

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

4 June 2010

To the Secretary,

RE: Migration Amendment (Visa Capping) Bill 2010

Thank you for the opportunity to comment on the Migration Amendment (Visa Capping) Bill 2010 ("the Bill").

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. Liberty works to defend and extend human rights and freedoms in Victoria.

Liberty Victoria writes to express its concern at the Bill's proposed amendments to the Migration Act 1958 (Cth) ("the Act").

At the outset we state our grave concern at the very short time allowed for comment on the Bill. It is extremely difficult for organisations, individuals and not-for-profit agencies to familiarise themselves with a Bill, analyse it and compose a submission in under two weeks. Liberty Victoria hopes that in future the Committee will allow a greater scope for comment and inquiry, particularly on a matter as important as this.

1. General comments

Liberty Victoria wishes to express its dismay at recent regressions in the Rudd government's migration program, particularly with

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regard to asylum seekers and refugees. It is unfortunate in the extreme that in the lead up to the 2010 Federal Election, the government has resorted to political point scoring at the expense of the human rights and wellbeing of asylum seekers. Liberty Victoria endorses the calls made by government backbenchers for the Prime Minister to instead tackle myths and fear-mongering about asylum seekers. We commend the Prime Minister's stated refusal this week to engage in a "race to the bottom" with the leader of the opposition, and we hope—and urge—that such words will translate into reality, policy and importantly, law reform.

2. Scope of the Bill

We understand that this Bill is intended to address concerns about the General Skilled Migration (GSM) program, and to expand the flexibility (which might well be termed arbitrariness) of the cap mechanism provided for in the current s 39(1). While this may be a valid and sensible intention, Liberty Victoria is concerned at the Bill's breadth, and we note immediately that there are no limits to its application (except for s 91AA(2) which is addressed below).

We understand that the purpose of providing a mechanism not limited to GSM is "to provide the government with a tool for the targeted management of all aspects of the migration program which will be available as the need arises". Liberty Victoria is, however, deeply concerned at the future possible applications of this mechanism, particularly considering its arbitrariness, unpredictability and retrospective operation.

3. Protection & family reunion concerns

We note that the proposed s 91AA(2) precludes the operation of the cap over protection visas. This is curious, given the established cap of 13,500 humanitarian visa grants in any financial year.

While it is true that 13,500 is a reasonable number per capita, Liberty Victoria objects in the strongest possible terms to the linkage of onshore arrivals with offshore resettlement places – a mechanism which gives traction to the notion of "queue jumping" and a false dichotomy between onshore or boat arrivals (who are deemed 'less deserving') and offshore resettlement cases (a group seen as being 'more deserving' and having their places 'stolen' by each onshore arrival). The cap at 13,500 combined with the deliberate linkage of the offshore and onshore arrival caseload causes unnecessary and unjustified emotional response in the electorate. Liberty calls for this linkage to be abolished.

Further, we note that beside the application of s 91AA(1), there are other mechanisms proposed through which protection visa applicants or holders could be adversely affected. The most notable of these would be through capping of visas under the family reunion or split family provisions, whereby a holder or grantee of a protection visa would seek to be reunited with members of his or her immediate family. It is well documented that a refugee's

separation from their immediate family is a source of enormous trauma, which has been remedied to an extent by the split family provisions of the Act. We note that it is already extremely difficult to gain access to those provisions, especially given the extremely limited definition of “immediate family” for the purposes of the Act, which has deservedly come under attack in various contexts for its limited and culturally restrictive interpretation of what constitutes a family.

4. Procedural concerns

Liberty Victoria is particularly concerned about the obvious injustice proposed in s 91AB(3), whereby any outstanding applications for a capped visa will, upon imposition of the ‘cap’, be taken not to have been made.

This proposed provision would create enormous uncertainty through every stream of the migration program and filters applications at completely the wrong ‘end’ of the procedural timeline. What a strange thing it would be to make a valid visa application, which could later be declared not to have been made at all. Not only is this logically preposterous; it is legally absurd and extremely unfair.

This proposed provision is particularly unjust given the enormous time, expense and effort involved in making a valid and complete application for a visa; a process which often consumes months and many thousands of dollars.

We note that the termination of a visa application would result in the refund of the visa application charge. While this is only fair, it does not even approach real compensation for costs incurred in most visa applications. Liberty urges that the proposed provision be withdrawn, and, if it were to be retained, that full compensation for all costs actually incurred be made.

5. Consequences of a visa application being ‘terminated’

The proposed s 91AC sets out consequences that will follow if a person’s visa application is taken not to have been made, including the cessation of any bridging visa the person held because the person had applied for a capped visa, within 28 days of the day on which the person is notified of the capping of the visa (inter alia). There are also proposed provisions for the termination of certain temporary visas.

Liberty Victoria is concerned at the potential upheaval this could cause in people’s lives. A period of 28 days is not sufficient time to allow for the termination of a visa which may require a person to leave Australia. This is so simply from a practical perspective (making arrangements to leave Australia and relocate to another country), let alone from the perspective of employment, housing, family upheaval, relationships and financial arrangements.

6. Conclusion

While Liberty Victoria sees the merit in attempting to maintain control over the General Skilled Migration program, we hold serious concerns as to the lack of restriction placed on the mechanisms proposed in the current Bill.

Liberty Victoria reiterates its objection to the broad operation of the Bill, which would create unfairness, unpredictability and confusion in the law, as well operating retroactively to place law-abiding people into untenable situations of limbo, both in life and law.

Please do not hesitate to contact Michael Pearce SC (President) on or Jessie Taylor (Secretary) on should you require further information or clarification.

Yours faithfully,

LIBERTY VICTORIA