real, genuine and not insubstantial reason for the unfavourable treatment, either alone or in combination with other reasons. That nexus must be proven on the evidence.[40] Conduct that may constitute unfavourable treatment may include visa-related threats, intimidation and abuse (which could not successfully be held over an Australian citizen or a person with the rights of a permanent resident),[41] being forced to work additional hours than contracted for, and forfeiting pay in return for ongoing visa and sponsorship support.[42]

The ACT model provides a clearer avenue of redress for temporary visa-holders, who face heightened risks of exclusion and discrimination, particularly in employment.



4. ADDRESSING GAPS IN PROTECTION

This Brief has shown that both discrimination law and employment law leave significant gaps in protection. While temporary visa-holders may have some recourse under existing protected attributes, those attributes do not provide clear or comprehensive protection against discrimination based on immigration status of the kind that the ACT model expressly recognises.

Addressing these gaps requires reform in both employment and anti-discrimination law. We recommend that immigration status be recognised as a standalone protected attribute under the FWA and state and territory anti-discrimination legislation, subject to appropriate exceptions. While amendment of the RDA is an alternative pathway, we prefer state and territory reform for reasons discussed below.

PROTECTION UNDER THE FWA

The threat of termination is one of the most potent tools used to coerce temporary visa-holders into tolerating poor conditions. Section 772 currently offers no protection against dismissal on the basis of immigration status. It should be expressly amended to include it as a prohibited ground.

As set out in **Section 3**, s 351 of the FWA applies only to attributes recognised under applicable anti-discrimination legislation. Recognition of immigration status under anti-discrimination law would therefore extend the general protections under s 351 to employees and prospective employees.

The general protections regime offers significant procedural advantages to anti-discrimination law, including the reverse onus of proof under s 361 once adverse action is established. This reduces the evidentiary burden on vulnerable workers and strengthens enforcement where discrimination occurs in the context of employment or prospective employment. The latter is particularly relevant to the exclusions discussed in **Section 2** of this Brief, including refusals to hire or policies limiting opportunities to citizens or permanent residents. Civil penalties are also available for general protections breaches in addition to compensation.

However, even if 'immigration status' is recognised for the purposes of s 351, protection would remain confined to "adverse action" within the meaning of Part 3-1. The general protections provisions apply only to specific forms of conduct within employment and prospective employment relationships, such as dismissal, refusal to employ, or altering an employee's position to their prejudice. They do not extend beyond employment and would not address visa-based discrimination in other areas of public life.

DISCRIMINATION ON THE BASIS OF IMMIGRATION STATUS

PROTECTION UNDER DISCRIMINATION LAW

Anti-discrimination law applies across a broader range of public life, including employment, accommodation, education, and the provision of goods and services. As the ACT model shows, recognising 'immigration status' as a standalone protected attribute would enable the law to address visa-related threats, intimidation, harassment, and other forms of unfavourable treatment that leverage a person's immigration status. Anti-discrimination commissions and tribunals also offer lower-cost and less formal complaint processes, which may reduce practical barriers for temporary visa-holders seeking redress.

Unlike the general protections provisions, however, anti-discrimination law does not generally operate with a reverse onus of proof. The complainant typically bears the burden of proving that the protected attribute was a reason for the unfavourable treatment. Civil penalties are generally not available in most jurisdictions, with remedies generally limited to compensation and orders to cease the discriminatory conduct. Nonetheless, expanded anti-discrimination protections would provide greater choice of forum and broader coverage. Differences in procedure and enforcement are important considerations in determining the most appropriate avenue for pursuing a claim.

Recognising immigration status as a distinct protected attribute also avoids the conceptual and evidentiary difficulties that arise when visa-based discrimination is treated as a subset of race discrimination. Immigration status is not a racial characteristic; it refers to a person's legal conditions of entry, residence, and work. Visa-based discrimination is not always racialised and does not necessarily turn on ancestry, ethnicity, or nationality. The evidence we have presented in this Brief indicates that the unfavourable treatment typically arises by reason of a person's temporary or insecure legal status.

A standalone ground would therefore more accurately reflect the nature of the harm. It provides a clearer and more direct legal pathway for addressing contemporary forms of exclusion and exploitation experienced by migrant workers. As aforementioned, it would also have significant flow-on effects for s 351 of the FWA.

STATUTORY EXCEPTIONS AND DEFENCES

Reform should incorporate carefully designed statutory exceptions. Acts done in direct compliance with Commonwealth or state laws, such as visa conditions or legal eligibility requirements, should not constitute unlawful discrimination. However, exceptions must not be drafted so broadly that they allow unfavourable treatment based on administrative convenience, such as an employer's reluctance to monitor or comply with visa conditions (see **Section 2**).

The experience of other common law jurisdictions offers useful guidance. In Canada, some provincial Human Rights Codes expressly prohibit discrimination on the ground of citizenship.[43] Under the Ontario Human Rights Code, for example, citizenship is treated as a status-based equality ground, which is defined to include the "status of being a non-citizen lawfully admitted to Canada".[44] The Code prohibits discretionary forms of exclusion on the ground of citizenship, subject to narrow exceptions for requirements imposed or authorised by law.[45] This protection has been applied to employment contexts where job requirements excluded non-citizens who were otherwise legally entitled to work.[46]

In Australian law, the scope of permissible justification depends on whether the restriction operates as direct or indirect discrimination. Where a restriction amounts to **direct discrimination**, it may be justified as an inherent requirement of the role. For example, a job advertisement stating "permanent residents and citizens only" may be justified where an applicant's remaining work rights are limited that they are genuinely unable to perform the role, or where eligibility is restricted by another law such as a citizenship requirement in certain public sector or national security roles. When assessing whether the exclusion would be justified as an inherent requirement, sector and operational context may be relevant where a role has genuine continuity requirements.

Where a restriction amounts to **indirect discrimination**, it may be justifiable as reasonable in the circumstances. As with pregnancy discrimination, the possibility of a future change in circumstances is not a legitimate reason to screen someone out at the point of hiring. For example, a requirement that applicants have at least two years remaining on their visa is unlikely to be justifiable for most roles. In many cases, temporary visa-holders are likely to obtain a further visa, and employers should be required to assess applicants on their current work rights rather than assumptions about their future status. The longer and more categorical a visa duration requirement relative to the role, the harder it will be for an employer to demonstrate a genuine operational reason rather than a generalised preference for more permanent workers.

The preferable approach is that taken by the ACT, which embeds reasonableness in its statutory limitation. As aforementioned, s 57P provides that discrimination on the basis of immigration status is not unlawful where it is "reasonable, having regard to any relevant factors", which can include the "effect of the discrimination on the person discriminated against". It invites a more contextual and flexible assessment of whether conduct is reasonable in all the circumstances, including its impact on the affected person. This is better suited to immigration status as a protected attribute, given the wide variation in visa conditions, work rights, and individual circumstances across the temporary migrant workforce.

JURISDICTIONAL CONSIDERATIONS FOR REFORM

While Commonwealth reform would expand the range of available complaint pathways, reform is most appropriately pursued at the state and territory level. As aforementioned, the RDA gives effect to Australia's obligations under the ICERD. Article 1(2) provides that the Convention does not apply to distinctions made by a State between citizens and non-citizens. While this does not prevent broader domestic protection, it means that expressly incorporating immigration status into the RDA could sit uneasily with the treaty framework it was enacted to implement.

State and territory anti-discrimination statutes therefore provide a more flexible and coherent site for reform. Alternatively, explicit protection for immigration status may sit more naturally within a consolidated Commonwealth anti-discrimination framework, particularly if modelled after the Equality Act 2010 (UK), which addresses many of the limitations inherent in Australia's fragmented system. A consolidated framework of this kind would also provide a more coherent basis for the statutory exceptions discussed above. In particular, such a framework would:

- Bring all protected attributes together in a single statute;
- Apply a proportionality test to indirect discrimination, so that visa-based exclusions can be scrutinised as a proportionate means of achieving a legitimate aim;[47]
- Provide that direct discrimination generally cannot be justified, except where specific statutory exceptions apply;[48] and
- Incorporate a burden-shifting mechanism, requiring respondents to disprove discrimination once a claimant establishes a prima facie case.[49]

Australia undertook a significant consultation process in 2011–2013, culminating in the proposed *Human Rights and Anti-Discrimination Bill 2012* (Cth), which was not enacted and has not been revived.[50] However, absent such consolidation, state and territory reform provides the most practical and immediate pathway.

More recently, there has been a renewed campaign to enact a federal Human Rights Act, which would function as a statutory bill of rights to better embed protected rights into legislative interpretation and executive decision-making. This campaign reflects ongoing concerns among civil society groups, unions and academics about Australia's fragmented and incomplete human rights framework.[51] A Human Rights Act would offer a broader rights-based framework capable of strengthening protections for migrant workers beyond the limits of current anti-discrimination legislation.

5. CONCLUSION AND RECOMMENDATIONS

Recognising immigration status as a standalone protected attribute under both discrimination and employment law would acknowledge the real and compounding harms caused by this form of discrimination, strengthen avenues for redress, and protect the integrity of temporary labour migration programs. If temporary visa-holders are systematically screened out of employment, the scheme will fail to deliver on its core purpose of connecting workers with labour market opportunities and filling critical labour shortages.

Anti-discrimination law plays an important normative function. By identifying such conduct as unlawful, it sends a clear signal that discrimination on the basis of immigration status is unacceptable in Australian workplaces and public life.

Without reform, employers may continue to exclude individuals who hold valid work rights, pushing them into informal or exploitative employment, entrenching skills under-utilisation, and allowing visa insecurity to function as a tool of labour market exclusion. This is unacceptable and requires urgent action if governments are serious about addressing the exploitation of migrant workers.

RECOMMENDATION 1

Incorporate 'immigration status' as a standalone protected attribute under state and territory anti-discrimination legislation, subject to appropriate statutory exceptions. Recognition under anti-discrimination law will have flow-on effects for employment law protections.

RECOMMENDATION 2

Amend sections 772(1)(f) and 351 of the *Fair Work Act 2009* (Cth) to include the additional ground of 'immigration status.'

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21. Settlement Services International (SSI), *Billion Dollar Benefit: A roadmap for unleashing the economic potential of refugees and migrants* (Report, June 2023).
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23. *Fair Work Act 2009* (Cth) s 342.
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30. ICERD Art1(2)-(3).
31. (1998) 90 FCR 202.
32. *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 211, adopting the reasoning of the *House of Lords in Ealing London Borough Council v Race Relations Board* [1972] AC 342.
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