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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Canberra ACT 2600
By email: legcon.sen@aph.gov.au

6 August 2014

Dear Sir/Madam,

Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the *Migration Amendment (Protection and Other Measures) Bill 2014*

The Immigration Advice and Rights Centre ("IARC") welcomes the opportunity to provide a submission to the Committee's Inquiry into the *Migration Amendment (Protection and Other Measures) Bill 2014* ("the Bill").

Introduction

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

IARC was established in 1986 and since that time has developed a high level of specialist expertise in the area of immigration law. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence victims.

IARC is concerned by a number of proposed amendments to the *Migration Act 1958* as detailed below. This submission is intended to focus on the impact the proposed changes are likely to have on our clients and Protection visa applicants generally.

Specify all particulars of a claim at the primary stage – proposed section 5AAA and section 423A

Proposed new section 5AAA in the Bill, makes it the responsibility of those seeking Australia's protection to specify all particulars of their claim and to provide sufficient evidence. Additionally, where an applicant provides new claims or evidence at the RRT, proposed new section 423A *requires* the RRT to "draw an inference unfavourable to the credibility of the claim or evidence", unless there is a reasonable explanation why the information was not provided at the primary stage.

IARC is concerned that these amendments seek to change the refugee status determination ("RSD") process from an inquisitorial and administrative process, into a judicial or adversarial style process. This change will negatively impact asylum seekers because of their special vulnerabilities. Asylum seekers generally have limited English language skills, little or no understanding of the RSD process and the legal complexities of seeking asylum, and have often experienced torture or trauma and may be fearful of government officers and figures of authority. Asylum seekers are also often stressed and anxious about their situation and the situation of their families back home, and usually lack the network of family and social support in Australia. These factors mean that asylum seekers find it extremely difficult to adequately present their case. In IARC's experience, it can take a number of interviews with a client to establish:

- A rapport and relationship of trust with a client;
- The facts and information that is relevant and irrelevant to a client's claims to protection;
- The chronological and organised story of a client.

IARC is concerned that these changes, together with the removal of free legal advice and assistance for many asylum seekers and for review applications, will simply lead to more refusals of Protection visas for genuine refugees, rather than achieve the stated objective of improved "efficiency".

In any event, the RRT is already empowered to draw an adverse inference in relation to the credibility of an applicant, where the applicant fails to provide at the primary stage all particulars of their claim, or seeks to change the details of their claim on review. This amendment interferes with the RRT's independence as a body that reviews an asylum seeker's application in its totality. There does not appear to be any justification for the addition of this mandatory inference.

The case study below is based on a former client of IARC and illustrates how the vulnerabilities of asylum seekers, particularly combined with a lack of legal representation, can lead to genuine refugees being refused protection in the first instance.

Case study

Client A had no legal representation at the primary/Departmental stage of her protection visa application. As a result, she had no idea what information was relevant and what was not. She spoke absolutely no English and was very isolated and depressed. Client A also suffered from a medical condition, which caused her pain and affected her ability to focus. Client A was also severely traumatised as a result of suffering torture in her home country. When she spoke about her experiences of torture she would break down. As a result of these difficulties, Client A was not able to properly articulate why she was seeking protection in Australia and was refused a Protection visa by the Department of Immigration. She sought legal advice from IARC and we represented her in her RRT matter. It took several months to prepare a comprehensive statement about her claims, which covered all her experiences of harm in her home country. It was challenging because her first statement to the Department of Immigration was only a basic statement of her experiences and did not fully reflect her case. With IARC's assistance and legal expertise, the client was able to substantiate her claims and produce relevant supporting documentation at the RRT. The Tribunal Member was made aware of the client's mental health issues prior to the hearing, and was sensitive to the client's needs during the hearing. As a result, Client A's application was successful at the RRT, and was remitted to the Department where she was eventually granted her Protection visa.

Identification, bogus documents, and destruction of documents – proposed amendments to section 91W and new section 91WA

The Bill proposes amendments to section 91W of the *Migration Act 1958* that mean if an applicant is not able to provide identity/nationality/citizenship ("identity") documents or provides a bogus identity document, their application for a Protection visa *must* be refused. This provision will apply unless the applicant can provide a "reasonable explanation" as to why they did not provide identity documents or provided bogus identity documents, and they then produce identity documentation or take "reasonable steps" to produce such documentation. In essence, this means that an asylum seeker who comes to Australia without identity documentation or with false identity documentation, cannot be granted a Protection visa, regardless of whether or not they are a genuine refugee, if they do not have a "reasonable explanation" for the lack of documentation or the false documentation.

The Bill also proposes to insert a new section 91WA into the *Migration Act 1958*, which states that the Minister *must* refuse to grant a Protection visa to an applicant who provides a bogus identity document, or destroys or disposes of their identity document, or causes such a document to be disposed of or destroyed. Again, this provision will apply unless the applicant can provide a "reasonable explanation" for providing a bogus document or for destroying or disposing of their identity document, and they then produce identity documentation or take "reasonable steps" to produce such documentation.

IARC is extremely concerned that these amendments directly breach Article 31 of the Refugees Convention, and may lead to breaches of Australia's *non-refoulment* obligations. The Refugees Convention recognises that the very nature of seeking asylum can mean that for many reasons, asylum seekers are unable to obtain proper identity, nationality or citizenship documentation. There is no requirement under the Refugees Convention that an asylum seeker provide identity documentation.

These amendments are premised on the notion that asylum seekers have the ability to travel freely in and out of their home country, are not inhibited by war and conflict, and are empowered to seek and maintain valid identity documentation. This fails to recognise that people who are forcibly displaced from their homes, or are fleeing violence and persecution, are not able to arrange travel and documentation through regular channels.

IARC is concerned that these provisions seek to connect an asylum seeker's documentation with the genuineness of their claims for protection, which is misleading and illogical. The lack of formal identity documentation does not mean a person does not have genuine claims to Australia's protection. In fact an inability to obtain identity documentation may be evidence of a genuine claim of persecution, for example where a person is denied nationality because of their race or ethnicity.

Furthermore, asylum seekers often have their passports or other documentation confiscated or withheld by people smugglers, regardless of mode of travel. Asylum seekers are uniquely dependent on people smugglers and are vulnerable to misinformation from people smugglers or other agents during their journey. It is not unrealistic to assume that asylum seekers will place a high degree of trust in their people smuggler, who (regardless of the problematic nature of the people smuggling trade) has enabled the asylum seeker to flee their persecutors.

The current system for assessing asylum seekers who arrive in Australia without a valid visa is to conduct usually one or two entry interviews shortly after arrival. These interviews are conducted by officers of the Department of Immigration and Border Protection ("DIBP"). At these interviews, asylum seekers are asked about their journey to Australia, including details about the people smugglers they had contact with, as well as what has happened to their passports or other identity documentation. Given that these interviews usually occur within a reasonably short time after a person has arrived, asylum seekers have generally not had any access to legal advice or representation, and are in immigration detention. IARC is concerned that information disclosed in these entry interviews with DIBP will be used to deny asylum seekers a Protection visa later on. This is particularly concerning because asylum seekers at this stage of the process have not had an opportunity to obtain legal advice and are likely to be wholly unaware of the consequences of what is said during these interviews.

IARC is also concerned that these amendments will adversely affect some asylum seekers over others, based on their mode of arrival. This is in breach of Article 31 of the Refugees Convention.

IARC is extremely concerned that these amendments will mean that the claims of genuine refugees are not recognised and that their Protection visas will be refused. This places genuine refugees at serious risk of refoulment to the country from which they are seeking protection. This would place Australia in breach of its obligations not to return a person to a country where they are at risk of persecution or other serious harm.

IARC is also concerned with the vagueness of the concepts of "reasonable explanation" and "reasonable steps" as stated in these amendments. It is difficult to imagine a more obvious "reasonable explanation" for not having identity documentation, providing false identity documentation, or having destroyed or disposed of identity documentation, than the journey of fleeing persecution and seeking asylum itself. Furthermore, for a person who is seeking protection from their home country, it is not possible for them to approach their government to obtain or try to obtain new identity documentation. This may be considered re-availing themselves of the protection of their home country and may also be grounds for refusing to recognise a person as a refugee. IARC cannot envisage what steps an asylum seeker could take that would be considered "reasonable steps" to provide identity evidence.

The case study below is based on a former client of IARC and illustrates how these proposed amendments would prevent a genuine refugee from being granted a Protection visa.

Case study

Client B and C were husband and wife. They were Christians from a majority Muslim country and had experienced many years of persecution and discrimination. After Client B was brutally beaten and the home of Client B and C was destroyed, they decided to flee. They had not travelled out of their home country before, and did not have passports. All of their possessions had been lost when their home was destroyed. A people smuggler arranged false passports for them and they travelled to Australia. Once they arrived in Australia, the people smuggler took the false passports and abandoned them. They did not have any identity documentation and did not know how to apply for a Protection visa. They were referred to IARC and we assisted them to make an application for Protection. They were not able to obtain any identity documentation because they were a religious minority and could not approach their own government authorities to obtain new documentation. Despite these issues, the Department found that they were genuine refugees and they were granted Protection visas.

Amending the standard of proof for 'complementary protection' – new section 6A and amended section 36(2)(aa)

The Bill inserts a new section 6A into the *Migration Act 1958* that amends the standard of proof an applicant must meet in order to engage Australia's protection obligations under the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Both the ICCPR and the CAT contain *non-refoulment* obligations.

In *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, the Full Federal Court held that the assessment of the risk of significant harm under 'complementary protection' was the same as that under the Refugees Convention – that there must be a "real chance" of significant harm. The High Court has held that a "real chance" must be a substantial chance, as distinct from a remote or far-fetched possibility, but that it may still be well below a 50% chance including as low as a 10% chance.[1]

The proposed new section 6A provides that the Minister can only be satisfied that Australia has protection obligations in respect of a person if it is "more likely than not" they will suffer significant harm. The Explanatory Memorandum to the Bill explains that there would need to be a greater than 50% chance of a person suffering arbitrary deprivation of life, the death penalty, torture, or cruel, inhuman or degrading treatment or punishment, in order to engage Australia's protection obligations.

IARC is aware that other submissions to this inquiry have addressed the national and international law jurisprudence relating to 'complementary protection', including the Andrew and Renata Kaldor Centre for International Refugee Law at the University of New South Wales ("the Kaldor Centre"). IARC agrees with and supports the Kaldor Centre's submissions on this proposed amendment, and will not repeat what they have covered in much detail. IARC is concerned that this amendment, if enacted, would place Australia at odds with international standards. IARC is also concerned that this amendment puts Australia at risk of breaching its *non-refoulment* obligations.

IARC is concerned that, if enacted, the proposed amendment would establish an inconsistency between what is required to obtain a Protection visa under the Refugees Convention and what is required to obtain a Protection visa under 'complementary protection'. A person at risk of significant harm for a Convention reason (i.e. because of their race, religion, nationality, political opinion, or membership of a particular social group) would need only establish that they have a 10% chance of persecution occurring, whereas a person at risk of significant harm but *not* for a Convention reason would have to establish that there was at least a 50% chance of harm occurring. This will be confusing for clients and set up two distinct processes for decision makers assessing Protection visa applications. It is likely to create inefficiency in the RSD process and lead to decisions affected by legal error.

IARC does not see any practical or legal justification for this amendment, or for having a higher threshold for determining *non-refoulment* obligations under the ICCPR and the CAT, compared with the same obligation under the Refugees Convention.

[1] *Chan v MIEA* (1989) 169 CLR 379

Application for Protection as a member of the family of a refugee – proposed new section 91WB

The Bill introduces a new section 91WB of the *Migration Act 1958,* which provides that the Minister *must* not grant a Protection visa to a family member of a person who holds a Protection visa, unless that family member applies for protection before the second mentioned person's protection visa is granted. The effect of this provision is that family members of Protection visa holders must have their own claims for protection and be recognised as a refugee or owed complementary protection. Presently, close family members (usually spouses and children) can be granted a Protection visa if a member of their family holds a Protection visa.

IARC is concerned about the impact this change will have on family reunification for refugees. Various sources of international law recognise the importance of the family and of family unity. UNHCR has also made clear the importance of family reunification for refugees. It is apparent from IARC's work with asylum seekers and refugees that family reunification is essential to a refugee's ability to settle in well in Australia and effectively integrate into their community.

IARC is concerned that due to recent changes to the Humanitarian visa program, the difficulties of obtaining a Humanitarian visa, and the removal of some family visas, options for family reunification for refugees will be severely limited. IARC is concerned that refugees and their family members will be forced to rely on family migration options, which are vastly more expensive and in some cases would prevent an application being made. For example, an onshore Partner visa application including a spouse and two dependent underage children would cost $6,865 simply to apply. This cost increases if there are more dependents included in the application and if dependent children are over 18 years of age.

IARC is also concerned that this amendment could lead to a breach of Australia's obligation under the Convention on the Rights of the Child and is not in the best interests of the child.

The case study below is based on a former client of IARC and illustrates how the proposed amendment could impact upon refugee families.

Case study

Client D travelled to Australia as a dependent on her husband's student visa. Client D and her husband also had a child together. They decided to apply for Protection once in Australia. However, they received incorrect legal advice and were told they could not apply together. They made separate applications for Protection visas. Client D and the child were refused their Protection visa, but Client D's husband was granted his Protection visa. Client D came to IARC and we represented her at the RRT. The RRT found that Client D was eligible for a Protection visa because her husband already held a Protection visa. Her case was sent back to the Department of Immigration and a Protection visa was granted for Client D and their child. Had this option not been open to Client D, she may have been forced to return to the country she had fled persecution from, and endure a lengthy separation from her husband while a Partner visa application was processed.

Conclusion and recommendations

IARC has raised a number of concerns about the proposed amendments in this Bill. IARC is concerned that these changes will mean Australia will fall foul of its international human rights obligations.

The stated purpose of these amendments is found in the opening lines of the Explanatory Memorandum; to "increase efficiency and enhance integrity in the onshore protection status determination process" and to "support an effective and coherent...process". It is our view that the proposed measures do not achieve their stated purpose. Rather, the amendments are designed to create an RSD process that itself acts as a disincentive to seek asylum in Australia, and is punitive, particularly for those who arrive without a valid visa or documentation. The proposed amendments are not commensurate with improved integrity, and in many ways create inconsistent outcomes, dependent upon a person's ability to arrange a visa prior to arriving in Australia. As we have experienced firsthand, a person's country of origin plays a significant role in whether or not they are able to arrange a visa, travel documents and regular means of arrival in Australia, in order to claim asylum "legally". It appears that in essence, the message the Australian government is intending to convey to those who

may choose to seek asylum here is, "Do not come, you are not welcome." The more complex and difficult we make the refugee status determination process, the less likely it is that people will seek asylum here at all. This is not the "fair go" that Australia so often prides itself on and it does not represent Australia sharing the burden of the world's refugees.

For the reasons detailed above, IARC recommends that the Bill in its current format not be passed.

If you require any further information, please don't hesitate to contact us.

Kind regards,

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