13 January 2014

Committee Secretary

Senate Legal and Constitutional Affairs Committee

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Parliament House

Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Due date for submissions: 13 January 2014

To the Committee

Migration Amendment Bill 2013

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS would like to make comments in relation to the three proposals contained in the *Migration Amendment Bill* 2013 (the **Bill**) that are relevant to our service, and particularly as they affect asylum seekers in Australia. In summary we oppose each of the changes proposed in the Bill.

A summary of our comments and position is also attached.

1. When decisions are made and finally determined

The Bill proposes to alter the current law to require that a decision made by either the Department of Immigration and Border Protection (the **Department**) or the Refugee Review

Tribunal (**RRT**) becomes final once it is recorded by the decision-maker, not once it is notified or communicated to the review applicant, the visa applicant or the former visa holder.

The Full Federal Court[1] found that a decision ought to only be final once notified outside the office of the decision-maker. In coming to this conclusion, they essentially decided that a decision-maker ought not to be precluded by law from revisiting their own decision at their own choice. The examples given by the Court[2] of where that might happen include where a member might have had second thoughts about the proper factual conclusions in a case, or where a new judicial decision might change the member's understanding of the relevant law.

The experience of RACS is that because of the nature of refugee cases, supporting documentation and evidence is not always available easily. Unlike litigation related to claims solely based in Australia with all available evidence also located within Australia, there are often significant practical problems our clients face in being able to obtain the best available evidence. This can include threats to their safety and/or risk posed for their friends and family who may still reside in the country they person fears returning to. In many cases applicants remain in the process of attempting to obtain evidence in support of their case with the assistance of friends and relatives in their home country throughout the consideration of their matter. It is the nature of this area of law that in some cases, there is very little an applicant can reasonably do to expedite this process, and as a result, representatives are frequently forwarding information to decision-makers as they become available. As the RRT notes, despite these best efforts, applicants for protection visas are "often unable to support claims by documentary or other proof."[3]

The RRT in its Guidance on the Assessment of Credibility notes at 1.37 that:

> *There may be good reasons why new information or claims are presented by applicants at a later stage in the application process. These reasons may include stress, anxiety, inadequate immigration advice and uncertainty about the relevance of certain information to an applicant's claims.*

Because protection visa decisions generally turn on their own facts and the application of the law to the particular circumstances of the individual case, proper procedural fairness allows decision makers the ability to consider all relevant facts, including those which surface at a late stage in the decision-making. Often additional information is required after the RRT

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[1] *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 and *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104.

[2] *SZQOY* above, quoting Madgwick J in *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240 at [102].

[3] RRT Guidance at 1.6.

hearing due to issues or questions raised by the Tribunal Member that were not previously in issue.

We submit that it is preferable that the RRT have an appropriate level of flexibility to enable them to make the correct and preferable decision in each case. This freedom would in some cases encompass a decision-maker's ability to revise a decision to take into account new developments in case law, or information or documents which may become available to an applicant subsequent their hearing before the Tribunal.

We note the current law does not obligate a decision maker to reconsider their decision after it has been made where new material or new developments in case law arise, although it does allow them to do so. RACS supports a continuation of this position, and supports not further restricting decision-makers to a strict literalism about when a decision has been finally made.

The RRT in its Guidance on the Assessment of Credibility notes at 1.7 that:

> *"The tribunal is not bound by legal forms and technicalities or the rules of evidence. The tribunal considers all of the evidence available in order to make the correct or preferable decision."*

It is our submission that to fetter decision makers by preventing reconsideration of a decision, as the amendment contained in the Bill proposes, could create situations where formality takes precedence over fairness. To this extent, the proposed amendment does not properly account for the nature of the cases before the Tribunal, and is broadly inconsistent with the overall aims of the Tribunal to provide a review process which is fair, just, economical, informal and quick.

RACS opposes the imposition of a requirement that a decision by either the Department or the Refugee Review Tribunal becomes final once recorded.

2. Bar on further applications for protection visas

The importance of complementary protection

Complementary protection provisions under the Migration Act give effect to Australia's *non-refoulement* obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**), the International Covenant on Civil and Political Rights (**ICCPR**), including its Second Optional Protocol and the Convention on the Rights of the Child (**CRC**).

RACS recommends that these provisions not be removed as proposed by the Bill.

The chief benefit of the current complementary protection scheme is the transparent, reviewable process which ensures all persons making an application for protection who are unable to meet the definition of a refugee will nevertheless have their claims assessed to determine whether they are at risk of suffering significant human rights violations if returned to their country of origin. The right to seek merits and judicial review of a negative decision on complementary grounds is an important procedural safeguard which accords with Australia's international obligations under the CAT, ICCPR and CRC. Prior to the introduction of complementary protection legislation, consideration of claims under the CAT, the ICCPR, and CRC took place solely at the discretion of the Minister under section 417 of the *Migration Act 1958 (Cth)* (the **Migration Act**), which grants the Minister discretionary powers to substitute a decision that is more favourable to the applicant. This legislative grant of discretion is a broad power which the Minister cannot be compelled to exercise and is not subject to any rights of review. In our view, this makes it unsuitable as a means of upholding Australia's obligations to protect applicants from serious human rights they may be subject to in their country of origin. The important nature of the rights sought to be protected by the existing complementary protection regime warrant a systematic process of assessment and review.

Prior to the introduction of complementary protection legislation, there was a high level of inefficiency in the consideration of Australia's *non-refoulement* obligations under the CAT, ICCPR and CRC. RACS' clients who wished to make submissions to have Australia's *non-refoulement* obligations under the CAT, ICCPR and CRC considered in relation to their cases were required to lodge a protection visa, continue to appeal that visa's refusal until they received an unsuccessful result at the RRT, and then write to the Minister under section 417 of the Migration Act. RACS was not always able to assist clients in relation to these requests, as the work was not funded under the IAAAS immigration assistance scheme. The previous system was entirely discretionary, largely unused by applicants, and allowed complementary protection claims to go unconsidered on a routine basis. Since the inclusion of complementary protection as part of the criteria for a protection visa, complementary protection is considered by every representative and every decision maker as a matter of course.

It could be said that the new system has costs in terms of the resources required to assess protection claims and review decisions against complementary protection. However, despite assertions to the contrary, it has not opened floodgates of dubious claims. In our experience, it has resulted in the claims being considered in a more efficient and accountable way. In our view, the scheme provides an efficient, effective and fairer

mechanism for dealing with those who do not qualify as refugees, but fear human rights violations if returned to their home country.

Allowing assessment of complementary protection claims not previously considered

Turning to the current issue before the Committee, RACS' position is that asylum seekers who were not previously assessed against complementary protection ought to have the right to have their claims assessed now that complementary protection is integrated into the eligibility for a protection visa. This position is based on two fundamental premises in Australian and international refugee law. Firstly, it recognises the right to make a claim for protection and secondly, to have that claim assessed under the current law, taking into account the facts and circumstances which exist at the time the application is considered.

The Full Federal Court[4] last year accepted that applications on the grounds of complementary protection obligations were not "further applications" to those made on the grounds of the Refugee Convention's protection obligations, and on that basis were not subject to the legislative bar which prevents further protection visa applications being valid. The Court also accepted that the purpose of the introduction of the bar to a further application for a protection visa only prevents further applications for a protection visa on the same basis as previously sought. The Court considered that the frequent references in the second reading speech to "repeat applications" strongly suggested that the purpose was to prevent an applicant from making a further application which duplicated an earlier application by that applicant, rather than to prevent an applicant from making another application for a protection visa based on a different criterion to an earlier unsuccessful application for a protection visa.

The Court also accepted that the introduction of a formal system of complementary protection in Australia was not an expansion of our international obligations but was a change in the manner in which Australia adhered to our existing *non-refoulement* obligations.

The situation as a result of the Court's decision, in our view, should remain because it provides important rights for applicants. Due process and a fair system of refugee status determination allows asylum seekers to have their claims assessed against the current criteria for a protection visa, which includes complementary protection grounds where they were not previously considered.

[4] *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71

3. Removal of review of security assessments

The Bill proposes to completely remove any merits review of security assessments of refugees by the Australian Security Intelligence Organisation (**ASIO**).

RACS holds a number of significant concerns in relation to this proposal.

We agree with the threefold concerns as identified by the Australian Human Rights Commission with respect to ASIO security assessments:

> *First, security assessment processes are subject to inadequate procedural safeguards, as refugees who have received adverse assessments are not told the reasons for ASIO's decision nor are they provided any substantive opportunity for appeal. Second, refugees with adverse security assessments are currently not considered for community placement but rather remain indefinitely detained in closed facilities. Many of these people have already spent prolonged periods in detention. Third, durable solutions are not being found for refugees who have received adverse security assessments.*[5]

In particular, we are concerned that the security assessment of refugees by ASIO has frequently involved the virtual elimination of procedural fairness and resulted in indefinite detention.

Our concerns about the changes proposed in the Bill are set out fully below.

The importance of retaining a discretion regarding national security

Generally where a discretionary power is removed, the risk is that there are unintended consequences which then cannot be remedied under either law or policy. It is our submission that the Minister ought to be able to exercise a decision-making power relating to

[5] The Human Rights Commission: Community arrangements for asylum seekers refugees and stateless persons, observations from visits conducted by the Australian Human Rights Commission from December 2011 to May 2012 accessible at:

http://www.humanrights.gov.au/publications/community-arrangements-asylum-seekers-refugees-and-stateless-persons-some-barriers-use#fn73

national security concerns rather than being required to refuse an application for a protection visa in the event of an adverse security assessment by ASIO.

Query a change to the use of ASIO resources / change to the order of when security is considered

Although a security assessment is not currently required prior to the grant of a visa, refugees who do undergo an ASIO security assessment must not be assessed as being directly or indirectly a risk to security. The consequence of being so assessed is that a person is then prevented from being granted a permanent visa to remain in Australia. The Australian Government's position has previously been that ASIO security assessments should be conducted only after an asylum seeker has been recognised as a refugee and this has been accepted as an effective way of managing the agency's resources with the demand for security assessments for boat arrivals[6].

We note that the Bill proposes to make it a binary criterion that ASIO either has or has not assessed the applicant to be directly or indirectly a risk to security, requiring a decision that the criterion is either met or is not met[7]. It is not clear whether any alteration is proposed to the order in which a security assessment would be undertaken on the proposed new criterion. However generally establishing a binary criterion to be met or not met is likely to require security assessments for those who would otherwise not be required to even undergo a security assessment, which under the current regime is not required in every case.

Lack of procedural safeguards, transparency or natural justice

Refugees who have received adverse security assessments are not required to be provided with the reasons for ASIO's decision and have very limited access to independent review mechanisms. For this reason, in the view of the Australian Human Rights Commission, security assessments conducted by ASIO are subject to inadequate procedural safeguards. We agree with the Australian Human Rights Commission's concerns in this regard and note it is particularly troubling given the magnitude of the consequences of an adverse

[6] "*In its 2009–10 Report to Parliament, ASIO highlighted the need to divert resources to undertaking security assessment of IMAs for DIAC. Prior to 2011, it was government policy that all IMAs be subject to the full ASIO investigative security assessment process. This proved difficult due to the complexity of the investigations and because of the numbers involved. In December 2010, the Government also decided that only those with refugee status would be referred to ASIO for the purpose of determining suitability — on national security grounds — to reside permanently in Australia*." 2010-2011 ASIO Report to Parliament, accessible at: http://www.asio.gov.au/img/files/Report-to-Parliament-2010-11.pdf

[7] As described in the Bills' Explanatory Memorandum.

assessment, namely, the deprivation of a person's liberty for an indefinite period of time and refusal of a protection visa.

When ASIO furnishes an adverse security assessment in respect of a person to a Commonwealth agency, the agency is ordinarily required by law to give the person a notice informing them that an assessment has been made and a copy of the assessment. However, this requirement does not extend to adverse security assessments regarding proposed actions taken under the Migration Act in relation to a person who is not an Australian citizen, the holder of a permanent visa or the holder of a special category visa. In practice, people in this situation are not provided with the reasons for their security assessments

Accordingly, refugees who are the subject of an adverse security assessment are not advised of the grounds upon which they have received their assessment, nor are they provided with the information necessary to challenge it. Provision of such information could prevent the identification of critical errors, such as errors concerning a person's identity or the bona fides of an informant. The absence of information or reasoning is not only very disempowering for an individual subject to indefinite detention on security concerns, it also undermines their capacity to challenge the basis for the finding in any meaningful way.

Professor Ben Saul notes that effective judicial review of adverse security assessments cannot be available without access to the information upon which the security assessment is based:

> "*Where detention pending removal is purportedly justified on security grounds, the requirement of substantive judicial review of the grounds of detention under art 9(4) necessarily requires a judicial inquiry into the information upon which the security assessment is based. Without access to such evidence, a court is not in a position to effectively review it.*"[8]

Refugees subject to an adverse security assessment have extremely limited opportunities to appeal the finding. Merits review through the Administrative Appeals Tribunal of security assessments in relation to proposed actions taken under the Migration Act is not available to people who are neither Australian citizens nor the holders of permanent or special category visas. This includes recognised refugees awaiting the grant of protection visas.

[8] See Ben Saul Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law *Melbourne Journal Of International Law2013,* accessible at: http://www.law.unimelb.edu.au/files/dmfile/03Saul1.pdf. page 36.

Further, substantive judicial review of adverse security assessments is effectively unavailable to refugees, even though the High Court of Australia has held that ASIO decisions are subject to judicial review. This is primarily because Australian courts cannot consider the merits of an adverse assessment but are limited to considering jurisdictional error.

The legal framework governing ASIO security assessments lacks transparency and contains inadequate procedural safeguards. As a result, a strong sense of injustice, confusion and frustration has been generated for those detained on the basis of adverse security assessments. The impact of this on refugees is particularly harsh, in our experience, given the past histories of trauma and abuse that exist in many cases, and the significant social and cultural barriers often faced by refugees in accessing legal assistance and information once in Australia. In this sense, in our experience and observation, those most adversely affected by ASIO's security assessments are also those exhibiting high levels of vulnerability. This enhances the importance of strong procedural safeguards and makes access to information and review imperative.

Indefinite detention following an adverse security finding

The Australian Human Rights Commission has raised significant concerns regarding the devastating effects of indefinite detention on refugees with adverse security assessments which were observed during their visits to detention centres.

> *"People spoke to the Commission of the acute distress they experienced as a result of their ongoing detention and expressed emotions ranging from acute anxiety to anger to despair. Many told Commission staff that their ability to eat, sleep or think clearly had been drastically compromised by their predicament. Thoughts of self-harm and suicide were common. Most people's distress was compounded by long periods of separation from their families, in some cases living in the Australian community, and in some cases remaining in their countries of origin or in situations of danger elsewhere."*

In order to avoid arbitrary and indefinite detention, RACS believes there must be an individual assessment of whether it is necessary, reasonable and proportionate to hold a person in detention. Moreover, if it is decided that a person must be detained, this should be in the least restrictive manner and detention should not continue beyond the period for which it is necessary. Under the Bill, once a person has received an adverse security assessment recommending that they not be granted a permanent visa, there does not appear to be any

further individualised assessment of whether that person is a risk to the Australian community and in particular whether they could be placed in less restrictive arrangements than closed detention. Rather, it seems to be assumed that because a person has received such an assessment, they necessarily pose a risk to the community which warrants continuing detention in closed facilities. This may not be the case and is not an appropriate assumption in our view. As the New Zealand Court of Appeal recognised in *Choudry v Attorney General*, it is 'obvious that all risks to national security do not call for equal treatment. It is also apparent that different risks can be identified and distinguished.[9]'

On 25 July 2013 the United Nations Human Rights Committee adopted conclusions finding that Australia's indefinite detention of 46 recognised refugees on security grounds amounted to cruel, inhuman and degrading treatment, inflicting serious psychological harm on them. The Committee members stated in their conclusions that:

> *"The combination of the arbitrary character of (their) detention, its protracted and / or indefinite duration, the refusal to provide information and procedural rights to (them) and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them".*

This was found to constitute treatment contrary to Articles 7 and 9 of the ICCPR. The Committee stated further that Australia is obliged under Article 2 of the ICCPR, to provide all 46 refugees with effective remedy, which includes releasing them under individually appropriate conditions, and offering them rehabilitation and appropriate compensation. The Committee also concluded that Australia is under an obligation to take steps to prevent similar violations in the future.

As at September 2013[10] forty seven refugees were being held indefinitely on the basis of adverse security assessments.

The creation in October 2012 of an Independent Reviewer of ASIO assessments somewhat improves the fairness of the process in that it allows the affected refugees to respond to an unclassified summary of ASIO's reasons for deeming them threats. All but one of the refugees involved in the process have given written responses. However this system remains deficient in key respects, including that the reviewer possesses only powers of recommendation and the new procedure remains insufficiently fair.

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[9] *Choudry v Attorney General* [1999] 2 NZLR 582, 595.
[10] Sydney Morning Herald "ASIO to review security findings against detainees" 10 September 2013 accessible at: http://www.smh.com.au/federal-politics/political-news/asio-to-review-security-findings-against-detainees-20130910-2tiak.html

Since establishing the system of review, ASIO has accepted recommendations that its assessment be overturned in the cases of two refugees and ASIO has released another two after its own reviews. The Independent Review has recommended in 10 cases that the ASIO assessment be maintained.

Given the relatively high percentage of altered ASIO decisions under this system of review, we submit that it is imperative that ASIO decisions are subject to a transparent review process by an external, independent and binding process which ensures that ASIO acts within the law.

To discuss the contents of this submission, please contact us on (02) 9114 1600.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

Tanya Jackson-Vaughan
Executive Director

Principal Solicitor

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SUMMARY OF RACS'S RECOMMENDATIONS:

Time of decision

1. Decision makers considering refugee status determination decisions should remain free to make the most correct and preferable decisions.

2. Decision makers should remain at liberty to revisit their decisions prior to those decisions being communicated externally.

3. This could include revisiting a decision based on new developments at law or new factual material specific to the case.

Bar on further protection visa applications

4. Complementary protection is a significant commitment to give effect to Australia's *non-refoulement* obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), including its Second Optional Protocol and the Convention on the Rights of the Child (CRC). RACS supports the continuation of this commitment.

5. Asylum seekers who were not previously assessed against complementary protection ought to have the right to have their claims assessed now that complementary protection has become part of the assessment for qualification for a protection visa.

6. Due process and a fair system of refugee status determination requires that asylum seekers have their claims assessed against the current criteria for a protection visa.

Removal of review of security assessments

7. Any person in Australia who has been refused a visa as a result of an adverse security assessment – including a person who is not an Australian citizen, the holder of a permanent visa or the holder of a special category visa – should be provided with material to enable them to be reasonably apprised of the information that ASIO has relied upon and the grounds for making the determination.

8. Merits review through the Administrative Appeals Tribunal should be extended to all people in Australia who have been refused a visa as a result of an adverse security assessment – including people who are not Australian citizens, the holders of a permanent visa or the holders of a special category visa. Review of adverse security assessments should be conducted by the Security Division of the Administrative Appeals Tribunal.

9. The Australian Government should explore options for providing for effective merits and judicial review of adverse security assessments. These should include opportunities for applicants with adverse assessments to know the basis of their

assessment and to make submissions on the content of that assessment, either directly or through an appropriate person such as a Special Advocate.

10. The Minister ought to retain a decision-making power relating to national security concerns rather than being mandated to refuse an application for a protection visa in the event of an adverse security assessment by ASIO.