

An immigration option for Scotland? Safeguarding workers on temporary migration programmes

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Acronyms

ADDPD	Association for the Rights of Household Workers (English version)
ARHW	Association for the Rights of Household Workers
BC	British Columbia
CBC	Canadian Broadcasting Corporation
CIMM	Canadian Institute of Mining and Metallurgy
COVID	Coronavirus Disease
CPS	Crown Prosecution Service
ESDC	Employment and Social Development Canada
FLEX	Focus on Labour Exploitation
HC Deb	House of Commons Debates
HUMA	Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities
IASC	Independent Anti-Slavery Commissioner
ICIBI	Independent Chief Inspector for Borders and Immigration
IMP	International Mobility Program
IRCC	Immigration Refugees and Citizenship Canada
IRPR	Immigration and Refugee Protection Regulations
LMIA	Labour Market Impact Assessment
MAC	Migration Advisory Committee
MEPV	Migrant Exploitation Protection Work visa
MWC	Migrant Workers' Centre British Colombia
MWSN	Migrant Worker Support Network
NGO	Non-governmental organisation
NRM	National Referral Mechanism
NZ	New Zealand
ODW	Overseas domestic worker
ODWV	Overseas Domestic Worker visa
OWPVW	Open Work Permit for Vulnerable Workers
QC	Queen's Counsel
RAMA	Radical Action with Migrants in Agriculture
RATTMAQ	Assistance Networks for Migrant Agricultural Workers in Quebec
SAWP	Seasonal Agricultural Worker Program
SAWS	Seasonal Agricultural Worker's Scheme
SOR	Statutory Orders and Regulations
SWV	Seasonal Worker visa
TFWP	Temporary Foreign Worker Program
UK	United Kingdom
UN	United Nations
UN DESA	United Nations Department of Economic and Social Affairs Statistics Division

Introduction

This study has been commissioned by the Scottish Government in response to the identification of safeguarding risks for workers on the UK Seasonal Worker Visa (SWV) in horticulture in Scotland (FLEX 2021). Specifically this study seeks to understand options for the Scottish Government to respond to the vulnerability created by temporary migration programmes. This Report considers options for Scotland to establish protection mechanisms for workers in response to this vulnerability. In so doing it looks specifically at an option recently developed in Canada, the Open Work Permit for Vulnerable Workers (OWPVW). Whilst a similar work permit has been developed in New Zealand, Canada's asymmetric federal model is comparable with the UK's asymmetrical devolution, within which the Scottish Parliament has responsibility for its devolved powers. This Report therefore examines Canada's response to safeguarding risks identified on their employer specific work permits, through the introduction of the OWPVW in 2019. It looks at how it has been implemented, the risks and opportunities, and the potential for transferring this model to Scotland. The Report assesses whether an open work permit could help safeguard workers on temporary migration programmes in Scotland and if so, how it might be implemented.

Understanding temporary migration programmes

Risks of exploitation in temporary migration programmes

Temporary migration programmes are in widespread use and favoured for their role in state labour regulation and migration control. Many such programmes rely on sponsorship visas, which tie a worker to a named employer or labour provider for the duration of their stay in a country. Temporary migration programmes are appealing for maintaining migrants as permanently peripheral to societies, often with limited access to social benefits. Temporary or short-term migrants are defined internationally as individuals spending between three and twelve months in a country of destination (UN DESA 1998). The UK generally places restrictions on benefits and services for short-term migrants, classifying individuals "moving to the UK for at least 12 months" (Migration Observatory 2022 p.3) as long-term immigrants, excluding short-term migrants from net-migration calculations.

Whilst temporary migration programmes, therefore, present a useful, targeted, and managed migration tool for states, evidence from countries around the world including Australia, the United States, New Zealand, Sweden and Finland **shows that the dependency of workers on their employers in such schemes increases their risk of exploitation** (Migration Observatory 2018 p.21). Indeed the elements that most benefit States are precisely the same ones that present the most risks to workers:

the same feature that enables work-permit schemes to target particular parts of the labour market—the fact that a worker is tied to a specific job—makes it harder for workers to leave exploitative employers (Ibid p.3).

The vulnerabilities created by such schemes have been labelled "state-mediated structures of exploitation" by one legal expert in human rights (Mantouvalou 2022 p.718). Temporary migration programmes are increasingly popular with governments as a migration governance solution, yet their proliferation has serious consequences for workers' rights and incidences of labour exploitation.

UK temporary migration programmes and risks of exploitation

Analysis of previous and existing temporary migration programmes in the UK, including the former Seasonal Agricultural Worker's Scheme (SAWS), the current Seasonal Worker visa (SWV) and the Overseas Domestic Worker Visa (ODWV) has linked them to increased risks of abuse and exploitation (Ewins 2015 p.24, MAC 2022 pp13-14, ICIBI 2022 p.2, FLEX 2019). The UK government's Migration Advisory Committee (MAC) recently identified a number of features of temporary migration programmes that can increase risks of exploitation for workers including restrictions on the ability to change employers, restrictions on sector or geographical location limiting worker choice, and dependency on employers for accommodation (MAC 2022 p.13). The non-governmental organisation (NGO) Focus on Labour Exploitation (FLEX), has detailed further risks to workers posed by such schemes:

- Debt bondage due to upfront migration costs and illegal recruitment fees;
- Deception in recruitment;
- Barriers to changing job or sector;
- Multiple dependencies on employers or third parties;
- Destitution due to no recourse to public funds;
- Lack of access to information about rights or how to seek support;
- Barriers to accessing justice; and
- Lack of guaranteed hours/zero hours contracts (FLEX 2022 p.5).

These risks have been recognised by the UK Government's Independent Anti-Slavery Commissioner (IASC) who has called for greater safeguarding for workers on such schemes (IASC 2022 and IASC 2020). Despite major safeguarding concerns raised about temporary migration programmes for low-paid workers, the UK government has continued to depend on such schemes to fill gaps in its labour market.

The UK ODWV is one temporary work visa that has been highlighted by worker support providers and human rights experts as creating a significant risk of exploitation for migrant workers (Kalayaan no date, Mantouvalou 2016). In 2012, the ODWV was changed from a sector specific visa to one that is tied to a single employer and restricted to six-month validity, without possibility for extension or settlement. The risks associated with the restrictive single employer tie and short-term nature of the visa are documented by the domestic worker support NGO, Kalayaan. These include increased physical abuse, movement restrictions and surveillance of workers and poorer working conditions and treatment for workers on the ODWV compared with workers on an open visa (Kalayaan 2015 p.1). In 2015, a UK government commissioned review of the ODWV conducted by James Ewins QC, found:

No evidence that a tie to a single employer does anything other than increase the risk of abuse and therefore increases actual abuse (Ewins 2015 p.24).

The review recommended that the ODWV be changed to provide workers:

a right to change employer, but limited to domestic work in a private household, that is *not* conditional upon claiming or proving any form of abuse (Ibid p.34).

In addition Ewins called for a "period of 28 days grace" during which workers could leave their employer and take time to find an alternative employer without becoming undocumented (ibid). The changes to the ODWV in 2012 to tie workers to a single employer have been linked to increases in incidences and risks of exploitation.

The SWV for migrant workers in horticulture was introduced in 2019 as a temporary work visa. The scheme has been expanded annually, including in 2022 the addition of visas for use in the poultry sector (Defra 2022 p.10). UK labour providers receive Home Office licenses to operate as ‘scheme operators’, sponsoring workers to come to work in UK horticulture for a maximum of six months in any 12-month period and in poultry from 18 October to 31 December in the same year. Whilst workers on the SWV are sponsored by a scheme operator, they are largely employed by farms and may make a transfer request to switch employers in case of problems. This visa tie to labour providers marks a shift from the predecessor SAWS which tied workers to a single employer, thereby demonstrating some recognition by the Home Office of the risk inherent in this tied relationship.

Initial research engaging workers on the SWV found major practical barriers to worker employment transfers (FLEX 2021). In addition, a UK government review of the first year of the SWV identified serious concerns about worker welfare, detailing worker reports of: not having their contract terms met, inadequate complaints processes, poor employer responses to medical incidents, and unfair treatment by managers (Defra and Home Office 2021 pp.15-16). Further, a recent report by the UK government’s Independent Chief Inspector for Borders and Immigration (ICIBI) reviewed Home Office SWV scheme compliance data and found “serious or alarming concerns” raised by workers in a number of reports yet limited action taken in redress (ICIBI 2022 p.44). Whilst the SWV tie to a labour provider rather than a single employer is marginally less restrictive than for its predecessor scheme, in practice workers report major barriers to switching employers and the serious welfare concerns persist.

Summary

Temporary migration programmes, such as the SWV and ODWV in the UK, are popular with States worldwide, yet pose significant safeguarding risks to workers, serving to increase vulnerability to exploitation. The core elements of such schemes are the employer or labour provider specific visa tie and their short-term nature, both features that serve to shift power away from workers in favour of employers. Instead of increasing the number of workers on temporary migration programmes, States should introduce alternative schemes where workers are not tied to a specific employer, labour provider or sector, with the possibility of transferring to longer term visas with pathways to settlement.

Responses to safeguarding risks by the UK and Scottish Governments

The UK Government has not taken significant steps to address concerns raised about the ODWV and the SWV, yet numbers on each visa, outside the COVID-19 travel restriction period, have grown annually. Prior to the 2020 COVID-19 lockdown annual positive ODWV decisions had reached 21,075 in 2019, up from 16,652 in 2013.¹ The SWV has been expanded from an initial annual quota of 2500 visas in 2019, to 47,000 in 2023, with a further 10,000 to be added if necessary; meaning the SWV quota has increased almost 20 fold since its introduction, just under four years ago.² In response to the 2015 review into the ODWV the UK government changed the immigration rules to permit overseas domestic

¹ These numbers dropped to 6244 in 2020, 8999 in 2021 and 14,796 for quarters 1-3, 2022. See Home Office 2022 Entry clearance visa applications and outcomes. Available at <https://www.gov.uk/government/statistical-data-sets/managed-migration-datasets>

² There were 2493 visas issued in 2019, 7211 in 2020, 29,587 in 2021 and 33,019 for quarters 1-3, 2022. Ibid.

workers (ODWs) to change employer during their six-month visa period without requiring evidence of abuse (Hansard HC Deb 7 March 2016 c583WS). However, ODWs remained ineligible to extend their period of stay in the UK, which poses a significant practical barrier to workers switching employer given the time constraints. Safeguarding issues identified in relation to the SWV have led the UK government to amend Scheme Operator guidance in relation to wages and transfer requests and most recently to announce plans to establish a Home Office led “team to monitor the operational immigration elements of the scheme” (Home Office 2022). Whilst serious safeguarding risks related to the design of UK temporary work visas have been raised by independent and Government experts and acknowledged by the UK government, very minimal changes have been made to date.

Immigration and visas are reserved matters for the UK government; therefore, the Scottish government cannot make visa changes. However, the Scottish government is seeking to become a “leading Fair Work nation” (Scottish government 2022) by 2025 and has underlined its support for migration policy that is supporting “fair work, protecting workers’ rights, pay and access to employment and preventing exploitation and abuse” (Scottish government 2020 p.10). In reference to tied migration programmes for low paid workers, the Scottish Government has recognised the risks to workers of exploitation created by a tie between workers and employers (Ibid p.47). In response to research into the risks of exploitation for workers on the SWV in Scotland, the Scottish Government funded worker’s rights information leaflets (FLEX et al 2022), a helpline (Macpherson 2021) and a Worker Support Centre (Scottish government 2022b) for workers on the SWV. In 2020 the Scottish government proposed a “Scottish visa” which would be endorsed and sponsored by the Scottish government, without tying workers to a particular employer, with a route to settlement in Scotland (Scottish government 2020 pp 18-25). More recently the Scottish government has put forward proposals for a long-term rural visa valid for up to four years, tied to a geographical area within Scotland and for the first 12 months to a single employer, with permanent residency after four years (Scottish government 2022c). These proposals have not been adopted by the UK government. Whilst immigration and visas are reserved matters, the Scottish government has sought to implement a range of safeguarding measures for workers on the SWV and in its immigration proposals has recognised the risks of tying workers to employers, seeking alternative options for Scotland.

International experience of temporary migration programmes

Two countries that have recently reviewed their temporary migration programmes for the safeguarding risks they pose workers, Canada and New Zealand, provide useful case studies for Scotland. These examples are relevant for the comparability of the temporary migration programmes with those in place in the UK, and for the innovative policy options pursued by Government to address migrant worker safeguarding risks. These contexts will be explored in brief below.

Canada’s Temporary Foreign Worker Program (TFWP)

There are two main temporary labour migration programs in Canada, the Temporary Foreign Worker Program (TFWP) and the International Mobility Program (IMP). These two streams were formally created by the Government of Canada in 2014. The IMP is managed by the Ministry of Immigration, Refugees and Citizenship Canada (IRCC) and the TFWP is managed by the Ministry of Employment and Social Development Canada (ESDC). By numbers, the IMP is the larger of the two streams and mainly facilitates higher skilled

migration to roles that are exempt from the Labour Market Impact Assessment (LMIA). In 2021 there were 485,400 work permits (new and extensions) issued under the IMP and 113,900 issued under the TFWP (Government of Canada, 2022a). The IMP predominately applies to high-wage work and includes open worker permits and is comprised of migrants from high- and middle-income countries, this stream also includes racialised and younger workers in low paid roles on tied work permits who are vulnerable to exploitation (Faraday 2016 p.11). The IMP and TFWP are considered by experts to increase vulnerability to exploitation, yet it is the TFWP that has faced ongoing and increasing attention for the risks it poses to workers.

Canada's TFWP establishes specified streams by which employers can hire workers including: the high-wage stream for roles above median hourly wage; the low-wage stream for roles paying below provincial median hourly wage; the Seasonal Agricultural Worker Program (SAWP), the primary agriculture stream for workers in on farm work (from countries not specified in the SAWP); and the Global Talent Stream (Parliament of Canada 2020). Whilst this programme is applicable to workers across all skill levels it is mainly comprised of low-skilled workers with the agricultural stream comprising over half of all workers on the TFWP (Akbar 2021 p.52). The SAWP permits workers to migrate to Canada from twelve specified countries for employment in agriculture for a period of up to eight months. Workers on the SAWP are issued sector-specific work permits, permitting them to move between employers in the programme, yet they must obtain permission from their in-Canada foreign agent, the new employer and often their current employer to do so.

Within the TFWP, low-wage and agricultural streams, workers face a range of restrictions associated with increased risks of exploitation including: employer dependency for their visa and housing; restrictions on immediate access to public healthcare; and limited routes to permanent residency (ESDC 2023). The "key feature" of the TFWP thought to contribute to workers' risk of exploitation is its tied nature:

The work permits remain tied permits that restrict the migrant to working only for the one specific employer named on the work permit [...] This restriction on a worker's mobility makes them dependent on, and beholden to, that one employer for their status in this country (Faraday 2016 p.47).

The Canadian TFWP and particularly the SAWP is tightly regulated, including bilateral agreements between SAWP participating countries and the Government of Canada and detailed standards on housing, working hours and wages and benefits. However, despite these measures, the TFWP has been widely associated with a high risk of worker exploitation (Mcgrath and Strauss 2017).

The Canadian OWPVW was primarily introduced in response to critiques of the TFWP and the risks of exploitation it poses to workers yet applies to all workers in Canada on tied visas. It was established through regulations amending the Immigration and Refugee Protection Regulations and entered into force on 4th June 2019. The OWPVW is largely based on an open work permit for temporary foreign workers at risk. It was initially established in the Canadian province of British Columbia as a pilot scheme which operated from 2016-18. This open work permit seeks to address the obstacles tied work permits place on workers who wish to leave abusive employment, including barriers to reporting abuse for risk of deportation or reprisals and to switching employer. Its objectives are threefold: 1. to provide migrant workers experiencing abuse with a means of leaving their employer; 2. to prevent migrant workers from becoming undocumented as a result of leaving their job; and

3. to facilitate the participation of migrant workers experiencing abuse in inspections of their former employer or recruiter. The Canadian OWPVW, with its origins in a Canadian provincial pilot, presents an interesting example to Scotland to consider as it seeks to safeguard workers on temporary work visas.

New Zealand's employer-assisted temporary work visas

New Zealand has a range of working holiday, student and 'employer-assisted temporary work visas.' It has specific routes for horticulture and viticulture: the Supplementary Seasonal Employment Work Visa valid for up to six months and fishing, the Fishing Crew Work Visa valid up to 12 months. In 2019, responding to growing concerns about migrant worker exploitation, the New Zealand government initiated an independent review of 'temporary migrant worker exploitation' which found:

Amongst both temporary migrant workers and key stakeholders, employer-assisted visas were identified as the key mechanism for establishing and maintaining exploitation in the workplace (Collins and Stringer 2019 p.83).

In particular, the review highlighted the power imbalance between workers and employers on such visas and the dampening effect of tied visas on workers reporting abuses (Ibid). As a result of the review the New Zealand government consulted on and implemented new migrant worker protection measures including: a freephone number for workers facing exploitation; a register of exploitative individuals and businesses; and a new Migrant Exploitation Protection Work Visa (MEPV) (Radhakrishnan 2022). The New Zealand government has implemented a range of safeguards for workers on tied and temporary visas yet has stopped short of removing the tie between workers and employers which drives the risk to visa holders.

Following its review of worker exploitation in 2019, the New Zealand government introduced the MEPV for migrants on employer assisted temporary work visas in July 2021. This visa is designed for workers at risk of or who have experienced material harm to their "economic, social, physical or emotional well-being" (Employment New Zealand 2022). On average visas take 16 days from application to issue and once granted provide exploited migrant workers an open visa valid for up to six months (NZ House of Representatives Education and Workforce Committee 2022 p.16). Following critique of the short-length of the visa, the New Zealand government is currently considering maximum and minimum visa lengths (Ibid p.17). In addition, the visa has been criticised for being overly bureaucratic, requiring a "report of exploitation assessed by Employment New Zealand" and receipt of a letter confirming exploitation (Aspoas 2021). The MEPV provides an additional example to the OWPVW of an open work permit dedicated to assisting workers at risk of or experiencing abuse and exploitation.

Summary

Both Canada and New Zealand present interesting examples of countries that have conducted inquiries into their temporary migration programmes which have identified high-risks of abuse and exploitation. In response to these findings, both governments have resisted amendments to the programme design yet have instead consulted on and introduced innovative open visas for workers at risk of or experiencing abuse. The experience of both countries provides useful learning for Scotland as it seeks safeguarding solutions to UK temporary migration programmes. The case study example of Canada will be considered in more depth in this Report.

Methodology

This Report draws on a combination of primary and secondary data. Data was collected in two phases, firstly through desk-based research, including a literature review of risks in temporary migration programmes in the UK and worldwide, with a particular focus on analysis of Canada's temporary migration programmes and the development of its OWPVW. The case study of Canada has been chosen because of the comparability of Canada's asymmetric federal model with the UK's asymmetrical devolution, within which the Scottish Parliament has responsibility for its devolved powers. The OWPVW is particularly relevant to Scotland as the Province of British Columbia (BC), which has shared responsibility for immigration with the federal Government of Canada, established an open work permit for at-risk temporary foreign workers pilot in BC from 2016-18. This work permit was subsequently adopted by the Government of Canada in federal policy as the OWPVW.

The desk-based research phase included review of relevant legal and policy documents relating to the development of the OWPVW and analysis of its implementation. Secondly primary data collection informed the case study development and involved qualitative semi-structured interviews with key informants working on design, implementation, and support for Canada's OWPVW. For this phase, a total of six individual interviews and two focus group discussions with key informants were conducted. Interviews were conducted with one lawyer, two academics, three NGO staff members and three government officials. Transcribed interviews were coded and analysed using qualitative data analysis software, key themes drawn from the initial coding informed secondary data collection, further coding identified common issues and themes.

Summary and structure of Report

Despite successive reports indicating high risks of exploitation on UK temporary migration programmes, the short-term SWV was established in 2019 in light of labour shortages arising from the UK exit from the European Union (Defra and Home Office 2018). Whilst Scottish horticultural growers are now dependent on the SWV for a growing proportion of their workforce, a visa with inherent risks of exploitation presents a serious problem to workers, growers, retailers, and the Scottish government. **The example of an open work permit for workers at risk of or experiencing abuse, like those implemented in Canada and New Zealand, deserves consideration as possible policy option for Scotland.** Whilst acknowledging the risks inherent in temporary migration programmes, open work permits offer a possible interim safeguarding route for workers.

This Report will consider the Canadian OWPVW in more detail, seeking to draw on this case study to understand what opportunities and risks an open work permit for workers at risk of or experiencing abuse presents for Scotland. The case study section starts by providing detail on temporary migration programmes in Canada, then the development and design of the open work permit for at-risk temporary foreign workers pilot conducted in BC from 2016-18. It then reviews the design, implementation, and outcomes of the OWPVW, considering what it has meant for workers and their advocates and what lessons have been

learnt over the three years it has been in place. Finally, the Report draws on the case study for discussion and reflects on the transferability of this approach to Scotland, presenting a range of options for the Scottish Government.

Canada: Temporary migration programmes and risk of exploitation

The Canadian TFWP low-wage and agriculture (seasonal and non-seasonal) streams include features in their design which increase worker vulnerability to abuse and exploitation. On these streams, many workers face considerable restrictions including: tied migrant status to their employer; employer provided accommodation; restrictions on access to public healthcare; restrictions to bringing their families to Canada; and limited access to permanent residency. Alongside these restrictions, seasonal farm workers on the TFWP Agricultural Stream and SAWP are excluded from key provisions of provincial employment standards legislation, including in some provinces, the right to unionize. There is widespread documentation of worker abuse and exploitation on the TFWP, particularly in high-risk sectors such as agriculture where there is:

lack of adequate equipment or training on pesticide use, unsafe work conditions, strenuous/long work hours, and workplace harassment [...] physical/sexual harassment or violence perpetrated by both employers and peers, and peer-policing and competition to perform at a rate that may cause acute or chronic injury (Caxaj and Cohen 2019 p.3).

Significant concerns were raised about the TFWP in 2009 by Canada's Auditor General, who noted poor compliance with protection measures for workers on different low-wage streams and recommended that mechanisms be put in place to "ensure the integrity of the Temporary Foreign Worker Program and the protection of individuals" (Office of the Auditor General of Canada 2009 p.34). Subsequent public pressure regarding risks to workers led to the Government to implement a series of reforms to the programme in 2014 (Faraday 2016 p.18). However, whilst these reforms sought to address precarity amongst some workers on the TFWP, there were exemptions for the lowest paid sectors, including agriculture and care work, thereby sanctioning a higher level of risk for workers on these low paid temporary roles.

In February 2016, the Minister of Employment, Workforce Development and Labour indicated the Government of Canada's intention to task a parliamentary committee with reviewing the TFWP (Mas 2018). The House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA Committee) launched its review into the TFWP in March 2016. The Committee heard evidence from migrant and labour rights organisations that low-wage workers on the TFWP were at a heightened risk of abuse due to the tied nature of the work permit which was thought to "magnify the power discrepancy between workers and employers" (HUMA Committee 2016). Of particular focus for those submitting evidence was the SAWP for its "discretionary power to repatriate workers when they do not comply with some aspect of the work" and the practice of SAWP employers naming workers they want to return the next season which is shown to discourage dissent (Ibid p.19). The report recommended measures to address "gaps in employer compliance and the protection of migrant workers'

rights” (Ibid p.33). The Committee’s ultimate report called for major changes to compliance and protection measures for workers on the TFWP.

In addition to the parliamentary report on the TFWP, in Spring 2017 the Auditor General of Canada published an audit of the management of the TFWP (Office of the Auditor General of Canada 2017). The audit report found gaps in compliance and called for an increase in ESDC workplace inspections, including more unannounced visits. In response, the Government of Canada announced an increase in “onsite inspections of workplaces that employ foreign workers” and an intention to collaborate with community organisations supporting at risk workers (Government of Canada 2017). In subsequent years, the Government of Canada has taken further action to address temporary migrant worker vulnerability, including introducing an open work permit for at-risk workers and targeting for temporary migrant worker support towards NGOs. The remainder of this case study will be dedicated to understanding the design and delivery of the open work permit for at-risk workers, from its origins in the BC provincial level pilot to the current federal policy.

In 2018, the Government of Canada proposed a new open work permit for migrant workers and their family members where there are “reasonable grounds” to believe the worker is at risk of or experiencing abuse (Government of Canada 2018). This permit, entitled the OWPVW draws heavily on the design of and learning from a pilot ‘open work permit for temporary foreign workers at risk’. To understand the drivers and design features of Canada’s OWPVW, the details of this pilot provide important background and will be set out in the following section.

The BC pilot: Open work permit for temporary foreign workers at risk

In response to growing complaints about the abuse of workers on the TFWP in BC, the Government of BC sought to include migrant worker protection provisions within the Canada-BC Immigration Agreement at its five-yearly review point in 2015 (Government of BC). This move coincided with the Federal Government’s own review of the TFWP, leading to it supporting the inclusion of a provision on the protection of temporary foreign workers in the Canada- BC Foreign Worker Annex under the Canada-BC Immigration Agreement 2015 (Annex B Section 9: Foreign Worker Protection [R204 (b)]). This provision referred to the need for collaboration between the federal and provincial governments to build employer awareness about their obligations towards workers and employee understanding about support services. Importantly, the provision included a new open work permit for workers facing a “real and substantial risk to a foreign worker as a result of an employer not complying with federal or provincial laws” (Government of BC 2015). These laws included the BC Employment Standards Act and Occupational Health and Safety Regulation and the Federal Immigration and Refugee Protection Regulations [SOR/2017-56 s.2.] which establish employment conditions for the TFWP, including defining and prohibiting worker abuse.

The Canada-BC Immigration Agreement 2015 established a BC specific, time limited – 2 year – pilot from 2016-18 to enable ‘at-risk temporary foreign workers’ on employer and sector-specific work permits, and migrant workers authorized to work without a work permit, access to an open work permit. The work permit was issued for any of the following purposes: to ensure worker protection; to enable workers to change employer when at risk; to facilitate worker engagement in inspections of non-compliant workplaces; and to

regularise worker's status (IRCC 2015). The details of the open work permit were developed in consultation with BC's established 'settlement services', civil society organisations funded by the Government of BC to deliver support to migrant workers (Government of BC 2022). Applicants for the open work permit, were required to initially make contact with a provincially funded settlement service provider who had delegated responsibility for submitting a written recommendation on behalf of the worker outlining their case, the laws they felt had been contravened and the risks to the worker. In addition, the worker applicant was required to have submitted an official complaint about their treatment to the appropriate enforcement agencies, including law enforcement and labour inspection authorities (Aziz 2022 p.10). Applications were assessed and decisions made by IRCC who issued open work permits for up to 180 days (IRCC 2017 p.4).

Figure 1 has been removed from the document but is available to view using the following link: [Supporting Documents](#)

Figure 1: A graphic showing the process for application and issuance of a BC open work permit for workers at risk of abuse, covering the roles of enforcement agencies, foreign workers, service providers and Citizenship and Immigration Canada, the former name for the Canadian federal department, Immigration, Refugees and Citizenship Canada. (IRCC 2015)

During the course of the two-year pilot, 75 work permit applications were received by the Government of BC, 68 were approved (90.7 per cent), six refused (8 per cent) and one decision was unknown (1.3 per cent) (Ibid). The pilot was deemed, by both the Government of BC and the Federal Government, to be a success, contributing to the development of the federal OWPVW programme:

It was fundamental in helping the federal government get a grasp on what was happening with foreign workers, in real time, in their situations and it led to this national programme. (Government of BC)

Whilst acknowledging the pilot's success both the provincial and federal governments identified areas in which improvements could be made, therefore the BC pilot provides a helpful example of where practice has informed design. The following section will look at the development and design of the federal OWPVW, including the adjustments that were made based on learning from the BC pilot.

BC Employer Registry

The Government of BC has taken a range of steps to address migrant worker vulnerability in the province. In addition to the open work permit, they have piloted a series of migrant worker protection measures including: a migrant worker support network; a licensing system for labour recruiters; an extended period for migrant workers to make labour complaints; prohibitions on recruitment fees and the misrepresentation of work; and established public registries for both labour recruiters and employers seeking temporary foreign workers (Government of BC 2023). The BC registry for employers seeking temporary foreign workers was introduced in December 2020 as a mandatory requirement for all employers seeking workers under the TFWP, SAWP, Home Child Care Provider or Home Support Worker pilots and any other programme that requires a LMIA³ (Government of BC 2020). If an application is successful then an employer is issued with a registration certificate which is valid for up to three years. An application may be refused if inaccurate or insufficient information is provided, if provincial or federal laws have been broken, or if an employer is not deemed to carry out business “legally, honestly, with integrity or in the interest of the public.” (Ibid) The recruiter and employer registries have helped the Government of BC to overcome the provincial level data gap and enabled it to draw on this information to conduct workplace inspections and compliance activity (Government of BC). This registry presents an interesting example for Scotland, which like BC, does not have access to all migration statistics required to comprehensively oversee the protection of its temporary migrant workers.

Canada’s Open Work Permit for Vulnerable Workers

In 2018, as the BC pilot was coming to an end, the Government of Canada proposed a new federal open work permit for migrant workers and their family members where there are “reasonable grounds” to believe the worker is at risk of or experiencing abuse (Government of Canada 2018). The Government of Canada’s proposal for an OWPVW recognised that the employer and sector-specific work permit creates a “power imbalance” between temporary foreign workers in Canada and the employer named on their work permit which increases risk of abuse (Ibid). The government conducted a wide-ranging consultation with key stakeholders - migrant worker support organisations, employers, trade unions, academics, industry and lawyers – on the design of the OWPVW (Aziz 2022). The proposal was accompanied by a financial commitment of C\$194.1 million over five years and C\$33.19 million per year ongoing to support a “robust compliance regime”, including unannounced inspections under the TFWP (Government of Canada 2018). An additional C\$3.4 million was allocated to a Migrant Worker Support Network (MWSN) of support organisations, employers and frontline agencies, to support migrant workers to understand and exercise their rights in Canada (ESDC 2018). The OWPVW was implemented in June 2019, three and a

³ A Labour Market Impact Assessment (LMIA) is required by employers seeking to hire workers through the TFWP to demonstrate that it is not possible to fill roles with Canadian workers or permanent Canadian residents. A worker must include evidence of an employer’s positive LMIA in their application for a work permit under the TFWP.

half years on this Report will consider the effect of the policy on workers and its transferability to Scotland.

The following section will consider key issues identified in implementation of the OWPVW to consider before any policy transfer might be made. This analysis is used to develop an understanding of whether the OWPVW is a potential replicable policy option for Scotland. This section draws on interview data conducted with key stakeholders offering support to workers and engaging with the OWPVW. Firstly, it will consider which factors were key to the OWPVW design including learning from the BC pilot. Next it will look at how the OWPVW has been implemented: its application process and the consideration of applications and determinations. Finally, it will consider the impact of the programme on incidences of abuse, abused workers, and on the migrant support sector more widely.

1. OWPVW Design

The OWPVW is based largely on the BC pilot for temporary foreign workers at risk. Its design draws on learning from that pilot and incorporates the views of a wide range of stakeholders through consultations. The objectives of the OWPVW are like those of the BC pilot, to protect workers from abuse and to facilitate workplace inspections, however the definition of abuse differs as it relates to federal rather than provincial regulations. The following section will explore key elements of the OWPVW design along with some of the critiques raised and remedies presented.

The OWPVW was introduced by amendment to the *Immigration and Refugee Protection Regulations* [SOR/2019-148], provided for in the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27 / subsection 5(1)]. The regulations entered into force on 4 June 2019 and provided for a work permit that is exempt from Canada's LMIA process and which applies to all migrant workers on employer and sector-specific work permits, for whom there are "reasonable grounds to believe" that they are experiencing or at risk of experiencing abuse in their employment (IRCC 2022a). The OWPVW applies where migrants hold a valid employer or sector-specific work permit, or where migrant workers have previously held an employer or sector-specific work permit and have applied to renew that permit, regardless of whether a worker has previously engaged in unauthorised work in Canada (Ibid). An open work permit may also be issued to the family member of a worker who is found to be eligible for an OWPVW. Those applying for the OWPVW are exempt from normal work permit costs - the C\$155 work permit processing fee and the C\$100 open work permit privilege fee (IRCC 2022a). In addition, IRCC Officers are encouraged to exempt applying workers from a requirement to provide biometric information and pay the related C\$85 fee for this service.

1.1 OWPVW influences from the BC pilot

The Government of Canada drew heavily on learning from the BC Pilot, set out above, for the design of the OWPVW, replicating the core principles of the permit, whilst also adjusting aspects that were felt to have caused problems in the pilot. Three design areas which were adjusted in the federal open work permit are the fees, the length of permit and the role of intermediaries in the application process. Whilst the BC pilot permitted IRCC officers to exercise their discretion over whether to charge application fees, all fees were removed for the OWPVW as were found to create a barrier to workers accessing the permit (Government of Canada 2019a). On the length of permit, while the BC open work permit

was fixed at 180 days, the OWPVW regulations provide for IRCC officers to use their discretion to issue a work permit for up to 12 months. This draws on findings from the BC pilot where decisions took longer than expected and workers struggled to find alternative employment within the validity period of their open work permit (Government of BC). Finally, whilst the BC pilot required workers to submit a written recommendation from BC settlement service providers and a report of a complaint to enforcement agencies with their application, this element was removed from the OWPVW process. These three important design changes sought to broaden access to the OWPVW.

1.2 Objectives of the OWPVW

The objectives of the OWPVW are to ensure workers at risk of abuse can legally leave employers named on their work permit and to remove barriers to worker participation in employer inspections and cooperation with authorities.⁴ These objectives seek to address the power imbalance identified for temporary foreign workers in Canada, by providing a route out of employer and sector-specific visas. They also seek to reduce the risk that workers will choose to leave abusive employment outside the terms of their visa. The objectives underline the importance of also addressing wider labour abuses and non-compliance in the labour market by facilitating the engagement of migrant workers in employer inspections and in enquiries by authorities, although the OWPVW is non-conditional on such engagement. Research participants were supportive of these objectives which span both specific and general risks to workers.

1.3 Link between the OWPVW and employer inspections

The link between a finding of worker abuse and compliance inspections serves as an important means of ensuring an open work permit for workers at risk of or experiencing abuse has a wider impact on cases of abuse and exploitation. Compliance oversight is divided in Canada between ESDC,⁵ for workers on the TFWP and IRCC⁶ in the case of workers on Canada's IMP. As outlined above, at the point of introduction of the OWPVW, the Government of Canada dedicated greater resources to related compliance activity. When an IRCC officer issues an OWPVW, they share summary details with relevant IRCC or ESDC inspections and compliance branches (ARHW 2021). This referral of allegations does not automatically trigger an inspection, instead the employer in question is prioritised "within the existing envelope of compliance inspections planned each year" (Government of Canada 2019a). In addition, inspections seek to identify whether employers have made

⁴ The objectives are as follows:

1. to provide migrant workers experiencing abuse, or at risk of abuse, in the context of their employment in Canada, with a distinct means to leave their employer (i.e., by opening the possibility of obtaining a work authorization for other employers);
2. to mitigate the risk of migrant workers in Canada leaving their job and working irregularly (i.e. without authorization) as a result of abusive situations; and
3. to facilitate the participation of migrant workers experiencing abuse, or at risk of abuse, in the context of their employment in Canada, in any relevant inspection of their former employer and/or recruiter
4. to help migrant workers in assisting authorities if required (noting that this will not be required for the issuance of the open work permit) by reducing the perceived risk and fear of work permit revocation and removal from Canada. (IRCC 2022a)

⁵ ESDC oversees the labour market and social programmes at the federal level, it includes the Labour Program and Service Canada.

⁶ IRCC is responsible for design and delivery of immigration programmes and services.

“reasonable efforts to provide a workplace that is free from abuse” rather than whether a workplace is abuse free (See IRPR SOR/2002-227). Whilst a finding of worker abuse is directly linked to workplace inspections, this does not guarantee a finding of non-compliance against their employer.

1.4 Definition of abuse

The OWPVW definition of abuse and cases of abuse reported to date by applicants for the work permit relate closely to situations experienced by workers on the UK SWV and therefore the definition provides a useful example for any potential transfer of this policy. The Immigration and Refugee Protection Regulations (IRPR), refer to five core categories of abuse, physical, sexual, psychological, financial abuse and reprisals.⁷ The IRCC Programme Delivery Instructions set out guidance for the interpretation of abuse and examples of what workplace abuse could constitute for the purpose of the definition (IRCC 2022a). One analysis of OWPVW applications found the most common forms of abuse experienced were financial abuses, including excessive work hours, unpaid wages, recruitment fees and secondly, psychological abuses, including verbal abuse, threats of termination and deportation, physical abuse and sexual abuse was also reported in fewer cases (Aziz 2022 p.15). Since the implementation of the OWPVW, problems have been identified with the breadth of the definition of abuse, evidence required to meet the threshold of certain forms of abuse and IRCC Officer’s capacity to understand abuse which will be explored below.

One important area of discussion and development to the OWPVW definition of abuse is the issue of reprisals by employers against workers. Support organisations have reported cases where workers have had their employment terminated or where their work permit has deliberately been left to lapse in “retribution for complaining about working conditions” (Aziz 2022 p.19). However, in these cases IRCC officers have demonstrated patchy and poor understanding of the relationship between employer mistreatment and financial abuse (ibid). In addition, support organisations have found employers “allowing the work permit to lapse” (Hannah Deegan, ADDPD-ARHW) as a form of abuse, leaving workers undocumented and therefore ineligible for the OWPVW altogether. IRCC sought to avoid the OWPVW being used by migrants seeking to regularise their status in Canada, yet this lacuna poses a risk to workers who unknowingly become undocumented (Government of Canada 2019). In addition, the risks posed by data sharing means workers can be reluctant to apply where they have a previous failed immigration application or prior irregular status. In the 2022 update to the IRPR, ‘reprisals’ was added to the forms of abuse (196.2 (1) (e)) which goes part way towards bridging this gap in the definition.

One further area of concern by support organisations is the charging of illegal recruitment fees, which are included in the IRCC programme delivery instructions as abusive only if “based on false promises or misleading information” (IRCC 2022a). Some support organisations report IRCC officers are therefore determining recruitment fees not to

⁷ The definition of abuse is as follows:

196.2 (1) For the purpose of this Part abuse consists of any of the following:

- (a) physical abuse, including assault and forcible confinement;
- (b) sexual abuse, including sexual contact without consent;
- (c) psychological abuse, including threats and intimidation;
- (d) financial abuse, including fraud and extortion; and
- (e) reprisals.

(IRPR, SOR/2002-227, 196.2)

constitute a form of abuse if they have been willingly paid for by workers (Aziz 2022). This is problematic as recruitment fees are both prohibited in domestic Canadian law and international law. A further amendment to the IRPR in 2022 sought to address this issue by prohibiting employers from charging or recovering fees, including fees relating to the LMIA, compliance or recruitment (IRCC 2022b).

Finally, whilst the OWPVW definition of abuse is based on the IRPR, and therefore provided for in federal law, abuses of provincial employment standards can be overlooked. This includes “contraventions of employment contracts” or “being assigned work that is contrary to the conditions of a worker’s work permit and employment contract” (Aziz 2022 p.16). IRCC officers have been found to apply an inconsistent approach to such cases which one support organisation attributes to gaps in their knowledge of “provincial employment, health and safety and human rights legislation” (ARHW 2021 p.12). IRCC has responded to such concerns by updating its training to improve IRCC officer understanding of working conditions (Véronique Tessier, RATTMAQ). However, this is an important consideration for Scotland, where employment law and industrial relations are reserved, yet agriculture is devolved, with the Scottish Agricultural Wages Board setting minimum wages and terms and conditions for agricultural workers in Scotland.

1.5 Summary

The OWPVW was designed to reduce the risk of abuse for migrant workers on employer and sector-specific work permits to address significant power imbalance identified for workers on the TFWP. Its objectives are clear and its design draws heavily on evidence from implementation of the BC Open Work Permit for Temporary Foreign Workers at Risk pilot. The OWPVW, like the BC Pilot, is linked to employer inspection activity, which is triggered when a work permit is approved which could result in a finding of employer non-compliance. Abuse for the purpose of the OWPVW takes five key forms, physical, sexual, psychological, financial and reprisals. This broad definition of abuse has been welcomed by support organisations, yet some gaps have arisen during implementation, and problems have been identified with the interpretation of abuse in practice. IRCC has acknowledged and sought to address some of these lacunae through amendments to the IRPR, enhanced guidance and training for IRCC officers. Discussions on and revisions of the OWPVW definition of abuse provide particularly useful lessons for any policy transfer, with specific issues related to the interaction between provincial and federal legislation holding relevance for Scotland.

1.6 Relevant considerations for any open work permit for vulnerable workers

Any open work permit for workers at risk of or experiencing abuse should:

- Be available to all workers, including undocumented workers, and their family members.
- Not draw on data related to migrant workers’ previous immigration applications, thereby placing workers who come forward to report abuse at risk of detention and deportation proceedings.
- Be based on a definition of abuse which is informed by international and national laws that safeguard workers and informed by evidence of working conditions for temporary migrant workers, and input from experts in law, worker, and victim support.

- Require a report to be shared with labour market enforcement authorities, triggering an automatic inspection of employers of workers issued an open work permit. Such inspections should seek evidence that proactive steps have been taken by employers to identify and address worker abuse.
- Establish detailed guidance to inform assessing officers, including continuing professional development, including on trauma informed practice and interpretations of abuse.
- Ensure an ongoing training programme is in place for implementing officers, in order to ensure uniformity of interpretation of abuse and application of the definition to individual cases.

2. OWPVW Implementation

The OWPVW implementation over the past three and a half years has been closely followed by support organisations helping workers to apply for the work permit. The below section will consider the means of applying for the OWPVW and consideration of applications by IRCC officers. It will look at the evidentiary burdens and considerations and the basis for decisions. Interviewees shared some concerns regarding this process, which is extremely resource intensive for support organisations and applicants alike. These will be explored in more detail below.

2.1 Application process

In a move to speed up the process, applications for the OWPVW are exclusively online, whereas during the BC Pilot, open work permit applications were paper based. Applications must be accompanied by a 'letter of explanation' describing the abuse or risk of abuse experienced by workers. This may be supported with evidence including photographs, digital communications, complaints to law enforcement, letters of support from frontline services, employment contract or payslips (see figure 2 IRCC 2022c). Once this information has been submitted then an IRCC Officer may use their discretion to decide whether to conduct an interview, in person or by telephone, with the worker to obtain further information.



Save

Reset Form

Print Form

LETTER OF EXPLANATION OPEN WORK PERMIT FOR VULNERABLE WORKERS

To issue an Open Work Permit for Vulnerable Workers, an immigration officer must have reasonable grounds to believe that you are experiencing or at risk of abuse in relation to your job in Canada. A letter of explanation may be used to assess your application.

If you have evidence to support your letter of explanation/allegations of abuse, you are encouraged to submit it, but this is not a mandatory requirement. You can upload supporting documents as evidence in the "Client Information" field under "Optional Documents". Examples of supporting evidence can include:

- photos showing working conditions or injuries
- copies of text messages and emails
- reports filed with a government agency
- letters or report from a support organization, doctor or healthcare professional
- witness testimony
- any other evidence that supports the facts in your letter of explanation
- a copy of your employment contract
- copies of paystubs and/ or financial transactions

Providing as much information as possible can help the Department to process your application more quickly. If you cannot provide supporting evidence please provide a brief explanation of why.

Please provide a description of the abuse or risk of abuse you have experienced or are currently facing
Are you able to provide any supporting documents with your application? <input type="checkbox"/> Yes <input type="checkbox"/> No
If yes, please list the documents you are submitting with your application
If no, please explain why you are unable to provide these supporting documents at this time

Figure 2. Example of form entitled 'letter of explanation' which must be submitted with an application for the OWPVW. The form asks applicants to describe the abuse or risk of abuse experienced and asks the applicant to submit supporting evidence where it exists. (IRCC 2022c)

Support organisations have found the OWPVW online application requires extensive additional information to achieve a successful outcome for workers. Two main concerns have been identified by support organisations with the OWPVW application process, the complexity of the online application and the evidentiary requirements of applicants. Many support organisations interviewed concluded that a successful OWPVW application is not possible without support.

2.2 Online application process

Support organisations find temporary migrant workers often lack the “technology or the literacy” (Delphine Nakache, University of Ottawa) to complete the online form and have limited understanding of “how the system functions” (Véronique Tessier, RATTMAQ). However, whilst some find the uniquely online form presents a technological barrier for workers, other support organisations find it speeds up the application process. Whilst information about the OWPVW is published in a range of languages, including Spanish, Cantonese, Hindi and Korean, the application form and supporting evidence can only be completed in English and French. One interviewee estimated that each application takes a support worker up to 30 hours (Véronique Tessier, RATTMAQ) and even more for the applicants. One interviewee reflected that the time requirement for an application “is not realistic for people working 60 hours per week” (Hannah Deegan, ADDPD-ARHW). The online application form has been found by support organisations to present a barrier to workers applying for the OWPVW without assistance. This creates a significant draw on the resources of support organisations which it is important to recognise and address.

2.3 Evidentiary requirements

As noted, applications should be accompanied by a range of evidence in order to be successful. As shown in figure 3, each application follows a two-step decision making process. In step one the evidence is assessed on a higher standard of proof, the “balance of probabilities”, or likelihood of it being true, then in step two the case as a whole is assessed and determined according to a lower bar of “reasonable grounds”, or more than a possibility (IRCC 2022a). A similar two-step process applies to the UK National Referral Mechanism (NRM) for potential victims of modern slavery/human trafficking in reverse order, first an initial reasonable grounds, “I suspect but cannot prove” assessment of the case is made to enable potential victims to access support services, then the case outcome, or ‘conclusive grounds’ decision, is determined on the balance of probabilities, which requires significant evidence gathering and review (CPS 2022). The review and pilot changes to the NRM provides useful evidence for establishing any similar system (Home Office 2017).

Level of persuasion required by standards of proof for an element to be established

Standards of proof (higher to lower)	Description	Officer's assessment
Beyond reasonable doubt	No doubt; convinced	Not applicable
Balance of probabilities	Likelihood of something being true	<p>Step 1: Officers must be satisfied on a balance of probabilities (50 + 1%) that the facts and evidence provided by the migrant worker occurred and are credible.</p> <ul style="list-style-type: none"> • Did the events described take place? • Did the situation occur? • Is it credible?
Reasonable grounds to believe	More than a mere possibility; would satisfy an ordinarily cautious and prudent person	<p>Step 2: Officers must determine if they have reasonable grounds to believe that abuse occurred or that there is a risk of abuse.</p> <ul style="list-style-type: none"> • Do the events reported amount to "abuse"? • Was the applicant abused, or at risk of abuse?
Mere suspicion	Simply an emotional reaction that it might be possible	Not applicable

Figure 3. This table sets out IRCC standards of proof used in the OWPVW the lower standard is mere suspicion, followed by reasonable grounds to believe, followed by balance of probabilities then beyond reasonable doubt. This table describes the meaning of each of these terms and then provides some detail of how each standard is assessed by IRCC Officers (IRCC 2022a).

Some support organisations find the evidentiary requirements to meet the balance of probabilities standard requires significant resources for data gathering and preparation (Aziz 2022 pp.20-21). In addition, whilst the OWPVW drew on learning from the BC pilot to eliminate the requirement for complaints to be submitted to enforcement agencies, some interviewees reported that applications are "more likely to be accepted if there has been a file of a complaint and a police report" (Hannah Deegan, ARHW). One interviewee said the evidentiary burden was high to account for IRCC officers being unable to contact a workers' employer to get their view (Delphine Nakache, University of Ottawa). In some cases, support organisations have sourced application evidence by submitting freedom of information requests to government departments. This is viewed as an unnecessary step if this information can be obtained by the assessing officer instead. Some support organisations propose oral evidence gathering using "trauma informed human interface and interaction" (Amanda Aziz, MWC) as a simpler way to assess applications. Data sharing protocols, clarity around evidentiary requirements and standards and innovative means of gathering evidence could help limit the resource burden on applicants and support organisations.

2.4 Application processing times

A target has been set for IRCC Officers to make decisions on OWPVW applications urgently, within 5 business days from the time the application is received (IRCC 2022a). IRCC officers may use their discretion to decide on the duration an open permit, up to a period of 12 months. To ensure consistency in implementation, training is provided to IRCC officers on application assessment, including guidance on supporting evidence and eligibility. In

addition, IRCC monitors decisions and cases to identify any changes that are needed to the guidance and delivery of the OWPVW (Ibid).

Whilst there is a requirement on IRCC officers to consider OWPVW applications urgently, in 2021 the average processing time was 40 days (ARHW 2021 p.16). For some workers, this means remaining with an abusive employer whilst their application is processed, therefore the longer an application takes to process the greater the risk to worker. Resourcing for IRCC capacity to process OWPVW applications relates to the estimation of applications that would be received, which was initially set at 500 annually (Government of Canada 2019b). However, data shows applications have in fact reached double this level requiring a re-think of resources allocated to the scheme (Aziz 2022 p.41). In its 2021 Budget the Government of Canada acknowledged the OWPVW processing problems and allocated C\$6.3 million to IRCC over three years for “faster processing and improved service delivery of open work permits for vulnerable workers” (Government of Canada 2021 p.219). Interviewees supporting workers in different parts of Canada reported an improvement in decision making timeframes in 2022:

We’ve noticed in BC all of a sudden, literally in the last six weeks, we’ve seen five-day processing (Amanda Aziz, MWC).

However, some support organisations indicated that cases with greater complexity continue to take much longer than five days. Capacity to meet application processing time targets has been recognised by the Government of Canada as under resourced, it has allocated increased funding to meet a higher rate of applications than initially expected.

2.5 Worker interviews

Worker interviews can provide an opportunity to probe evidence and engage workers in a meaningful way yet can also serve as an obstacle to access if interviewers are not trauma informed. IRCC’s programme delivery instructions state that interviews should address “contradictions or gaps in the applicant’s submission” to add to the evidence provided (IRCC 2022a). However, some interviewees have found that IRCC officers can be reluctant to speak to workers, seeing a general drop in interviews since COVID-19:

If they have doubts about the admissibility of the worker they won’t search deeper, they won’t investigate, they will just refuse as that is problematic (Véronique Tessier, RATTMAQ).

Support organisations have raised concerns about the nature of interviews finding IRCC officers “insensitive to the workers and the trauma they experienced” (Aziz 2022 p.23). In response to such critiques, IRCC has developed further training for its officers which has resulted in more trauma-informed interviews (Amanda Aziz, MWC). Support organisations underline the importance of interviews being accessible to workers, including by ensuring interpretation is provided, workers are permitted to be accompanied by an advocate or support organisation, and the scheduled time and place is convenient (Aziz 2022 p.30, ARHW 2021 p.17). Worker interviews can serve as a positive way of gathering evidence if interviewing officers are trained in trauma informed practice and guided by an understanding of the complex needs of potential victims of abuse.

2.6 Length of permits issued

The length of work permits issued was increased based on findings from the BC pilot with IRCC officers exercising discretion to issue permits for 6-12 months. Whilst immigration officer discretion is a feature of the Canadian system, this does present a challenge to

uniformity. In addition, many interviewees consider the 12-month validity of the OWPVW to be too short both logistically and emotionally for abused workers. Interviewees warned that the shorter the permit the more likely workers will re-enter dangerous tied employment situations, with one interviewee suggesting that to safeguard workers a “24-month period would be preferable” (Daniel Lee, Fasken). It is important that the length of work permits is based on the time it could take for workers to find secure employment and reviewed based on practice.

2.7 Decision making

Transparency over decision making and criteria is important, to facilitate uniformity and provide grounds for learning and review. Currently the OWPVW decision making process is not routinely published and support organisations access information about decisions through freedom of information requests (Véronique Tessier, RATTMAQ). Support organisations can draw on an officer’s rationale for a decision, to improve future applications and to re-apply for workers or contest refusal (ARHW 2021 p.35). There is no dedicated review process for the OWPVW, applicants instead pursue judicial review, request reconsideration or re-application (Ibid p.18). An integrated review process has not yet been considered by the Government of Canada, but could simplify reconsiderations and provide data for monitoring, evaluation, and learning.

2.8 Summary

In implementing the OWPVW, the accessibility of the application process, processing speed and uniformity of decisions are central to its success. The online nature of applications, whilst intended to speed up the process, can be complex to access for workers with limited computer access or access to translation services. The speed of decision making is classified urgent with a five-day application processing target for IRCC officers, which has required a significant investment in IRCC capacity to meet it. Whilst current OWPVW evidentiary requirements are considered resource intensive, this pressure could be eased through data sharing protocols, greater clarity on evidence required to meet standards of proof and by drawing on oral evidence. It is important that interviews are conducted by officials trained in trauma informed practice so that this process is positive for vulnerable workers. The length of open work permits should reflect evidence of the time it takes for workers to recover and find alternative safe and sustainable employment. In order to assist the design and development of open work permits, information on decisions and a review facility can help with monitoring, evaluation and learning systems.

2.9 Relevant considerations for any open work permit for vulnerable workers

Any open work permit for workers at risk of or experiencing abuse should:

- Be accessible for all, without requiring evidence of complaints to enforcement agencies or a report from an intermediary organisation which can present a barrier to access.
- Ensure all relevant materials are translated into the native languages of temporary migrant workers.
- Be accompanied by funding for proactive engagement by support organisations to address specific application support needs experienced by vulnerable workers.
- Be assessed and delivered urgently, the Government of Canada’s five-day target for OWPVW application processing is positive in this regard, sufficient funding should be provided for this.

- Consider a trauma informed oral evidence gathering process instead of written requirements for applications or evidence, interviews should be accessible and include facility for workers to be accompanied and provision for interpretation.
- Establish a two-step assessment process, applying an achievable standard of proof to evidence, recognising that the open permit is designed for highly vulnerable individuals and that labour abuses can be hard to evidence.
- Publish decisions made and include a formal review facility within the open work permit.

3. OWPVW outcomes for workers

The OWPVW's objectives are to provide migrant workers on employer and sector-specific work permits experiencing or at risk of abuse with a means of leaving their employer without becoming undocumented and to increase engagement of such workers in labour inspections and enforcement action. The Government of Canada measures applications and approval rates, and compliance activity and outcomes to assess whether these objectives have been met. In addition, two Canada based NGOs have recently conducted reviews of the OWPVW for its impact on workers, which has provided useful evidence and recommendations for improvement. The following section will consider the impact and outcomes of the OWPVW on reducing the risk of worker abuse for workers on employer and sector-specific work permits in Canada.

3.1 Government assessment of outcomes

The Government of Canada has not conducted any review of the OWPVW for its impact on vulnerable workers and incidences of abuse, nor was this considered in the assessment of the BC Pilot. However, two metrics are cited as linked to programme assessment: recorded data on employer compliance activity and outcomes; and the uptake and numbers of successful applications (Government of BC). In terms of compliance activity, one analysis found approximately one third of inspection referrals result in inspections, yet OWPVW triggered inspection outcome data is not routinely tracked (ARHW 2021 pp.21-22). In the case of the BC Permit, delivered from 2016-18, there were 75 applications with a 90 per cent approval rate (Government of BC). Data for the federal OWPVW shows 1,080 applications in 2020 with a 55 per cent approval rate and 813 applications in January-July 2021 with a 63 per cent approval rate (Aziz 2022 p.41). Anecdotal evidence from support organisations suggests that workers are much more likely to be successful if they receive assistance with their application, and/or reconsideration, from expert organisations. Applications and approval rates are useful tools for assessing the need for any open work permit, however data is influenced by the level of support available for workers.

3.2 NGO reviews of outcomes

The impact of the OWPVW on workers has been documented by NGOs supporting workers in two reports on the scheme published in 2021 by the Migrant Workers Centre BC (MWC) and the Association for the Rights of Household and Farm Workers (ARHW). Through interviews with support organisations and review of applications, these reports evidence the impact of engagement with the OWPVW process on workers. Both reports identified important evidence of workers feeling re-victimized by re-living their trauma during the OWPVW application (ARHW 2021 p.16, Aziz 2022 p.22). The range of recommendations made in these reports have informed the recent OWPVW amendments and developments to implementation. Implementation evidence is therefore very important to programme

development and external review of the OWPVW by support organisations provides useful learning to embed in any transfer of policy.

3.3 Outcomes for workers

Research participants raised the importance of the OWPVW providing a rapid route out of abusive employment for workers. Departure from work with tied accommodation can be challenging for workers without an income to pay for alternative housing, with some NGOs funding emergency accommodation. However, some interviewees highlighted how rapidly workers find new employment, including in new labour sectors:

Other employment is found really fast, the worker I accompanied chose to change industry and to exit agriculture, but lots of them find a job on other farms quickly. When they want to stay in agriculture, we are better placed to help them find another job, we can make a few phone calls and it's really easy (Véronique Tessier, RATTMAQ).

Workers that are supported to find alternative employment are viewed by support organisations as less likely to fall into further risky working situations. Some interviewees highlighted a potential barrier the OWPVW could pose to recruitment, as the visa code is printed on the work permit making a worker identifiable as someone who has previously reported abuse (Daniel Lee, Fasken). However, support organisations have not found evidence of this posing a barrier to employment, this is attributed to limited understanding of what the visa codes represent and the buoyant labour market.

Whilst finding work is reported to be easy for individuals on the OWPVW, its 12-month validity can limit their recovery. Some workers are reportedly becoming undocumented, whilst others are re-entering tied temporary employment (Amanda Aziz, MWC, Véronique Tessier, RATTMAQ). Interviewees noted how little choice people had at the end of the 12 months and highlighted the risk of re-victimisation the tied-visa poses. Therefore, some interviewees recommended offering specific employment finding services alongside the OWPVW, to help workers find safe and sustainable alternative employment. Additionally, some interviewees had observed a need to enable workers to renew the OWPVW. Whilst outcomes are generally felt to be positive for workers during the validity of the OWPVW, the visa creates a cliff edge by setting a maximum of 12-months validity, at which point some workers are re-entering high-risk tied employment.

3.4 Impact of OWPVW on support organisations

As set out above, support organisations assisting OWPVW applicants are experiencing a significant drain on their resources. Many interviewees offering direct support to workers raised concerns about the huge diversion of their resources towards supporting workers to access the OWPVW from other frontline support work. NGOs with limited means are offering emergency accommodation and food to workers applying for the open work permit, as there is currently no State provision for such needs. One interviewee said their organisation now allocates a large percentage of resources to the OWPVW:

half of our budget is now going to support workers during the time they are waiting on the outcome of applications (Amy Cohen, RAMA).

For workers in tied accommodation, support for alternative housing whilst they pursue an OWPVW application is even more urgent, as without this they face the high risk of remaining in employer accommodation whilst their application is processed. The resource intensity of supporting workers applying for the OWPVW is leaving frontline organisations

very stretched, significant thought is required at design stage to understand worker support needs and resource requirements for support.

3.5 Summary

To date there has been no formal evaluation of the wider impact of the OWPVW. However, due to the link between the OWPVW and workplace inspections, data on related compliance activity and outcomes is recorded and tracked by way of measuring wider impact. In addition, two frontline organisations have conducted their own reviews identifying areas for improvement to improve access to the OWPVW, worker engagement and outcomes. Workers accessing the OWPVW are largely found to be able to leave employers and enter alternative work, which offers short-term protection. However, the inability to extend the OWPVW and lack of transition permit means many workers re-enter tied temporary employment once the permit expires. The high uptake of the OWPVW is demonstrates the need for the work permit, yet frontline organisations note that applications and approval rates are influenced by the level of support available to workers. This support is limited without dedicated funding allocated to support organisations. The diversion of resources by support organisations to OWPVW applications and emergency assistance to applicants is having a knock-on impact on existing services and capacity.

3.6 Relevant considerations for any open work permit for vulnerable workers

Any open work permit for workers at risk of or experiencing abuse should:

- Include funding to support providers to assist applicants with housing and food once they have left their employer.
- Be extendable at the end of its validity period upon consideration of the workers' circumstances
- Be associated with a migrant worker employment programme, to assist workers on open work permits to find safe and sustainable future work.
- Include monitoring, evaluation and learning to ensure that its impact on vulnerable workers and incidences of abuse can be understood and programme alterations made if required.
- Ensure data on outcomes of employer inspections linked to open work permits issued is documented and tracked to monitor wider impact of the permit.

Discussion and conclusions

The Scottish Government has recognised risks of abuse and exploitation for workers on the UK SWV and has commissioned research to identify options for safeguarding workers on temporary migration programmes. This Report has detailed the risks of exploitation on temporary migration programmes, acknowledging the growing number of workers on short-term visas in the UK since Brexit. It underlines the UK Government's resistance to altering the two key drivers of risk on such visas, the tie with an employer or single labour provider and the temporary status of workers. It has documented similar resistance on the part of governments in comparative countries. Therefore, an interim policy option has been developed to safeguard workers in both New Zealand and Canada through an open visa for workers at risk of and in situations of abuse. Whilst such open work permits offer interim safeguarding options, there is a large body of evidence pointing to the need to end employer or single labour provider visa ties in temporary migration programmes and ensure such visas are convertible with pathways to settlement.

Whilst steps to rethink visa ties and short-term visas are essential first steps to safeguarding workers on temporary migration programmes, interim measures can offer temporary protection for workers. This Report considers the open work permit for workers at risk of and experiencing abuse as a possible safeguarding mechanism to reduce the risk of abuse and exploitation for workers on temporary migration programmes. It examines in detail the case study of Canada's OWPVW, analysing lessons from an early Province of BC open work permit pilot which contributed to the design of the OWPVW, and from three and a half years of implementing the OWPVW nationally. The Report sets out the OWPVW's objectives, to provide a safeguarding route to workers at risk of or in abusive situations and to facilitate workplace inspections, and key design features, from application, to consideration and decision making to wider impact. Interview data and secondary research is used to analyse each of these stages looking at issues such as their accessibility to vulnerable workers, the uniformity of application, transparency of decisions and utility of the OWPVW once issued. Considerations are provided for governments seeking to establish an open work permit for workers at risk of or experiencing of abuse.

Examination of the OWPVW case study shows open work permits for workers at risk of and in situations of abuse can serve to safeguard workers on temporary migration programmes, yet there are a range of important considerations to be made. The evidence from Canada shows that workers at risk of or experiencing abuse who transfer to an open work permit can leave abusive employers and find alternative work quickly, thereby creating an emergency pathway to an alternative and less risky visa. This pathway should therefore be available to all workers, regardless of status, and should be made as accessible as possible. Importantly, the definition of abuse should be broad enough to capture the range of possible circumstances faced by workers, with strong guidance and training for implementing officers. Decisions should be transparent and continuously monitored to ensure uniformity and to permit review, which should be integrated into any open work permit for workers at risk of or experiencing abuse.

The need for workers at risk of or experiencing abuse to leave their workplace immediately should be considered, and an urgent application processing target set. Significant resources may be required for such a target is to be met and a pilot open work permit programme can offer evidence of potential demand to ensure resourcing requirements are identified early. Additional resources should be provided to support organisations to facilitate support and emergency assistance, including legal advice, housing, food, and employment advice. This emergency approach recognises that once a worker raises a case of abuse, they put themselves in danger, particularly where they live in tied employer accommodation.

In order that an open work permit can have a wider impact beyond individual cases and serve as a deterrent to unscrupulous employers, it is important that when a permit is issued information detailing worker allegations is shared with labour market enforcement authorities. Targeted inspections should be immediately triggered by such information sharing, including unannounced workplace visits. Considering the vulnerability of workers on temporary migration programmes, evidence of pro-active steps taken by employers to identify and address abuses should be a minimum requirement of any associated inspection function. Data from such inspections if collated and monitored contributes to evaluation and learning about the wider impact of an open work permit.

The length of an open work permit is important and should be based on evidence of how long it could take workers to find alternative employment and recover from abuse. Given how variable each worker's experience will be any open work permit should be extendable based on an assessment of circumstances. An overall objective for an open work permit should be to ensure workers accessing an open work permit find safe and sustainable employment enabling them time for recovery and restitution and to prevent repetition of abuses. Monitoring data should seek to assess the contribution of open work permits to helping workers to access stable employment pathways free from abuse and to reducing further incidences of abuse for temporary migrant workers.

This case study review provides lessons for the Scottish Government should it consider proposing the interim measure of an open work permit for temporary migrant workers at risk of or experiencing abuse. Through detailed analysis of the design, implementation and outcomes of the OWPVW the Report has assessed the potential for transferring the model to Scotland and the policy considerations needed. **This Report concludes that whilst the priority remains reforming the UK's temporary migration schemes, open work permits can help safeguard workers and could be considered as an interim measure for Scotland.**

Recommendations for the Scottish Government

Tackle the risks associated with temporary migration programmes

- As a priority the Scottish government should propose alternative migration routes to temporary migration programmes. Such routes should not tie workers visas to a single employer, sector or labour provider and be convertible, offering pathways to settlement.
- Continuous monitoring and evidence gathering is necessary to assess the risks faced by workers on temporary migration programmes in Scotland, this includes workers on the OWPVW and SWV whose numbers are growing annually.

Ensure employer compliance

- The Scottish government does not currently have access to all immigration data held by the UK Home Office, including data related to SWV worker placement with employers. By establishing a registry for all employers of temporary migrant workers, it would enable compliance activity and engagement to be more targeted towards this high-risk cohort of workers.

Consider proposing a pilot open work permit for workers at risk of or experiencing abuse.

- An open work permit can help safeguard workers on temporary migration programmes and provide an *interim* option to reduce the inherent risks of exploitation on such schemes.

If an open work permit is piloted the following considerations should be made:

Design:

- **Engage a wide range of stakeholders** with expertise in direct support to temporary migrant workers and legal frameworks to protect migrant workers. In particular, the definition of abuse should be informed by wide ranging expertise and there must be detailed analysis of the possible resource requirements and implications for NGOs that support temporary migrant workers.
- **Establish a pilot open work permit programme** to test efficacy, accessibility, and outcomes and to generate a clear picture of likely demand, including a monitoring, evaluation and learning component with opportunity for ongoing stakeholder engagement in findings.
- **Extend the scope of any open work permit** to all workers at risk of or experiencing abuse on temporary migration programmes, including those that have become undocumented.
- **Ensure a comprehensive definition of abuse** and accompanying guidance covering the range of possible circumstances and workable in conjunction with relevant employment, immigration, and human trafficking law and in a devolved context.
- **Ensure work permit validity is based on evidence** of the time it takes for workers to move on and find safe and sustainable employment.
- **Ensure workers are not placed at risk of detention and deportation by applying**, by ensuring secure reporting.
- **Create a direct link between work permits issued and workplace inspections**, seeking evidence that employers of workers issued open work permits are taking proactive steps to root out workplace abuse.
- **Establish ongoing training for implementing officers**, to ensure trauma informed worker engagement and uniform assessment of applications.

Implementation:

- **Establish an accessible application process**, including online and paper applications, with translation into workers' native languages and limited requirements for supporting documentation.
- **Consider innovative ways of gathering evidence**, that centre the worker's needs, including trauma informed oral evidence gathering.
- **Ensure sufficient resources for emergency assistance**, including a provision for emergency accommodation or support for applicants for an open work permit.
- **Set an urgent target for application processing and decisions**, such as the five working days target set by Canada's IRCC, ensuring resources are allocated to meet the demand.
- **Consider a two-step assessment process applying a lower standard to evidence than decisions**, recognising that the open permit is designed for highly vulnerable individuals and that abuses can be hard to evidence.
- **Publish decisions made and include a formal review facility** within the open work permit, for transparency and accountability.

Outcomes for workers:

- **Ensure open work permits are extendable** at the end of their validity period upon consideration of the workers' circumstances.
- **Support an associated migrant worker employment programme**, to assist workers on open work permits to find safe and sustainable future work.

- **Include monitoring, evaluation and learning** to ensure that the impact of an open work permit on vulnerable workers and incidences of abuse can be understood and programme alterations made if required.
- **Document and monitor linked employer inspection outcome data** to monitor wider impact of the permit.

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Appendix

Interviewees

1. Amanda Aziz, Staff Lawyer, Migrant Workers' Centre BC
2. Hannah Deegan, Program Director, Rights Advocacy Association for the Rights of Household and Farm Workers (ARHW)
3. Véronique Tessier, Coordonnatrice Régionale, Réseau d'aide aux travailleuses et travailleurs agricoles migrants du Québec (RATTMAQ)
4. Delphine Nakache, Law Professor, the University of Ottawa
5. Amy Cohen, Professor of Anthropology and researcher, Okanagan College, Co-founder and community organizer, Radical Action with Migrants in Agriculture (RAMA)
6. Daniel Lee, Immigration Lawyer, Fasken
7. British Columbia Government official
8. Anonymous.



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