iarc Immigration Advice & Rights Centre Inc.

Level 5, 362 Kent Street, Sydney NSW 2000 Australia
PO Box Q1283, Queen Victoria Building NSW 1230

t +61 2 9279 4300 *(Admin Line 9-5pm)*
+61 2 9262 3833 *(Advice Line Tues & Thurs 2-4pm)*
f +61 2 9299 8467
e iarc@iarc.asn.au
w www.iarc.asn.au

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6021
Parliament House
Canberra ACT 2600

**BY EMAIL:** legcon.sen@aph.gov.au.

**Re: Inquiry into the Migration Amendment (Family Violence and Other Measures) Bill 2016**

The Immigration Advice and Rights Centre ("IARC"), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), client information sheets and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence survivors.

IARC welcomes the opportunity to comment on the Migration Amendment (Family Violence and Other Measures) Bill 2016 ("Bill") and commends any initiative towards the elimination of violence against women and children. We are of the view, however, that aspects of the Bill are problematic and do not serve to protect visa applicants. We do not support the Bill in its current form.

**The family violence provisions**

The Family Violence provisions (the Provisions), found in Division 1.5 (reg 1.21 – 1.27) of the *Migration Regulations* 1994 (the Regulations), are essentially deeming provisions which determine whether, under Australian immigration law, family violence is taken to have occurred. If it has, then certain visa

applicants[1] may continue to be able to obtain a permanent visa even though the relationship with their partner/sponsor has ceased. The Provisions, no doubt, exist to ensure that visa applicants do not feel compelled to remain in abusive and violent relationships in order to obtain a visa.

**Sponsorship undertakings (current position)**

Currently, a part of the visa application process requires the Minister to approve a sponsorship which must remain in force at the time a decision is made on the application. The elements of a sponsorship undertaking are found in reg. 1.20 and for partner visas require a sponsor to undertake to assist the visa applicant, to the extent necessary, financially and in relation to accommodation for a specified period of time[2]. While these undertaking may not be enforceable an application may be refused on the basis that a sponsor cannot fulfil their sponsorship undertaking[3].

The Procedures Advice Manual 3 (PAM3) provides that reg. 1.20 requires officers to assess the risk of whether or not a sponsor can provide sufficient support for the applicant so as to prevent them from becoming a cost to the Australia taxpayer within the first two years of their settlement in Australia. It further provides that consideration will be given to the applicant's likely need for assistance and the sponsor's capacity to provide assistance, should it be necessary.

**The Bill**

The Bill seeks to extend relevant aspects of the sponsorship framework to apply to family sponsored visas with a view to:

1. Introducing a separate sponsorship assessment (requiring approval) before any relevant visa application can be made; and
2. Imposing statutory obligations on persons who are or were approved as family sponsors and providing for sanctions if the obligations are not satisfied; and
3. Facilitating the sharing of personal information between a range of parties associated with the program.

The Statement of Compatibility with Human Rights in relation to the Bill identifies that the amendments will initially apply to partner visas but will be extended to other visas in the family program.

[1] The Provisions only apply to certain visa subclasses and do not apply to other family visas such as carer visas, aged dependent relative visas, remaining relative visas or parent visas.
[2] This varies depending on whether or not the applicant is in Australia.
[3] See for example reg. 820.325 and the decision of the Migration Review Tribunal in *Gaigerov, Vladislav* [2002] MRTA 5857.

**Sponsorship assessment**

The proposed new framework will require a sponsor for a family visa to satisfy criteria prescribed in the Regulations before a valid application for a visa can be made. Unfortunately, the explanatory memorandum to the Bill gives little detail about what may be prescribed other than that a sponsorship may be refused in limited circumstances, including where the sponsor has convictions for paedophilia or other sexual offences against minors or offences relating to violence[4]. In our submission, any criteria allowing for the refusal of sponsorship should be solely directed to the welfare and safety of a visa applicant and not involve a consideration of whether a person is deserving to be a sponsor based on their character or criminal history. It would be problematic, for example, if a sponsorship application was unsuccessful on the basis that a sponsor had a prior conviction where that conviction does not result in them posing an unacceptable risk to the visa applicant's welfare or safety[5].

The explanatory memorandum to the Bill also provides that an approved sponsorship may be cancelled where there is inappropriate use of the program or where serious offences are detected. A consequence of cancelling the approval of sponsorship would be that a visa applicant is no longer eligible to be granted a visa. The difficulty with this aspect of the Bill is that it goes to punishing a visa applicant for the conduct of a sponsor and will deter applicants from disclosing a serious offence (including family and domestic violence)[6]. This amendment will not serve to protect visa applicants and is counterproductive to the National Plan to Reduce Violence against Women and Children.

Where 'inappropriate use' of a program is detected this may also be more appropriately addressed through existing powers. We would welcome the opportunity to discuss the various powers depending on the circumstances surrounding the 'inappropriate use'. We note, for example, that a partner visa can be refused if the Department is not satisfied that a relationship is genuine and that there are existing provisions that deal with serial sponsors.

**Imposing obligations and sanction**

The Bill replaces some of the existing undertakings (see above) with statutory obligations and provides for sanctions if they are not complied with. It is our experience that the two most common circumstances where a sponsor might fail to fulfil their undertaking is either because of severe financial hardship or due to manipulative and/or controlling behaviour over the applicant. We are of the view that imposing

[4] See explanatory memorandum to the Bill at page 23-24
[5] Question would arise about whether such an approach would breaches Article 14(7) of the ICCPR and whether it would be supported by the necessary heads of power.
[6] It must be recalled that the Provisions do not apply to most family visas

sanctions in either of those circumstances is inappropriate. If the failure to comply with the undertaking is because of family violence (manipulative and controlling behaviour) then sanctioning a sponsor may place the applicant at a greater risk of harm and if the failure is because of severe financial hardship then imposing a sanction will only add to the existing hardship and will deter people from seeking aid and assistance.

We do not otherwise take issue with a requirement that sponsors maintain evidence of any claim they make throughout the sponsorship period; that they provide such evidence when requested by the Department; and that they notify the Department of any changes material to the sponsorship.

**Sharing of information**

The Bill seeks to extend the information sharing provisions that exist in Division 3A of Part 2 of the Act to family visas. The explanatory memorandum states that under the proposed amendments, sponsors and visa applicants will agree for the results from their police checks, and for details of relevant migration-related activities, to be shared with other parties to the application (including agencies). It goes on to identify that the purpose of the proposed provision is to encourage the sharing of relevant information so that both applicants and sponsors can make fully informed decisions before committing to the visa application process.

While it may be readily accepted that a visa applicant should be alerted if their partner/sponsor has a prior criminal conviction relating to violence, it does not follow that the information sharing should extend to prior migration-related activities or matters that are not relevant to the safety and welfare of the visa applicant. It is also not clear as to why it is reasonable or necessary for the information to be disclosed to other agencies. Care needs to be taken to ensure that the Department of Immigration and Border Protection is not unnecessarily interfering with the privacy and affairs of citizens and visa applicants.

We respectfully adopt the views of the Australian Law Reform Commission in its 2012 Report 117, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, that the safety of visa applicants can be better promoted through targeted education and information dissemination and submit that this approach is consistent with Action Item 11 of the National Plan to Reduce Violence against Women and their Children which requires "*development of resource material to inform and support these overseas spouses, including information about essential services and emergency contacts in Australia".*

For the reasons set out above we do not support the Bill in its existing form. We would welcome the opportunity to expand on our submissions should the Committee consider it appropriate.

Immigration Advice & Rights Centre Inc.

Kind regards,

**Ali Mojtahedi**

Principal Solicitor