



Submission on the *Migration Amendment*
(*Protection and Other Measures*) Bill 2014

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About the Human Rights Law Centre

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1. Executive Summary

1. The Legal and Constitutional Affairs Legislation Committee (**Committee**) has asked for submissions in relation to its inquiry into *the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) (Bill)*.
2. Among other things, the Bill seeks to:
 - (a) increase the risk threshold asylum seekers have to meet before being eligible for Australia's protection under several human rights treaties;
 - (b) require protection visas to be denied to asylum seekers who have refused or failed to establish their identity, nationality or citizenship or provided 'bogus' identity documents; and
 - (c) impose a legal burden of proof on asylum seekers to demonstrate that they require Australia's protection.
3. Collectively, these reforms would significantly increase the risk of Australia breaching international law and returning asylum seekers to harm.
4. Of particular concern is the proposal to raise the threshold for Australia's protection under several human rights treaties to "more likely than not", or a greater than 50 per cent chance. Under the proposed changes a person assessed by the Australian Government as facing a 50 per cent risk of death or torture could nevertheless be returned.
5. Australia's current asylum seeker policies impose considerable hardship on anyone arriving by boat. The Government maintains that harsh measures are necessary to stop deaths at sea. If the Government is truly concerned at the prospect of asylum seekers dying, it ought to abandon reforms which could see them returned to a 50/50 chance of death.

2. Recommendations

6. The HRLC recommends that:
 - (a) the proposed section 6A be removed from the Bill and the existing threshold for complementary protection be retained;
 - (b) the proposed new sections 91W and 91WA (requiring visas to be denied to asylum seekers who have failed to establish their identity, nationality or citizenship or provided 'bogus' documents) be removed from the Bill; and
 - (c) the proposed new section 5AAA (imposing a legal burden of proof on asylum seeker to prove their claims) be removed from the Bill.

3. Changing the test for complementary protection

7. Australia has absolute and non-derogable obligations under various international human rights laws to not return people to territories where they would be at risk of serious human rights violations.
8. In addition to the *Refugee Convention*, these *non-refoulement* obligations arise from the following international treaties:
 - (a) the International Covenant on Civil and Political Rights (**ICCPR**)¹;
 - (b) the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (**Optional Protocol on the Abolition of the Death Penalty**)²;
 - (c) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)³; and
 - (d) the Convention on the Rights of the Child (**CRC**)⁴.
9. Protection granted under these other treaties is known as ‘complementary protection’. The *Refugee Convention* covers people facing persecution because of their race, religion, nationality, political opinion, or membership of a particular social group. Complementary protection covers people fleeing similar dangers but for different reasons – people fleeing civil war, honour killings, domestic violence, revenge attacks or blood feuds, for instance.
10. The Bill’s proposed new section 6A would dramatically raise the threshold for complementary protection.
11. A person is currently eligible for complementary protection from Australia if there is a “real risk” they’ll face significant harm on return. Australian courts have roughly equated the “real risk” test with the “real chance” test applicable under the *Refugee Convention*. Although it is difficult to translate such qualitative concepts into precise percentages, Australian courts have said the current threshold may be met when the probability of harm is well below 50 per cent.

¹ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976).

² *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 29 ILM 1464 (entered into force 11 July 1991).

³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

12. As former High Court Justice Michael McHugh has explained:

[A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. ... an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be ... persecuted.⁵

13. The proposed reforms would increase the risk threshold an asylum seeker is required to meet to “more likely than not”, that is, a probability of greater than 50 per cent.
14. Consequently, the *Migration Act* would afford different levels of legal protection to people facing similar risks of harm but for different reasons, such that a person facing a 50 per cent risk of serious harm for a reason not covered by the *Refugee Convention* could be returned.
15. For example, the reforms would potentially see a woman 50 per cent likely to be the victim of an honour killing forced to return to her country of origin and take her chances. Someone at the centre of a blood feud, assessed as being 50 per cent likely to be killed on return, could also be sent back.
16. Unsurprisingly, returning people to such a high risk of serious harm would breach international law, which requires only a ‘real risk’ of harm.⁶

Recommendation 1: The proposed section 6A be removed from the Bill and the existing threshold for complementary protection be retained.

4. Proof of identity, nationality and citizenship

17. The proposed reforms would also require the rejection of a protection visa application if an asylum seeker fails to provide evidence of identity and citizenship or provides ‘bogus documents’.
18. Specifically, amended section 91W and new section 91WA would require the Minister to refuse to grant a protection visa to any applicant who:
- (a) refused or failed to provide evidence of identity, nationality or citizenship when requested to do so;
 - (b) provided a ‘bogus document’ in response to such a request or provided bogus documents for the purposes of their application; or

⁵ *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429.

⁶ The HRLC recommends and endorses the detailed explanation of the relevant international jurisprudence in paragraphs 43-73 of Submission 6 to this inquiry, prepared by the Andrew and Renata Kaldor Centre for International Refugee Law.

- (c) destroyed or disposed of documentary evidence of identity, nationality, or citizenship, or caused such evidence to be destroyed or disposed of,
- unless the Minister was personally satisfied that the person had a reasonable explanation.
19. Establishing identity is a legitimate and important part of refugee processing. However, the law as it stands already provides for consequences where a person does not engage with this part of the process in good faith. Section 91W of the *Migration Act* already empowers an officer to request an applicant to provide identity documents and confers a power to draw “any unfavourable inference” if the person fails to comply with that request.
20. Removing this discretion to draw adverse inferences and replacing it with a duty to refuse a protection visa is arbitrary, unnecessary and overlooks the nature of flight from persecution.
21. Refugees often can’t ask the regimes from which they’re fleeing for help getting all their paperwork in order. Sometimes they require and obtain fake documentation to escape.
22. As the UNHCR recognises in its *Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook)*, “in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.”⁷
23. So when someone does flee without documents or with fake ones which they then discard, they shouldn’t automatically be viewed with suspicion. They may simply be the victims of circumstance.
24. It is for precisely these reasons that Article 31 of the *Refugee Convention* prohibits states from penalising refugees just because they arrive “without authorisation”.
25. It is thus both unfair and unlawful to deny a refugee protection just because they arrive without particular documents or with fake ones. Australia’s non-refoulement obligations are not extinguished simply because a person in need of protection comes without the requisite paperwork.
26. Although the Minister will retain the personal, non-reviewable and non-compellable power under the *Migration Act* to intervene and grant a visa so someone who would otherwise be refused by virtue of these amendments, protection entirely dependent on one member of the Executive’s personal, non-compellable and non-reviewable discretion is an insufficient safeguard. Effective and robust protection, not ministerial discretion, is vital where fundamental human rights are at stake.

⁷ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 197, available at <http://www.unhcr.org/3d58e13b4.html>.

Recommendation 2: The proposed new sections 91W and 91WA be removed from the Bill.

5. Proof of need for protection

27. The Bill would insert a new section 5AAA into the *Migration Act* requiring asylum seekers claiming Australia's protection to 'specify all particulars of his or her claim' and 'provide sufficient evidence to establish the claim'.

28. In effect, asylum seekers would bear a legal burden to prove their need for Australia's protection.

29. Strict legal burdens of proof have been widely recognised as unfair and inappropriate to the assessment of refugee claims because asylum seekers are often in a position of special vulnerability. As the UNHCR Handbook reminds states:

...an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.⁸

Often ... 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.⁹

30. For these reasons, refugee assessment processes tend to be more inquisitorial in nature. The objective is correctly identifying whether a person is in need of protection, not withholding that protection unless they strictly prove a legal entitlement to it:

...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.¹⁰

⁸ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 190, available at <http://www.unhcr.org/3d58e13b4.html>.

⁹ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 196, available at <http://www.unhcr.org/3d58e13b4.html>.

¹⁰ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 196, available at <http://www.unhcr.org/3d58e13b4.html>.

31. Against the UNHCR's recommended best practice, the proposed reforms would impose a strict legal burden on asylum seekers to prove their claims. That will be a very difficult burden for many asylum seekers to discharge, particularly for:
- (a) applicants who have suffered significant torture and trauma and may be in poor mental health;
 - (b) unaccompanied children; and
 - (c) people who have claims based on harm or risks of harm in the private sphere, such as women fleeing honour killings or serious domestic violence, in respect of which it can be especially difficult to obtain documentary evidence.¹¹
32. As the UNHCR Handbook identifies, "it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized"¹²
33. The proposed reforms effectively require of asylum seekers what the UNHCR considers to be "hardly possible".
34. The risk created is that refugees with legitimate claims will nevertheless fail to prove them to the required standard and be wrongfully returned to harm.
35. These risks are exacerbated by the recent withdrawal of IAAAS funding support for asylum seekers arriving by boat, a measure which will see many people already at a disadvantage go through a legal process with profound consequences for their future without the benefit of legal assistance.

Recommendation 3: The proposed new section 5AAA be removed from the Bill.

6. Conclusion

36. We thank the Committee for the opportunity to raise our concerns.
37. We reiterate that collectively these proposed reforms create grave risks that Australia will return people to serious harm, in breach of international law.
38. We would welcome the opportunity to speak to this submission should that be of assistance.

¹¹ Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 23 – 26 June 2014; Legislative Instruments received 7 - 20 June 2014*, at 1.246.

¹² ¹² United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 203, available at <http://www.unhcr.org/3d58e13b4.html>.