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Senate Standing Committee on Legal and Constitutional Affairs
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Via email <legcon.sen@aph.gov.au>

Dear Ms Dunstone

SUBMISSION TO MIGRATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2016

INTRODUCTION

The Migration Law Program, within the ANU College of Law, specialises in developing and providing programs to equip people with the necessary knowledge, skills and qualifications to register as Migration Agents, or to work as academics and migration law specialists through our Graduate Certificate in Australian Migration Law and Practice and LLM Migration Law.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided

submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

INTRODUCTION

We thank the Committee for the opportunity to make a submission to the Migration Amendment (Family Violence and Other Measures) Bill 2016 (Cth).

The ANU Migration Law Program is supportive of measures to improve the ability of Australia's migration laws to protect victims of family violence. While we support — with reservation — some aspects of the Bill, we are of the view that the Bill should not be passed.

Our overwhelming sense is that the Bill is not the most efficient way of enhancing the safety of family violence victims. Our objection rests on the following points:

- The measures proposed represent a fundamental change to Australia's family migration program with consequences extending beyond family violence;
- The Bill has the potential to conflict with Australia's human rights obligations, including the principle of non-interference with the family and non-discrimination;
- There are already existing provisions to prevent serial sponsorship and to protect children; and
- There are alternative methods to strengthen the integrity of Partner visas and the protection for family violence victims. The Government ought to consider implementing the recommendations of the Australian Law Reform Commission (ALRC) in its report, *Family Violence and Commonwealth Laws — A National Legal Response*¹ and the recent Victorian Royal Commission into Family Violence.²

PURPOSE OF THE BILL

The Bill seeks to establish a separate sponsorship framework for the sponsored family program to:

- introduce applications for sponsorship for family visas, which will be assessed against criteria to be prescribed in the Regulations;³

¹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence and Commonwealth Laws — Improving Legal Frameworks* (ALRC Report No 117, 2012).

² State of Victoria, Royal Commission into Family Violence: Final Report, Parl Paper No 132 (2014–16).

³ Migration Amendment (Family Violence and Other Measures Bill) 2016 (Cth), sch 1.

- provide that a valid visa application cannot be made for a sponsored family visa unless the Australian sponsor has first been approved as a ‘family sponsor’;⁴
- impose statutory obligations on persons who are or were approved as family sponsors and provide for sanctions if those obligations are not satisfied;⁵
- facilitate the sharing of personal information between parties identified in a sponsorship application;⁶ and
- enable the refusal of a sponsorship application and the cancellation or barring of a family sponsor in certain circumstances.⁷

In essence, the Bill seeks to provide the framework for ‘family sponsorship’ which parallels existing arrangements for sponsorship of temporary work visas.

THE CURRENT ARRANGEMENTS

Under the current arrangements, it is a criterion for the grant of sponsored family visas that an Australian citizen or permanent resident sponsors the non-citizen.⁸ That is, the Minister or a delegate of the Minister must approve the sponsorship when making the decision to grant the visa.⁹ Regulation 1.20 of the *Migration Regulations 1994* (Cth) provides that a sponsor in relation to an applicant for a visa is a person who undertakes certain obligations provided for in reg 1.20(2). The sponsorship obligations vary between each different visa subclasses, but mainly relate to providing necessary financial and accommodation needs of the person sponsored for the period of two years from visa grant or arrival in Australia.¹⁰ These are not legally enforceable.

An Australian sponsor is required to fill out a sponsorship form, in which they undertake to meet the sponsorship obligations provided for in the Regulations.¹¹ Case officers usually

⁴ Explanatory Memorandum, Migration Amendment (Family Violence and Other Measures Bill) 2016 (Cth), 23.

⁵ Migration Amendment (Family Violence and Other Measures Bill) 2016 (Cth), sch 1, proposed changes to s 140K, 140L and 140M.

⁶ Ibid, proposed s 140ZH(1A).

⁷ Ibid, proposed s 14L(3)(b).

⁸ See for example, in relation to an onshore Partner Visa (Subclass 820/801). *Migration Regulations 1994* (Cth) sch 2 cl 820.211(2)(c), 801.221(1)(b).

⁹ That is, the relevant power to approve or not approve sponsorship lies in the criteria for the grant of the visa.

¹⁰ *Migration Regulations 1994* (Cth) reg 1.20

¹¹ See Form 40 (for parent, aged dependent relative, remaining relative, carer visas), Form 40SP (partner visas), Form 40CH (child visas).

make a decision on whether the sponsor can meet the sponsorship undertakings based on the information provided by the sponsor, when deciding whether or not to grant the visa.¹²

The *Regulations* also provide limitations on sponsorship. Under reg 1.20J, an Australian citizen or permanent resident cannot sponsor more than 2 people in a lifetime, and the sponsorships must be at least 5 years apart.¹³ Notwithstanding the above, there is a power for the Minister to waive the sponsorship limitations where there are compelling and compassionate circumstances affecting the sponsor.¹⁴

In addition, under reg 1.20KB, for sponsors wishing to sponsor others on a Child, Partner or Prospective Marriage visa, and where any of the applicants are aged under 18 years, the Minister must refuse the sponsorship if the sponsor has been charged with or convicted of a 'registrable offence'.¹⁵ A 'registrable offence' is defined to include offences against child protection legislation in Australian states and territories.¹⁶ Again, the Minister has the discretionary power to approve sponsorship where the charge or conviction occurred more than 5 years ago, and where there are compelling circumstances affecting the sponsor or the applicant.¹⁷

The changes proposed in the Bill represent a significant departure from these arrangements. It is envisaged that a person cannot sponsor a person without being approved as a 'family sponsor' and that no valid visa application for a sponsored family category visa can be made unless a decision has been made that the proposed sponsor is a 'family sponsor'.

SIGNIFICANT INCREASE IN WAITING PERIODS

Instituting a separate sponsorship criterion will significantly increase the workload of visa decision-makers. For the year 2014-15, the family migration component of Australia's overall migration program totalled 61,085 visas.¹⁸ Of these, 47,825 were Partner visas.¹⁹ As the Migration Institute of Australia noted in their submission, waiting times for the first stage of the Partner visa applications already are 'now at minimum of 12-15 months and

¹² See Procedures Advice Manual 3, Form 40 Sponsors and Sponsorship.

¹³ *Migration Regulations 1994 (Cth)* reg 1.20J(1).

¹⁴ *Ibid* reg 1.20J(2).

¹⁵ *Ibid* reg 1.20KB.

¹⁶ *Ibid* reg 1.20KB(13) defines 'registrable offence' as a registrable offence within the meaning of, or an offence that would be registrable under the following Acts if it were committed in that jurisdiction: *Child Protection (Offenders Registration) Act 2000* (NSW); *Sex Offenders Registration Act 2006* (SA); *Crimes (Child Sex Offenders) Act 2005* (ACT). An offence is a reportable offence within the meaning of the following Acts: the *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2004* (WA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Child Protection (Offender Reporting and Registration) Act* (NT).

¹⁷ *Ibid* reg 1.20KB(5), (9), (10).

¹⁸ Department of Immigration and Border Protection, 2014-2015 Migration Programme Report (2015), 4.

¹⁹ *Ibid*.

may take in excess of 24 months to be decided'.²⁰ It is hard to envisage how these waiting periods would not be further lengthened under the proposed framework, unless significant increases in funding and resources were forthcoming. Without such, this will result in prolonged separation of Australian citizens from their partners, especially those who apply offshore.

This situation would be especially unfair, given recent hikes in the visa application charges for Partner visas, which increased by 72% between the period September 2013 and January 2015.²¹

THE NECESSITY FOR CHANGE

The Bill's Explanatory Memorandum makes no mention of why these changes are necessary, or what, if any, are the deficiencies of the current arrangements.

The proposed changes essentially provide for a sponsorship framework similar to that currently in place for sponsors of temporary work visas. It was very clear that when the temporary work visa sponsorship regime was brought in, they were necessary for the protection of overseas workers, as well as for the integrity of the temporary worker visa program.²² That is, if there were no provisions governing the duties and obligations of work sponsors, there would be little to no protection for overseas workers.

By contrast, we note that family violence victims are already afforded a measure of protection by the sponsorship limitations and the 'family violence exception' under the *Regulations*. The 'family violence exception' allows a person who is on a temporary partner visa to be eligible for the permanent visa where the relationship has broken down due to family violence.²³ The exception allows a person to leave a violent relationship without jeopardising their visa status. The Explanatory Memorandum does not suggest, for example, that the proposed sponsorship framework is necessary because the family violence exception is not working, or that the current sponsorship framework is inadequate.

Therefore there appears to be no clear rationale why family sponsorships should be regulated in the same way as temporary work sponsorships. We acknowledge that the provisions are intended to prevent people from entering into relationships where there is a

²⁰ Migration Institute of Australia, *Submission no 5 to the Senate Legal and Constitutional Affairs Inquiry into the Migration Amendment (Family Violence and Other Measures) Bill 2016 (Cth)* (2016), 2.

²¹ *Ibid.*

²² See *Migration Amendment (Sponsorship Obligations) Act 2007 (Cth)*. Concerns were raised at the time about employers abusing and underpaying employees.

²³ For an overview of how the family violence provisions work, see Australian Law Reform Commission and New South Wales Law Reform Commission, above n 1, chapter 20. See also, Khanh Hoang, Distance is no hurdle: Reforming the family violence exception to better protect immigrant women in rural, regional and remote communities, (2015) 2 *International Journal of Rural Law and Policy*, 9.

risk of family violence. However, we submit that such decisions ought to be made by the individuals themselves, rather than by the government.

CRITERIA FOR SPONSORSHIP APPROVAL

It is most concerning to us that the Bill does not specify at all what the obligations of the sponsors might be, what the sanctions for breaching sponsorship are, or under what circumstances a person would have their sponsorship status cancelled or barred. The Bill simply provides that these matters will be provided for in the Regulations.

Of equal concern is that the Bill is silent on the consequences for the visa holder should the sponsorship be cancelled. This would leave the visa holder vulnerable to exercise of the general visa cancellation power, on the grounds that the circumstances for the grant of the visa no longer exist. It may be an unintended consequence of the Bill that innocent person is liable for visa cancellation. Unless the person can make an application for another visa, they would be liable for detention and removal from Australia. This perpetuates the vulnerability of visa holders in family violence situations, and we believe is contrary to the intent of the Bill.

This provides the executive with wide ranging power and control to specify the criteria on which a person could be refused an application for being a 'family sponsor'. Such criteria may well extend beyond what is necessary to protect victims of family violence. For example, the Regulations may provide that a person cannot be a 'family sponsor' unless they meet minimum financial thresholds. This may put sponsoring partners and family members out of reach for newly arrived migrants such as refugees, who may be unable to meet the threshold for a number of years. We point to financial thresholds for sponsorship that apply in the UK that have prevented not just new migrants but also lower-income citizens from sponsoring their partners.²⁴

Similarly, the Bill does not outline the circumstances under which a person might have his or her sponsorship application refused or cancelled. For example, would a person who has previously been charged with a crime be refused sponsorship? Would the existence of a previous apprehended violence order lead to refusal? Our concern is that the legislation could be used to refuse a sponsorship application solely on the basis of prior criminal history. This could lead to discrimination against those with a past criminal history and may amount to double punishment.

²⁴ See Migration Observatory, *The Minimum Income Requirement for Non-EAA Family Members in the UK* (2106) noting that the numbers of partner visa applications and grant have dropped since the introduction of the income threshold. Since 2012, UK citizens and settled residents are required to meet a minimum income requirement of £18,600 per year before tax to be an eligible sponsor.

While we acknowledge that a separate sponsorship criterion *may* help prevent people from being sponsored by perpetrators of family violence initially, we see no reason why the same aims could not be achieved under the current arrangements or with minimal adjustments to the legislation. For example, the Regulations could be amended to explicitly require that sponsors for a family visa must supply a police check. This information can be used as part of the decision to approve the sponsorship under the relevant Schedule 2 criteria for the grant of the visa. For example, a person who has a criminal conviction for family violence within the last 10 years should be prevented from having his or her sponsorship approved. Even so, we would still recommend that waiver provisions be made available to accommodate for compelling and compassionate circumstances.

INFORMATION SHARING

The Bill provides that a new s 140ZH(1A) will allow the Minister to share personal information of a 'prescribed kind' about a person who proposes to apply for, or is an applicant for, or the holder or former holder of a visa, to the Australian sponsor. Similarly, personal information of a prescribed kind about an applicant for approval as a family sponsor can be disclosed to a person who proposes to apply for a visa if the applicant is approved as a family sponsor. Additionally, prescribed personal information of either party may be disclosed to an agency of the Commonwealth or of a State or Territory prescribed by the Regulations.

In principle, we see some merit in the disclosure of information (such as previous criminal convictions) to the Australian sponsor or visa applicant, in order to help them make an informed decision about whether or not to apply for the visa. However, such provisions need to undergo rigorous scrutiny to ensure that the 'prescribed information' that can be shared does not infringe the privacy of the Australian sponsor or the visa applicant.

RIGHT TO FAMILY AND NON-DISCRIMINATION

The Australian Law Reform Commission (ALRC) in its report has previously considered the issue of a separate sponsorship criterion: *Family Violence and Commonwealth Laws — Improving Legal Frameworks*. After widespread community consultation, including with the Department of Immigration, it concluded that a separate sponsorship criterion could not be pursued 'without breaching Australia's international obligations, and adequate framing of procedural fairness and privacy obligations to the sponsor.'²⁵ The Department of Immigration and Citizenship itself submitted to the ALRC that:

²⁵ Australian Law Reform Commission and New South Wales Law Reform Commission, above n 1, 506.

*Such measures could lead to claims that the Australian Government is arbitrarily interfering with families, in breach of its international obligations. It could also lead to claims that the Australian government is interfering with relationships between Australians and their overseas partners in a way it would not interfere in a relationship between two Australians.*²⁶

We agree with this. In our view, a separate sponsorship criterion, which does not allow a person to validly apply for the visa unless the sponsorship is approved, amounts to arbitrary interference with family life in breach of Article 17 of the International Covenant on Civil and Political Rights (ICCPR). In addition, it might also be seen to breach Article 23 of the ICCPR which states that ‘family is the fundamental unit of society and is entitled to protection by the society and the State’. The UN Human Rights Committee, in General Comment 15, has observed in respect of the rights of aliens that:

*“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of **non-discrimination**, prohibition of inhuman treatment and **respect for family life arise**”.*²⁷

Indeed, given the protections already in place, we do not see that these provisions are reasonable or proportionate to achieve a legitimate objective. We see no basis for why the Australian Government should interfere in the rights of both Australians and non-citizens to form relationships and a family, and no reason to discriminate against Australian citizens or permanent residents who wish to enter into relationships with, or marry, non-citizens. In this sense, we note that there is a distinction between provisions that seek to protect children from harm, and those that are aimed at adults who should not be restricted in their ability to choose a life partner.

ALTERNATIVE MEASURES TO PROTECT FAMILY VIOLENCE VICTIMS

We agree that family violence in the migration law context needs to be addressed and that reform is needed. In this context, we urge the Committee to consider the suite of recommendations from the reports of the ALRC and the Victorian Royal Commission into

²⁶ Department of Immigration and Citizenship, Submission No 121 to the Australian Law Reform Commissions’ Inquiry into Family Violence and Commonwealth Laws (2012).

²⁷ Human Rights Committee, *General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994)*, [5].

Family Violence. In particular, we support the recommendations of the ALRC to amend the *Migration Regulations*

1994 (Cth) to:

- amend the definition of family violence to be consistent with other pieces of Commonwealth legislation;²⁸
- extend the family violence exception to those on Prospective Marriage Visas (subclass 300);²⁹
- extend the family violence exception to secondary applicants of onshore permanent visas;³⁰
- allow victims of family violence to present any form of evidence in support of a non-judicially determined claim of family violence;³¹ and
- ensure targeted education and information is disseminated in relation to family violence issues.³²

The Royal Commission on Family Violence in Victoria has also made sensible recommendations for reform that should be considered. Importantly, the Commission recommended that:

'The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government to broaden the definition of family violence in the Migrations Regulations 1994 (Cth) so that it is consistent with the Family Violence Protection Act 2008 (Vic) and to ensure that people seeking to escape violence are entitled to crisis payments (regardless of their visa status) [within 12 months].'³³

We support these recommendations not only on the basis that they are sensible, but that they resulted from extensive community consultation, which is the hallmark of best law reform practice.

²⁸ Australian Law Reform Commission and New South Wales Law Reform Commission, above n 1, rec 3-1.

²⁹ Ibid Rec 20-1.

³⁰ Ibid Rec 20-2.

³¹ Ibid Rec 21-3.

³² Ibid Rec 20-5, 20-6.

³³ State of Victoria, above n 2, Rec 162.

The Department of Immigration and Border Protection noted in their submission that the only parties consulted in relation to the proposed changes include the Attorney-General's Department, the Office of the Information Commissioner and Office of Best Regulation. We consider this inappropriate given the wide ramifications of this Bill.

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