Immigration Amnesty as a Viable and Necessary COVID-19 Response

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The disproportionate impact of the COVID-19 pandemic on the health, mobility and economic security of temporary migrants, refugees and people without lawful immigration status brought discussions of immigration amnesties to the fore of pandemic-related immigration policy responses (Dehm & Vogl, 2022). In Brazil, civil societies groups launched a movement called *'Regularização Já* (Regularisation Now)' in response to COVID-19 impacts (Dias, 2020). The group called for radical reforms, including a bill 'that would grant residency to all immigrants in the country, regardless of their current status' (Dias, 2020). Portugal, too, temporarily granted all migrants and refugees living within its territory full citizenship rights, including access to state healthcare (Pla, 2020). The measure benefited approximately 260,000 migrants who saw their 'legal position temporarily regularised', with subsequent governmental orders extending the operation of the measure until the end of April 2021 (Gil, 2021). Like other pandemic-related immigration policy reforms and status grants, these initiatives are notable either for their explicitly 'temporary' or emergency nature, or for the grant of status being conditional upon the immediate effects of the pandemic rather than the systematic and prior forms of exclusion faced by people living without legal status.

In Australia, the COVID-19 pandemic highlighted the centrality of undocumented workers to Australia's essential industries and led to calls for an immigration amnesty from diverse sources, including from conservative Australian National Party parliamentarians. At the same time, national border closures in response to COVID-19 limited non-citizens' ability to depart Australia once their visas had expired. Although exact numbers are unknown, the Government estimates that there are currently over 64,000 people living without lawful immigration status in Australia (Department of Immigration and Border Protection, 2017). Other sources of support for amnesty in Australia during the pandemic included the Federal Government's National Agricultural Labour Advisory Committee (National Agriculture Advisory Committee, 2020), labour and migration experts (Howe et al., 2019; Howe, 2021; Farbenblum & Berg, 2020; Dehm & Loughnan, 2021), Victorian Farmers Federation representatives (Sullivan, 2020), agricultural sector unions, and undocumented workers themselves (United Workers Union, 2020).

In this piece, we present the growing evidence that an immigration amnesty is a viable, necessary and desirable legal and policy response to the uncertainty, exploitation and suffering experienced by undocumented people in Australia today. In particular, we explain how and why immigration amnesties have arisen as a legal and political response to the complex, intersecting challenges created by the COVID-19 pandemic both for Australia's workforce of temporary migrant labour and for non-citizens living in Australia more generally. We also highlight our recent research project on Australia's little known past three immigration amnesties. We briefly present key lessons from these past initiatives and argue that Australia's past amnesties and their legal legacies are instructive for contemporary and urgent campaigns for a broad-ranging immigration reform in Australia.

What is a Legal Immigration Amnesty and Why is it Currently Needed in Australia?

While amnesties take a range of forms and serve multiple ends, in general, legal immigration amnesties are mechanisms by which governments allow people within their territory without lawful migration status to come forward and lawfully regularise their status without risk of punishment or deportation. US immigration law scholar Linda Bosniak defines amnesties broadly as 'policies that lift or eliminate the illegality of status imposed on [undocumented people] and that incorporate them into the body politic' (Bosniak, 2013). While some definitions focus on the 'illegality' of so-called 'unauthorised non-citizens' and others emphasise the exclusionary nature of migration laws that make people illegal (Lakoff & Ferguson, 2006), all immigration amnesties involve the change of status for particular groups of non-citizens. Although legal amnesties are often designed to have a broad application, they may also apply to limited subsets of non-citizens, and outcomes for non-citizens may range from temporary reprieves from deportation (such as the US Deferred Action for Childhood Arrivals program) to facilitating more formal pathways to permanency and citizenship. Amnesties may also be referred to as 'legalisation' or 'regularisation' programs, and common criteria delimiting eligibility for amnesty include the duration of one's residence within a state or participation in the labour market (Levinson, 2005). And, as Levinson (2005) notes, they are 'usually implemented in concert with the internal and external strengthening of migration controls'.

As states increasingly equate orderly migration programs and effective border control with the exercise of state sovereignty, governments generally only consider amnesties when other internal and external migration controls have failed (Levinson, 2005). Marmora outlines four broad reasons why states opt to implement immigration amnesties: to achieve control over irregular migration; to improve the social situation of migrants; to increase labour market transparency; or in response to foreign policy goals or agreements (Mármora, 1999). In practice, these motivations overlap, as is evident in the recent turn to regularisation in Australia.

Recent engagement with the need for an immigration amnesty in Australia has focused on two groups of undocumented people in particular: unlawful non-citizens living in the community as the result of overstaying previous visas, and refugee applicants living in the community whose status has lapsed, or who do not have pathways to permanent residency under the *Migration Act* (Cth). As noted, in 2017 the Department of Immigration and Border Protection estimated the number of undocumented people in Australia to be at least 64,000 people (Department of Immigration and Border Protection, 2017), approximately 6,000 of whom had lived in Australia for over a

decade (Truu, 2020). However, precise and up-to-date numbers are not available; and other estimations range up to 90,000 people (Rimmer & Underhill, 2015). Similarly, there is no precise account of the make-up of this group, though in 2017 the Government identified the main nationalities of undocumented people as including nationals from Malaysia (14.6%), China (10.1%) , USA (8%) and the UK (5.7%). In 2013, the Department reported agriculture, forestry and fishing, construction, hotel accommodation and hospitality as the most common industries of work for people without lawful status in Australia (Howe et al., 2019)

(i) Undocumented workers

The recent emergence of amnesty as a policy option – both before and during the COVID-19 pandemic – has focussed on the risks faced by undocumented people who are currently in the workforce, and specifically on those in the agricultural sectors. One of the findings of Joanna Howe et al's 2019 report into addressing labour challenges in the horticultural industry is that the industry has a 'structural reliance' on undocumented migrant workers as a key source of labour (Howe et al., 2019). Undocumented workers are highly vulnerable to exploitation and have limited capacity to seek assistance or redress due to their irregular status (Farbenblum & Berg, 2017). The high risks of exploitation identified in relation to this group of workers extends to undocumented people in the workforce more generally, and successive governments and multi-agency government initiatives, have failed to address these issues or even to successfully detect undocumented people.

It is in response to the systematic exploitation and harm faced by undocumented workers that recent recommendations for an immigration amnesty have emerged. For the agricultural sector in particular, amnesty calls are also motivated by concerns that deportation or removal of undocumented workers will further affect the limited supply of labour. In late 2020, a Government Advisory Committee convened by the Department of Agriculture to develop a 'labour strategy for Australian agriculture' made a direct recommendation for a 'one-off regularisation of the undocumented workers in the country' (National Agricultural Labour Advisory Committee, 2020). The recommendation was made as part of the Federal Government's National Agricultural Workforce Strategy report, which presented it as a means to eliminate the 'unscrupulous and unethical practices' that labour hire companies use to employ and exploit documented people. A number of Australian unions have expressed a similar rationale for an amnesty (United Workers Union, 2020), including a suggestion that amnesties should be available where visa conditions are breached due to exploitation or pressure from an employer (Senate Education and Employment References Committee, 2016; Shop, Distributive and Allied Employees' Association, 2015).

Notably, the National Agricultural Labour Advisory Committee (2020) report explicitly put forward regularisation as part of the public health response to COVID-19. It presented public health concerns for undocumented people and the broader public as a core reason for an amnesty, stating that:

> [the] current pandemic provides a unique chance to design a one-off regularisation program for social health reasons. It is a potentially dangerous situation for the Australian public to have 60,000 to 100,000 overseas workers avoiding contact with clinics and hospitals (p. 190; Davis, 2021).

(ii) Refugees and Asylum Seekers

Amnesty as a potential political and legal solution also pertains to asylum seekers and refugees, who have lived for extended periods in the Australian community either on continual temporary visas or without regular status at all (Vogl, 2019). A complicated regime of post-arrival policies aimed at refugee deterrence has created a population of refugees and asylum seekers who cannot access either permanent residency or citizenship, but who also cannot return 'home' or to their country of persecution. The key factor giving rise to both a permanent temporary migration status and associated precarity was the re-introduction of temporary protection in late 2014 under the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). Both Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs) were introduced at this time. These visas last only three and five years respectively and must be renewed on an ongoing basis. While refugees granted SHEVs have some conditional pathways to permanency, those holding SHEVS and TPVs live for the most part with a permanently temporary migration status. The group to which these policies apply has been labelled the 'legacy caseload' by successive Liberal Governments, and includes people who have lived in the community for up to 10 years.

As with people living without documentation in Australia more broadly, the need for regularisation – and with it access to health services– has been exacerbated during the COVID-19 pandemic for asylum seekers and refugees. The absence of regularization opportunities has effects which are particularly acute for members of this group who are living in the community without lawful status, due to delays in the renewal of their bridging visas or refusals of bridging visas, often without clear reasons given by government for these delays or refusals. As the Refugee Council of Australia ('RCOA') notes, this group includes asylum seekers who have made every effort to maintain a lawful status and engage in the Government processes and have been forced into an irregular status, with no rights or entitlements (RCOA, 2020). This group also includes asylum seekers living in community on 'final departure' visas prior to deportation (RCOA, 2020; Liberty Victoria, 2021).1 The

1 Recent research has demonstrated that these asylum seekers regularly fall out of regular status due to the complex processes involved in grant and renewal bridging visas valid for as short as three or six months: Liberty Victoria, 2021.

size of this population frequently changes, however as of June 2021, there were 2,281 asylum seekers who arrived by boat as part of the 'legacy caseload' residing without a valid visa in the community (Department of Home Affairs, 2021; Boon-Kuo, 2017).

Like undocumented workers, refugees and asylum seekers without permanent status are at high risk of systemic labour exploitation (Fleay & Hartley, 2016). This is particularly so for people living in the community without a valid visa or regular migration status (Kooy & Bowman, 2019; Berg, Dehm & Vogl, 2022). Organisations such as the RCOA have recommended creating pathways to residency for refugees and asylum seekers who fill agricultural labour shortages exacerbated by COVID-19 (Bonyhady, 2020). Providing such pathways would address similar issues to those identified in respect of long-term undocumented people – not least their exploitation at work and exclusion from COVID-19 public health response by virtue of their lack of status.

At present, however, it remains unclear whether there is political will in Australia for a broad amnesty as a necessary pandemic response measure. While the newly-elected Labor government has committed to providing recognised refugees on temporary visas (TPVs or SHEVs) a pathway to permanency, they have not as yet announced any broader measures to address the systemic creation and exclusion of undocumented populations in Australia. The previous Liberal Government, for example, resolutely rejected an immigration amnesty as a response to the issues outlined above. Michael Pezzullo (2021), then Home Affairs Secretary, told a Senate Estimates hearing in March 2021 that an amnesty would 'undermine the integrity' of Australia's visa system and 'create an incentive for people to get themselves smuggled into Australia' or overstay their visa. A similar preoccupation with the 'pull' factors of unauthorised migration is evident in the Department's formal statement on the issue, in which it said that '[b]road regularisation of the status of unlawful non-citizens may perversely encourage non-compliance with migration law', and that '[d]espite the closure of the Australian border, pull factors encouraging illegal immigration are still relevant' (cited in Davis, 2021).

Australia's Little-Known Past Immigration Amnesties

Yet, despite such concerns, immigration amnesties have been used by successive Australian governments in the past to provide a fair and humane pathway to permanency for undocumented people in Australia. Indeed, a little-known aspect of Australia's legal and immigration history is its past use of three legal immigration amnesties in 1974, 1976 and 1980. Each amnesty was implemented via executive action and allowed certain non-citizens living in Australia without state authorisation to apply for permanent residency. These past amnesties were implemented under both Labor and Liberal governments, and each enjoyed enthusiastic bipartisan support. Each amnesty was explicitly promoted as a way to remedy the issue of people living in Australia without status as humanely as possible, and to avoid further exploitation and uncertainty as a result of this status. Further, in language that seems at odds with contemporary practices of migration management, successive Immigration Ministers stressed during each amnesty campaign that any so-called 'illegal immigrants' who came forward would be treated sympathetically, and applicants did not need to fear arrest or deportation.

Despite the legal and political prominence of Australia's past amnesties at the time of their implementation, they have been subject to surprisingly little scrutiny within both legal and historical scholarship on immigration law and policy in Australia (North, 1984; Rhodes, 1986). While it is beyond the scope of this piece to outline each of the historical amnesties in detail, elsewhere, we have argued that these past amnesties provide fruitful lessons for contemporary law reform efforts. In particular, they demonstrate how contemporary amnesties ought to:

- be informed by a social (rather than legal) conception of citizenship;
- adopt an inclusive criteria and consultative process for engaging migrant communities, and
- be presented as a humane and effective legal response to the harmful practices associated with the prevailing detection and deportation model for addressing the presence of undocumented people in Australia today (Dehm & Vogl, 2022).

In recalling these lessons from past amnesties in Australia alongside noting the use and benefits of immigration amnesties in other jurisdictions, we argue that – so long as state border controls remain in place – immigration amnesties should be seen as an effective political and legal mechanism to remedy the exclusion, illegalisation and exploitation that undocumented people experience. Indeed, immigration amnesties are valuable not only as a response to the effects of the COVID-19 pandemic, but also as a permanent and cyclical feature of the Australian migration system.

This piece is based on a larger research project on the historical use of immigration amnesties in Australia. For a detailed account, see: Sara Dehm and Anthea Vogl, 'Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns' (2022) 44(3) Sydney Law Review (forthcoming).

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