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Submission to the Senate Legal and Constitutional Affairs Committee

Migration Amendment Bill 2013

Introduction

The Immigration Advice and Rights Centre ("IARC") is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. IARC provides free and independent immigration advice. IARC also produces *The Immigration Kit* (a practical guide for immigration advisers), client information sheets (including in relation to protection visa applications, Refugee Review Tribunal ("RRT") appeals and requests for Ministerial intervention) 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 victims.

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. We also have considerable experience with the administrative and review processes applicable to Australia's immigration law.

This submission will be limited to the amendments proposed in schedules 2 and 3 of the Bill.

Schedule 2 – Bar on further applications for protection visas

The proposed bar will have the effect of preventing the lodgement of an application for protection where the applicant who has been previously refused or cancelled, did not previously have recourse to the complementary protection provisions that came into law on 24 March 2012. If the proposal is accepted such an applicant will only have access to the Ministerial intervention process at which he/she can raise complementary protection claims – a process which is non-reviewable, discretionary without the current legislative process of review. In effect this would mean that an applicant would not:

- Be interviewed by a Department of Immigration and Border Protection ("DIBP") officer after lodgement of a protection application (not a legal requirement but a common practice of providing an interview)
- Be provided with reasons for refusal by a DIBP officer
- Be provided a hearing at review with the Refugee Review Tribunal ("RRT")

- Be provided with reasons for refusal by the RRT

It is our submission that this amendment is a retrograde step because the changes that were introduced with the implementation of complementary protection on 24 March 2012 were effectively a codification of the Complementary Protection process. This was a long needed reform as previously the system of Ministerial intervention pursuant to section 417 of the *Migration Act 1958 (Cth)* (the "Act") was arbitrary, inconsistent, not transparent and more of a lucky dip than a safety net. The Minister's non-reviewable and non-compellable powers pursuant to section 417 are important but are not a replacement for a codified process as currently exists.

The system is now more robust and thorough and in accordance with comparative jurisdictions.

IARC has also provided a submission to the Committee arguing against the abolition of Complementary Protection [1] and for the reasons set out in that submission, the schedule 2 amendments are not supported.

The number of cases is realistically a limited class as those who had their cases finally determined prior to 24 March 2012 never had an opportunity to have claims raising complementary protection issues assessed in a more thorough process. Also, it may be that because their complementary protection claims were not considered to be relevant for the purposes of the Refugee Convention, that they were not raised at either the primary or review levels.

The proposed system is not a safety net as it is neither reviewable nor compellable. The Ministerial intervention process under section 48B is not an appropriate mechanism for the presentation of complementary protection claims, which could not be previously assessed prior to 24 March 2012. It is more suited for cases where new or fresh claims arise. The Ministerial intervention process under section 417 does not provide a mechanism for testing claims through an interview, nor raising issues which would normally require a procedural fairness process be followed. This means that adverse recommendations are possible without being carefully checked and the possibility of the breach of Australia's non-refoulement obligations is increased.

Schedule 3 – Security assessments

In 2012, IARC submitted a response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012*. The submission strongly supported the main premise of the Bill which aimed to strengthen procedural fairness and transparency for asylum seekers who are the subject of an adverse security assessment by ASIO.

The proposed amendment ensures that there is no review for those protection applicants with an adverse ASIO finding. The lack of transparency and inability to seek review can result in indefinite detention and removal from Australia of asylum seekers who may have a well-founded fear of persecution. While IARC supports a system of robust security checks it does not support the lack of procedural fairness for those who are most vulnerable – namely asylum seekers.

Whilst it is recognised that there is a tension between the need to protect sources for security purposes and the need to provide procedural fairness, it is our submission that the amendments will overly favour the security assessment without any proper and independent checks being undertaken.

A possible consequence is the possibility of indefinite detention for people who have not been charged let alone convicted of any matter contrary to Australian law, without the reasons for the indefinite

[1] Submission to the Senate Legal and Constitutional Affairs Committee on Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

detention ever being disclosed to them. The consequences for an adverse security assessment are extremely serious. A system without proper review or procedural fairness can lead to mistakes and errors which may not be identified without proper independent review.

The presumption of liberty is an ancient right in our law and it should not be limited unless there are very serious reasons for doing so – reasons that have been carefully assessed and ideally independently reviewed. The Refugee Convention provides grounds for assessment of adverse character issues in articles 1F and 33(2). An adverse assessment against these articles leads rightly to merits review in the AAT. There is a limited process in the AAT for reviewing adverse security assessments and whilst not ideal from the applicant's perspective, it is vastly superior to the proposed amendments.

IARC's recommendation

IARC recommends the bill not be passed, for the reasons given above.