18 June 2010

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

Dear Committee Secretary

Inquiry into the Migration Amendment (Visa Capping) Bill 2010

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comments on the Migration Amendment (Visa Capping) Bill 2010 (the Bill) and is pleased that the Committee has extended time for submissions.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 14,500 members. The LIV's Administrative Law and Human Rights Section Migration Law Committee is made up of legal practitioners experienced in immigration law. Many Committee members are accredited specialists in immigration law and many have experience representing applicants under the General Skilled Migration (GSM) and under previous skilled migration schemes. They also have insight into how changes to the migration program affect both onshore and offshore potential and existing visa applicants and Australian relatives who sponsor such applicants, as well as the administrative law repercussions which can follow from changes to legislation.

The Bill follows the announcement by the Minister for Immigration and Citizenship on 8 February 2010 regarding changes to Australia's skilled migration program, which has the following objectives:

- to meet short term, cyclical and quickly changing demands for skilled labour in an efficient and responsive manner; and
- to help address Australia's longer term demographic and economic needs.

The Bill is one policy response in a suite of measures being developed by the government in this area, which includes reform of the Points Test being undertaken by the Department of Immigration and Citizenship and the announcement of a new Skilled Occupation List (SOL) on 17 May 2010. Our comments are made in the context of this broad policy framework.

The LIV has serious concerns about the implications of the Bill, which in our view, undermines the rule of law and introduces uncertainty and a lack of the transparency to Australia's migration program. We object to legislation with retrospective impact, to the unfettered Ministerial discretion permitted under the Bill and to the potential for human rights breaches that may be authorised by the Bill.

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Broad discretion in proposed new s91AA

The Bill establishes a new discretionary ministerial power to cap the number of visa grants and terminate visa applications based on the class or classes of applicant applying for a specified visa (proposed new s91AA).

The purposes of the Bill as stated in Explanatory Memorandum (EM) and Second Reading speech include:

- to assist the GSM program to change from demand to supply driven;
- to prevent skew in the GSM program towards certain occupations nominated by individuals;
- to allow the Minister to end the ongoing uncertainty faced by GSM applicants whose applications are unlikely to be finalised because their skills are not in demand in Australia; and
- to address the approximately 146,000 primary and secondary applicants for general skilled migration visas currently "waiting in the pipeline for a visa decision".

Yet proposed new s91AA is cast broadly and will be exercisable for any visa subclass (except protection visas). The Second Reading speech indicates that this broad power will 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".

The Bill will enable the government to terminate a visa application on the basis of any characteristic, however arbitrary. The LIV does not support the introduction of this broad discretion, which lacks any policy imperative other than providing flexibility and can be exercised without scrutiny and for any reason. In our view, the broad nature of the proposed power undermines the rule of law because visa applicants will no longer be able to determine with any certainty whether they will have a positive visa outcome, even where they meet eligibility criteria under the *Migration Act* 1958 (Cth) and the *Migration Regulations* 1994 (Cth).

The Bill merely shifts uncertainty

The Second Reading speech indicates that the "primary policy imperative" of the proposed amendments is to end the ongoing uncertainty faced by GSM applicants whose applications are unlikely to be finalised because their skills are not in demand in Australia. The LIV is concerned that while the Bill might enable the government to end uncertainty faced by certain visa applicants at present (uncertainty that has arisen largely due to the government's decision to implement priority processing and to amend the SOL), the introduction of a broad power to terminate visa applications will introduce uncertainty for all visa applicants at time of application. This uncertainty is likely to have a detrimental effect on Australia's ability to attract the "best and the brightest" migrants, because visa applicants risk considerable time and money on supporting material including health assessments, skills assessments and English language testing.

Furthermore, the provision will be applied retrospectively to validly lodged applications. In addition, we are concerned that the provision could be used to cap any visa category, including under the family migration program.

We urge the government to recognise that the Bill affects the lives of potential and current visa applicants, who might have already spent considerable sums in making their visa application, many of whom have already lived in Australia for a number of years, and of Australian citizens and permanent residents, who are seeking to bring family members to Australia or remain in Australia.

Potential for discrimination

The Second Reading speech indicates those characteristics that may be specified for capping and terminating visa applications "will be objective", such as the occupation nominated by the applicant. However, as identified above, the Bill proposes a broad power to cap and terminate for any reason. This might include age or nationality. The LIV has recently written with the Law Council of Australia to the Minister for Immigration and Citizenship to express our disappointment to learn of the suspension of the processing of Afghan and Sri Lankan asylum applicants and our concern about the human rights impact of the decision.

An advice recently prepared by Debbie Mortimer SC, Chris Horan and Kathleen Foley of the Victorian Bar for the Human Rights Law Resource Centre indicates that, on the available information, the suspension policy may:

- involve discrimination on the basis of country of origin and nationality and infringe Article 3 of the Refugee Convention, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Convention of the Elimination of all forms of Racial Discrimination (CERD);
- lead to prolonged detention which amounts to arbitrary detention in contravention of Article 9 of the ICCPR;
- breach sections 9 and 17 of the *Racial Discrimination Act 1975;* and
- extend the period of detention and have implications for the lawfulness of detention under the *Migration Act 1958.*

The LIV and Law Council have sought further information from the Minister in relation to the implementation of the suspension and we are awaiting a response. However, the suspension of processing is evidence that that government is willing to discriminate on the basis of nationality in relation to visa processing.

We note that the Second Reading speech suggests that the particular determination to cap and terminate visa applications will be consistent with Australia's international obligations. We recommend that if the proposed new s91AA is passed it be amended to limit exercise to certain characteristics such as occupation or English language ability.

Consequences if a person's visa application is taken not to have been made

Proposed new s91AC(3) provides that if a persons' application for a visa is taken not to have been made, the person's temporary visa ceases to be in effect in 28 days (or such longer period as prescribed by regulations).

The LIV is particularly concerned about the potentially broad application of this section. Under current legislation, a temporary visa ceases to be in effect when a permanent visa is granted. The effect of this subsection means that visa holders on any substantive visa including 457 or 485 visa holders could have their temporary visa cancelled upon capping of their permanent residence application.

If implemented, potential permanent residence applicants who are currently in Australia on a temporary visa may no longer consider converting to a permanent visa for fear of their temporary visa being cancelled should their permanent application be capped. Once again, this provision is likely to have a detrimental effect on Australia's ability to attract the "best and brightest" migrants who may have been working in Australia on a temporary visa initially and would like to convert to permanent residence, but do not wish to place themselves or their family at risk of having to leave the country within 28 days.

The LIV does not support the cessation of temporary visas for onshore applicants, in particular for those people who applied prior to the introduction of the legislation if passed.

In any case, the LIV submits that a 28 day period is too short. People on temporary residence visas and/or bridging visas are likely to have commitments including the areas of housing and employment and possibly child care or schooling and should have time to make arrangements to depart Australia.

Please contact Laura Helm, Policy Adviser Administrative Law and Human Rights, on or in relation to this matter.

Yours faithfully

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Steven Stevens
President
Law Institute of Victoria