The Senate

Legal and Constitutional Legislation Committee

Provisions of the Migration Legislation Amendment (Sponsorship Measures) Bill 2003

August 2003

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Recommendation 1

The Committee recommends that either a Regulatory Impact Statement should be prepared before proposed section 140H is agreed to, or the section should be amended to provide that costs for locating and detaining a sponsored person are specifically excluded from the ambit of regulations that may be made under that section.

Recommendation 2

Because of the broad regulatory framework established by this Bill, the Committee recommends that the Senate ensure that future regulations made under these provisions are scrutinised most carefully, in order to ensure that more onerous sponsorship obligations are not imposed without adequate justification and consultation, particularly in relation to family stream visitors, and that appropriate decisions are prescribed as reviewable by the Migration Review Tribunal.

Recommendation 3

Subject to the Committee's previous recommendation, the Committee recommends that the Bill proceed.

ABBREVIATIONS

DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
MRT	Migration Review Tribunal
RILC	Refugee and Immigration Legal Centre (Inc.)
the Act	*Migration Act 1958* (Cwlth)

CHAPTER 1

INTRODUCTION

1.1 On 25 June 2003, the Senate referred the Migration Legislation Amendment (Sponsorship Measures) Bill 2003 (the Bill) to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 12 August 2003.

Key aspects of the Bill

1.2 The Bill provides a framework for regulations to prescribe requirements relating to sponsorship, providing for:

- sponsorship to be a criterion for a visa;
- a process for approving sponsors; and
- sponsors' undertakings.

1.3 It also allows the Minister to take certain action against sponsors if these undertakings are breached.

Conduct of the inquiry

1.4 The Committee advertised the inquiry in *The Australian* newspaper on 2 July 2003 and invited submissions by 16 July 2003. Details of the inquiry, the Bill and associated documents were placed on the Committee's website. The Committee also wrote to over 130 interested organisations and individuals.

1.5 The Committee received 3 submissions and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.6 The Committee held a public hearing in Canberra on 23 July 2003. A list of witnesses who appeared at the hearing is at Appendix 2.

Acknowledgements

1.7 The Committee thanks those organisations and individuals who made submissions and gave evidence at public hearings.

Note on references

1.8 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

KEY ISSUES

Introduction

2.1 This chapter briefly outlines the scope of the proposed provisions, summarises key concerns in submissions, and discusses six key issues that emerged during this inquiry:

- sponsorship for family visitor visas;
- reviewability of decisions on visas and sponsors;
- violence and abuse;
- sponsorship undertakings;
- cancellation and barring of sponsors; and
- disclosure of personal information on visa holders.

The scope of the Bill

2.2 In his Second Reading Speech, the Minister for Immigration and Multicultural and Indigenous Affairs stated that the Bill establishes a 'comprehensive and transparent' framework for the regulations that enables a formal recognition of the growing role of sponsorship and aims to standardise sponsorship arrangements as much as possible.[1]

2.3 The Bill also formalises 'the longstanding government policy that (costs associated with the stay of non-citizens in Australia) 'should be borne by sponsors who bring the persons to Australia, rather than by the Australian community.'[2]

2.4 Two important aims of the proposed amendments are to make sponsorship undertakings clear and enforceable, and to 'prevent abuse of the merits review process'[3] by certain temporary visa applicants.

2.5 The Bill inserts a new Division 3A of Part 2 to the *Migration Act 1958* to deal with sponsorship. Key provisions include:

- proposed section 140C (sponsorship as a criterion for a valid visa application);
- proposed section 140F (process for approving sponsors);

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1 The Hon Philip Ruddock MP, *Second Reading Speech*, 4 June 2003.

2 ibid.

3 Explanatory Memorandum, p. 25.

- proposed section 140H (sponsorship undertakings); and
- proposed section 140V (disclosure of personal information in prescribed circumstances).

2.6 Schedule 2 of the Bill contains another important proposed amendment. A new paragraph 338(2)(d) of the Act would limit the circumstances in which a decision to refuse to grant certain visas for which a sponsor is required may be reviewed by the Migration Review Tribunal (MRT).

2.7 Other provisions of the Bill deal with the application of the sponsorship system to partnerships and unincorporated associations (proposed sections 140X-140ZH).

Summary of concerns

2.8 The Committee received three submissions, including one supplementary submission, which expressed concerns about the Bill.

2.9 Ms Jennifer Burn, lecturer at the Faculty of Law, University of Technology Sydney, was particularly concerned that while the Bill appears initially to focus on the temporary residence program, there could be significant change in some temporary visas that come within the family stream of the migration program, particularly for spouse visas and prospective spouse visas.[4] Further, she contended that the amendments were too broadly drafted and were unnecessary, as existing regulations allow for adequate monitoring and compliance.

2.10 The Refugee and Immigration Legal Centre (RILC) was 'fundamentally opposed' to the proposed Bill, their main concerns being:

> … firstly, the creation of a framework that increases the discretion of the government to make decisions which are not subject to proper and appropriate merits review. Secondly, it would enable the government to hold private individuals and organisations liable for unlimited costs which are beyond their capacity to meet or constrain. Thirdly, the Bill is unnecessary in that there are already provisions within the migration regulations which deal with sanctions and undertakings. The only apparent justification that we can see for this Bill is to make undertakings in relation to costs and other matters more wide ranging and punitive in nature. Fourthly, we are particularly concerned that such undertakings would impose extraordinarily undesirable and indeed inappropriate dimensions to family and employment relationships which could quite unavoidably compromise or endanger those very relationships themselves. Finally, this Bill would not in our view achieve the stated aim of protecting those whom it is meant to protect—that is, the Australian community.[5]

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4 *Committee Hansard*, 23 July 2003, p. 2.

5 *Committee Hansard*, 23 July 2003, p. 7.

Sponsorship of family visitors

2.11 There are currently three classes of visas that are subject to sponsorship criteria under the Migration Act:

- family visitors;
- business visitors; and
- professional development visitors.

2.12 Regulations requiring sponsorship are made under three general provisions of the Act: subsection 31(3), which provides for regulations that prescribe criteria for visas; and subsections 46(3) and (4), which provide for regulations for valid visa applications. There is no specific regulation-making power relating to sponsorship.

2.13 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) advised the Committee that the original intention had been to limit the Bill to 'temporary residence sponsored visas'. However, during drafting of the Bill, the Office of Parliamentary Counsel had advised that it would be preferable for the provisions establishing sponsorship as a requirement to apply generally to all visas, including permanent visas.[6] There was a concern:

> … that the existence of specific powers to make regulations requiring sponsorship in respect of certain visas might cast doubt on the power to continue to use these general provisions to require sponsorship from other visas.

2.14 By contrast, the proposed provisions relating to *sanctions* would apply only to temporary visas.[7]

2.15 Another reason for drafting the powers widely was to achieve consistency with the framework in the Migration Act:

> In most cases, the Act establishes general powers to impose requirements in respect of visa applications … but provides for the regulations to specify the detail of the requirements and to determine the visa classes and subclasses to which the requirements will apply. This is appropriate in view of the very large number of visa classes and subclasses, which may be affected.[8]

2.16 Initially, proposed regulations under the new provisions will deal with the long stay sponsored business visa (subclass 457) and the new sponsored professional development visa (subclass 470).[9]

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6 DIMIA *Submission 3*, p. 2.

7 *Submission 3*, p. 1.

8 *Submission 3*, p. 2.

9 Second Reading Speech.

2.17 During the public hearing, a Departmental representative told the Committee:

> Sponsorships in the family stream, for example, would not be affected by changes to the Act as specific regulations have not been made that would cover these and, at this stage, I am not aware of any plans to do so.[10]

2.18 However, the Minister noted in his Second Reading Speech that the new framework was important because it 'will allow the existing regulations relating to sponsorship to be changed and implemented gradually, following appropriate consultations'. This indicates a possibility that at some future date regulations relating to family and visitor stream temporary visas may be amended to impose further requirements.

2.19 Ms Jennifer Burn contended the proposed legislation was drafted too broadly to provide any confidence that restrictions and sanctions similar to those in the business and professional development visa streams would not be applied to family and visitor stream sponsored visas. She argued that the family stream should be excluded from the regime on the basis that 'We protect the family and recognize the importance of family bonds in our community.'[11] In particular, she referred to a 1991 decision of the Immigration Review Tribunal[12] which stated:

> The Act and Regulations when addressing the spouse visa class acknowledge fundamental rights of Australian Citizens and permanent residents to be assisted by the State or at least not be hindered by it, in founding families of their choice. It places upon the spouse and dependents less onerous hurdles than on other visa classes so as to effect family unity acknowledging the societal and individual benefits of its cohesion.[13]

2.20 Ms Burn argued that applying the legislative scheme to family visas, in particular, would 'allow for unreasonable hurdles to be placed on Australians who seek to sponsor their immediate family members to Australia'.[14] Moreover, it could have a particularly detrimental effect in cases of domestic violence, as discussed further below.

2.21 Mr David Manne, Coordinator of the RILC, believes that applying such provisions to families would represent a 'wholesale shift of responsibilities for proper processing and selection from the department of immigration to individuals'.[15]

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10 *Committee Hansard*, 23 July 2003, p. 13.

11 ibid.

12 Now the MRT.

13 Ms Jennifer Burn *Submission 1*, p. 3, citing the decision of Mr Joseph Italiano, *Re Cocozza* V91/00552 [1991] IRTA 313 (2 September 1991) p. 6.

14 Ms Jennifer Burn *Submission 1*, p. 3.

15 *Committee Hansard*, 23 July 2003, p. 10.

Reviewability of decisions

2.22 An area of concern to both Ms Burn and the RILC was the issue of which decisions would be reviewable by the MRT and under what circumstances.

Review of visa applications

2.23 Subsection 338(2) of the Act essentially provides that a decision to refuse to grant a visa to a non-citizen is reviewable by the MRT if the application was made while the person was in the migration zone.[16]

2.24 A proposed amendment to that subsection limits the circumstances in which the decision may be reviewed. New paragraph 338(2)(d) provides:

> … that if it is a criterion for the grant of a visa that the non-citizen is sponsored by an approved sponsor, and the visa is a temporary visa prescribed for the purposes of this paragraph, a decision to refuse to grant the visa is only reviewable by the MRT if:
>
> - the non-citizen is sponsored by an approved sponsor at the time the application to review the decision is made (subparagraph 338(2)(d)(i)); or
> - an application for review of a decision not to approve the sponsor has been made, but not finalised, at the time the application to review the decision to refuse to grant the visa is made (subparagraph 338(20(d)(ii)).[17]

2.25 A "loophole"[18] in the Act allows those who do not meet the criteria of the visa to submit an application and, when the application is rejected on the grounds of not meeting the criteria, to request a review. This effectively allows a de facto extension of whatever visa the person holds until the MRT can review the application. The proposed amendment is intended:

> … to prevent abuse of the merits review process by refused visa applicants, who have no sponsor, and therefore no ability to meet the criteria for grant of the visa, seeking to extend their stay in Australia by lodging a review application[19]

2.26 The Committee was interested to explore the extent of this perceived problem during the public hearing. A Departmental representative described it as a 'substantial problem', explaining that of approximately 35,000 – 40,000 subclass 457 (business) visa applications made each year, three years ago there had been 'about 1,000'

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16 And certain other circumstances apply (namely, the visa could be granted while the person was in the migration zone, and the decision was not made when the person was in immigration clearance or had been refused immigration clearance).

17 Explanatory Memorandum, p. 43.

18 Second Reading Speech.

19 *Committee Hansard*, 23 July 2003, p. 13.

applications from people without an employing sponsor.[20] The Department had worked with the MRT to ensure that such applications were 'fast-tracked' and the figure was down to about one-third of the thousand review applications each year from that subclass (less than one per cent).

2.27 Other provisions of the Bill also affect reviewability of certain decisions. Proposed section 140C(1) states that regulations may prescribe that it is a criterion for a valid application for a visa of a prescribed kind that the applicant is sponsored by an approved sponsor. Proposed section 140C(2) states that regulations may prescribe that it is a criterion for a valid application for a visa of a prescribed kind that the applicant's proposed sponsor has applied to be an approved sponsor at the time, or before, the application for the visa was made. (The requirement that the proposed sponsor must have applied for approval at, or before, the time of the visa application appears to be consistent with current practice for family sponsored visitor visas.[21])

2.28 These provisions also attracted criticism. The RILC stated:

> As a matter of general principle and policy, we fundamentally oppose – as we have done in submissions to this committee in previous years – any inclusion of a provision which seeks to deprive persons of merits or other review of a Departmental decision.[22]

2.29 The RILC argued that the effect of section 140C was to 'deprive applicants of merits review by the [MRT] because a decision that a visa application is not valid is not a decision to refuse a visa' which is reviewable under section 338(2).[23] Ms Jennifer Burn made a similar point.[24]

Review of decisions on sponsors

2.30 Proposed section 140F provides that regulations may be made to establish a process for the Minister to approve a person as a sponsor. The Explanatory Memorandum states that if the Minister refuses to approve a person, that decision 'may' be prescribed under subsection 338(9) of the Act as an MRT-reviewable decision:

> As decisions to refuse or reject applications for approval as a business sponsor are currently prescribed under subsection 338(9) as MRT-reviewable decisions, this would be consistent with existing practice.[25]

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20 *Committee Hansard,* 23 July 2003, p. 13.

21 Migration Series Instruction 378 – Sponsors and Sponsorship.

22 Refugee & Immigration Legal Centre Inc. *Submission 2*, p. 5.

23 ibid.

24 *Committee Hansard*, 23 July 2003, p. 2.

25 Explanatory Memorandum, p. 8.

2.31 The Department initially told the Committee that it was only where an application for a subclass 457 visa and the sponsorship application were lodged together that the sponsorship decision would be reviewable as a 'consequential review'. The Department noted that it was seeking to encourage employers to lodge applications 'as a single package'.[26] However, in a subsequent submission the Department advised that under current regulations decisions to refuse an application for approval as a sponsor, to refuse a nomination under an approved business sponsorship and to cancel a business sponsorship were all prescribed as MRT-reviewable decisions. It stated:

> Nothing in the current Bill will have the effect of altering or removing the current review rights available to business sponsors.[27]

2.32 During the hearing, the Committee queried whether the use of the words 'may be prescribed' indicated that the Minister could prescribe decisions on a case-by-case basis. A representative of the Department responded that in the case of sanctions, 'it would have to be specifically outlined in the regulation relating to the relevant visa class'.[28] He also noted that in the case of sponsorship the situation 'does vary visa by visa' and that any changes would need to be made via regulation.[29]

2.33 Reviewability of decisions to cancel or bar sponsors is discussed further below.

Violence and abuse

2.34 Both Ms Burn and the RILC expressed concerns about the potential detrimental effect the amendments may have in the case of a sponsored person who is subject to either domestic violence by a sponsor or abuse by his or her employer sponsor.

2.35 Ms Burn related her concerns specifically to the reviewability of decisions to grant visas. She argued that if:

> … in the context of a relationship breakdown where there are Australian citizen children of the relationship and where there is domestic violence in the relationship, the Australian sponsor has withdrawn their sponsorship and the visa is refused that would not be reviewable.[30]

2.36 In response, DIMIA referred to the special provisions relating to domestic violence in Division 1.5 of the Migration Regulations 1994, and special provisions relating to domestic violence in particular visa regulations for permanent and

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26 *Committee Hansard*, 23 July 2003, p. 14.

27 DIMIA *Submission 3*, p. 3.

28 *Committee Hansard*, 23 July 2003, p. 14.

29 *Committee Hansard*, 23 July 2003, p. 15.

30 *Committee Hansard*, 23 July 2003, p. 6.

temporary visas, including spouse, interdependency and dependent child visas.[31] The effect of those regulations was that the visa applicant would meet the criteria for the visa where the relationship had ceased and the person had suffered domestic violence. The proposed amendment to section 338 that would restrict review would apply only in relation to prescribed temporary visas, the Department noting that there was 'no intention' to prescribe the temporary family stream visas for that purpose.[32]

2.37 The RILC expressed broader concerns about violence in sponsored relationships. Mr David Manne noted that the RILC had dealt with 'a substantial number of very violent and abusive staff-employer relationships':[33]

> … our concern is that additional pressures in incredibly complex and difficult relationships – where we would hope that the intention is to try and resolve difficulties in one way or another safely and satisfactorily for all – could devastate or diminish the possibility of successful resolution.[34]

2.38 Ms Priscilla Jamieson, Course Coordinator, Solicitor and Migration Agent for the RILC, noted that more onerous sponsorship undertakings (discussed further in the next section) would increase pressures on such relationships:

> People have been bustled off to airports at 4 a.m. to get them out of the country before they complain about the appalling conditions and the physical abuse they have suffered as employees. If exploitative employers were also to be responsible for compliance costs and so on or any further visa applications, there would be the possibility of irreparable harm being caused.[35]

Sponsorship undertakings

2.39 A Departmental representative told the Committee that one purpose of the Bill is to 'put beyond doubt that sponsorship undertakings are enforceable, including, where appropriate, by sanctions'.[36] The Department also referred to its 'limited ability to enforce undertakings where sponsors fail to comply with them.'[37] There was scant elaboration on those limitations during the hearing when the new professional development visas were discussed:

> We can only [recover costs] to a limited degree at this stage. We can do it, for example, via requiring the sponsor to lodge a bond with us and to draw on that bond. However, there are other ways in which you could do this, to

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31 DIMIA *Submission 3*, Question 2.

32 ibid.

33 *Committee Hansard*, 23 July 2003, p. 11.

34 ibid.

35 ibid.

36 *Committee Hansard,* 23 July 2003, p. 12.

37 ibid.

> ensure recovery, which may be more cost effective and more broad ranging and which we would want to draw upon if the bill was in place.[38]

2.40 Proposed section 140H allows regulations to be made to require undertakings to be made by those seeking to be approved as sponsors. The Committee notes that the undertakings will not be restricted to sponsors of temporary visa holders (as will the sanctions to be imposed on sponsors, discussed in the next section), but may also apply to sponsors of permanent visa holders.

2.41 Ms Burn and the RILC argued that sanctions already exist for those who sponsor applicants who violate the conditions of their visa.[39] The RILC argued that further undertakings would 'impose extraordinarily undesirable and indeed inappropriate dimensions to family and employment relationships'.[40]

2.42 Mr Manne referred to the notes to proposed section 140H which give examples of the kinds of undertakings that might be included. Several of the examples are already in place, including accepting financial responsibility for all medical and hospital costs, notifying DIMIA of any change in circumstance, and responsibility for repatriation costs for sponsored persons and their dependants.[41]

2.43 However, the RILC noted serious concern with paragraph (b) of the notes which requires a sponsor to:

> … pay to the Commonwealth the costs of locating, detaining and removing from Australia a visa holder sponsored by the sponsor.

2.44 Mr Manne and Ms Jamieson contended that such an obligation would permit liability for uncontained costs. This would be an unacceptable condition for sponsorship and, in the case of family relationships, cause undue stress on the immediate and extended family of anyone violating the terms of their visa.

2.45 Mr Manne summarised his concerns as follows:

> What we are looking at is shifting what is fundamentally, as we see it, a duty of the state onto a private individual in relation to such a matter, which is quite inappropriate. Indeed, what we see as one of the fundamental consequences of moving down this sort of path is every potential to drive a wedge between family members, for example, to impose quite inappropriate and entirely undesirable wedges or pressures upon relationships which are most fundamental — it could be a spousal relationship; it could be a relationship between a parent and a child. Imposing such additional obligations and additional pressures over and above those which already

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38 *Committee Hansard*, 23 July 2003, p. 15.

39 *Committee Hansard*, 23 July 2003, pp. 2-3 and 7.

40 *Committee Hansard*, 23 July 2003, p. 7.

41 DIMIA Form 1196 Sponsoring temporary overseas employees to Australia.

> exist in those relationships would seem to us inherently undesirable and unjustified.[42]

2.46 Although the potential ambit of such costs was not explored in evidence, the Committee considers that the costs of 'locating and detaining' a person might include, for example, police costs of investigating and searching for a person, perhaps on a national scale, as well as detention. Such costs could be very considerable.

2.47 Ms Jamieson also argued that the absence in the notes of any examples of undertakings that would protect sponsored employees from exploitation 'is a significant omission in proposed section 140H'.[43]

Cancellation and barring of sponsors

2.48 Proposed section 140L lists the actions the Minister may (or must) take against approved sponsors or former approved sponsors of temporary visa holders under proposed sections 140J and 140K. They include cancelling the approval of the sponsor for specified types or for all temporary visas, barring the sponsor for a specified period from sponsoring others, and barring the sponsor for a specified period from applying for approval as a sponsor. The provisions do not apply to sponsors of permanent visa holders.

2.49 The RILC maintained that the capacity to cancel approval in relation to all categories of visas could render a person unable to sponsor immediate family members based on a sponsorship of a temporary visa holder.[44] When questioned about whether rejection or cancellation of a sponsor in relation to one class of visa would preclude him or her from sponsoring a family member, the Department said it would not, adding that 'specific sanctions in respect of specific visa classes' would be determined in regulations.[45]

2.50 RILC strongly opposed the introduction of further mandatory cancellations or bars, based on its experience. RILC's submission argued that the absence of:

> … discretion to take into account any mitigating circumstances which might have contributed to the factors leading to the cancellation … has the real capacity to render outcomes unfair, and to cause unnecessary and potentially unintended hardship to former visa holders.[46]

2.51 The Department responded:

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42 *Committee Hansard*, 23 July 2003, p. 8.

43 *Committee Hansard*, 23 July 2003, p. 11.

44 Refugee & Immigration Legal Centre Inc. *Submission 2,* p.5.

45 *Committee Hansard*, 23 July 2003, p. 15.

46 Refugee & Immigration Legal Centre Inc. *Submission 2,* p. 5.

> In fact, the language of the new section, allowing for a mandatory imposition of certain actions, reflects the existing regulation 1.20L [concerning short stay sponsored visitor visas].[47]

2.52 The Department provided the Committee with a summary of its proposed sanctions regime for the temporary business and professional development visas, noting that the proposals were still under consultation with industry.[48]

2.53 In response to the Committee's query as to reviewability of these decisions, the Department stated that it was intended that the Minister's decisions under this section would be prescribed as reviewable by the MRT under section 338(9). The Department noted that this was current practice under regulation 4.02 (concerning business sponsors).[49]

2.54 The Committee notes that this is another situation where much important detail is not available for scrutiny to assist in considering whether the provisions of this Bill are appropriate and whether sufficient safeguards, including review mechanisms, will be available.

Disclosure of information

2.55 Proposed section 140V allows the Minister to disclose personal information of a visa holder or former visa holder to an approved sponsor or former approved sponsor in prescribed circumstances. The personal information will need to be 'of a prescribed kind'. The circumstances in which the sponsor may use or disclose such information may also be prescribed.

2.56 The Committee was interested to explore what type of information was envisaged and in what circumstances that might apply. The Department gave evidence that this provision would apply to situations where sanctions were being applied to sponsors, who then might ask on what basis the sanction was being imposed. That query would result in the Department disclosing information regarding the applicant which might have been previously unknown to the sponsor, in order to accord natural justice.[50]

2.57 This example is also included in the Explanatory Memorandum. However, the Committee notes that the provision is very broadly drafted and does not make it clear that it would necessarily relate to sanctions being imposed on a sponsor.

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47 DIMIA *Submission 3*, p. 2.

48 *Submission 3*, pp. 7-9.

49 *Submission 3*, p. 3.

50 *Committee Hansard*, 23 July 2003, p. 20.

Conclusion

2.58 The Committee welcomes in principle efforts to establish a 'comprehensive and transparent framework' for migration sponsorship. As the Department has argued, this is consistent with the overall scheme of the Migration Act.

2.59 However, the Committee is concerned that the proposed broad amendments do not establish a scheme that is transparent. In fact, the Committee's task of scrutinising this Bill has been made more difficult by the lack of detail or information as to the ambit of proposed regulations.

2.60 Because of the broad framework established by the Bill, the Committee emphasises the need for very careful scrutiny of any future regulations made under these provisions, both to ensure that more onerous obligations are not imposed without adequate justification and to ensure that particular decisions are prescribed as MRT-reviewable, as the Department has assured the Committee during this inquiry.

2.61 The Committee particularly notes the concerns it has heard during this inquiry about the possible future application of some of these provisions to family stream visitor visas and the increased pressure that additional requirements may put on families, particularly in cases where violence may be an issue. The Committee notes that future amendment of regulations is specifically referred to in the Second Reading Speech. In relation to domestic violence, the Committee notes the Department's advice on the general provisions in the Migration Regulations 1994 and special provisions in respect of particular visa subclasses, under which the visa applicant would meet the criteria for the visa where the relationship had ceased and domestic violence has been suffered. The Committee also notes the Department's advice that it has 'no intention' that the relevant temporary family stream visas which take account of domestic violence would be prescribed for the purposes of restricting MRT review under section 338(2), and that such restrictions would not apply to permanent visas in any case. The Committee would be extremely concerned if this position were to alter in the future, and stresses again the need for careful scrutiny of future regulations.

2.62 The Committee is particularly concerned about the possibility that sponsors may be liable for unlimited costs in locating, detaining and removing a sponsored person, as envisaged by the notes to proposed section 140H. While it is not unreasonable to impose some financial obligations on sponsors, as is currently the case, a provision of the type described could lead to massive costs for events which are outside the sponsor's control. This runs the risk of not only putting more pressure on family relationships, but making sponsorship of business and professional development applicants less attractive. The Committee notes that the Department is in the process of consulting with industry about proposed sanctions for breach of the undertakings in relation to business and professional development visas.[51] However, the Committee has heard no evidence of any consideration by DIMIA of the impact of imposing essentially uncapped financial obligations in the form of the sponsorship

51 DIMIA *Submission 3*, p. 6.

undertakings themselves. In the circumstances, the Committee considers that either a Regulatory Impact Statement should be prepared before proposed section 140H may proceed, or that the section should be amended to provide that costs for locating and detaining a sponsored person are specifically excluded from the ambit of regulations that may be made under that section.

2.63 The Committee also notes concerns about the reviewability of decisions on visa applications for which sponsors are required and decisions concerning the approval of sponsors. As the RILC has argued, removing merits review by the MRT may have serious consequences for individuals. The Committee notes that under the Bill, reviewability of such decisions 'may' be prescribed by regulation under section 338(9). Again, the Committee stresses that future regulations in this area will need to be carefully considered.

2.64 In respect of the argument that the proposed amendments to section 338 concerning reviewability by the MRT are directed at preventing abuse of the process by subclass 457 visa applicants, the Committee notes there was an amendment in March 2003 to Schedule 1, Item 1223A criteria. That amendment requires an applicant for a subclass 457 visa to specify the sponsoring employer and provide evidence with the application that the employer is either already an approved business sponsor or has lodged an application for approval that has not yet been determined.[52] This suggests the "loophole" referred to during this inquiry has already been largely addressed, in that those subclass 457 visa applicants without an employer sponsor cannot now make use of the MRT processes. However, it is understood from subsequent discussions with the Department that a legislative amendment would be preferred to regulations, in order to deal not only with this situation but also with those applicants who have a sponsor who is rejected and does not apply for review (proposed subparagraph 338(2)(d)(ii)).[53] The Committee notes that the existence of this regulation and the extent to which it might address the problems outlined in the Explanatory Memorandum were not matters raised by the Department during the public hearing or in its subsequent submission to the Committee, and its existence was discovered only late in this inquiry. The Committee is disappointed at this approach taken by the Department and would have expected this information to be provided in the course of its inquiry.

Recommendation 1

The Committee recommends that either a Regulatory Impact Statement should be prepared before proposed section 140H is agreed to, or the section should be amended to provide that costs for locating and detaining a sponsored person are specifically excluded from the ambit of regulations that may be made under that section.

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52 See DIMIA's website at www.immi.gov.au/legislation/amendments/lc1032003_6.htm.

53 Discussion with Mr Bernie Waters, DIMIA, 4 August 2003.

Recommendation 2

Because of the broad regulatory framework established by this Bill, the Committee recommends that the Senate ensure that future regulations made under these provisions are scrutinised most carefully, in order to ensure that more onerous sponsorship obligations are not imposed without adequate justification and consultation, particularly in relation to family stream visitors, and that appropriate decisions are prescribed as reviewable by the Migration Review Tribunal.

Recommendation 3

Subject to the Committee's previous recommendations, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair

Additional comments by ALP Senators

ALP Senators agree with the concerns that have been raised by submissions as outlined in the report, particularly those relating to the applicability of the proposed regime to sponsorship for family visitor visas, the ability of the Migration Review Tribunal to review decisions on visas and sponsors, the impact of further sponsorship obligations in the context of violence and abuse, the breadth of possible sponsorship undertakings, and mandatory cancellations of sponsors.

While supporting Recommendations 1 and 2, ALP Senators will give further consideration as to whether some additional amendments to the Bill are required.

Senator the Hon Nick Bolkus **Senator Joseph Ludwig**

Senator Linda Kirk

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Ms Jennifer Burn
1A	Ms Jennifer Burn
2	Refugee & Immigration Legal Centre Inc
3	Department of Immigration and Multicultural and Indigenous Affairs

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Wednesday 23 July, 2003

Faculty of Law, UTS
Ms Jennifer Burn, Lecturer (by teleconference)

Refugee and Immigration Legal Centre (by teleconference)
Mr David Manne, Coordinator
Ms Priscilla Jamieson, Course Coordinator, Solicitor and Migration Agent

Department of Immigration and Multicultural and Indigenous Affairs
Mr Abul Rizvi, First Assistant Secretary, Migration and Temporary Entry Division
Mr Bernie Waters, Assistant Secretary, Business Branch, Migration and Temporary Entry Division
Ms Hedvika Knopova, Assistant Director, Sponsored Training and Education Relations Section, Migration and Temporary Entry Division
Ms Catherine Swarbrick, Acting Director, Legislation Section, Visa Framework Branch, Parliamentary and Legal Division