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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE REGARDING THE MIGRATION LEGISLATION AMENDMENT BILL (NO.1) 2014 (CTH)

1. Introduction

1.1. Salvos Legal Humanitarian (SLH) was established in 2010 as a pro bono legal service for people in need. SLH provides advice to many clients throughout Australia in the area of immigration law. SLH welcomes the opportunity to present submissions on the Migration Legislation Amendment Bill (No. 1) 2014 (Cth) (the 'Bill').

1.2. As a firm working with a number of clients who may suffer from a mental impairment or who are minors, we consider that the Bill has the potential to discriminate against those persons by holding them to an unreasonable standard of knowledge. These vulnerable groups are further marginalised if they cannot make a visa application simply because someone previously made an application on their behalf that they did not know about or understand the nature of. Our concern is also that a number of amendments proposed in the Bill risk breaching Australia's *non-refoulement* obligations.

1.3. Our position is that Australian immigration law and policy should be amended to safeguard the rights of minors and people with a mental impairment to make their own visa application even if they may not have known of, or understood the nature of, a previous application made on their behalf. SLH further submits that no person should be removed from Australia while they have a bridging visa application being processed.

2. Proposed amendments to s 48 of the *Migration Act 1958* (Cth)

2.1. The Bill proposes to extend limitations under sections 48, 48A and 501E of the *Migration Act 1958* (Cth) (the 'Act') to apply to a non-citizen who has previously been refused a visa for which an application was made on the non-citizen's behalf, even if the non-citizen did not know of or did not understand the nature of the application due to a mental impairment or because they were a minor at the time the application was made.

2.2. The proposed amendments would ensure that a non-citizen who is a minor or suffers from a mental impairment who does not hold a substantive visa and since last entering Australia was refused a visa under an application made on his or her behalf is subject to section 48 of the Act. Under the proposed amendments it would be irrelevant that the visa application may not have been finally determined and that the visa applicant may not have known of, or understood the nature of, the application because they had a mental impairment, or because they were a minor at the time the visa application was made.

2.3. On this basis the amendment holds a minor or person with a mental impairment to an unreasonable standard of knowledge as compared to their capacity, and puts them in a

position where for that reason, they may be prevented from making an application on their own.

2.4. The Explanatory Memorandum to the Bill expressly submits that the proposed amendment constitutes a measure to preserve the integrity of Australia's migration program that outweighs the best interests of the child, a factor required to be considered in accordance with Australia's obligations under Article 3(1) of the *Convention on the Rights of the Child* ('CROC').[1] The Explanatory Memorandum suggests that Ministerial Intervention under section 48B of the Act reconciles these interests. It also suggests that the proposed legislative amendments are consistent with Article 9(1) of CROC on the basis that a uniform visa application outcome for a family preserves family unity.

2.5. Article 5(1) of the *Convention on the Rights of Persons with Disabilities* ('CRPD'),[2] to which Australia is party, states that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and benefit of the law. Under CRPD differential treatment will not amount to prohibited discrimination where the discrimination is based on reasonable and objective criteria to achieve a legitimate purpose. SLH refutes the assertion in the Explanatory Memorandum that the proposed amendment to expressly limit or prohibit the making of further applications by non-citizens who have a mental impairment, is discrimination based on reasonable and objective criteria and for the legitimate objective of protecting the integrity of Australia's visa systems.

2.6. The Explanatory Memorandum states that the amendment ensures that the limitation or prohibition on the making of further applications will apply objectively and consistently to all non-citizens who have been refused a visa while they are in the migration zone. SLH rejects that safeguarding the integrity of Australia's visa system is a reasonable justification for the denial of equal protection for persons with disabilities, and we submit that the amendment is inconsistent with preserving the rights of persons with a disability.

2.7. This proposed amendment risks Australia breaching its *non-refoulement* obligations under Article 3(1) of the *Convention Against Torture* ('CAT'),[3] Articles 6(1) and 7 of the *International Covenant on Civil and Political Rights* ('ICCPR'),[4] and Article 33(1) of the *Convention Relating to the Status of Refugees* ('Refugee Convention').[5] Ministerial Intervention does not provide adequate protection where there is already potentially limited capacity to make a claim due to the fact the person is a minor or has a mental impairment.

3. Proposal to ensure that a non-citizen's bridging visa application is not an impediment to removal under subsection 198(5) of the *Migration Act 1958* (Cth)

3.1. The proposed amendments to section 198 of the Act address what is considered in the Explanatory Memorandum as a legislative gap that 'leaves the Department without power to remove certain detainees who have lodged a bridging visa application within time under section 195 following their detention under section 189'. The concern is that this may result in indefinite detention where the applicant has no alternative visa options. The proposed amendment to subsection 198(5) of the Act seeks to address this by providing that a bridging visa application is not a barrier to the removal power under subsection 198(5).

3.2. SLH submits that a person should not be removed from Australia while they have a bridging visa application under consideration. Removal may adversely impact on unlawful non-citizens who have made a bridging visa application with the intention of lodging a

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[1] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 3(1).
[2] UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Article 5(1).
[3] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, Article 3(1).
[4] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Articles 6(1), 7.
[5] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 33(1).

subsequent visa application, or who are in the process of preparing a request for Ministerial Intervention (including if on grounds never previously raised).

3.3. The proposed safeguards against removal for protection visa applicants under subsection 198(5) do not extend to persons who have made a bridging visa application only. The concern expressed in the Explanatory Memorandum with indefinite detention is seen as the impetus to remove non-citizens having lodged a bridging visa application. SLH submits that this concern is outweighed by the possibility that removal may potentially breach Australia's *non-refoulement* obligations. On this basis, SLH submits that the proposed amendments are too broad and provide insufficient safeguards.

3.4. Further, SLH is concerned that a person may be removed before their application is given genuine consideration on its merits. This potentially breaches procedural fairness as required by the rules of natural justice when making a decision to remove a person from Australia.[6]

4. Conclusion

4.1. SLH submits that streamlining Australia's migration system should not compromise the opportunity for minors and those with a mental impairment to lodge their own visa applications, given that they may not have knowledge of or the ability to comprehend that a previous application was made on their behalf. SLH recommends that Australian immigration law and policy be reformed to safeguard the opportunity for minors and persons with a mental impairment who did not have knowledge of previous applications made on their behalf, to make their own visa applications, whilst also ensuring that Australia meets its international obligations.

4.2. SLH submits that persons should not be removed while an application for a bridging visa is under application. It is our view that each application should be considered on its merits. By allowing the removal of the applicant before the application has been finalised, the amendments would breach the rules of procedural fairness and natural justice.

If you have any questions or require further information please do not hesitate to contact our Ms Andrea Christie-David

Yours faithfully

ANDREA CHRISTIE-DAVID
PARTNER

[6] *Kioa and Others v Minister for Immigration and Ethnic Affairs and Another* (1985) 62 ALR 321.