IMMIGRATION AND DISCRIMINATION LAW: A STORY OF THE COLLUSION OF LEGAL CATEGORIES AGAINST TEMPORARY MIGRANTS IN AUSTRALIA

BEN CARRICK*

Discrimination on the basis of immigration status is commonly encountered by temporary migrants in Australia. It can be understood as an internal border, taking its character from immigration law but implicating a broad array of government and private sector entities, restricting access and choices, and leading to social exclusion. As Australia is now home to large numbers of long-term temporary residents, their exclusion is problematic for those individuals and also for the broader society. The concept of legal categorisation allows us to understand why discrimination law is unable to address immigration status discrimination. On the one hand, there are straightforward textual issues that appear to explain it, however, viewing the issue from the position of the values and characters of each domain or category of law is helpful. This reveals that the values of discrimination law are fundamentally compromised in their encounter with immigration law, to the point where they actively cooperate with immigration law to enforce the social exclusion of temporary residents. This in turn reveals a feature of immigration law that must be accounted for if this issue is to be effectively addressed.

I INTRODUCTION

Although immigration has been a significant part of Australia's story since settlement, over the last 20 years and especially the last 10 years, the form of that immigration has been changing. Previously, the overwhelming majority of immigrants to Australia were granted permanent residency before they arrived. Aside from the right to vote, they enjoyed nearly all the same benefits, rights and services as citizens from the moment they entered, and their transition from

* Independent scholar and Unit Coordinator at Swinburne Online bcarrick@swin.edu.au. This. paper is based in part on work I did during my PhD candidature at Melbourne Law School. It also draws on my practice in refugee and immigration law, including most recently at the Refugee and Immigration Legal Service ('RAILS'). I am indebted to Associate Professor Jenny Beard and Professor Beth Gaze for their comments on earlier versions of this article. Thanks too, to the anonymous reviewers for their helpful suggestions.

permanent resident to citizen was smooth and encouraged by government.[1] This situation is now dramatically shifting.[2] Since the 2000–01 planning year, and setting aside the brief period in which borders were closed due to COVID-19, an average of 50,000 more temporary migrants have arrived in Australia each year compared to the number that have departed, and the number arriving has increased year on year.[3]

Some of those who have stayed have obtained permanent residency — roughly half of the permanent residence visas granted each year are now granted to people who were already in Australia on a temporary visa.[4] Surveys of temporary residents indicate that the majority want to qualify for permanent residency.[5] However for most, this is a long and complex process, and they are often required to cycle through three or more temporary visas over several years before qualifying.[6] Others, such as refugees who travelled to Australia by sea, were prevented, until recently, from applying for permanent visas.[7] As a result, from 2001–17, the total number of temporary residents in Australia at a given time had doubled from 0.8 to 1.6 million.[8] There are no reliable statistics on the number of people residing in Australia with temporary status over a long period, but journalist and author, Peter Mares, who has done much to bring the plight of temporary residents to public attention, estimates that around one million have lived here for more than five years.[9]

1 For a history of Australian immigration up until this time, see James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2002).

2 See Peter Mares, *Not Quite Australian: How Temporary Migration Is Changing the Nation* (Text Publishing, 2016) ch 2 ('*Not Quite Australian*'); Peter Mares, 'The Permanent Shift to Temporary Migration', *Inside Story* (online, 17 June 2009) <https://insidestory.org.au/the-permanent-shift-to-temporary-migration/>.

3 Treasury and Department of Home Affairs (Cth), *Shaping a Nation: Population Growth and Immigration over Time* (Report, 2018) 19 ('*Shaping a Nation*').

4 Ibid 20.

5 Data indicates between 65% and 84% of international students, depending on their course, and 70% of temporary workers intend to apply for permanent residency when they are able: Mares, *Not Quite Australian* (n 2) 60.

6 See ibid 60–1.

7 Such individuals are unable to apply for permanent protection visas: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). A number of other provisions in the *Migration Act 1958* (Cth) also ensure they cannot apply for other permanent visas: see, eg, at s 46A. In February 2023, a pathway to permanency was opened when the *Migration Regulations 1994* (Cth) were amended to allow them to apply for permanent Resolution of Status visas.

8 *Shaping a Nation* (n 3) 19.

9 See Mares, *Not Quite Australian* (n 2) 23. This figure is the best estimate available from existing data. Neither the Department of Home Affairs nor the Australian Bureau of Statistics keep figures on the number of persons living in Australia for five years or more on temporary visas: at 61–4.

In this paper, I look at the way immigration law enacts the social exclusion of temporary migrants in Australia,[10] and why discrimination law not only fails to address it, but actively cooperates to enforce that exclusion. I begin with why law is divided into domains such as immigration law and discrimination law and what implications flow from that categorisation. This is important for understanding the relationship between these laws and what happens when they encounter one another.

Following this, I explain the concept of an internal border and the character and values of immigration law, which permeate that border. Australia's system of over 100 visa subclasses is mapped out, and the relationship between visa subclasses and immigration status is explained. I outline the reasons that temporary migration programs are so often accompanied by exclusion from, in particular, social rights. I then go on to explain how that exclusion becomes problematic, on both an individual and community level, when temporary migration lasts for many years.

In Australia, social exclusion is generally addressed through the provision of welfare state benefits, and through the various state and federal laws in the category of discrimination law. Therefore, in the third section, my focus shifts to the role of discrimination law in the ongoing social exclusion of temporary migrants. The most straightforward reason for this is that most jurisdictions do not include 'immigration status' among their range of protected attributes.[11] However, I argue that provisions in the statutes that 'carve out' discrimination authorised by other laws (statutory authority exceptions) are just as heavily implicated in the maintenance of the internal border, and thereby the social exclusion of temporary migrants. Furthermore, those provisions ensure that discrimination law not only gives way to immigration law in many matters involving discrimination on the basis of citizenship or immigration status, but actively cooperates with it to maintain the social exclusion of temporary migrants.

II IMMIGRATION AND DISCRIMINATION AS CATEGORIES OF LAW

To understand the way that immigration and discrimination law work together or 'collude' to enforce the exclusion of temporary migrants, we must first reflect on what it means to speak of 'discrimination law' and 'immigration law'. As Dorsett and McVeigh have written, the categorisation of law into domains, such as tort or criminal law, does much more than determine which textbook to look in for explanations of them.[12] They emphasise that 'categories name, order and locate lawful relations; they determine the points of institutional limit; and they offer an

10 Social exclusion is *enacted* both in the sense of making it law and of putting it into action or bringing it about.

11 In fact, only the *Discrimination Act 1991* (ACT) ('*Discrimination Act (ACT)*') s 7(1)(i) currently does so. See below IV(A)(1).

12 Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012) 71–6.

account of the substance of law'.[13] Each category or domain has an accepted evolutionary history, set of values and a character, all of which make it sensible, and even possible, to speak of a subset of law as a domain. The history, values and character of immigration law and discrimination law are as different as any two domains within one legal system. The brief descriptions of each that follow highlight that difference.

A *Discrimination Law*

The origins of modern discrimination or equality law in Anglo-American legal systems are usually traced to the development of international human rights and labour law, and the American civil rights movement.[14] However, they also can be seen as the extension of a more basic notion that like cases should be treated alike. This principle dates back to Aristotle and according to the Privy Council, is a 'general axiom of rational behaviour'.[15] English common law has therefore been said to include a 'principle of equality' or '[entitlement] to equal protection of the law', which protects individuals from unjustified distinctions on the basis of irrational criteria.[16]

The evolution of discrimination law from this basic form of equality to the comprehensive guarantees of substantive equality embraced in many legal systems today, and informed by international human rights law, helps explain the range of values that discrimination or equality law is claimed to support. These include the recognition of individual dignity and worth,[17] the distribution of economic and social goods among groups,[18] and the importance of individual liberty and

13 Ibid 75. See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) 3; Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509–1625* (University of Chicago Press, 2007) 3.

14 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 30–4; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 17–18; Dominique Clément, 'The Rights Revolution in Canada and Australia: International Politics, Social Movements, and Domestic Law' in David Goutor and Stephen Heathorn (eds), *Taking Liberties: A History of Human Rights in Canada* (Oxford University Press, 2013) 88, 88.

15 *Matadeen v Pointu* [1999] 1 AC 98, 109 (Lord Hoffman for the Court).

16 *R (Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin), [36] (McCombe J), quoting Lord Steyn, 'Democracy through Law' (Occasional Paper No 12, New Zealand Centre for Public Law, September 2002) 13 <https://www.wgtn.ac.nz/public-law/publications/occasional-papers/pdfs/democracy-through-law.pdf>.

17 See generally Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148(5) *University of Pennsylvania Law Review* 1503; Deborah Hellman, *When Is Discrimination Wrong?* (Harvard University Press, 2011) 6; John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18(1) *Oxford Journal of Legal Studies* 167, 169; Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press, 2015) 76–80.

18 See generally Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press, 2014); Richard Arneson, 'Discrimination, Disparate Impact, and Theories of Justice' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 87, 87–8.

autonomy.[19] It can also be understood as having multidimensional goals that include elements of recognition, distribution and liberty,[20] as well as a concern with the quality of community relations and social inclusion.[21] Importantly, this variety of scholarly views on the precise aims of discrimination law are only possible because 'discrimination law' has already been identified as a category or domain of law.[22]

B *Immigration Law*

Immigration law is also a relatively new domain of law. During the decades of colonial imperialism, the direction of migration was very much from Europe to the so-called Third World with the host countries being afforded little or no say in the enterprise.[23] The first English legislation restricting immigration was not passed until 1793[24] and throughout the late 18th and early 20th centuries immigration restrictions largely consisted of race-based laws and policies that applied in the settler communities of Australia, Canada, South Africa and the United States.[25] Aside from those, the period from the mid-1800s until the outbreak of World War I was 'characterized by free migration both within Europe', and from Europe to North America and Australia.[26] The beginning of World War I, however, saw the introduction of immigration controls in many countries across the world, and these

19 See, eg, Sophia Moreau, 'What Is Discrimination?' (2010) 38(2) *Philosophy and Public Affairs* 143, 160–4; Sophia Moreau, 'In Defense of a Liberty-Based Account of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 71, 86.

20 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 25, citing Sandra Fredman, *The Future of Equality in Britain* (Working Paper Series No 5, Equal Opportunities Commission, 2002). See also Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109(2) *Ethics* 287, 288–9. The objective of discrimination law is to end socially-imposed repression that arises when community members are not afforded equal concern and respect. See also Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54(3) *University of Toronto Law Journal* 291, 296. Discrimination law should address unequal treatment by governments that lessen personal autonomy, perpetuate oppressive power relations and deprive individuals of access to basic goods: at 299, 303–4, 308–9.

21 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 121–4; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *Modern Law Review* 16, 22–4; Fredman, *Discrimination Law* (n 20) 25.

22 I acknowledge there is debate over whether the category should be properly termed 'equality law' or 'discrimination law', stemming from differing positions on what goal(s) the laws should or do serve. I use 'discrimination law' because that is the language of the Australian statutes. I also note that equality always includes non-discrimination as at least one aspect of it: Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing, 2014) 14–19.

23 E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 *Stanford Law Review* 1509, 1533–47.

24 *Aliens Act 1793*, 33 Geo 3, c 4.

25 Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Laws: A Historical Perspective' (2017) 66(1) *International and Comparative Law Quarterly* 235, 237.

26 Göran Rystad, 'Immigration History and the Future of International Migration' (1992) 26(4) *International Migration Review* 1168, 1170.

have continued to grow in complexity, although at various times and in various places those controls have been tightened and loosened.[27]

Immigration law, as it stands today, is characterised by a strong emphasis on the national interest, and a high degree of executive control with relatively weak judicial oversight.[28] Underlying these features is a particular concept of sovereignty, which Lester terms 'absolute sovereignty' and which is presumed to 'embody an unfettered right of the state to exclude and condition the entry and stay of aliens'.[29] The Privy Council has explained the relationship between immigration powers and a state's sovereignty in the following way:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests …[30]

The values and character of contemporary immigration law flow directly from this conception of sovereignty and its perceived link to immigration powers. The form of power exercised within immigration law is plenary, marked by judicial deference, high degrees of executive discretion and direct political control.[31] The national interest, whether conceived in economic, security or membership-defining terms, always dominates individual interests.[32] As a result, individuals have far fewer rights in immigration law than in criminal law, despite them both including coercive powers, including the power to imprison or detain.[33]

From this brief description of discrimination law and immigration law, the differences between them are obvious. Discrimination law is focused on improving the quality of relationships, in terms of fairness, between individuals or groups who are inside a polity. It is heavily influenced by international human rights.

27 Ibid 1171.

28 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008) 6 ('*Making People Illegal*').

29 Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Cambridge University Press, 2018) 14.

30 *A-G (Canada) v Cain* [1906] AC 542, 546 (Lord Atkinson for the Court), quoted in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29–30 (Brennan, Deane and Dawson JJ).

31 Stephen H Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, 1987) 306–7, 326; Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (UBC Press, 2005) 157–8 ('*Humanitarianism, Identity, and Nation*'); Dauvergne, *Making People Illegal* (n 28) 7–8.

32 Catherine Dauvergne, 'Evaluating Canada's New *Immigration and Refugee Protection Act* in Its Global Context' (2003) 41(3) *Alberta Law Review* 725, 741 ('Evaluating Canada's New *Immigration and Refugee Protection Act*'); Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge University Press, 2016) 175.

33 Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8(2) *Theoretical Inquiries in Law* 489, 494.

Immigration law, on the other hand, is concerned with maximising the state's control of which persons are permitted to enter its territory, and the conditions on which they are permitted to remain there. Individual rights are virtually non-existent in this context and the state's right to discriminate is seen as critically important. The primary focus in immigration law is always the state's right to control its borders and who is permitted to cross those borders.

C *The Work of Categorisation*

The history, values and character of discrimination law and immigration law, as with all legal categories, create lenses through which the law views and understands problems. As domains, they determine what subjects can expect from the law and how they can access it, the procedures that must be followed when using it, and the forms of evidence that are relevant and required.[34]

If a temporary resident was denied access to, for example, homelessness services, because of her immigration status, Australian discrimination law would understand the problem as (potentially) direct discrimination on the basis of immigration status. The domain (discrimination law) would also determine the mechanism by which she could seek redress (make a complaint) and the appropriate institution to seek it from (eg the equal opportunity or human rights agency or commission of the state in which the act occurred). The domain would then determine what type of evidence was appropriate, necessary and relevant for the complaint to be upheld, the form(s) in which that evidence may be presented, the process by which the matter would be adjudicated, the factors upon which the respondent agencies may wish to rely in order to demonstrate that prima facie discrimination is nevertheless permissible, and the type(s) of remedies that may be available if the complaint is upheld.

Immigration law, on the other hand, might ask whether the temporary resident had provided incorrect or fraudulent information on her visa application by indicating that she had sufficient funds to support herself, or whether she was subject to a visa condition requiring her to reside in a particular place. The answer to those questions would determine whether she should be penalised for breaching a condition of her visa or providing false or misleading information, the mechanism for carrying out that penalty, any avenues of review or appeal, and the ultimate sanction she might face. Immigration law has no interest in the types of questions that discrimination law would ask. Strictly speaking, immigration law is concerned with regulating the entry or movement of persons across the state's border. Its focus is on whether a temporary migrant is performing the tasks for which she was temporarily admitted (eg engaging in education or filling a skill shortage), rather than her status as a rights-holding individual within Australia's jurisdiction. Provided the resident has not breached a condition upon which she was granted entry, immigration law has no interest in her circumstances.

34 Dorsett and McVeigh (n 12) 72–5.

Appreciation of the way that domains create unique lenses through which problems are viewed, understood and ultimately addressed is important for examining what happens when discrimination law encounters immigration law. The striking differences between these two domains of law suggest they cannot comfortably inhabit the same space. However, this is precisely what is at risk of occurring when a person is discriminated against in a public setting because of her immigration status.

III IMMIGRATION LAW AND THE INTERNAL BORDER

It is now recognised that the physical locations at which border controls operate are not restricted to airports, seaports, checkpoints or boundary fences. Rather, border controls and therefore, in a sense, borders themselves, extend outward from states' geographical borders and overlap with the borders of other states. Kesby refers to such a border as an 'exported' border.[35] Outwardly extending borders allow, for example, the United States to conduct immigration and customs screening in Canadian, the United Arab Emirates or Irish airports,[36] and allow Australia to intercept and interdict unauthorised migrants at sea or in transit countries.[37] Detached from territory in this way, national borders are fluid and able to shift as needed, limited only by the willingness of other nation-states to permit their own territory and border to be overlaid with the border of another. Border controls can also extend inward from a state's territorial border, meaning that individuals remain subject to the border's surveillance for the duration of their residence or stay in the state. This can be understood as the state's border extending inwards, facilitated by technology and increased securitisation of migration. Shachar refers to this as a shifting border: one that moves both outwardly and inwardly from the territorial boundary, 'an unmoored legal construct'.[38]

Thus, it is recognised that borders are no longer static and geographically aligned with where states' edges touch the edges of other states. The border Shachar describes, however, is still one that it is concerned with '[regulating] the mobility

35 Alison Kesby, 'The Shifting and Multiple Border and International Law' (2007) 27(1) *Oxford Journal of Legal Studies* 101, 102.

36 'Preclearance', *US Customs and Border Protection* (Web Page, 26 January 2024) <https://www.cbp.gov/border-security/ports-entry/operations/preclearance>; 'Preclearance in Canada and the United States', *Public Safety Canada* (Web Page, 9 February 2023) <https://www.publicsafety.gc.ca/cnt/brdr-strtgs/prclrnc/index-en.aspx>.

37 See, eg, Helen Davidson, 'Almost 300 Asylum Seekers Prevented from Sailing to Australia in Past Year', *The Guardian* (online, 12 November 2018) <http://www.theguardian.com/australia-news/2018/nov/12/hundreds-of-asylum-seekers-disrupted-while-trying-to-sail-to-australia-in-past-year>; Colin Packham, 'Australia Intercepts Sri Lankan Boat with 13 Asylum Seekers: Government', *Reuters* (online, 2 September 2019) <https://www.reuters.com/article/us-australia-immigration-idUSKCN1VN04A/>.

38 Ayelet Shachar, 'The Shifting Border: Legal Cartographies of Migration and Mobility' in Ayelet Shachar (ed), *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press, 2020) 3, 4.

of people'.[39] Its effect is that people within a state's geographical territory can be outside its constitutional protection.[40] The internal border of Australia, as I describe it in this paper, is consistent with Shachar's depiction but goes further. Rather than being a boundary that migrants cross at some point in their migration journey, which I take Shachar to still describe, the internal border of Australia continues to shadow migrants as temporary residents, permanent residents, and even, albeit to a far lesser degree, as dual citizens. Its purpose is not just to prevent certain types of migrants from becoming members of the national community, but to regulate (positively and negatively) their participation in the benefits of residence. The following sections set out in more detail the way that it occurs. This internal border allows Australia to accept an uncapped number of temporary migrants each year, reaping the economic benefits from doing so, without paying many of the costs associated with their residence here.[41] Its effect on the migrants subject to the internal border can be profound. Bosniak has described it as living 'in the shadows of the federal immigration authority' which 'define [migrants'] experience in this country more than any other single factor'.[42]

A *Australia's Internal Border*

The nature or character of the internal border reflects the character and values of immigration law. In Australia, immigration law has three dominant attributes: a clear privileging of the national interest; a high degree of executive control with relatively weak judicial oversight; and relatedly, an emphasis on malleable substantive provisions.[43]

Firstly, in comparison to other fields of law that impact on individuals' fundamental liberties, the executive arm of government enjoys significant degrees of discretion over central aspects of immigration law, including those that affect people's liberty. There are non-reviewable, non-compellable powers that can only be exercised personally by the Minister for Immigration, Citizenship and Multicultural Affairs to, for instance, grant visas, cancel visas, override decisions of the Administrative

39 Ibid 7.

40 Ibid 8.

41 This is because, unlike permanent residents, temporary residents with the right to work are generally ineligible for government funded services such as health and education. Openness to low-medium skilled temporary migrants and the restriction of rights can be seen as economically linked: see Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, 2013) ('*The Price of Rights*') 111–21.

42 Linda S Bosniak, 'Membership, Equality, and the Difference that Alienage Makes' (1994) 69(6) *New York University Law Review* 1047, 1129–30. Although Bosniak was speaking here of undocumented migrants in the United States, her arguments hold for many temporary migrants in Australia as the following sections will hopefully demonstrate.

43 These features can, in turn, be said to derive in large part from the plenary nature of the federal Parliament's power over aliens.

Appeals Tribunal and release or detain people.[44] These powers are subject to a statement that they may be exercised when the Minister 'thinks that it is in the national interest' to do so.[45] The 'national interest' is an overarching theme of immigration law in most, if not all, countries. In Australia, it is implicit in the operative provisions of the *Migration Act 1958* (Cth) ('*Migration Act*') and its accompanying regulations, and explicitly stated in relation to the Minister's personal discretions.[46] The question of what constitutes the 'national interest' is considered by courts to be 'largely a political question', a matter best determined by the legislative or executive arms of government.[47] The same applies to policy guidelines around the Minister's use of personal discretions more generally: 'the laying down of a broad policy on deportation is essentially a political function, to be performed by the Minister who is responsible to the Parliament' and therefore ought not to be interfered with by tribunals or courts.[48] The extreme reluctance of courts to constrain ministerial discretion in these areas exacerbates the executive's dominance of immigration law.

Even when the Minister's powers are delegated to officials, immigration decisions involve a significant degree of discretion. The *Migration Act* requires that visas be granted if the criteria are satisfied.[49] However, the criteria themselves, largely contained in regulations, frequently require decision-makers to form subjective or even speculative judgments.[50] The criteria are directed towards the achievement of broad immigration goals, which again are often framed in national interest terms. The 'national interest' is used to justify policies that select, that is, discriminate, for perceived economic capacity and reject on the basis of disability, health status and age, among other attributes.[51] Individuals seeking to migrate are assessed for the degree of 'risk' they pose to the welfare state, which is typically then offset against their capacity to generate taxation revenue and degree of

44 *Migration Act 1958* (Cth) ss 46A, 133C, 195A, 197AB, 197AD, 197AF, 197AG, 351, 417, 501BA ('*Migration Act*').

45 See, eg, ibid s 46A(2), which states that '[i]f the Minister thinks that it is in the public interest to do so, the Minister may' allow an unauthorised maritime arrival to apply for a visa.

46 Ibid ss 46A(2), 46B(2), 48B(1), 195A(2), 197AB(1), 351(1), 417(1), 501J(1).

47 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

48 *Drake v Minister for Immigration and Ethnic Affairs* (Administrative Appeals Tribunal of Australia, Brennan J, 21 November 1979).

49 *Migration Act* (n 44) s 65(1).

50 For example, the criteria for protection visas, where the implications of a wrong decision are most serious, require decision-makers to determine whether a person has a 'real chance' of experiencing serious harm and, in the case of complementary protection, whether relocation to another area of the country is 'reasonable': *Migration Act* (n 44) ss 5H, 5J(1)(b), 36(2), 36(2B).

51 For a description of how skills-based selection discriminates on these grounds, see Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (McGill-Queen's University Press, 2nd ed, 1991) 106.

familial connection.[52] These assessments necessarily require officials to exercise a significant degree of discretion and create a broad space within the decision-making process that is not amenable to judicial review and is deeply and inherently discriminatory.

The other prominent feature of immigration law's substantive content is a tendency to be highly malleable. Executive dominance and the national interest focus of immigration law contribute to the malleability of standards in this area. However, at an operational level, malleability is achieved simply by placing the overwhelming majority of visa criteria in regulations, rather than legislation.[53] Malleability, arising from these factors, leads Dauvergne to describe immigration law as 'a container into which the national interest of the day can be contained and given authority of law', while executive governments continually vary the settings that affect individuals.[54]

The dominance of national interest considerations, executive control and use of regulations means that immigration law, as a category or domain of law, is highly flexible from the perspective of the government and unpredictable from the point of view of those who are subject to it.[55] The internal border displays this character as well. Visa conditions, which form the core of the internal border's control, are set out in schedules to the *Migration Regulations 1994* (Cth) and are therefore easily changed. The range of conditions that accompany particular visas reflect the policy goals of each visa and, as the next section explains, this links immigration policy with the internal border's control of immigration status groups.

B *Immigration Status*

'Immigration status' is not a legally defined term but is commonly used in immigration policy. Sometimes it refers to whether a person is a lawful or unlawful

52 Ruhs (n 41) 44; Michael Bommes and Andrew Geddes, 'Conclusion: Defining and Redefining the Community of Legitimate Welfare Receivers' in Michael Bommes and Andrew Geddes (eds), *Immigration and Welfare: Challenging the Borders of the Welfare State* (Routledge, 2000) 248, 250; Anne Mainsbridge and Nancy Walker, Public Interest Advocacy Centre and Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, Submission No 87 to Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into the Migration Treatment of People with Disability* (6 November 2009) 5, 8; Ben Saul, 'Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities' (2010) 16(1) *Australian Journal of Human Rights* 63, 81–4.

53 The criteria for the various visas are contained in schs 1 and 2 of the *Migration Regulations 1994* (Cth) ('*Migration Regulations*'). They typically include in sch 1, whether the application must be made inside or outside Australia, and whether the applicant must be inside or outside Australia. Schedule 2 contains criteria to be met at time of application for primary and any secondary applicants, criteria to be met at time of decision by each applicant, circumstances applicable to the grant, duration of the visa and the conditions imposed on the visa.

54 Dauvergne, 'Evaluating Canada's New *Immigration and Refugee Protection Act*' (n 32) 741. Dauvergne was speaking here of Canadian immigration law but the same applies to Australian immigration law. See generally, Dauvergne, *Humanitarianism, Identity, and Nation* (n 31).

55 See Carl E Schneider, 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 47, 61, 74.

non-citizen, that is, whether they have a valid visa or not.[56] At other times, it is used to distinguish between permanent and temporary residents, and sometimes it is used as a synonym for 'visa type'. *Temporary* residents can further be broken down into subgroups: visitors and tourists, temporary workers (those with visas designed to meet labour needs in Australia), students (those whose visas have the primary purpose of allowing them to study at various levels in Australia), refugees (those who did not have a valid visa when they first arrived but have been assessed as engaging Australia's protection obligations) and so forth.

Immigration status is the mechanism by which the internal border identifies, classifies and controls those who are subject to it. It is because of laws and policies that attach to immigration status that migrants can be in the community in a physical sense yet excluded from it in terms of their ability to fully participate in its life and enjoy its benefits. Immigration status marks a person as an outsider or 'non-belonger' and assigns them a particular label and identity.[57] The internal border then enforces their exclusion or allows a degree of inclusion, according to their immigration status. The next section explains how this occurs.

1 *Immigration Status as a Status*

Status in common law systems has been defined as a 'special condition … which is conferred by law and not purely by the act of the parties' and which recognises some non-legal fact — age, for example, in the case of minor status — and carries specific legal and non-legal consequences.[58] Correspondingly, immigration status recognises the non-legal fact that people who have such a status are 'newcomers' or 'originated elsewhere'. It carries legal consequences in immigration and the other domains of law that form part of the internal border and it carries social consequences as well.

The most obvious consequence of immigration status is its effect on an individual's permission to remain in the territory. The *Migration Act* establishes that visas are of two kinds: permanent visas that allow the holder to 'remain indefinitely' and temporary visas that place limits on the holder's permission to remain.[59] Secondly, immigration status conveys the reason a person has been granted permission to enter or stay and frequently there are legal consequences attached to that reason. For instance, 'international student' is an immigration status that signifies an individual has been permitted to temporarily reside in Australia and engage in study but is prohibited from engaging in more than 40 hours of employment per fortnight and from accessing state-funded health care.[60] Similarly, 'temporary

56 *Migration Act* (n 44) ss 13–14.

57 *Love v Commonwealth* (2020) 270 CLR 152, 288 [394], 289 [396], 308 [437] (Edelman J).

58 RH Graveson, *Status in the Common Law* (Athlone Press, 1953) 2, 112–18.

59 *Migration Act* (n 44) s 30.

60 *Migration Regulations* (n 53) sch 2 cl 500.611(1)(a), sch 8 cls 8105(1), 8501. The restriction on work hours was temporarily relaxed in the wake of the COVID-19 pandemic to assist with labour shortages, illustrating the malleability of immigration law: 'Work Restrictions for Student Visa Holders', *Australian Government: Department of Home Affairs* (Web Page, 20 October 2023)

worker' is an immigration status held by people who hold one of a range of temporary work visas, most of which require a person to work either for a particular employer, in a regional area or in a particular occupation or industry in which a skill shortage has been identified.[61] Legal consequences of immigration status are also found in legislation dealing with topics as diverse as welfare, health care, education, taxation, crime, the environment and hundreds of others.[62]

Immigration status also carries social consequences that flow from these legal consequences. Restrictions around hours, type, or location of work impact on people's social connections, social status and capacity to improve their income. The extent of permission to reside also signifies the degree to which the state endorses a person's inclusion in the national community, and the reason for their entry or residence impliedly conveys the individual's value to the nation, as determined by the state.

The value judgments that are implicit in a person's status have the potential to affect their social standing or approval, or to identify them as a social group to which particular social value has been attached. In the Weberian tradition, social status is understood as the extent of honour, prestige, dignity or approval that an individual or group receives from others.[63] Social status groups are formed around social evaluation of particular traits associated with groups.[64]

Refugees with temporary status form the starkest example of this. Social research has found widespread views in the Australian community that refugees and asylum seekers who travel to Australia by sea, and are therefore only eligible for a temporary visa, are a threat to Australia in some way, that they are law-breakers and 'queue-jumpers'.[65] Reflecting this view, Dandy and Pe-Pua have found that African and Muslim refugees, in particular, face discrimination and vilification at higher rates than other migrants and that this intensifies when news media is

<https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500/temporary-relaxation-of-working-hours-for-student-visa-holders>.

61 The Subclass 476 (Skilled — Recognised Graduate) visa and Subclass 485 (Temporary Graduate) visa are the exceptions to this. The skill shortage restriction for those visas is placed on the qualification earned in Australia, rather than the work they perform after graduation: see *Migration Regulations* (n 53) sch 2 cl 476.212.

62 For a comprehensive list of Australian legislation that discriminates on the basis of citizenship or residency status, see Kim Rubenstein, *Australian Citizenship Law* (Lawbook, 2nd ed, 2017) ch 5.

63 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed Guenther Roth and Claus Wittich, tr Ephraim Fischoff et al (University of California Press, 1978) 391.

64 Symposium, 'The Constitution of Status' (1997) 106(8) *Yale Law Journal* 2313, 2325.

65 Alison Saxton, '"I Certainly Don't Want People like That Here": The Discursive Construction of "Asylum Seekers"' (2003) 109(1) *Media International Australia* 109, 118; Fiona H McKay, Samantha L Thomas and Susan Kneebone, '"It Would Be Okay if They Came through the Proper Channels": Community Perceptions and Attitudes toward Asylum Seekers in Australia' (2012) 25(1) *Journal of Refugee Studies* 113, 128–9.

focused on boat arrivals, generating an impression that most refugees arrive by boat.[66]

Additionally, legal consequences such as not having a right to access health care or choose an employer and hours of work can have effects that extend beyond the obvious physical ones. Restricting the rights of a particular group of people signals a lack of communal regard for their humanity, dignity and individuality.[67] Undocumented residents and those on bridging visas often do not have the right to work, and all undocumented and temporary migrants except refugees are excluded from welfare benefits. Studies in both Australia and internationally have found that temporary residents without the legal right to work or access welfare benefits are far more likely to be employed in jobs that are dangerous, low-wage and where employers regularly breach employment and other laws.[68] In this way, inequalities flow both directly from legal restrictions placed on particular immigration status groups, and indirectly from social values and risks that attend those restrictions.

With this deeper understanding of immigration status as the mechanism used by the internal border to exclude and control, the internal border can be described as the range of laws, policies and control mechanisms that ensure that the values and priorities of immigration law control migrants within Australia. Immigration status is a mechanism that confers both legal and non-legal consequences on individuals, and which influences the degree to which they are included or excluded from social, economic and political life.

2 *Immigration Status Groups and Degrees of Exclusion*

Whether a migrant is a permanent, temporary or undocumented resident makes the greatest difference to the degree of exclusion they encounter. This is significant because Australia has only relatively recently embraced uncapped temporary migration, making the social exclusion of *large numbers* of temporary residents a

66 Justine Dandy and Rogelia Pe-Pua, 'The Refugee Experience of Social Cohesion in Australia: Exploring the Roles of Racism, Intercultural Contact, and the Media' (2015) 13(4) *Journal of Immigrant and Refugee Studies* 339, 349–50, 354. This result was found in the areas of verbal abuse, employment discrimination and difficulty obtaining rental housing. Although all migrants on low incomes struggled to afford housing, refugees experienced fear, prejudice and ignorance that compounded their disadvantage: at 349–50.

67 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007) 38–41.

68 Patricia Landolt and Luin Goldring, 'The Social Production of Non-Citizenship: The Consequences of Intersecting Trajectories of Precarious Legal Status and Precarious Work' in Luin Goldring and Patricia Landolt (eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (University of Toronto Press, 2013) 154, 165 ('The Social Production of Non-Citizenship'); Peter Mares, 'Temporary Migration and Its Implications for Australia' (Senate Occasional Lecture Series, Parliament House, 23 September 2011) 45–6, quoting *Visa Subclass 457 Integrity Review* (Final Report, October 2008) 49; Ana Deumert et al, 'Global Migration and Social Protection Rights: The Social and Economic Security of Cross-Border Students in Australia' (2005) 5(3) *Global Social Policy* 329, 334; Stephen Castles, Hein De Haas and Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (Palgrave Macmillan, 5th ed, 2014) 255.

relatively new phenomenon.[69] In general, permanent residents are in a more advantageous position than temporary residents in terms of the security of their status, their access to the welfare state and their vulnerability to discrimination on account of their immigration status. Temporary residents, however, are not a homogenous group. Differences can be seen in their vulnerability to discrimination and exploitation, and these differences flow from the conditions attached to the particular type of visa they hold.

One distinct group is temporary sponsored workers. They hold visas that tie them to particular employers or industries. Visas that fit within this group include the former Temporary Work (Skilled) Subclass 457 visa and its replacement, the Temporary (Skill Shortage) Subclass 482 visa, as well as a small number of domestic and seasonal workers on Temporary Work (International Relations) subclass 403 visas or the Temporary Work (Short Stay Specialist) subclass 400 visa. Because their visa, and therefore their ability to lawfully remain in Australia, is subject to their employer's ongoing willingness to sponsor them, they are vulnerable to exploitation from those same employers. Although, on paper, they are entitled to employment protections such as minimum pay rates, and terms and conditions on the same basis as other Australian workers, it is difficult for them to enforce these rights when they depend on their employers to remain in Australia. Temporary sponsored workers cannot access free health care or education and are ineligible for welfare benefits. This was particularly problematic during the recent COVID-19 pandemic, when many temporary workers, like other workers, lost their jobs or had their work hours dramatically curtailed but were ineligible for federal government assistance.[70]

The potential for exploitation in employment is greater for international students who are ordinarily permitted by immigration law to work 40 hours per fortnight during semester.[71] Many need to work in order to pay their course fees and meet their living costs.[72] They are vulnerable to workplace abuses because of their age, cultural or linguistic backgrounds, and skill level, compounded by their temporary

69 Mares, *Not Quite Australian* (n 2) 22–3.

70 Laurie Berg and Bassina Farbenblum, '"I Will Never Come to Australia Again": New Research Reveals the Suffering of Temporary Migrants during the COVID-19 Crisis', *The Conversation* (online, 17 August 2020) <http://theconversation.com/i-will-never-come-to-australia-again-new-research-reveals-the-suffering-of-temporary-migrants-during-the-covid-19-crisis-143351>; Bassina Farbenblum and Laurie Berg, '"Garbage" and "Cash Cows": Temporary Migrants Describe Anguish of Exclusion and Racism during COVID-19', *The Conversation* (online, 17 September 2020) <http://theconversation.com/garbage-and-cash-cows-temporary-migrants-describe-anguish-of-exclusion-and-racism-during-covid-19-146098>.

71 *Migration Regulations* (n 53) sch 2 cl 500.611(1)(a), sch 8 cl 8105(1); Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78, 81.

72 Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25(3) *Australian Journal of Labour Law* 181, 186–7; Mares, *Not Quite Australian* (n 2) 251.

status and restricted work rights.[73] Employers have frequently been found to have allowed or insisted students work more than the permitted 40 hours per fortnight and then threatened to have their visas cancelled if they complained about being underpaid.[74] Research has found that almost a quarter of international students are paid less than half the minimum wage and expect to be paid less than the minimum wage because of their immigration status.[75] They also experience poor conditions and exploitative practices in finding accommodation.[76] Student visas are often used as part of the two- or three-step pathway to permanency mentioned above as student visas are relatively easy to obtain and the number available each year is uncapped. However, many young people studying vocational courses, in particular, have very little chance of ever qualifying for a permanent skilled visa and find themselves repeatedly enrolling in courses in order to obtain another student visa and remain lawfully in Australia.[77] International students cannot access free health care or education and are ineligible for welfare benefits.[78]

Until very recently, a third group of temporary residents, New Zealand citizens, were indefinitely temporary. New Zealand citizens are uniquely eligible for a temporary visa, the Subclass 444 Special Category visa that, under normal circumstances, remains valid as long as they remain in Australia. They have long been able to apply for permanent residency on the same terms as other temporary residents if they can meet the criteria. However, less than half of those who have

73 Reilly (n 72) 182; Australian Government, *Report of the Migrant Workers' Taskforce* (Report, March 2019) 36–7 <https://www.dewr.gov.au/migrant-workers-taskforce/resources/report-migrant-workers-taskforce> ('*Migrant Workers' Taskforce Report*').

74 Fair Work Ombudsman, 'Convenience Store Operators Fined $150,000 for Underpaying International Students' (Media Release, 27 April 2011) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2011-media-releases/april-2011/20110427-bosen>, archived at <https://web.archive.org/web/20200815175857/https://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2011-media-releases/april-2011/20110427-bosen> ('Convenience Store Operators Underpaying International Students'); Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016) 48 ('*Inquiry into 7-Eleven*'). See also Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) 160 [6.91] ('*A National Disgrace*').

75 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, November 2017) 5–7 <https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey> ('*Wage Theft in Australia*').

76 Laurie Berg and Bassina Farbenblum, *Living Precariously: Understanding International Students' Housing Experiences in Australia* (Report, December 2019) 8–9 <https://www.ssrn.com/abstract=3550890>.

77 Mares refers to student visas as '[d]e [f]acto [l]abour [m]igration': Mares, *Not Quite Australian* (n 2) 233. See also Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (Report, 2 March 2011) 46 [98]: 'There have been cases where non-citizens have come for the purpose of working and have very clearly only entered a course of study in order to meet the entry requirements for the visa'. In my work, it is not unusual to see people who have been in Australia studying vocational courses for 10 years and still not have a visible pathway to permanency.

78 See Reilly (n 72) 187.

resided in Australia over the long term were able to do that.[79] As temporary residents, they are ineligible for unemployment benefits, parenting payment or special benefit, most public housing and the National Disability Insurance Scheme. Many are also unable to access the Higher Education Loan Program ('HELP').[80] However, because New Zealanders are eligible for Medicare and subsidised school education,[81] they could live in Australia for decades without experiencing significant disadvantage and begin to consider themselves part of the Australian community. It is only when they were unexpectedly plunged into crisis through illness, unemployment, family violence or similar life-changing event, that their exclusion from the welfare safety net was noticed. As a result, in recent years indefinitely temporary New Zealanders have comprised up to 60% of the clients of some charities, and in 2013–14 approximately 4,500 New Zealand citizens received homelessness assistance from just one agency.[82] The indefinitely temporary status of this group was finally addressed in 2023 when amendments to citizenship law were made, allowing New Zealand citizens on Subclass 444 visas to be treated as if they were permanent residents, for the purposes of citizenship.[83] This means that New Zealanders now have a pathway to citizenship that does not depend on them being able to qualify for a permanent skilled or employment visa. Although they remain temporary residents until they are granted citizenship, this welcome change means they need no longer remain indefinitely temporary.

Finally, the most disadvantaged and socially excluded subgroup of indefinitely temporary residents are asylum seekers and refugees with temporary status. This is a relatively small group in terms of Australia's overall resident non-citizen population but their acute disadvantage and the determination of the former Coalition government to never allow them to obtain permanent residency or

79 Mares, *Not Quite Australian* (n 2) 135, citing Paul Hamer, '200,000 New Zealanders Live in Australia without a Helping Hand', *Right Now* (online, 14 April 2016) <https://rightnow.org.au/opinion/200000-new-zealanders-live-in-australia-without-a-helping-hand/>.

80 To qualify, they must have begun living in Australia at least 10 years ago when they were a child with no spouse or de facto partner, and they must have been in Australia for at least eight of the last 10 years and 18 months of the last two years: Australian Government, 'Non-Australian Citizens', *Study Assist* (Web Page) <https://studyassist.gov.au/help-loans/non-australian-citizens>.

81 Harriet Spinks and Michael Klapdor, 'New Zealanders in Australia: A Quick Guide' (Research Paper, Parliamentary Library, Parliament of Australia, 29 August 2016).

82 Tamara Walsh, 'New Zealanders in Crisis in Australia: The Absence of a Social Safety Net' (2015) 26(3) *New Zealand Universities Law Review* 673, 690, citing Australian Institute of Health and Welfare, *Specialist Homelessness Services 2013–14* (Report, 2014) tbl S2.4 (the relevant data is separate from the report and can be downloaded from https://www.aihw.gov.au/getmedia/17a65138-ab77-4308-ba2e-be37669f5809/18406-national-supp-tables.xls.aspx) and Pasifika Pioneers, Pacific Indigenous Nations Network Gold Coast and Nerang Neighbourhood Centre, Submission to Productivity Commission, Parliament of Australia, *Strengthening Economic Relations between Australia and New Zealand* (18 October 2012) 3.

83 *Australian Citizenship (Permanent Resident) Determination (LIN 22/103) 2022* (Cth).

citizenship makes them notable.[84] This group includes asylum seekers on bridging visas and a significant and growing group of undocumented asylum seekers who have no visa because they are legislatively barred from applying for one or just unable to meet the criteria. The majority of asylum seekers with and without a visa are ineligible for income support even if they are unable to find work, leaving them dependent on charities for subsistence. Undocumented residents and some bridging visa holders do not have the right to work.[85] As a group, refugees and asylum seekers on temporary visas face significant barriers to gaining employment including weak English skills, non-recognition of overseas qualifications, discrimination and poor mental health.[86] They are ineligible for most government-funded English programs, and around 60% of temporary-status refugees have a diagnosable mental illness.[87] Unemployment or underemployment, as well as discrimination and the prolonged uncertainty regarding the continuation of their temporary status have been found to have long-term consequences for their mental health and wellbeing.[88]

Australia has very few long-term undocumented residents, in comparison to other so-called 'settler states'.[89] However, as mentioned above, there is a relatively small but steadily growing group of 'failed asylum seekers' who live, undocumented, in the Australian community with the tacit acceptance of the federal government.[90]

84 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10546 (Scott Morrison, Minister for Immigration and Border Protection): 'It has been a clear policy of this government to ensure that those who flagrantly disregard our laws and arrive illegally in Australia are not rewarded with a permanent protection visa'.

85 A penalty of two years imprisonment can be incurred for employing those who lack the right to work: *Migration Act* (n 44) s 245AC(1), (3).

86 Susan SY Li, Belinda J Liddell and Angela Nickerson, 'The Relationship between Post-Migration Stress and Psychological Disorders in Refugees and Asylum Seekers' (2016) 18(9) *Current Psychiatry Reports* 82:1–9, 2, citing Harvey Krahn et al, 'Educated and Underemployed: Refugee Integration into the Canadian Labour Market' (2000) 1(1) *Journal of International Migration and Integration* 59.

87 Debbie C Hocking, Gerard A Kennedy and Suresh Sundram, 'Social Factors Ameliorate Psychiatric Disorders in Community-Based Asylum Seekers Independent of Visa Status' (2015) 230(2) *Psychiatry Research* 628, 631.

88 Susan SY Li, Belinda J Liddell and Angela Nickerson, 'The Relationship between Post-Migration Stress and Psychological Disorders in Refugees and Asylum Seekers' (2016) 18(9) *Current Psychiatry Reports* 82:1–9, 4.

89 For instance, in 2017 Australia had an estimated 64,600 undocumented residents, which amounts to less than 0.3% of the population: Shamsher Kainth, 'Over 64,000 People Staying in Australia on Expired Visas', *SBS News* (online, 11 August 2017) <https://www.sbs.com.au/yourlanguage/punjabi/en/article/2017/07/19/over-64000-people-staying-australia-expired-visas>. In 2000, 28% of the then 58,745 undocumented were estimated to have overstayed 9 years or more: Australian Bureau of Statistics, *Year Book Australia, 2002* (Catalogue No 1301.0, 25 January 2002) 93–6.

90 The Senate was told that on 31 December 2021, there were 2,352 asylum seekers in this position: Department of Home Affairs (Cth), Response to Question on Notice No 264 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *2021–22 Additional Estimates*, 14 February 2022 <https://www.Aph.Gov.Au/Api/Qon/Downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId13-PortfolioId20-QuestionNumber264>. Working with this group in Queensland, my sense is that the number has increased considerably since then.

Unable to legally work and ineligible for any form of government assistance, this group is entirely dependent on the charity sector and lack any way of regularising their status without the personal intervention of the Minister for Immigration, Citizenship and Multicultural Affairs.[91] It should also be noted that the challenges experienced by many of the temporary residents described above, particularly those who retain that status for many years, is comparable to those faced by undocumented migrants elsewhere. Research from Canada, for instance, shows that having had either undocumented *or* temporary status has a lasting negative effect on future employment, controlling for other variables.[92]

C *Border Expansion*

As outlined above, the internal border enacts control over people with an immigration status and takes its character from immigration law, foregrounding national interest considerations and executive discretions, while remaining unpredictable from the perspective of those it controls. As outlined in the previous section, visa conditions are a key and core part of the internal border's control, which has the effect of excluding certain immigration status groups from many of the benefits that usually accompany residence in Australia. However, the internal border describes more than the effect of visa conditions. It extends beyond the Department of Home Affairs, responsible for immigration, and even beyond the federal government, into other levels of government and the private sector.

This is because immigration status is an eligibility criterion for not just government-funded services in areas such as health, welfare, transport and education, but also privately funded services like professional bodies[93] and insurance.[94] It is not uncommon to see employment advertisements directed at, or against, particular immigration status groups. Similarly, real estate agents in capital cities now routinely ask to see potential tenants' visas, raising the possibility that those with an unfavourable immigration status will be declined tenancies.[95]

91 Most are subject to legislative bars, namely one or more of the bars created by ss 46A, 46B or 91K of the *Migration Act* (n 44), which prevent them from applying for bridging visas to regularise their status. The Minister can personally intervene to lift those bars but to date, has tended not to. The author is personally aware of at least 50 people in this situation in the greater Brisbane area and others working in the sector report similar or greater numbers in other states.

92 Landolt and Goldring, 'The Social Production of Non-Citizenship' (n 68) 157, citing Luin Goldring and Patricia Landolt, 'Immigrants and Precarious Work' (Immigrants and Precarious Employment Brief No 2, June 2009) 3, 8–9 <https://tspace.library.utoronto.ca/bitstream/1807/110644/1/Goldring_Landolt_Brief_2.pdf>.

93 See, eg, Department of Home Affairs (Cth), 'Other Requirements', *Office of the Migration Agents Registration Authority* (Web Page) <https://www.mara.gov.au/becoming-an-agent/registration-requirements/other-requirements/>, archived at <https://web.archive.org/web/20210305034212/https://www.mara.gov.au/becoming-an-agent/registration-requirements/other-requirements>; *Dickenson v Law Society of Alberta* (1978) 84 DLR (3rd) 189.

94 See, eg, *Faulkner v ACE Insurance Ltd* [2011] NSWADT 36 ('*Faulkner*').

95 I have heard numerous complaints from refugees on temporary visas who believe they have been discriminated against in this way. No research or investigations of its prevalence could be located

In addition to this, private individuals and businesses are sometimes required to perform tasks necessary for the enforcement of immigration conditions. For example, educational institutions must check that their students are not undocumented and have the right to study, then if they have a student visa, report them to the Department of Home Affairs if they fail to attend classes or maintain satisfactory progress.[96] Australian employers are required to verify employees' immigration status and eligibility to work.[97] The use of immigration status as an eligibility criterion by private sector organisations and the tasking of private sector entities to enforce visa conditions greatly expands the reach of the internal border. The more areas into which the internal border expands, the greater the depth and breadth of exclusion temporary residents encounter, as the next section explains.

D *Temporary Migration and Social Exclusion*

The effect of the internal border's constant monitoring and control of temporary residents is social exclusion, that is, a process by which some individuals in a society are excluded from 'opportunities, choices and life chances'.[98] Millar notes that the focus of social exclusion is relational, referring 'to inadequate social participation, lack of social integration and lack of power'.[99] It has material, social and political dimensions.[100] The internal border contributes to the social exclusion of temporary and undocumented residents because of the legal and social consequences that attach to their immigration status. If the internal border expands unchecked, progressively absorbing more and more areas, immigration status becomes a measure of migrants' access to, and participation in, many of the social, political and economic benefits of living in Australia.

In the case of visitors to Australia, it is, arguably, appropriate and unproblematic for them to be excluded from the material, social and political benefits of residence. However, when people can reside for several years, even indefinitely, while being systematically excluded from public benefits of residence, problems arise both for

but real estate agents are among a select group of persons who are able to obtain an account from the Department of Home Affairs to electronically check a person's visa validity and conditions: Department of Home Affairs (Cth), 'Check Visa Details and Conditions', *Immigration and Citizenship* (Web Page, 19 February 2024) <https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online/for-organisations>.

96 *Education Services for Overseas Students Act 2000* (Cth) s 19; *Migration Regulations* (n 53) sch 8 cl 8202(2).

97 *Migration Act* (n 44) ss 245AB, 245AC.

98 Jane Millar, 'Social Exclusion and Social Policy Research: Defining Exclusion' in Dominic Abrams, Julie Christian and David Gordon (eds), *Multidisciplinary Handbook of Social Exclusion Research* (John Wiley & Sons, 2007) 1, 2.

99 Ibid.

100 Ibid 3. See also Collins (n 21) 21–6.

the migrants themselves, and the community that hosts and excludes them.[101] It was for this reason that Walzer argued that, while states should have a very broad and largely unfettered discretion to choose who they will accept as immigrants, once they have admitted someone, they must allow them to become a full member or citizen within a reasonable period of time.[102] He saw temporary migration as inherently problematic, likening temporary residents to 5th century metics or 'live-in servants'.[103]

However, Walzer also recognised, and Ruhs has more recently empirically demonstrated, that the temporary migration of unskilled or semi-skilled workers, in particular, is economically advantageous for states only if it is accompanied by the denial of rights that contribute to social exclusion.[104] States are willing to grant rights to highly skilled migrants in order to attract them, however, migrants with fewer skills only present an economic net benefit to the state if they are denied permanency and social rights.[105] In other words, if states want the economic benefits of a temporary migration program, as Australia does, they must deny those migrants certain rights. Following Walzer's point as well though, if states want to avoid creating an underclass of exploitable resident labour, there must be a limit on the time temporary migrants can reside in the country before progressing to a more secure and rights-carrying status. The detrimental effect on temporary migrants and on the state increases with the length of time that people reside in the community with temporary status and are therefore unable to progress to citizenship.[106] Australia's new reliance on uncapped temporary migration to not just fill short-term skill vacancies, but to create a pool from which permanent residents can be selected, places more weight on economic considerations than concerns about creating an underclass.

People may be forced to live in Australia for long periods with temporary status for a range of reasons. For instance, they may have:

- been unable to qualify for permanency prior to entry and so entered with temporary status and a plan to obtain permanency in the future — a strategy which is implicitly approved of by immigration law and policy;
- entered without an intention to stay in the long-term but due to changed circumstances now seek a path to permanency; and/or

101 Valeria Ottonelli and Tiziana Torresi, 'Temporary Migration, Identity and Allegiance' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 407, 419.

102 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 60–1.

103 Ibid 52–3.

104 Ibid 56–7; Ruhs, *The Price of Rights* (n 41) 39, 44.

105 Ruhs, *The Price of Rights* (n 41) ch 3. Humanitarian migrants would seem to be the exception to this as they are granted entry not for the benefit of the state, but because of their need. However, the emphasis of Australia's migration intake over the last 20 years has been to move away from humanitarianism, in favour of economic benefit.

106 Walzer (n 102) 60–1.

- no viable pathway to permanency but prefer to remain in Australia as temporary residents than return to their country of nationality.

Currently in Australia, this group also includes refugees whose mode of entry was by sea, rather than air, and as a result are not permitted to apply for permanent protection visas.

Sometimes critics of temporary migration are themselves criticised for underplaying the degree of agency temporary migrants have in accepting that status. Ottonelli and Torresi identify this group as those who migrate temporarily in order to

> exploit the differential in economic opportunities between the home and host countries to achieve the migrants' personal ends in the country of departure; the centre of the migrants' lives, therefore, remain their home countries and they never intend to recreate a new life in the destination country.[107]

Clearly, the personal detriment suffered by a migrant will be influenced by the degree to which they feel that their status is an autonomous choice, rather than something forced upon them. Not all temporary migrants intend or desire to reside in Australia permanently. However, it ought not to be implied that those who choose to enter or to continue living here with temporary status have therefore consented to living as a member of an underclass, systematically and extensively excluded from many of the benefits of being here.

In addition, being 'temporary by choice' does not prevent the exclusion of temporary migrants from having a damaging effect on the communities in which they live. The existence of a group of residents who are excluded from many social and political benefits of residence has 'corruptive effects' on the 'liberal society', regardless of the intentions or desires of the temporary residents.[108] The presence of groups of people who sit on the edge of social and political life for long periods, unable to fully participate, is usually understood as undesirable both for them and the community as a whole. It can corrupt 'the egalitarian ethos of the political community' in just the way that Walzer was concerned about.[109]

Furthermore, even if residing with a temporary status is an autonomous choice a migrant has made, if they spend long periods with that status, they are arguably still vulnerable to the 'stigmatisation that comes from their being seen as second-class or failed citizens'.[110] For these reasons, the potential for long-term temporary migration to create negative consequences for communities and individuals is, at best, only partially lessened if the migrant in question believes she has exercised free choice in accepting that status.

107 Ottonelli and Torresi (n 101) 415.

108 Ibid 420.

109 Ibid 419.

110 Ibid 420.

In summary then, immigration law creates and maintains an internal border with visa conditions at its core. This border takes its character from immigration law, and via immigration status, regulates the participation of those subject to it, particularly temporary and undocumented migrants. However, part of the nature of the internal border is to progressively expand, and it does this whenever other domains of law, or public and private sector entities and bodies, use immigration status as a way of restricting access to the services or activities that they provide. This results in the social exclusion of temporary migrants and, particularly when people retain that status for many years, it yields negative consequences for those individuals and for the communities from which they are excluded.

IV AUSTRALIAN DISCRIMINATION LAW

Governments seek to prevent and ameliorate social exclusion through a range of measures. Key among these are the provision of government-funded essential services such as health care, education, financial payments and tax concessions (collectively, 'welfare state benefits'), and legislation that prohibits certain forms of discrimination in public life. However, neither discrimination legislation nor welfare state benefits attempt to address the exclusion of temporary residents. From a legal point of view, the superficial reason for this lies in the text of discrimination legislation. However, an appreciation of the way that categorisation works reveals that immigration law actively co-opts discrimination law into supporting its values and goals. This is consistent with the description of the character of immigration law outlined earlier.

A *Textual Issues?*

The two most basic reasons that Australian discrimination law cannot limit the internal border appear, at first glance, to be straightforward textual deficiencies. Discrimination is prohibited in Australia primarily through eight statutes at the state/territory level,[111] as well as federal legislation dealing with particular forms of discrimination, the most relevant here being the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*').[112] These statutes prohibit particular forms of discriminatory conduct, on the basis of specified attributes, in areas of public life.

The focus on discrimination in public life is appropriate for discrimination occurring within the internal border. There are some variations between the various statutes but typically these areas include work, education, the provision of goods

111 *Discrimination Act (ACT)* (n 11); *Anti-Discrimination Act 1977* (NSW) ('*Anti-Discrimination Act (NSW)*'); *Anti-Discrimination Act 1992* (NT) ('*Anti-Discrimination Act (NT)*'); *Anti-Discrimination Act 1991* (Qld) ('*Anti-Discrimination Act (Qld)*'); *Equal Opportunity Act 1984* (SA) ('*Equal Opportunity Act (SA)*'); *Anti-Discrimination Act 1998* (Tas) ('*Anti-Discrimination Act (Tas)*'); *Equal Opportunity Act 2010* (Vic) ('*Equal Opportunity Act (Vic)*'); *Equal Opportunity Act 1984* (WA) ('*Equal Opportunity Act (WA)*').

112 Certain other statutes also require statutory duties to be performed in a non-discriminatory manner: see, eg, *Education Act 1990* (NSW) s 34(5).

and services, public places or facilities, accommodation, and membership of clubs and other organisations.[113] The 'immigrant' ground in the *Racial Discrimination Act* is the exception to this, relating only to access to places and facilities, and the provision of goods and services.[114]

Empirical research on the discrimination experiences of overseas-born residents in Australia suggests that this focus on public settings is fitting. Discrimination is most frequently reported to take place in public spaces such as streets, shopping centres, workplaces and public transport.[115] Placing duties on entities that perform public roles such as employers, service providers and educators within these settings can also be justified in that these groups control access to the minimum level of basic goods necessary for individuals' personal wellbeing.[116] These entities are also among those who form part of the internal border, which excludes temporary residents.

The legislation fails however, in two key areas: the range of attributes that are protected against discrimination; and the inclusion of statutory authority exceptions. Each of these are explained in turn below.

1 *Protected Attributes*

The discrimination statutes prohibit discrimination against individuals who have, or are presumed to have, certain characteristics, or 'protected attributes'. The attributes that most closely resemble the forms of discrimination inherent in the internal border are nationality, 'being an immigrant' and 'immigration status'.

(a) Nationality

All state and territory discrimination statutes include 'nationality' in their list of protected attributes by placing it within their definitions of 'race'. The *Equal Opportunity Act 2010* (Vic) for instance states that

> ***race*** includes —
> (a) colour;
> (b) descent or ancestry;
> (c) nationality or national origin;
> (d) ethnicity or ethnic origin;
> (e) if 2 or more distinct races are collectively referred to as a race —
> (i) each of those distinct races;

113 See generally *Discrimination Act (ACT)* (n 11) ss 10, 18–22; *Anti-Discrimination Act (NSW)* (n 111) ss 8, 17, 19–20A; *Anti-Discrimination Act (NT)* (n 111) ss 19(1)(a), 29, 31–4, 38, 41, 46; *Anti-Discrimination Act (Qld)* (n 111) ss 7(g), 14–5, 38–9, 46, 48; *Equal Opportunity Act (SA)* (n 111) ss 52, 57–8, 59, 61; *Anti-Discrimination Act (Tas)* (n 111) s 22; *Equal Opportunity Act (Vic)* (n 111) ss 16, 38, 44, 52–3, 64–5; *Equal Opportunity Act (WA)* (n 111)ss 37, 44–8.

114 *Racial Discrimination Act 1975* (Cth) ss 5, 11, 13 ('*Racial Discrimination Act*').

115 Andrew Markus, *Australians Today: The Australia@2015 Scanlon Foundation Survey* (Report, 2016) 66.

116 Khaitan (n 21) 95–6, 208–9.

> (ii) that collective race …[117]

Nationality has been held to have a distinct meaning from the other cognates of 'race'. Nationality refers to a 'sometimes transient legal status' that is 'equivalent to citizenship' as established by domestic law.[118] 'National origin', on the other hand, refers to a 'connection subsisting at the time of birth between an individual and one or more groups of people who can be described as a "nation" — whether or not they also constitute a sovereign state'.[119] Like 'ethnic origin', it is related to a person's ancestry.[120] This distinction between 'national origin' and 'nationality' has also been adopted in state and territory discrimination cases.[121] This means that when the reason a temporary resident is discriminated against is their nationality or citizenship, then legislation protects them.

(b) Being an Immigrant

The *Racial Discrimination Act* differs from the state legislation by not explicitly affording protection against discrimination based on nationality. However, along with the *Anti-Discrimination Act 1992* (NT) and *Anti-Discrimination Act 1998* (Tas), it does afford protection to 'immigrants'.[122] For example, s 13(a) of the *Racial Discrimination Act* provides that

> [i]t is unlawful for a person who supplies goods or services to the public … to refuse or fail on demand to supply those goods or services to another person … by reason of the race, colour or national or ethnic origin of that other person …

Section 5(a) then states:

> Without prejudice to its effect apart from this section, this Act also has, by force of this section, the effect it would have if:

117 *Equal Opportunity Act (Vic)* (n 111) s 4(1) (definition of 'race') (emphasis in original).

118 *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 211–12 (Carr, Sundberg and North JJ) ('*Macabenta*'). Its meaning in this context therefore differs from its meaning in international law, which requires, in addition to conferral by domestic law of the state, a bond based on social ties between the individual and the state: *Nottebohm (Liechtenstein v Guatemala) (Judgment)* [1955] ICJ Rep 4, 23, quoted in Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 11, 12.

119 *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 365 (Lord Cross) ('*Ealing London Borough Council*'), quoted in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75 (Sackville J) and *Macabenta* (n 118) 211 (Carr, Sundberg and North JJ).

120 *Macabenta* (n 118) 211–12 (Carr, Sundberg and North JJ), quoting *Ealing London Borough Council* (n 113) 365 (Lord Cross).

121 *AB v New South Wales* (2005) 226 ALR 322, 339 [52] (Driver FM); *Faulkner* (n 94) [65] (Member Wright, Dr Weule and Dr Schneeweiss), discussing *Macabenta* (n 118) 211 (Carr, Sundberg and North JJ).

122 See also below Part IV(A)(1)(c): the *Discrimination Act (ACT)* (n 11) includes 'immigrant' in its definition of 'immigration status'.

> (a) there were added at the end of [section] … 13 the words 'or by reason that that other person or any relative or associate of that other person is or has been an immigrant' …[123]

Very few complaints have been made on the basis of the 'being an immigrant' attribute, and its meaning has never been judicially considered.[124] The Attorney-General's second reading speech for an earlier bill, on which the *Racial Discrimination Act* was based, mentioned the attribute briefly:

> [T]he Bill has been extended to deal with discrimination against persons on the ground that they are immigrants. The previous Bill applied only to discrimination that is made on the grounds of race, colour, descent or national or ethnic origin. This is the basis on which most discrimination is made against migrant people and the form of discrimination dealt with by the *Convention against Racial Discrimination*. However, I have decided that it would be desirable for the Bill to deal also with discrimination made against a person purely on the ground that he is an immigrant, and the Bill has been so extended.[125]

Thus, the government apparently intended to ensure that the Act would protect overseas-born residents who were discriminated against specifically because they were born overseas, rather than because of their racial characteristics. This group would include some Australian citizens and virtually all permanent and temporary residents.[126] As a result, temporary residents are protected by legislation when they are discriminated against because they were born overseas.

(c) Immigration Status

From this brief analysis, it can be seen that temporary residents may be protected from discrimination on the basis of their citizenship (or non-citizenship) as well as that which arises from being born overseas. Neither of these attributes equate to immigration status, however. The *Discrimination Act 1991* (ACT) ('*Discrimination Act (ACT)*') stands alone among state and territory laws in also

123 The 'immigrant' attribute applies in a narrower range of circumstances than the other attributes protected by the *Racial Discrimination Act* (n 114). It is relevant only in direct discrimination occurring in access to places or the supply of goods and services: at ss 5(a), 11, 13.

124 In *Kienle v Commonwealth* (2011) 248 FLR 454, Lloyd-Jones FM noted that the absence of authority on the meaning of the term and found no need to define it, dismissing the application on other grounds: at 481 [80].

125 Commonwealth, *Parliamentary Debates*, Senate, 4 April 1974, 673 (Lionel Murphy). A Racial Discrimination Bill was introduced to Parliament on 21 November 1973 and then again on 4 April 1974. The latter was not debated before Parliament was dissolved: Commonwealth, *Parliamentary Debates*, Senate, 31 October 1974, 2192 (Lionel Murphy). The Bill that eventually passed into law was introduced 31 October 1974 and retained the 'immigrant' provision of the April Bill.

126 Children born in Australia to parents with a temporary immigration status generally have the same immigration status as their parents by virtue of the *Migration Act* (n 44) s 78 and are not Australian citizens, because children born in Australia do not obtain citizenship at birth unless at least one of their parents is a citizen or permanent resident: *Australian Citizenship Act 2007* (Cth) s 12(1)(a).

prohibiting discrimination on the basis of immigration status.[127] It defines 'immigration status' inexhaustively to include 'being an immigrant, a refugee or an asylum seeker, or holding any kind of visa'.[128] This attribute was adopted in 2016, following a review of the *Discrimination Act (ACT)* by the Law Reform Advisory Council.[129] The Council recommended 'immigration status' be included, stating that it would be relevant 'when, for example, a person is refused sporting club membership on the basis that they are in Australia on a student or bridging visa, or a person is treated unfavourably because they were born overseas'.[130] Its inclusion was also supported by the Australian Capital Territory ('ACT') Human Rights Commission, which described immigration status as a 'pertinent issue facing people in the ACT' and cited international students as an example of a group that would benefit from its inclusion.[131]

The form of discrimination that the internal border perpetuates and supports is immigration status discrimination. Following the amendment in the ACT, a temporary worker succeeded in her complaint against an employer who forced her to work additional hours and forfeit part of her pay, in return for ongoing visa and sponsorship support.[132] The inclusion of 'immigration status' as a distinct attribute can therefore provide a welcome method of redress for people with temporary immigration status who face a heightened risk of employment exploitation.[133] The failure of all Australian jurisdictions bar the ACT to include 'immigration status' as a standalone attribute is the most obvious and straightforward reason that Australian discrimination law fails to inhibit the exclusion of temporary residents by entities making up the internal border.

2 *Statutory Authority Exceptions*

Aside from the range of protected attributes, the other apparently textual reason that discrimination law fails to address immigration status discrimination is statutory authority exceptions. These provisions ensure that governments have complete freedom to stipulate eligibility criteria for the services they provide, regardless of whether a criterion is specified as a protected attribute in discrimination legislation. They ensure that, generally speaking, the discrimination

127 *Discrimination Act (ACT)* (n 11) s 7(1)(i).

128 Ibid Dictionary (definition of 'immigration status').

129 ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, 18 March 2015).

130 Ibid 81.

131 Human Rights and Discrimination Commissioner, ACT Human Rights Commission, Submission to Law Reform Advisory Council, *Review of the ACT Discrimination Act 1991* (June 2014) 20.

132 *Abraham v Thomas* [2020] ACAT 41, [154] (Senior Member Mulligan).

133 See generally Migration Council Australia, *More than Temporary: Australia's 457 Visa Program* (Report); Reilly (n 72); Hardy (n 72); *Migrant Workers' Taskforce Report* (n 73); 'Convenience Store Operators Underpaying International Students' (n 74); *Inquiry into 7-Eleven* (n 74); *A National Disgrace* (n 74); Berg and Farbenblum, *Wage Theft in Australia* (n 75).

statutes do not apply to the actions under statutory authority of federal or state officials.

The discrimination legislation in each state and territory, except South Australia, contains an exception for acts done with statutory authority.[134] The breadth of the exceptions varies somewhat between jurisdictions. In New South Wales ('NSW') and Victoria they cover all Australian legislation.[135] In Tasmania and the Northern Territory ('NT') they relate to the relevant state/territory and Commonwealth legislation.[136] The exceptions in the ACT and Western Australia are more restrictive, covering only legislation from that jurisdiction, while Queensland's is the broadest, applying to all government policies and actions that explicitly discriminate on the basis of citizenship or immigration status, as well as to legislation.[137] In NSW, Tasmania, the NT, Victoria, Queensland and the ACT, the exceptions relate also to legislation adopted earlier than the discrimination legislation, thus overriding the usual presumption of implied repeal. These exceptions mean that, other than in South Australia, legislation that makes certain immigration status groups ineligible for welfare state benefits is consistent with discrimination law.

Earlier I noted that the two primary strategies by which Australian law addresses social exclusion are the prohibition of discrimination in public settings and the provision of welfare state benefits. However, it can now be understood that discrimination legislation is involved in ensuring that neither of these strategies assist temporary residents. Citizenship and immigration status are very commonly used to restrict eligibility to these benefits with temporary residents almost invariably being excluded from accessing them.[138] The statutory authority exceptions in discrimination legislation make this permissible.

In 2005, the Victorian Scrutiny of Acts and Regulations Committee commented that statutory authority exceptions in the *Equal Opportunity Act 1995* (Vic) effectively placed it 'at the base of the legislative hierarchy' because any and all other ordinary legislation could override it.[139] In most Australian states and territories, discrimination legislation effectively sits below other ordinary

134 *Discrimination Act (ACT)* (n 11) s 30; *Anti-Discrimination Act (NSW)* (n 111) s 54(1); *Anti-Discrimination Act (NT)* (n 111) s 53; *Anti-Discrimination Act (Qld)* (n 111) s 106; *Anti-Discrimination Act (Tas)* (n 111) s 24; *Equal Opportunity Act (Vic)* (n 111) ss 75–6. At the Commonwealth level, the *Racial Discrimination Act* (n 114) does not contain a statutory authority exception but neither does it prohibit discrimination based on nationality or immigration status.

135 *Anti-Discrimination Act (NSW)* (n 111) ss 54(1)(a)–(b); *Equal Opportunity Act (Vic)* (n 111) ss 75(1)(a)–(b).

136 *Anti-Discrimination Act (Tas)* (n 111) s 24(a); *Anti-Discrimination Act (NT)* (n 111) ss 53(a)–(b).

137 *Discrimination Act (ACT)* (n 11) s 30(1)(a)–(b); *Equal Opportunity Act (WA)* (n 111) s 52 (in relation to citizenship discrimination); *Anti-Discrimination Act (Qld)* (n 111) ss 106, 106B.

138 For a comprehensive survey of federal legislation referencing citizenship and immigration status, see Rubenstein (n 62) ch 5.

139 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Discrimination in the Law: Inquiry under Section 207 of the Equal Opportunity Act 1995* (Final Report) 46.

legislation, subordinated to enactments made prior to and after it was enacted. By comparison, in Canada for example, the human rights codes of Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nunavut and Quebec explicitly provide that they are paramount over other legislation, while the codes of the other Canadian provinces and territories have been judicially interpreted as having the same 'quasi-constitutional' status.[140]

Of course, merely because it is possible for governments to discriminate in this way does not mean they must do so, and as mentioned above, South Australia does not have a statutory authority exception in its discrimination legislation. However, there appears to have been conscious recent decisions on the part of legislators in some states and territories to retain the exceptions. When originally enacted, in a number of jurisdictions these exceptions were intended to be temporary, allowing time for existing incompatible legislation to be identified and amended. However, their repeal has not eventuated. For instance, after the NSW legislation was enacted in 1977, the Anti-Discrimination Board conducted a review of inconsistent legislation completing it in 1978, yet the exception remains today.[141] Similarly, the more recently enacted *Discrimination Act (ACT)* allows the Minister, two years after the Act's enactment, to set a date at which the statutory authority exception will cease to have effect, but to date, no sunset clause has been set.[142] It appears therefore, that most Parliaments wish to continue to be free to exclude some or all residents from welfare state benefits, and in the absence of any constitutional constraint, they are free to do so.

B *Discrimination Law's Endorsement of the Internal Border*

The aforementioned textual features of Australian discrimination law — the range of attributes that are protected and the use of statutory authority exceptions — are sufficient to ensure that much of the internal border remains unaddressed by this domain of law. However, when the internal border is viewed from the position of the character, values and rationales of immigration law which created it, a different image of discrimination law emerges. From this viewpoint, immigration status discrimination is not just missing from the activities that discrimination legislation prohibits and prevents, rather that legislation actively supports the internal border in its work of excluding temporary residents from aspects of social and economic, that is, public life.

140 *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 1(1); *Human Rights Code*, RSBC 1996, c 210, s 4; *Human Rights Code*, SM 1987, c H-175, s 58; *Human Rights Act*, SNL 2010, c H-13.1, s 5; *Charter of Human Rights and Freedoms*, RSQ 1975, c C-12, s 52; *Human Rights Act*, SNu 2003, c 12, s 5; *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150, 156 (McIntyre J), discussed in *A-G (Canada) v Druken* [1989] 2 FC 24, 30–1 (Mahoney J); *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 157–8 (Lamer J).

141 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, (Report No 92, 1999) [6.8]–[6.9].

142 *Discrimination Act (ACT)* (n 11) s 30(2); Explanatory Memorandum, Human Rights and Equal Opportunity Bill 1991 (ACT) 10.

Earlier, Australian immigration law was described as being characterised by a clear privileging of the national interest, a high degree of executive control with relatively weak judicial oversight, and relatedly, an emphasis on malleable substantive provisions. The national interest, when it comes to temporary residents, is currently interpreted primarily in economic terms using the logic identified by Ruhs, as combining high levels (uncapped numbers) with tightly restricted social rights.[143] Consistently with this, statutory authority exceptions are used to restrict social welfare benefits on the basis of immigration and citizenship status.

The impact falls most heavily on long-term temporary residents. A study by Liberty Victoria of asylum seekers' and refugees' access to health, housing and education in Australia found that immigration status often prevents asylum seekers (all temporary residents) from being eligible for housing assistance, in particular, and in some states and territories, for emergency health care as well.[144] South Australia, as the sole jurisdiction without statutory authority exceptions, subjects asylum seekers to fewer exclusions than other governments.[145] In NSW, one of the most discriminatory states according to the study, social housing, private rental assistance, free school education, hospital care and free ambulance were not available to asylum seekers on bridging visas, while in Tasmania, only Australian citizens could access private rental assistance and homelessness services.[146] Many of these services have other eligibility criteria as well, particularly income- or needs-based requirements, which apply to everyone.[147] The effect of the immigration status restrictions identified in the study is therefore to ensure people with temporary immigration status who would qualify on the basis of need, are not in fact eligible. Each of the exclusions identified were supported by statutory authority exceptions in the relevant discrimination legislation. In this way, the exceptions, as a part of Australian discrimination law, effectively endorse the social exclusion of temporary residents that results from their use.

Within the internal border, the maintenance of executive control at the expense of judicial oversight is an important feature. Discrimination law contributes to this non-justiciability of the internal border in several ways. Firstly, the regime established by the state and territory Acts relies heavily on confidential conciliation of individuals' complaints by non-judicial bodies. Only around 5% of complaints are heard by courts or tribunals.[148] Secondly, by omitting 'immigration status' from

143 See above nn 104–5.

144 Liberty Victoria, *States of Refuge: Access to Health, Housing and Education for People Seeking Asylum and Refugees in Australia* (Report, 2 July 2018) 18, 54–5.

145 Ibid 14.

146 Ibid 14–17.

147 Ibid.

148 Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22(3) *Sydney Law Review* 321, 322, citing Rosemary Hunter and Alice M Leonard, 'Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience' [1997] (Summer) *Public Law* 298, 299. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law*

the range of protected attributes *and* including wide-reaching statutory authority exceptions, most jurisdictions succeed in sending a message to potential claimants that immigration status discrimination is unproblematic and 'natural'.

Evidence of this arises from the apparently very low rate of discrimination complaints that are made on the grounds of nationality/citizenship, 'being an immigrant' and immigration status. Although there is no readily available data on the frequency of complaints involving nationality/citizenship, there are strong indications that these grounds of discrimination have an even lower level of complaints than other grounds, in spite of the prevalence of citizenship and immigration status restrictions. The various state and territory commissions publish annual data on the number of complaints in relation to each attribute but they do not distinguish between nationality and the other incidents of race such as colour, ethnicity and national origin.[149] Similarly, in the NT and Tasmania, being, or having been, an immigrant is an incident of 'race' and not a separate attribute, meaning separate data is not available.[150]

Data from the Australian Human Rights Commission certainly suggests there are issues around enforcement. The Commission received 139 complaints about discrimination on the basis of 'being an immigrant' in the 10 years before June 2018.[151] Of these, 52 were successfully conciliated.[152] In *Kienle v Commonwealth*, applicants proceeded to the Federal Magistrates Court, but the application was ultimately dismissed.[153] Even if some that were initially made on the basis of 'being an immigrant' were later pursued on other related grounds — national origin for example — this would still mean that around half were withdrawn or not taken further.

Finally, the internal border relies heavily on malleable provisions, whether these are visa conditions set out in schedules to regulations and forming the border's core, contracts between government and private entities, or simply private sector

(Federation Press, 3rd ed, 2018) 61–2, quoting Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 789.

149 See, eg, Victorian Equal Opportunity and Human Rights Commission, *2016/17 Annual Report: Year in Review* (Report, 2017) 66; Anti-Discrimination New South Wales, *Anti-Discrimination NSW Annual Report: 2021–22* (Report, 2022) 42–5; Queensland Human Rights Commission, *Annual Report 2021–22* (Report, 2022) 22; Equal Opportunity Tasmania, *Annual Report 2021–22* (Report, 2022) 35; Equal Opportunity Commission (WA), *Annual Report 2020–21* (Report, 2021) 42; Office of the Commissioner for Equal Opportunity (SA), *2021–22 Annual Report* (Report, 2022) 23–8; NT Anti-Discrimination Commission, *Annual Report 2021–2022* (Report, 2022) 23, 25; ACT Human Rights Commission, *Annual Report 2021–22* (Report, 2022) 38–9.

150 *Anti-Discrimination Act (Tas)* (n 111) s 3 (definition of 'race' para (e)); *Anti-Discrimination Act (NT)* (n 111) s 4(1) (definition of 'race' para (b)).

151 This figure of 139 complaints was derived by adding the number of complaints in the annual complaint statistics between 2008–18: see generally 'Search Result: "Complaint Statistics"', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/search/gcs?keyword=%22complaint+statistics%22>.

152 Ibid.

153 (2011) 248 FLR 454.

entities setting policies for their own services. The statutory authority exceptions support this characteristic of the internal border, through their breadth of application, typically covering all government policies and actions (although in some jurisdictions these need to be authorised by another statute). Understood in this way, Australian discrimination law is not neutral when it comes to the social exclusion of temporary residents, as it first appears to be. Rather, it actively works with the internal border in its work of regulating and restricting temporary migrants' inclusion in public life.

V CONCLUSION

An internal border exists in Australia to reduce the extent to which temporary migrants, in particular, can freely participate in the social and economic communities in which they live. Immigration law, by means of immigration status, assigns a particular legal identity to people and enforces their visa conditions via that identity. However, when other domains of law, as well as public and private institutions and entities, adopt immigration status as a way of identifying individuals, immigration status begins to carry not just far-reaching legal consequences, but also social ones. Together, these legal and social consequences exclude particular immigration status groups, particularly temporary and undocumented residents, from many of the benefits that ordinarily accompany residence in Australia. While the exclusion of short-term visitors is probably largely unproblematic, it is no longer unusual for people to live in Australia for many years, and even indefinitely, with temporary status, making their exclusion problematic on an individual and societal level.

Discrimination law, which generally seeks to remedy and prevent social exclusion, fails to do so when the exclusion is based on immigration status. The most obvious reason for this, in Australia, lies in the failure of all jurisdictions except the ACT to include 'immigration status' among their protected attributes. However, the problem runs deeper than this. Statutory authority exceptions effectively endorse discrimination that is authorised by other legislation, and it is this feature of discrimination law that allows the internal border to continue to expand.

An appreciation of the work of categorisation allows us to see that Australian discrimination law actively works with immigration law to enact the exclusion of temporary residents. It enacts it in the sense of making it part of law, and also in the sense of bringing it about in practice. This paper began with noting the very different histories, character and values of discrimination law and immigration law, and suggested that they could not easily co-exist. The domains' treatment of temporary migrant discrimination reveals that when they encounter one another, immigration law prevails. This too, is unsurprising, given immigration law's foundation in a doctrine of 'absolute sovereignty'.[154] When the two domains of law, each having incompatible characters and goals, meet in the form of

154 Lester (n 29) 14.

immigration status discrimination, it is discrimination law whose values are compromised and whose character bends.

As Australia continues to embrace uncapped temporary migration, large numbers of people will continue to reside here for long periods with that status. As that occurs, it can be expected that the social exclusion enacted by our ever-expanding internal border will become increasingly problematic. The insights outlined here suggest that in order to be successful, legal reforms will need to address not just the obvious textual issues in discrimination law, but the underlying logic and force of the internal border, that is the assumption that all aspects of immigration law reflect and rely on absolute sovereignty.