Refugee Council of Australia

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

RESPONSE TO THE *MIGRATION AMENDMENT (PROTECTION AND OTHER MEASURES) BILL 2014*

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 190 organisations and almost 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Legal and Constitutional Affairs Committee's inquiry into the *Migration Amendment (Protection and Other Measures) Bill 2014*. RCOA is troubled by the changes proposed in this Bill, notably the imposition of a higher burden of proof placed solely on asylum seekers; the refusal of protection visas if fraudulent documents are supplied; the limitations imposed on family reunion; the facilitation of temporary protection as the only visa option; the changes to the threshold for complementary protection and the enabling of the dismissal of applications for failure to appear and other changes to Refugee Review Tribunal procedure.

While not exhaustive, RCOA's submission outlines our concerns and recommendations under each of the four schedules of the Bill:

- Schedule 1 — Protection Visas
- Schedule 2 — Amendments relating to Australia's protection obligations under certain international instruments
- Schedule 3 — "Unauthorised maritime arrivals" and transitory provisions
- Schedule 4 — Migration Review Tribunal and Refugee Review Tribunal
- As well as other concerns about this Bill

1. Schedule 1 — Protection Visas: Burden of proof changes

An inquisitorial versus adversarial determination process

1.1. The Bill's introduction of section 5AAA to the *Migration Act* seeks to place the onus or burden of proof on asylum seekers, no matter their mode of arrival, to specify the particulars of their protection claims and provide sufficient evidence. Currently, the Refugee Status Determination (RSD) processes are understood to be inquisitorial rather than judicial in nature. In this context, there is no legal burden of proof on either party.[1]

1.2. Importantly, the High Court's observations in *FTZK v Minister for Immigration and Border Protection & Anor* [2014] HCA 26 provide relevant explanations in relation to domestic law concepts of burden of proof and standard of proof, noting that these cannot be equated with the critical task of interpreting international treaty terms. As a result, if enacted, this provision

[1] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1.

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The Refugee Council of Australia represents non-government organisations and individuals working with and for refugees in Australia and around the world

could alter the legal approach to determining protection claims in a way that may not align with Australia's obligations under international law.

1.3. The proposed change would be applied inappropriately to the context of the Refugee Review Tribunal (RRT) as well as to all administrative processes under the *Migration Act* and the associated regulations. RCOA finds this consequence highly problematic, as more adversarial procedures would work against the principles of natural justice and a comprehensive, quality RSD process.

1.4. RCOA calls for the continuance of an inquisitorial rather than an adversarial process for RSD decision reviews. Such a process is maintained in the *Migration Act*, which requires an informal process. There has been no evidence put forward for a move towards an adversarial process and such a move would be a fundamental shift in the merits review system. RCOA emphasises the imbalance and unfairness such a move would create, especially without adequate legal representation.

1.5. RCOA believes that the use of an inquisitorial tribunal for cases concerning refugee applications are most suited to ensure Australia meets its non-*refoulement* obligations. An inquisitorial process ensures that decision-makers and Tribunal Members can investigate further country of origin information and gain a broader understanding of the circumstances that an asylum seeker may be fleeing from. This is especially important with regard to the limited country of origin profiles currently provided to the Tribunal.

1.6. Professor Ben Saul points out that "decision-makers should be aware that closed or interrogative questioning significantly increases the likelihood of errors and inconsistencies, while conversely open questioning may improve the coherence of narratives."[2]

1.7. As the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* requires, a decision-maker must "ensure that the applicant presents his case as fully as possible and with all available evidence."[3] The nature of the RRT, which can investigate further information and is not bound by the rules of evidence, supports this end.

1.8. If an adversarial process were to be adopted, the issue of legal representation would be of an even greater importance, as the ability for asylum seekers to adequately present their cases would be limited. Applicants would not have adequate experience to rebut evidence, understand the rules of the Tribunal and effectively argue their case without experienced legal representation. Given the changes to the provision of funded immigration advice and assistance, an adversarial process without legal representation would be unfair and contestable at judicial review.

1.9. The move to an adversarial system of RSD, including merits review, would be a fundamental retooling of administrative law, and RCOA believes that such a move would be a step backwards for Australia's Refugee Status Determination and merit review systems.

1.10. RCOA is also deeply troubled by the Government's attempt to create a system whereby asylum seekers are viewed as antagonistic, with the determination of their protection claims framed as "asylum seeker vs. Australia". The proposed amendments related to RSD and protection visas seem built on the presumption that it is not in Australia's interests to grant protection to refugees. That is, the granting of protection would somehow represent a "defeat" for Australia.

1.11. RCOA is concerned that the shift in the burden of proof assumes against the protection needs of an applicant: a high-quality RSD process does not start with assumptions of a case either way. An assessment of a case on its merits underpins a robust and high-quality Refugee Status Determination system.

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[2] Ben Saul, submission to The Tribunal's Draft Guidance on the Assessment of Credibility http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/RRTCredibilityAssessment_Submission.pdf

[3] Office of the United Nations High Commissioner for Refugees 1992, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees", http://immi.se/asyl/handbook.htm.

Undue burden on people seeking protection

1.12. If enacted, this shift in the burden of proof would disadvantage asylum seekers, particularly those most vulnerable. This provision seeks to clarify that the Minister for Immigration – and all those people acting on his or her behalf – are not obliged to provide legal or migration advice and assistance or other forms of necessary support that people will need when making a claim for asylum. Without appropriate advice and support, asylum seekers could be expected to navigate the complex RSD processes without being given information about the law that applies to their claims and with no assistance to present their claim, including the provision of interpreters and translated documents.

1.13. The ability of protection applicants to gain access to the documentation and evidence that may be required would also be difficult and even impossible without appropriate advice, support and representation. In fact, the act of seeking documentation and information from countries of origin could potentially place applicants or their families in dangerous situations.

1.14. The shift in the burden of proof and related lack of support structures for people seeking protection also has the potential to complicate and expose the work of the Department of Immigration: if Departmental decision-makers are required to make a decision without access to complete information or in circumstances where the applicant is not fully informed as to his or her legal rights and responsibilities, this may result in delays and the need for internal (or even external) investigations. The Department may be exposed to litigation or judicial review of decisions.

1.15. The Explanatory Memorandum of this Bill explains the purpose of changes to the Refugee Status Determination (RSD) process as necessary to "contribute to the integrity and improve the efficiency of the onshore protection status determination process". RCOA argues that these proposed changes would actually contribute to the lessening of quality and robustness of Australia's RSD process. Furthermore, the most significant issue currently for Australia's RSD process is that the assessment of protection applications has been frozen and stymied by successive governments. Thousands of people in Australia – both in detention and in the community – have been awaiting either the finalisation of a protection application made years ago or have not been able to even make an application for a Protection visa.

1.16. A simple way to improve the efficiency of the RSD process would be to actually assess the claims of people seeking protection and provide people with access to timely and appropriate immigration advice and assistance.

Recommendation 1: RCOA recommends that the Committee reject section 5AAA, which would shift the burden of proof onto the protection applicant without providing legal assistance and support to make a claim.

2. Schedule 1 — Protection Visas: Credibility at review

2.1. While the new section 5AAA places the responsibility to provide and substantiate claims on an asylum seeker, the new section 423A is directed at encouraging asylum seekers to provide all claims and supporting evidence as soon as possible. As detailed in the Explanatory Memorandum, the new section 423A requires the RRT "to draw an inference unfavourable to the credibility of new claims or evidence provided to the RRT, where the applicant does not have a reasonable explanation to justify why the claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application".

2.2. This proposed change is problematic for several reasons. This type of directive hinders both the independence and discretion of the RRT and consequently, procedural fairness and rule of law principles. This lack of flexibility afforded to the RRT and the consequent impact on the credibility of asylum seekers also fails to recognise the personal and lived experiences of seeking protection from persecution.

2.3. RCOA stresses that these amendments are simply unnecessary. The RRT already assesses credibility and would draw an unfavourable inference if someone presented new evidence without a reasonable explanation. Introducing unnecessary amendments which interfere with

the RRT's independence, and which send the message that providing new evidence equates to a lack of credibility, is burdensome and unwarranted. The message also fails to acknowledge the realities of the refugee experience and is therefore likely to do more harm than good.

2.4. This provision also does not recognise the reasons why someone may not disclose evidence or information in the early stages of his or her application. There is considerable evidence both in Australian refugee cases and internationally that documents that survivors of torture, sexual violence and other traumas of conflict and persecution find it difficult to disclose their experiences when seeking protection.[4]

2.5. The Bill in its current form does not provide adequate explanation about what would form a "reasonable explanation" in order for the RRT Tribunal Member to not draw an unfavourable assessment of a person's credibility. Again, this provision is not only unnecessary to enhance the robustness of the RSD process but actually would contribute to the creation of an inferior and inadequate merit review system.

Recommendation 2: RCOA recommends that the Committee reject section 423A related to the Refugee Review Tribunal guidance on credibility.

3. Schedule 1 — Protection Visas: Identity documents

3.1. In the Explanatory Memorandum, the amended section 91W and new section 91WA relating to the provision of documentary evidence of identity, nationality or citizenship for the purposes of a protection visa application are presented as "integrity measures". RCOA rejects this interpretation and asserts that these measures actually undermine the integrity of Australia's Refugee Status Determination system.

3.2. Amendments in this section introduce the definition of a "bogus document". A "bogus document" is one the Minister reasonably suspects "(a) purports to have been, but was not, issued in respect of the person; or (b) is counterfeit or has been altered by a person who does not have authority to do so; or (c) was obtained because of a false or misleading statement, whether or not made knowingly". The definition of "bogus document" inserted by the Bill, identical to the definition provided under section 97 of the *Migration Act*, does not require there to be proof that the document is false, only that the Minister "reasonably suspects" it to be false. Additionally, a "bogus" document itself can be valid but obtained by a false or misleading statement, "whether or not made knowingly".

3.3. These provisions completely disregard the lived experience of people fleeing persecution. There are many legitimate reasons why asylum seekers do not have correct documentation. These reasons have been documented in literature[5] and also are reflected in feedback that RCOA has received from its members. The reasons why asylum seekers and refugees often do not have documentation or must use false documents to flee their home country include:

- Their home government refusing to issue documentation to persecuted groups;
- There being no effective government to provide such documents;
- The person having no government from which to request documents (that is, being stateless);
- The person being too afraid of government authorities to request documentation;
- The person being too afraid to identify themselves correctly when obtaining documentation;
- The person having no time to obtain identity documents before fleeing persecution;
- People smugglers confiscating their documents or requiring them to destroy their documents in order to protect the smuggling network.

3.4. Former refugees in Australia – whether they have come to Australia through the resettlement program, the split family provisions in the Humanitarian Program or have applied for protection onshore – all detail the difficulties that people forced from their homes face when trying to seek

[4] See for instance, Bögner, Herlihy & Brewin 2007, "Impact of sexual violence on disclosure during Home Office interviews", *British Journal of Psychiatry*, available at http://bjp.rcpsych.org/content/191/1/75.full
[5] Goodwin-Gill, G and McAdam, J 2007, *The Refugee in International Law*, Oxford University Press, 3rd ed: 384.

protection. In many cases, the use of their government-issued identity documents when trying to escape would actually put their lives in danger, especially if their government is responsible for their persecution.

3.5. The proposed provisions in the Bill actually have the potential to encourage fraud, as the United Nations High Commissioner for Refugees (UNHCR) has found that "unreasonably high expectations of applicants to submit documentary evidence may unwittingly encourage applicants to submit documentary evidence, including false documents, in support of all asserted material facts at all costs".[6]

3.6. Indeed, there is no legal or logical link between the falsity of documentation and the falsity of a claim. As the current Guidance on Credibility by the [Australian] Refugee Review Tribunal correctly states, "the use of false documents does not necessarily mean that an applicant's claims are untrue".[7]

3.7. For example, an applicant could destroy or dispose of false documents provided by a people smuggler for the purpose of transit but still be able to prove his or her identity through other evidence or, indeed, through obtaining genuine documents. Nevertheless, these provisions would require the person to be refused protection, even if the decision-maker is satisfied of the person's identity and need for protection.

3.8. As a result, these provisions could put Australia at risk of breaching its obligations not to return people to persecution or other significant harm.

3.9. RCOA finds, like the previous amendments, that these amendments are unnecessary. Under current policies, the provision of false documents without a reasonable explanation would undermine a person's credibility, and the Minister already has options in place to deal with this scenario. Introducing amendments which send a message that in all circumstances asylum seekers who have false documents are not trustworthy will undermine accurate decision-making.

3.10. Amendments in this Bill – section 91W – also seek to remove the flexibility of the Minister related to the granting of a Protection visa. Under current law, the Minister may draw an adverse inference about a person's credibility if the asylum seeker "refuses or fails to comply" with a request to provide documents relating to his/her identity, nationality or citizenship. This Bill's amendments would change the "adverse inference" option to one of a requirement of mandatory refusal of a Protection visa if an asylum seeker refuses or fails to comply with requests for identity documents and extends the refusal requirements to cases where an asylum seeker provides "bogus documents" relating to their identity, nationality or citizenship. This provision is also extended to cases where an asylum seeker does not provide the "bogus documents" but "causes" the documents to be provided.

3.11. The Bill also inserts section 91WA, which requires the Minister to refuse a Protection visa even where no request is made and requires the Minister to refuse a Protection visa in circumstances where a person destroys or disposes of their identity, nationality or citizenship documents, or causes them to be destroyed or disposed of. So even if a person is found to be in need of protection, under these provisions, that person would be denied a Protection visa. The implications for this are troubling and raise several questions that require an explanation: would people be held in closed detention even after being found to be refugees and having committed no crime? What will be the resolution for people found to be owed protection but refused a visa because of this provision relating to documents? Will people be warned that they may be refused a Protection visa – even if found to be owed protection -- if they disposed of their identity documents before their arrival in Australia?

3.12. The Bill also seeks to change the settings for an exemption to the refusal only if "the Minister is satisfied" that the applicant has a reasonable explanation and the asylum seeker produces, or takes reasonable steps to produce, documentary evidence of his or her identity. RCOA finds this provision unsatisfactory, as the question is not whether the explanation is objectively

[6] UNHCR and European Refugee Fund of the European Commission 2013, Beyond Proof: Credibility Assessment in EU Asylum Systems, http://www.unhcr.org/51a8a08a9.html

[7] Refugee Review Tribunal 2012, *Guidance on the Assessment of Credibility*, http://www.mrt-rrt.gov.au/Files/HTML/GuidanceOnVulnerablePersons-GU-CD.html

reasonable, but whether the Minister is satisfied the explanation is reasonable. This limits the grounds on which the Minister's decision can be challenged, and therefore creates a real risk of Australia breaching its non-*refoulement* obligation and returning a person to persecution and danger.

3.13. A troubling aspect of this proposed change is that, even if someone is found to be in need of protection, there is no discretion for the Minister to grant a Protection visa. There will, therefore, be a high risk that people will be found to be refugees – and therefore not able to return to their country of origin – but will not be able to receive a Protection visa. RCOA is deeply concerned that this will leave hundreds if not thousands of people in a state of limbo and at risk of spending the remainder of their natural lives in closed detention or on short-term visas with no future, for no legitimate reason.

Recommendation 3: RCOA recommends that the Committee reject sections 91W and 91WA related to the use of identity documents and the refusal of Protection visas.

4. Schedule 1 — Protection Visas: Family members

4.1. The proposed section 91WB provides that the Minister must not grant a Protection visa to a family member of a person who has been granted a Protection visa, if the family member applies after the primary applicant has already been granted a Protection visa. That is, a family member who seeks to join a recognised refugee in Australia must have an independent claim to being a refugee, and otherwise must apply for resettlement in Australia under the offshore Humanitarian Program.

4.2. RCOA contests this proposed change to force the family member of a recognised refugee to have to make a separate and independent claim for protection. The close family members of a person found to be owed protection from persecution based on racial, religious, ethnic or political grounds would very likely have a well-founded fear of serious harm at the hands of those from whom the person accepted to be a refugee was fleeing. This is because harm to a person's family is one of the most common threats used by perpetrators of serious harm.

4.3. This proposed change fails to recognise key realities and circumstances faced by people fleeing persecution. The statement of compatibility justifies this provision with:

> *The Government has a legitimate aim of encouraging people to enter and reside in Australia using regular means, thereby preserving the integrity of the migration system and the national interest. … The Australian Government will not provide a separate pathway (outside of the Humanitarian Programme) for family reunification that will exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited in existing law, these limitations are considered necessary, reasonable and proportionate to achieve a legitimate aim.*[8]

4.4. RCOA does not accept this explanation and rejects the notion that the proposed change is a reasonable or a proportionate response.

[8] Explanatory Memorandum, *Migration Amendment (Protection and Other Measures) Bill 2014*, available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5303_ems_6ab8fffb-a1dd-4ffa-b95a-2f5852a17590/upload_pdf/395782.pdf;fileType=application%2Fpdf

4.5. RCOA is also troubled by the Government's explanation that alternative "normal" migration pathways exist for families to reunite. The statement of compatibility notes other (offshore) avenues for family reunion. However, this does not take into account the increasingly complex barriers to family reunion. These include the:

- reversal of the allocation of 4,000 places within the family stream for irregular arrivals in the 2014-15 Budget;
- removal of non-contributory family and parent visas in the migration stream in the 2014-15 Budget (which increasing numbers of refugees were using)[9];
- bar on family reunion under the Humanitarian Program for "irregular maritime arrivals" on or after 13 August 2012, and lowest processing priority for family reunion for people who arrived by boat before that date; and
- significant processing times for family reunion under the Humanitarian Program.[10]

4.6. The lack of accessibility and capacity of Australian Refugee and Humanitarian Program and the general Migration Program mean that family members of refugees do not have a viable alternative. Successive Australians government have barred or limited other "normal" migration pathways available to family members.

4.7. The explanation that people can apply to UNHCR for resettlement completely disregards the lived experience of refugees and unfairly disadvantages some groups of refugees. Access to UNHCR is often limited or very difficult. People often have to undertake very dangerous journeys to get access to UNHCR and many countries do not cooperate with UNHCR processes (e.g. Bangladesh). Even with UNHCR registration, the majority of people will not be resettled, with less than one percent of the world's refugees finding a durable solution through a resettlement process in any year. People still living in their country of origin would be at an even greater disadvantage as they would not be eligible to approach UNHCR for assistance.

4.8. The need for family unity and reunion is paramount for people who have had a refugee experience, as the unity and safety of the family is of even greater importance to those who have experienced violence, conflict and the breakdown of social order. RCOA's documentation on the role of family in settlement[11] found that family separation compromises the psychological health and wellbeing of refugees, with family separation one of the most pervasive sources of emotional distress for refugees who have been resettled. Separation from family has also been shown to compound or exacerbate trauma reactions.

4.9. When family unity is maintained or family reunion is facilitated, however, refugees have more positive settlement outcomes. Former refugees have advised RCOA of the pivotal role that families play in providing emotional, physical and material support. Given the strong evidence of the importance of family unity, these amendments would contradict the overarching protection visa framework, which ensures family unity where family members apply for a Protection visa in the same application.

4.10. This provision also may not align with Australia's international law obligations relating to family unification. It is worth noting that this provision may have particularly serious consequences for unaccompanied minors seeking to reunite with their immediate family members.

Recommendation 4: RCOA recommends that the Committee reject section 91WB related to Protection visas and family member applications.

[9] Refugee Council of Australia 2009, "Family Reunion and Australia's Refugee and Humanitarian Program: A Discussion Paper", http://www.refugeecouncil.org.au/r/rpt/2009-Reunion.pdf
[10] RAILS 2013, "Refugee Family Reunion: Guide for applicants, migration agents and volunteers", http://www.rails.org.au/wp-content/uploads/2013/01/RAILS-Refugee-Family-Reunion-Guide.pdf
[11] RCOA 2012, "Humanitarian Family Reunion: the Building Block of Good Settlement", available at http://www.refugeecouncil.org.au/r/rpt/2012-Family.pdf

5. Schedule 2 — Amendments relating to Australia's protection obligations under certain international instruments

5.1. RCOA is yet again dismayed by the Government's introduction of legislation to curtail Australia's complementary protection obligations. The provisions in the Bill look to increase the threshold of measuring harm by which the Minister would be satisfied for complementary protection claims. The complementary protection framework was designed to remedy a number of serious flaws in Australia's processes for assessing complementary protection needs, namely the reliance on a discretionary and non-compellable Ministerial intervention mechanism and the inefficiency of the determination process. The provisions in this Bill would introduce serious weaknesses that would undermine protection for people at risk of egregious human rights violations and would significantly increase the likelihood of Australia breaching its international obligations.

5.2. Australia's complementary protection framework is an essential mechanism for ensuring compliance with our international human rights obligations. The Convention Against Torture (CAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 37 of the Convention on the Rights of the Child (CROC) all prohibit torture and cruel, inhuman or degrading treatment or punishment. The CAT also specifically prohibits states parties from returning people to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture. A robust complementary protection framework plays a vital role in ensuring that Australia adheres to these provisions. The amendments in this Bill set out to undermine the framework.

5.3. The proposed section responds to the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB*,[12] where it was held that the test of "substantial grounds" was the same as the "real chance" test used under the Refugee Convention. However, the Full Federal Court did not have the benefit of full argument on this issue, as the Commonwealth withdrew the relevant ground because the Attorney-General's Department and the Department of Immigration and Citizenship had differing views on the relevant threshold.[13] This legislation, therefore, seeks to overturn a Full Federal Court decision in which the matter was not even contested by the Commonwealth.

5.4. The most troubling aspect of this amendment is that it will result in Australia knowingly returning people to danger. The amendments will make it impossible for Australia to comply with its non-*refoulement* obligations because it will effectively require people to be returned in circumstances where we know there is a good chance of them being seriously harmed.

6. Schedule 2 — Threshold for harm

6.1. The proposed section 6A of this Bill sets out that in assessing complementary protection obligations, the Minister can only be satisfied "if the Minister considers that it is more likely than not that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country". This change would apply not only to formal applications under the *Migration Act* but also in relation to any assessments under regulations or administrative processes.

6.2. This amendment seeks to make clear that the Minister can only be satisfied that Australia has protection obligations under the ICCPR or CAT if the Minister "considers that it is more likely than not that the non-citizen will suffer significant harm if removed from Australia to a receiving country".

6.3. This measure of "more likely than not chance" – measured as greater than a 50 per cent chance – raises the threshold for harm from the "real chance" test that can be triggered if there is a 10 per cent chance of a person facing significant harm.

6.4. Australia's High Court has long established that the appropriate test in relation to whether a person has a "well-founded fear of persecution" under the Refugee Convention is whether there

[12] *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (20 March 2013).
[13] *Minister for Immigration and Citizenship v SZQRB* http://www.austlii.edu.au/au/cases/cth/HCATrans/2013/323.html

is a "real chance" of persecution, meaning that there is a "substantial, as distinct from a remote" chance of persecution occurring, "regardless of whether it is less or more than 50 per cent" and which may be satisfied even "though there is only a 10 per cent chance".[14]

6.5. Rather than ensure that Australia abides by its domestic laws and international obligations by measuring claims against the agreed "real chance" of significant harm threshold, the Government has proposed the unsuitable "more likely than not" test that would mean that people facing significant harm would be returned to places of danger.

6.6. Given that Australia would knowingly return people still facing a "real chance" of significant harm but not "more likely than not", RCOA cannot envisage how Australia could remain "committed to ensuring it abides by the non-*refoulement* obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] and the International Covenant on Civil and Political Rights [the ICCPR]".[15] Australia will knowingly and purposefully return people to places where they could face torture, cruel, inhuman treatment or other gross violations of their rights.

6.7. In RCOA's submission[16] to the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, the legislation where this Government sought to repeal Australia's statutory complementary protection framework, we outlined cases of people saved from significant harm after being granted protection based on complementary protection grounds. The compelling cases detail people fleeing persecution or serious mistreatment, such as family violence (including so-called "honour crimes"), blood feuds and other revenge attacks, residence in highly insecure and dangerous environments, extortion attempts and other forms of torture or cruel, inhuman and degrading treatment based on non-Refugee Convention grounds.

6.8. Complementary protection provides an essential lifeline for these individuals who, while they may not be considered refugees under international law, are nonetheless in need of protection due to risk of torture or other forms of cruel, inhuman or degrading treatment or punishment. As complementary protection focuses on the *type* and *severity* of persecution or mistreatment, rather than the *grounds* on which a person may be persecuted or mistreated, it provides a broader and more flexible framework for protecting people at risk of serious violations of human rights on non-Convention grounds. At the same time, the stringent eligibility criteria for complementary protection, tightly circumscribed by elements of causation, ensure the integrity of the framework and guard against abuse.

6.9. It is troubling to RCOA to think that the people that have received protection because of the significant harm that they faced would possibly be subject to forced return to that torture or cruel, inhuman or degrading treatment or punishment because the Minister or his/her delegate assesses that risk of harm at a 40 per cent chance. The real-life cases included: a woman facing violence and insecurity in Homs, Syria; a man from Nepal harassed and persecuted because he provided information that led to the imprisonment of drug-dealers; and a husband and wife who faced arbitrary deprivation of life and significant harm because of the threat of honour killing. Our fear is that this amendment could result in people in these circumstances being returned to situations where there is significant risk to their lives.

6.10. RCOA also finds these amendments disproportionate and unnecessary, given that there have been only a small number of successful complementary protection claims (55 cases as at the end of 2013).

7. Schedule 2 — Definition of "receiving country"

7.1. The Explanatory Memorandum of this Bill describes the change to subsection 5(1), the definition of receiving country, to be a rights-positive amendment to ensure that stateless people have a country to have their protection claims assessed against. While there may be further implications of this proposed change, it is clear to RCOA there is a need for a comprehensive

[14] *Chan* (1989) 169 CLR 379, [12], [19], [34].
[15] Minister Second Reading Speech, 25 June 2014.
[16] Available at http://www.refugeecouncil.org.au/r/sub/1401-CP.pdf

Stateless Status Determination procedure and a substantial visa outcome for people found to be stateless. RCOA is concerned that Australia cannot guarantee that it is fulfilling its international law obligations under the 1954 *Convention relating to the Status of Stateless Persons*. A model that would enable statelessness claims to be considered in a single, transparent process (after first considering claims under the Refugee Convention and then complementary protection), subject to merits review and scrutiny by the courts, would be a substantial improvement to this legislation.

7.2. This would also respond to the Australian Government's statement that the removal of *de facto* stateless persons from Australia has historically been impracticable, often resulting in protracted immigration detention or indefinite temporary stay on bridging visas.

7.3. RCOA calls on the Australian Government to implement a process to assess statelessness alongside Refugee Convention and complementary protection claims. We recommend that Statelessness Status Determination form part of a single asylum procedure.

Recommendation 5: RCOA recommends that the Committee reject the provisions set out in Schedule 2, particularly the change to the threshold for harm.

Recommendation 6: RCOA recommends that the Committee encourage the Government to give consideration to a comprehensive, statutory statelessness status determination procedure.

8. Schedule 3 — "Unauthorised maritime arrivals" and transitory provisions

8.1. RCOA has long opposed the provisions of the *Migration Act* which restrict the right of asylum seekers who arrive by boat to validly apply for visas except at the Minister's discretion. We believe that this restriction unfairly discriminates against asylum seekers based on their mode of arrival, impedes access to effective protection and hampers the efficiency of the RSD process by requiring personal Ministerial intervention in each case. We are therefore concerned by the amendments outlined in Schedule 3 of the Bill which seek to extend the Minister's discretionary powers.

8.2. Currently, the statutory bar on visa applications applies only to asylum seekers. Under the proposed amendments, the bar will also extend to people who have been granted temporary humanitarian visas after having been recognised as refugees or as being in need of protection on complementary grounds. Given that the bar effectively operates to exclude people from a fair and efficient status determination process except at the Minister's discretion, we are alarmed at the prospect of it being extended to people who have a recognised need for protection. Should this occur, temporary humanitarian visa holders who are at ongoing risk of persecution or other forms of serious mistreatment once their visas expire will have no means of accessing further protection in Australia unless the Minister decides it would be in the "public interest" to allow them to do so.

8.3. As RCOA argued in its submission on the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*,[17] a process in which life and death decisions lie with a single Minister, with no further avenues for review or appeal, is not compatible with Australia's international protection obligations. In circumstances where an individual may be at risk of serious human rights violations, a discretionary, non-statutory administrative process guided by vague principles such as the "public interest" test cannot provide the level of rigour necessary to ensure that people will not be returned to danger in violation of our international obligations. It is RCOA's view that only a robust, statutory framework of status determination and protection can ensure adherence to these obligations.

8.4. RCOA is also concerned by the broad scope of the amendments outlined in Schedule 3, in particular that they would allow the Minister to determine that the statutory bar should be lifted for a limited period of time and vary or revoke this determination if the Minister believes it would be in the "public interest" to do so. As the amendments stand, it would be well within the Minister's powers to lift the bar for only a short period of time, potentially comprising the person's ability to obtain legal advice or lodge a complete application, or to re-impose the bar

[17] Available at http://www.refugeecouncil.org.au/r/sub/1401-CP.pdf

before the determination process is complete. The amendments could thus hamper the capacity of asylum seekers to prepare thorough and detailed applications based on sound legal advice and would introduce greater volatility into the visa determination process, compromising both fairness and efficiency.

8.5. Furthermore, RCOA believes that the Australian Government has not adequately justified the need for the proposed amendments. For example, the Explanatory Memorandum claims that the amendments will "provide the Minister and the Department with more flexibility to address the specific issues relevant to individuals and cohorts". It provides no explanation as to why the Minister's current (and considerable) powers to grant or revoke visas by discretion are insufficient to address such issues. The Memorandum also claims that the amendments would "allow for more efficient management of unauthorised maritime arrivals", an assertion which RCOA believes is difficult to substantiate given that the amendments would require the Minister to personally intervene in the determination process more often and in a broader range of circumstances than is currently the case.

8.6. We agree with the Australian Government's assertion that current arrangements for granting visas to asylum seekers who arrived by boat are "inefficient and administratively complex". However, we maintain that these problems would be far better resolved through returning to a single statutory system of status determination and protection for all asylum seekers, rather than maintaining parallel systems for different groups based on their mode of arrival and requiring personal Ministerial intervention in cases where standard processing procedures would easily suffice.

Recommendation 7: RCOA recommends that the Committee reject the provisions set out in Schedule 3.

9. Schedule 4 — Migration Review Tribunal and Refugee Review Tribunal

9.1. RCOA emphasises the need to uphold natural justice and the rule of law when making decisions regarding Refugee Status Determination. Natural justice is especially important for cases of refugee claims, where matters of life and death are under consideration. As Justice Drummond affirmed, "the international aspect of such a determination, combined with its significance for the individual concerned, requires that a high standard of procedural fairness be observed in the [refugee status] determination process".[18]

9.2. RCOA is concerned that moves to dismiss an application without an adequate chance to be heard, moves to provide decisions simply in writing or orally, the use of Guidance Decisions and definitions of "finally determined" work against the requirements of natural justice and the rule of law.

10. Schedule 4 — Powers to dismiss an application for failure to appear

10.1. RCOA is concerned about increasing penalties for an already vulnerable group. Many asylum seekers in the community are living below the poverty line, with little or no income support and no right to work. As such, there are significant difficulties present for those trying to attend an RRT hearing, such as lack of money for public transport, lack of knowledge of the local area, lack of English language skills and lack of support systems to assist in attending hearings. These issues have been compounded by the revocation of Immigration Advice and Application Assistance Scheme (IAAAS) funding for all asylum seekers at the review stage. Due to these cuts, many applicants are forced to appear on their own, without the support of a lawyer or migration agent able to guide them through the process and assist them to appear at the right time.

10.2. An essential element of administrative law and the RRT process is the right to be heard. As a principle of natural justice, *audi alteram partem* states that no person should be condemned without being given a reasonable opportunity for their case to be heard. In order to ensure this

[18] *Li Shi Ping and Another v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1275 [35].

element of natural justice, it is important that the Tribunal consider the limitations and often destitution many asylum seekers face in the community.

10.3. RCOA submits that a case should not be dismissed or decided without reasonable effort to ensure the applicant has had a chance to have their case heard. This should involve ascertaining the reasons the applicant was not able to attend and considering alternative arrangements to allow the applicant to attend another hearing. Furthermore, RCOA emphasises the need for IAAAS to be reinstated in order to adequately support asylum seekers through this process.

10.4. RCOA is also concerned that Items 11 and 26 impose short, seven-day timeframes to apply to the Tribunal for reinstatement after notice of the decision is received. Again, these short time frames do not consider the significant obstacles many asylum seekers face.

Recommendation 8: RCOA recommends that the Committee reject items 4 and 11 (for the MRT) and items 19 and 26 (for the RRT).

11. Schedule 4 — Oral and Written decisions

11.1. Under item 12 (for the MRT) and item 27 (for the RRT), the Tribunal must give the applicant notice of their decision in writing within 14 days of the decision if the decision was made without the applicant present. RCOA is concerned about moves to allow the Tribunal to present decisions in writing for those who were not present at the hearing. Informing an applicant in writing of their outcome does not adequately address the cultural and linguistic needs of many asylum seekers. Many asylum seekers are not fluent in English, and some are not literate in any language. Simply providing written decisions to this group does not adequately provide procedural fairness or an appropriate form of communicating decisions, particularly if applicants do not have access to a lawyer or migration agent who can explain the implications of the letter.

11.2. In addition, items 13 and 17 (for the MRT) and items 28 and 32 (for the RRT) seek to change the delivery of oral decisions. Oral decisions will no longer need to be reduced to a written statement unless this is requested by the applicant (within a period prescribed by regulation) or the Secretary (at any time). RCOA is concerned that for some applicants, oral decisions do not adequately address the cultural and linguistic barriers that asylum seekers may face. This is especially compounded by the applicant's likely lack of understanding of Australia's legal system and lack of familiarity with such processes. Given the memory and retention issues that torture and trauma survivors often experience[19], there is a compelling need for applicants to receive a written record of the decision.

11.3. As with other provisions in this Bill, these issues are compounded by the lack of support systems available for asylum seekers after the revocation of IAAAS, as representatives would normally be able to provide a more appropriate explanation of the decision to the applicant.

11.4. RCOA submits that these changes are at odds with the principles of the rule of law and natural justice, as the Tribunal may not provide clear and appropriate access to legal decisions which affect a person's rights.

Recommendation 9: RCOA recommends that decisions should be made both orally and in writing, with appropriate explanations and translation as required and with an opportunity for the applicant to ask reasonable questions so as to seek clarification of the decision.

12. Schedule 4 — Principal Member power to give directions

12.1. Items 5-7 (for the MRT) and items 19-22 (for the RRT) provide the Principal Member with new powers to give directions setting out "procedures to be followed by applicants and their representatives in relation to proceedings before the Tribunal" and to provide for "efficient processing practices".

[19] See Coffey, et al 2010 *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, http://www.ncbi.nlm.nih.gov/pubmed/20378223

12.2. RCOA is concerned that Guidance Decisions will affect the ability of Tribunal Members to make fair and informed decisions based on the facts of each individual case. Such an informed and individual process is a vital component of natural justice and the rule of law.

12.3. International law and the rule of law require RSD procedures to be considered on a case by case basis in order to assess each individual's claims of persecution. As Professor Kneebone points out, "implementation of the non-*refoulement* obligation requires an individual assessment in each case".[20]

12.4. As a vital element of administrative law, Members should be free to seek out further evidence and not be limited to the evidence before them. The fact that the RRT has the power to consider all the evidence available, including any additional evidence from the applicant and information from other sources, is of considerable benefit for the RSD process.

12.5. The informal nature of the RRT, as currently required by the *Migration Act*[21], ensures that a fair and flexible process is undertaken to assess a person's protection claims. The process is a participatory approach that best serves the interests of justice and procedural fairness, especially when dealing with applicants who may not speak English and may have significant trauma and mental health issues associated with their refugee experiences.

12.6. RCOA recommends that each case be considered in an informal, inquisitorial approach which best suits the aim of ensuring the correct or preferable decision is reached in a particular case. Guidance Decisions may work against these aims and may put Australia in breach of its non-*refoulement* obligations.

Recommendation 10: RCOA recommends that the Committee reject Items 7 and 22 and that Tribunal Members remain able to assess the facts of each application on a case-by-case basis.

13. Schedule 4 — Changes to when decision "finally determined"

13.1. Items 1 and 2 of Schedule 4 seek to clarify "when a review of a decision that has been made in respect of an application under the *Migration Act* is finally determined". RCOA submits that the priority should be on making the correct or preferable decision rather than seeking to strictly define when a case has been finally determined.

13.2. As the nature of the merits review process requires, Tribunal Members are 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 and can consider new evidence brought before them.

13.3. Due to the nature of asylum applications, additional information can sometimes arise after a hearing which may be of considerable value to the decision. 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.[22]

13.4. Furthermore, documents or evidence may be delayed because of the difficulty of getting documents out of war-torn regions. Many applicants are unable to provide supporting documents in time due to a number of issues, including armed conflict, disruption of local services (e.g. postal services), disrupted communication between friends or relatives (who may be fleeing persecution themselves) and issues relating to translations and verification.

13.5. There are a number of scenarios when a case which may be considered completed may need to be reconsidered in light of new information. In order to ensure the Tribunal reaches the correct or preferable decision and that Australia meets its non-*refoulement* obligations, the Tribunal should be free to reconsider cases when new and relevant information arises.

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[20] Kneebone, S 2005, "What We Have Done with the Refugee Convention: The Australian Way," *Law in Context* 22, no. 2: 95.
[21] *Migration Act 1958,* 420(1).
[22] Available at http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=2a4572ae-1b02-4cc4-bf2d-b4ee5a30a13e

14. Other concerns about the Bill

Retrospective nature of changes

14.1. RCOA is concerned about the retrospective nature of these laws. RCOA understands that, if these changes are passed, they will apply to all applicants who have not yet been heard, have not received a decision or are considered to be not "finally determined". Retrospective legislation is considered to be against the fundamental principles of the rule of law and should be reserved for the most extreme situations. The Australian Parliament's *Legislation Handbook* (at 6.8) provides that, "Provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances and on explicit policy authority". A move to implement retrospective legislation will be contrary to these principles and will erode the public's faith in the legislative system. Of particular concern in this Bill are the retrospective changes in relation to the provision of fraudulent documents, the retrospective imposition of a legal burden of proof and the retrospective imposition of the civil standard of proof in respect of complementary protection.

14.2. RCOA sees no justification for the retrospective consequence of these rules, as this cannot have the intended effect of "encouraging" such people to put their claims forward earlier and more fully (as suggested in the Explanatory Memorandum). We also note that this effect has not been adequately justified by the Commonwealth in its Explanatory Memorandum.

Recommendation 11: RCOA recommends that the Committee reject the retrospective nature of the Bill, and, if it recommends any provisions in the Bill, that the changes come into effect only for applications made on or after the commencement of the Bill.

A punitive Refugee Status Determination system?

14.3. RCOA's overall assessment of this legislation is that it seeks to reshape Australia Refugee Status Determination system as a series of obstacles for refugees to overcome rather than a reliable and just system for determining if someone requires Australia's protection. The changes outlined in this Bill seem to be designed to make it harder for people to succeed in the RSD process. While RCOA supports a robust system, we are concerned that these amendments would mean that people with valid and considerable claims for safety would struggle to navigate the system and be granted much-needed protection. Australia's protection system must not punish people for facing persecution: it must assess their claims fairly.

15. Recommendation

15.1. In light of the concerns outlined in this submission, RCOA strongly recommends that the *Migration Amendment (Protection and Other Measures) Bill 2014* not be passed.