

10 September 2014

Dear Committee Secretary,

RE: Further evidence following the hearing on the Migration Amendment (Protection and Other Measures) Bill 2014

Thank you for the opportunity to provide evidence at the hearing on this Bill on 5 September 2014. As requested by the Senate Legal and Constitutional Affairs Committee, I am submitting further evidence regarding a specific query made by the Committee. I also take the opportunity to clarify two issues that the Committee raised during this hearing.

The Chair of the Committee asked myself and other witnesses to examine the current tender for legal services to unaccompanied minors and others arriving irregularly. I have now had the opportunity to examine this tender. It provides that the Department will select the asylum seekers eligible for these services, being those with 'demonstrated high levels of vulnerability (which may include unaccompanied minors, people with an intellectual disability, or cases in which resolution of protection claims would otherwise be in the best interest of the Government)'.

While we welcome the Government's commitment to funding legal representation of vulnerable groups, the information available in the tender does not change the views and concerns we express in our submission. The tender adds little information to that provided in the Explanatory Memorandum, which we took into account when preparing the submission. I note, in particular, that other highly vulnerable asylum seekers, including victims of sexual violence or torture, are not likely to be identified for such a targeted measure. As discussed at the hearing, such victims generally are reluctant to disclose such intimate and traumatic details at an early stage.

First, I also take the opportunity to clarify that I agree entirely with the other witnesses that the 'more likely than not' test is clearly intended, and would be interpreted, as requiring that a person must be more than 50% likely to be harmed upon return. This is the clear and unambiguous result of the legislation as currently drafted, as attested to by all the legal experts who made submissions.

Secondly, I was unable to complete my answer to a question asked by the Committee as to , exactly how the legislation would result in *refoulement* (return to persecution or other significant harm). Some of the clearest examples of how this would occur are:

- **Fraudulent documents:** A person who satisfies the definition of a refugee, but who has submitted (or is suspected of submitting) fraudulent documents, would not be entitled to a protection visa. There is no other legal right protecting them from return. A person who is returned because of this provision, who is otherwise a refugee, would therefore be *refouled*.
- **Failure to appear:** A person who satisfies the definition of a refugee, but who has failed to appear at a Refugee Review Tribunal hearing, could have their claim dismissed without the evidence being considered. If the person fails to apply to reinstate within 7 days (for example, they are in hospital for a period, or because the post is sent to the

wrong address), and is therefore unable to obtain a protection visa, that person could be *refouled*.

- Late claims: A person who would satisfy the definition of refugee, except that important evidence was discounted because it was provided late, could have their claim dismissed as a result. For example, a victim of sexual violence are likely, for the reasons described above, not disclose this claim earlier, and the lateness of this claim may be disbelieved by the decision-maker. If their claim is dismissed, this would also leave the person open to *refoulement*.
- Complementary protection: If a person meets the international test for complementary protection (which is a 'real risk'), but does not meet the proposed domestic test of 'more likely than not', then that person is not entitled to a visa and could be *refouled*.

Thank you for the opportunity to provide additional comments. Please feel free to contact me if you have any further questions or require clarification.

Yours sincerely,

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