Australian Government

Department of Immigration and Multicultural Affairs

Submission to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Migration Amendment (Visa Integrity) Bill 2006

PURPOSE OF THE BILL

The Migration Amendment (Visa Integrity) Bill 2006 proposes to amend the *Migration Act 1958* to:

- provide certainty in relation to the immigration clearance and immigration status of non-citizen children born in Australia;
- harmonise certain offence provisions with the Criminal Code;
- amend section 269 to ensure that a security may be imposed before grant for compliance with visa conditions;
- ensure that a non-citizen who leaves and re-enters Australia on a Bridging Visa B cannot avoid the provisions of section 48 (bar on certain applications in Australia); and
- ensure that a Bridging Visa which ceases when an event occurs will cease the moment the event occurs rather than at the end of that day.

This is an omnibus Bill and does not make any substantial changes to existing policy.

BACKGROUND

The current Bill revives some of the amendments previously contained in the Migration Legislation Amendment Bill (No. 1) of 2002.

The Committee tabled its report on this earlier bill on 5 June 2002. It recommended that the bill be passed with two amendments, which were accepted. However prior to the amendments being made, the bill lapsed from the legislative program when Parliament was prorogued in 2004.

The Committee's first recommended amendment is not relevant here, as it related to a measure not included in the current bill.

The second recommended amendment concerned a measure relating to bridging visas, which is included in the current bill (at Schedule 4). We have not made the recommended amendment as the legal effect of the provision is correct and we considered it was not necessary. Further details are set out below.

CONTENT OF THE MIGRATION AMENDMENT (VISA INTEGRITY) BILL 2006

1. Immigration clearance status of non-citizen children born in Australia

A child born in Australia to parents who are not citizens is taken to have the same visa as the parents. However, it is currently unclear whether the child is also "immigration cleared" at birth and hence subject to visa cancellation.

Section 172 deals with the immigration status of non-citizens on entry to Australia. It outlines the circumstances in which a non-citizen is "immigration cleared", "in immigration clearance", "refused immigration clearance" or "bypasses immigration clearance". Subsection 172(1) sets out the circumstances in which a non-citizen is "immigration cleared".

The insertion of paragraph 172(1)(ba) clarifies that a child born to non-citizen parents *where at least one parent is immigration cleared*, is immigration-cleared and does not enter Australia in contravention of the Act.

New subsection 173(2) puts it beyond doubt that a non-citizen child born in Australia who, is taken to have been granted a visa or visas at the time of his or her birth, is not to be taken to have entered Australia in a way that contravenes section 43 of the Act causing the visa to cease to be in effect at the same time. On a literal interpretation of section 173, a non-citizen child's visa would *appear* to cease when the child enters Australia under section 10 in a way that "contravenes" section 43 – ie: by not entering through a port or on a precleared flight.

There is an application provision in relation to both of the above amendments which applies to a non-citizen child born in Australia on or after 1 September 1994. The date corresponds with the introduction of the relevant provisions and specifically the concept of "immigration clearance" introduced into the Act by the *Migration Reform Act 1992*.

The effect of these amendments is beneficial and merely confirms the position or interpretation that has been taken in the past despite some lack of clarity in the provisions.

Provision is also made in paragraph 172(1)(d) that a person may be immigration cleared if, they are in a prescribed class of persons. This provides flexibility for the future, enabling further classes of persons to be prescribed in the *Migration Regulations 1994*, as persons immigration cleared for the purposes of section 172.

Previous Senate Committee Considerations

The Committee previously considered these amendments in the context of the Migration Legislation Amendment Bill (No 1) 2002.

A submission to the Committee by the International Commission of Jurists suggested that, just as the bill proposes that children born in Australia to parents, at least one of whom is immigration cleared at the time of the child's birth, would be immigration cleared, so children born in Australia to parents who were subsequent to the birth given immigration clearance should also be immigration cleared.

We did not support this proposition. Where a child is born to a person who did not hold a substantive visa and who had not been immigration cleared, if the person applied for and was

granted a substantive visa, the issue of whether the child was entitled to a visa would have to be examined at that time. Where a child is born to a person who has bypassed immigration clearance but been granted a substantive visa, so that the person was immigration cleared under s 172 at the time of the birth, the child would be immigration cleared.

The Committee agreed with our position.

2. Criminal code harmonisation amendments

Following the enactment of the *Migration Legislation Amendment (Application of Criminal Code) Act 2001*, the Commonwealth Director of Public Prosecutions (the DPP) wrote to the Department to draw attention to certain offence provisions in the *Migration Act 1958* (the Migration Act).

The DPP expressed doubt about whether or not some parts of certain offences were fundamental elements of the offence (which the prosecution must prove beyond reasonable doubt) or exceptions to the offence. Defendants bear an evidential burden in relation to exceptions, which means that they bear the burden of adducing or pointing to evidence that suggest that there is a reasonable possibility that the matter in question exists or does not exist (see section 13.3 of the Criminal Code). This Bill will amend section 229(1) so that it is clear which parts of that offence are fundamental elements and which part is an exception.

Similarly, sections 232 and 232A will be amended to clarify which part of those offences is an exception, and the current section 232A is also renumbered to reflect the addition of a new section 232A(2).

The DPP advised that, as a result of the commencement of the Criminal Code, the offence in section 233(1)(a) had become an offence where the mental element was recklessness. Prior to the Criminal Code, the courts had established that the fault element for this offence was strict liability. This Bill will restore the mental element of that offence to the same as it was prior to the commencement of the Criminal Code.

The DPP also advised that they were concerned with parts of the offences in sections 268BJ(1) and 268CN(1), which are both offences to do with giving or showing to an authorised officer documents that are misleading or false. The term ‘authorised officer’ is defined in section 5(1) of the Migration Act to, relevantly, means an officer authorised in writing by the Minister or the Secretary for the purposes of that section. The DPP was concerned that the offence provisions would require them to prove that the person knew that the person to whom they were giving or showing these documents was an officer who was authorised in writing by the Minister or the Secretary for the purposes of the relevant section. The Bill would remove that requirement and clarify that the offence goes to the giving or showing of documents that are misleading or false. These offences are in Division 14A in Part 2 of the Migration Act, which provides for a scheme to monitor compliance with student visas.

The DPP noted that the offence provisions in sections 268CM and 268CN(1) incorrectly reflect the provisions of sections 268CJ and 268CK. Section 268CJ provides that an authorised officer on premises with consent may ask questions of an occupier or person. Section 268CK provides that an authorised officer on premises under a monitoring warrant

may require an occupier or person to answer questions. Both offence provisions include reference to a person who is "complying purporting to comply with section 268CJ or 268CK". This is inaccurate because section 268CJ does not require a person's compliance. The Bill will amend the offence provisions to accurately reflect sections 268CJ and 268CK. These offences are also in Division 14A in Part 2 of the Migration Act.

Previous Senate Committee Considerations

These amendments were previously considered by the Committee in the context of the Migration Legislation Amendments Bill (No 1) 2002.

Various submissions to the Committee expressed concern that the offence provisions in section 233 were serious offences, carrying a maximum penalty of 10 years imprisonment. The legislation attached strict liability to elements of these offences.

We advised that the effect of s233(1)(a) currently was to make it an offence for someone to participate in the bringing or coming of a non-citizen into Australia ***being reckless*** as to whether the non-citizen has a lawful right to come to Australia. Advice was given that DPP had advised that because of the Criminal Code, the offence in section 233 had been altered.

The courts had interpreted the offence as being a strict liability offence and this had not been picked up in the harmonisation exercise undertaken the previous year. The amendment would ensure that the provision operated in the way it always had. It was being made a strict liability offence again.

The Committee noted the concern in respect of strict liability but stated that the change from recklessness to strict liability was justified in the current context.

3. The taking of securities

The Act allows authorised officers to require and take securities from visa applicants. It is necessary that securities can be required *before* grant because once the visa is granted the holder could simply refuse to provide the security requested.

In 1999, in the case of *Tutugri,* the Federal Court raised doubts about whether an officer could take a security from a visa applicant *before* the visa was granted. The amendments address this uncertainty by making it clear that officers may require securities *before* a visa is granted.

The amendments are necessary to bring clarity to the issue of allowing officers to take securities *before* the visa is granted and ensure that the ability to require securities can be used effectively.

This amendment was not included in the Migration Legislation Amendment Bill (No 1) 2002.

4. Bridging visas

Cessation on the occurrence of an event

The amendments ensure that a bridging visa which ceases on the occurrence of an event will cease the moment the event occurs rather than at the end of that day.

At present, a bridging visa which ceases when an event occurs, ceases at the end of the day on which the event occurs. For example, a Bridging E Visa granted to a non-citizen in criminal detention until release from criminal detention, ceases at midnight on the day of the person's release. Under the proposed amendment, the BVE will cease immediately on the person's release, allowing them to be taken into immigration detention at that time.

It is important to ensure that persons in criminal detention are able to be immediately placed in immigration detention the moment that their criminal detention ceases. Otherwise, the non-citizen must be released into the community when the prison sentence ends, (risking the person absconding) and then taken into immigration detention at midnight on that day.

Another example of a bridging visa ceases on an event occurs where a Bridging A visa is granted to a visa applicant who already holds a substantive visa. If that substantive visa is cancelled, the BVA ceases. Currently, the BVA would cease at the end of the day on which the substantive visa is cancelled, and the non-citizen could not be detained until midnight. Under the proposed amendment, the BVA would cease as the moment the substantive visa is cancelled.

This amendment was not included in the Migration Legislation Amendment Bill (No 1) 2002.

Bar on applications for substantive visas where re-entry is made to Australia by persons holding a bridging visa

The amendments ensure that a person who leaves and re-enters Australia on a Bridging B Visa cannot avoid the provisions of section 48. Section 48 provides that a non-citizen who does not hold a substantive visa, and who after last entering Australia was refused a visa, may only apply for a prescribed class of visa.

This amendment is important to maintain the integrity of our migration programme and protection of our borders. It has become apparent that a non-citizen, who holds a Bridging Visa B, can circumvent the section 48 bar by leaving and re-entering Australia on that Bridging Visa B.

On re-entering Australia, the non-citizen is no longer subject to section 48 as he or she has not had a visa refused "after *last entering* Australia". The amendment corrects this loophole.

<u>Previous Senate Committee Considerations</u>

This amendment was previously considered by the Committee in the context of the Migration Legislation Amendment Bill (No 1) of 2002.

Many of the submissions to the Committee in relation to this amendment were based on an incorrect understanding of the legislation. Those making the submissions believed the amendment meant that persons who hold a bridging visa, whose application for a substantive visa had been rejected, could no longer travel overseas to lodge an offshore application, then return to Australia.

The Committee noted that there was some confusion around the provision and recommended a clarifying amendment be made. However the Committee also noted that the legal position was in fact correct.

The provision remains the same as originally drafted in the Migration Legislation Amendment Bill (No 1) 2002 as we consider that the legal effect of the provision is correct. The explanatory memorandum also makes it clear that the provision relates to person seeking to apply for a visa when they are in Australia, not when they are offshore.