

**AMNESTY
INTERNATIONAL**



31 July 2014

Dr Sophie Dunstone
Secretary
Senate Legal and Constitutional Affairs
Legislation Committee
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Dear Dr Dunstone,

Migration Amendment (Protection and Other Measures) Bill 2014 [Provisions]

On behalf of Amnesty International Australia's 417,600 supporters, I write to highlight Amnesty International's significant concern regarding the proposed measures in the Migration Amendment (Protection and other Measures) Bill 2014 (the Bill). The Bill further erodes important protections for asylum seekers in Australia.

Amnesty International supports the [Fact Sheet](#) published by the Refugee Advice and Casework Service (RACS) which highlights broad concerns relating to the Bill.¹ While Amnesty International does not seek to provide an exhaustive analysis of the provisions of the Bill in this submission, the points below outline the organisation's key concerns relating to the proposed changes.

Schedule 1, Item 1

Proposed change to explicitly set out that it is the sole responsibility of an applicant for a protection visa to set out all the details of their claim and to provide demonstrable supporting evidence to support that claim.

Amnesty International holds that this proposed change does not take into account the full reality often faced by those seeking asylum in Australia. While the organisation would agree that the burden of proof to establish a claim for a protection visa lies with the claimant, it will not always be possible to do so without some assistance. This proposed change applies to Australia's obligation to provide protection to anyone under both the 1951 Convention on Refugees (Refugees Convention) as well as the obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT). Those fleeing persecution from conflict, or even the threat of female genital mutilation or other forms of torture, may not have the capacity to prove their likely threat explicitly.

This proposed measure would place Australia in direct opposition to the 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status' issued by the United Nations High Commissioner for Refugees (UNHCR), which outlines the international standards for the assessment of refugee protection claims. It states:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the

¹ RACS, Fact Sheet: The Migration Amendment (Protection and Other Measures) Bill 2014. Available at < <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-The-Migration-Amendment-Protection-and-Other-Measures-Bill-2014-25-June-2014.pdf> >

barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.²

Furthermore, in the context in which the government has removed the provision for free legal advice to asylum seekers who arrive by irregular means, the capacity for such individuals to prepare and defend their claims to the satisfaction of the government can be called into question. Amnesty International has serious concerns that should this change come into effect, Australia will be at risk of returning asylum seekers with legitimate claims for protection due to an inability to effectively complete the administrative requirements. This is entirely unacceptable and would constitute *refoulement* in breach of the Refugees Convention, the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

Schedule 1, Items 2-11

Proposed introduction of a new requirement that if no evidence of a person's identity is provided, or if bogus documents are provided and no reasonable explanation is provided as to why the person has no identity documents or why their documents are bogus, the application must be refused.

It is well established that there are a range of reasons why a person seeking asylum may not have this form of identity documents, or why they may have destroyed this documentation. As highlighted in the UNHCR Guidelines above, asylum seekers fleeing their country of origin may lose their possessions or be forced to use false documentation to cross the border, as carrying their original documents would identify them to the authorities persecuting them. Similarly, asylum seekers may be forced to use false identity documents to cross borders or board airplanes.

Asylum seekers may be advised by people smugglers to dispose of their documentation prior to coming to Australia. People smugglers may confiscate these documents as a form of insurance to prevent the asylum seeker acting as an informant against them, or to sell on for further profit. It has been reported that asylum seekers may be told that arriving without identity documents will aid their asylum claim.

Furthermore, many asylum seekers who arrive irregularly will arrive with birth certificates, drivers licences, school certificates, letters from local priests, photocopies of identity cards, or other documents, however they are officially classified as "undocumented" if they cannot produce state-issued photo identification upon arrival. The possession of documents does not dictate whether a person has a genuine claim to asylum. The Australian government has a legal obligation to assess people's refugee claims based on their need for protection.

Amnesty International welcomes the inclusion in the Bill of an acknowledgement that in some circumstances – such as for those who are 'Stateless' (without official nationality) exception should be made. However the organisation seeks clarification of where the Bill includes the caveat that should a person not carry documentation, they will not necessarily be rejected where they make 'reasonable steps' to seek adequate proof of identity. It is not clear to Amnesty International what would constitute 'reasonable steps' in this instance.

The Bill's Statement of Compatibility with Human Rights rightly highlights that in the case that a person has not satisfied the requirements of the proposed amendments to provide adequate identification, but who has been found to require protection – Australia's *non-refoulement* obligations still apply. Amnesty International has serious concerns that should the proposed change come into effect, people in this situation will be unable to be returned but will be denied a visa. This would result in indefinite detention.

² UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, para 196

Schedule 1, Item 11

Proposed removal of the grounds for a protection visa that a person is a member of the same family unit as a person who has already been found to be a refugee.

A major concern relating to this measure, as outlined in the Fact Sheet prepared by RACS is the practical reality that family members (spouse and/or children) of a protection visa recipient are highly likely to require protection from the same potential perpetrators as that of the applicant. To require them to undergo a separate process simply adds to the trauma of refugees who are kept from their family members – a connection which is of particular significance to those in the highly disruptive process of seeking and attaining asylum.³

The principle of family unity is a fundamental in international law.⁴ When facing persecution, families will adopt a range of protection strategies, some of which may lead to temporary separation. While the right to family unity is not found in the 1951 Refugee Convention itself, the 'essential right' to family unity was the subject of recommendations approved unanimously by the Conference of Plenipotentiaries that adopted the final text of the Convention.

Further, repeated UNHCR Executive Committee Conclusions have emphasised the importance of maintaining family unity. This has led to the acceptance of the principle of 'derivative status' under international law. Derivative status holds that once one member of a family is recognised as a refugee, the rest of the family members should also receive the same status.⁵ Crucially, this principle of derivative status operates only in favour of recognition, not in favour of rejection.⁶

Schedule 1, Item 15

Proposed introduction of a new obligation for asylum seekers to specify all particulars of a claim from the outset. Where new claims arise later, the RRT is to draw an adverse inference on credibility unless a reasonable explanation is provided.

There are a range of reasons why an applicant may not present the full gamut of their claims at the outset of the refugee status determination (RSD) process. These include significant trauma including leading to post traumatic stress disorder (PTSD); a fear of authority developed from persecution by authorities in their country of origin; inability to recognise all significant details from the outset. There have also been cases in which issues surrounding translation have resulted in a misrepresentation of a claim or key details of a person's claim being omitted from the initial reporting. This will result in apparent discrepancies between initial claims and that presented to the RRT. Furthermore, Amnesty International holds that such a change would impact significantly on survivors of sexual and gender based violence. It has been shown that survivors of sexual and gender based will be reticent to outline in detail the nature of the abuse they have suffered until a trusting relationship has developed with an interviewer. For any of these these reasons, it is clearly unacceptable that should a person fail to provide all details at the first opportunity, their claim will inevitably be rejected. Such a practice could and would lead to the return of those with legitimate protection needs.

³ RACS, Fact Sheet: The Migration Amendment (Protection and Other Measures) Bill 2014, p. 2

⁴ The Universal Declaration of Human Rights, 1948, article 16(3), International Covenant on Civil and Political Rights, 1966, article 23(1), and American Convention on Human Rights, 1969, article 17(1) each state that 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. European Social Charter, 1961, article 16, 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life' African Charter on Human and Peoples' Rights, 1981, article 18(1) 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.'

⁵ See, for instance, Executive Committee Conclusions No. 88 (L) 1999 (b)(iii) and No. 47 (XXXXVIII) 1987 (h); UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 5.

⁶ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 185.

Amnesty International notes that the 'Statement of Compliance with Human Rights' does state that an applicant can provide further evidence at a later point as long as 'reasonable explanation' is given for why it wasn't presented from the outset. However once again there is no clarity about what would constitute a 'reasonable' explanation in this instance and who is responsible for deeming whether an explanation meets those criteria.⁷

Schedule 2

Proposed change to the test for complementary protection to whether or not the Minister considers significant harm "more likely than not" (greater than 50%) rather than the current "real chance" level.

'Complementary protection' relates to the system for compliance with Australia's *non-refoulement* obligation under international treaties outside of the 1951 Refugee Convention. These obligations arise under a number of treaties including the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). Therefore it refers to the protection Australia offers to those who may require protection from very serious forms of harm such as torture, female genital mutilation, or honour killings. This proposed change would mean that only those who face a risk of harm which the Minister deems is above 50% will be offered protection. This will inevitably result in people who face a 'real risk' of harm (the current test and the level at which Refugees Convention claims are tested) will be returned to their country of origin. Any such change to the test which results in a person suffering further harm constitutes a clear breach of Australia's *non-refoulement* obligations.

The government, in the Bill's Statement of Compatibility with Human Rights, acknowledges that its determination regarding Australia's *non-refoulement* obligations under CAT and ICCPR should be 50% or higher risk is contentious in regards to international opinion.⁸ Amnesty International holds that Australia's fundamental obligation of *non-refoulement* must be equally applied under all international instruments to which Australia is a party.

Schedule 4

Proposed requirement that guidance decisions for the RRT must be followed by all members unless the case is clearly distinguishable.

Amnesty International has significant concerns that this proposed change calls into question the independence of the Refugee Review Tribunal (RRT). The independence of the RRT is a pivotal element of the robust system of review in the RSD process. Amnesty International has concerns with any attempt by the government to intervene in the independent process and apply rules and parameters around what the Tribunal can consider.

Amnesty International strongly opposes the passage of this Bill into law and calls on the Committee to recommend that the Bill not be passed. Amnesty International would be pleased to expand on this submission in a public hearing.

Yours sincerely,

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National Director

⁷ Statement of Compatibility with Human Rights, Migration Amendment (Protection and Other measures) Bill 2014, p. 5

⁸ Statement of Compatibility with Human Rights, Migration Amendment (Protection and Other measures) Bill 2014, p. 8