unicef australia

Dr Sophie Dunstone
Secretary
Senate Legal and Constitutional Affairs
Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dunstone

Migration Amendment (Protection and Other Measures) Bill 2014

I thank you for the opportunity to contribute to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014 (the Bill).

As you may be aware UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF Australia is the national committee for UNICEF in Australia and has a dual mandate of raising funds to advance the rights of all children and advocating for the rights of all children by improving public and government support for child rights and international development.

UNICEF Australia has a number of concerns about the compatibility of the Bill with the rights of the child as articulated by the *Convention on the Rights of the Child* (CRC) and other international human rights instruments.

Evidentiary requirements

The Bill makes it the responsibility of asylum seekers who are claiming that Australia owes them protection obligations to "specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim".

It also clarifies in section 5AAA(4) that the Minister "does not have any responsibility or obligation" to "establish, or assist in establishing, the claim" or "specify, or assist in specifying, any particulars of the non-citizen's claim".

This same level of responsibility is imposed on applicants under the complementary protection provisions in section 36(2)(aa) and those alleging protection on Refugee Convention grounds under section 36(2)(a).

UNICEF Australia has serious concerns that these changes may deny children their rights as contained in Article 22(1) of the CRC, which provides that appropriate measures should be taken to ensure that a child who is seeking refugee protection, whether accompanied or unaccompanied, receive appropriate protection and humanitarian assistance.

Australian Committee for UNICEF Limited
Level 4, 280 Pitt Street, Sydney NSW 2000 | Level 27, 101 Collins St, Melbourne VIC 3000
P +61 2 9261 2811 **F** +61 2 9261 2844 **E** unicef@unicef.org.au **www.unicef.org.au**
PO Box 488, Queen Victoria Building, NSW 1230 | ABN 35 060 581 437
Donation Hotline: 1300 884 233

Many children making an application for asylum are from a non-English speaking background and they are likely to have difficulty articulating their claims. Children seeking asylum have also often had recent and continuing experiences of profound stress which may prevent them from providing every relevant detail when making an initial claim. Without adequate support, an applicant is unlikely to be able to specify all the particulars and evidence such that the decision maker need lend no assistance whatsoever.

The amendment to the Act does not provide for any allowances to be made for children. UNICEF Australia has not seen evidence to suggest that the support services currently offered are sufficient to enable children to clearly articulate their claims. The Government has indicated that it would provide a small amount of additional support to applicants who are considered "vulnerable", including unaccompanied minors. However UNICEF Australia considers that the requirements to specify all particulars and produce sufficient evidence will create an unnecessary and unacceptable risk that the rights of children will not be adequately assessed and protected.

We harbor similar concerns about the potential effect of section 423A which obliges the Refugee Review Tribunal to draw an inference unfavourable to the credibility of a claim or evidence if, without a reasonable explanation, it was not raised or presented in the application before the primary decision was made.

Evidence may not be presented at first instance simply because applicants, particularly children, do not fully understand the process or the significance of the evidence. It is unclear whether a lack of understanding would be regarded as a reasonable explanation for not presenting claims or evidence at the earliest opportunity.

Family reunion

Currently, there is no restriction on the time when an applicant of the same family unit of a person holding a Protection Visa (PV), can apply for a PV.

The new section 91WB applies to a "non-citizen" in Australia (family applicant) who applies for a PV and who is a member of the same family unit of another person who has been granted a PV (family visa holder). The proposed amendment would operate to reduce the ability for families to access protection under temporary PV, in that applicants seeking a PV on the basis that a family member is entitled to a PV must make that application prior to the family member being granted a PV. The consequence of this amendment is that the applicants must go through the Offshore Humanitarian Program to be reunified.

Australia has an obligation under Article 9(1) to ensure that a child is not separated from their parents against their will (unless necessary for best interests of child). Australia also has obligations of tracing and re-establishing contact for a separated child under Articles 22(2), 9(3) and 10(2)).

The Government argues in its Statement of Compatibility that "there is no right to family reunification under international law." However, there are several Articles under the CRC which establish that children should not be separated from their family against their will (Article 9) and have a right to preserve his or her family relations (Article 8). Most importantly, Article 10 obliges the Government to deal with applications for family reunifications in a positive, humane and expeditious manner.

The result of this amendment would be that families may be permanently separated or would experience greater periods of time separated. The Government indicted in its Statement of Compatibility that where a

PV holder in Australia is separated from family who is outside Australia, they may apply for family reunification under the offshore Humanitarian Programme.

The Humanitarian Programme is subject to significant restrictions. To be eligible for reunification through this program, the family member in Australia must have a permanent humanitarian visa and not have arrived in Australia as an Illegal Maritime Arrival on or after 13 August 2012. Further, this Programme does not apply to families who are separated within Australia, such as where family members have arrived at different times and are split between various immigration detention centres.

We also note that the Government announced on 9 January 2014 that "*Family stream visa applications sponsored by permanent visa holders who arrived in Australia as illegal maritime arrivals (IMAs) will now be given the lowest processing priority. This means their applications will not be processed for several years.*"

Complementary protection

The current section 36(2)(aa), which allows for complementary protection, provides that the Minister could be satisfied that Australia had protection obligations if he or she "*has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm*". This is in line with Australia's non-refoulement obligations under the CRC, the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*.

The Bill amends this section to provide that the Minister can now only be satisfied that Australia owes protection obligations if he or she "*considers that it is* more likely than not *that the non-citizen will suffer significant harm if they are removed from Australia*".

In the Second Reading Speech, Minister for Immigration and Border Protection Morrison stated: "'More likely than not' means that there would be a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to." (Hansard 25 June 2014 p. 9). The purpose of these amendments is to raise the threshold above the "*real chance*" of significant harm standard adopted in recent judicial decisions.

The amended standard is insufficient to ensure that Australia's non-refoulement obligations are met (the Castan Centre's submission provides a detailed explanation as to why this is the case). The standard may also be in breach of Article 3 of the CRC which provides that the best interest of the child should be a primary consideration in all actions concerning children. It is hard to see how such a high threshold is compatible with decision making regarding the best interests of the child.

It is for these reasons that UNICEF Australia recommends that the Bill not proceed.

We would welcome the opportunity to expand upon this correspondence were it to assist the Committee.

Yours Sincerely

Norman Gillespie
Chief Executive
UNICEF Australia