

Migration Amendment (Protection and Other Measures) Bill 2014

Portfolio: Immigration and Border Protection

Introduced: House of Representatives, 25 June 2014

Purpose

1.166 The Migration Amendment (Protection and Other Measures) Bill 2014 (the bill) seeks to amend the *Migration Act 1958* (the Migration Act) to:

- confirm that it is an asylum seeker's responsibility to specify the particulars of their claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish their claim;
- expressly require the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation why those claims and evidence were not raised before a primary decision was made;
- create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so;
- clarify when an applicant for a protection visa, where a criterion for the grant of the visa is that they are a member of the same family unit of a person who engages Australia's protection obligations, is to make their application;
- define the risk threshold for assessing 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);
- simplify the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa;
- amend the processing and administrative duties of the Migration Review Tribunal (MRT) including:
 - a Principal Member being able to issue guidance decisions and practice directions;
 - tribunals being able to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons; and
 - tribunals being able to dismiss an application where an applicant fails to appear before the tribunal after being invited to do so, and to reinstate

the application where the applicant applies for reinstatement within a specified period of time; and

- make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Migration Act is 'finally determined'.¹

Committee view on compatibility

Non-refoulement obligations

1.167 Australia has non-refoulement obligations under the Refugee Convention and under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).² This means that Australia must not return an individual to a country where there is a real risk that they would face torture or other serious forms of harm, such as the death penalty, arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.³

1.168 Non-refoulement obligations are absolute and may not be subject to any limitations.

1.169 Human rights law requires provision of an independent and effective hearing to evaluate the merits of a particular case of non-refoulement. Equally, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.⁴

1.170 Australia seeks to effect its non-refoulement obligations principally through the Migration Act. In particular, section 36 of the Migration Act sets out the criteria for the grant of a protection visa, which include being found to be a refugee or otherwise in need of protection under the ICCPR or the CAT.

1 Explanatory memorandum (EM), pp. 1-2.

2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3(1); International Covenant on Civil and Political Rights, articles 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

3 The non-refoulement obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights are known as 'complementary protection' as they are protection obligations in addition to those under the Refugee Convention.

4 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights (PJCHR), *Second Report of the 44th Parliament*, 11 February 2014, p 45, at pp 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament*, 18 March 2014, p 51, at pp 55-57, paras 513.41-3.47 (comments on Minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

Responsibility of asylum seeker to provide evidence of claims

1.171 The bill would insert proposed section 5AAA into the Migration Act to provide that asylum seekers have responsibility to 'specify all particulars of his or her claim' and 'to provide sufficient evidence to establish the claim'. The statement of compatibility asserts that this amendment is:

Consistent with requirements in other resettlement countries, and guidelines from the United Nations High Commissioner for Refugees, this provision places the responsibility for making claims for protection and providing sufficient evidence to establish the claim, on those who are seeking protection. The provision clarifies that it is not the responsibility of the decision-maker to make a case for protection on behalf of a person.

1.172 The committee acknowledges that it is a general legal principle of international law that the burden of proof rests with the asylum seeker. The committee assumes that the relevant section of the UNHCR 'guidelines' referred to in the statement of compatibility provides:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, 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. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, 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. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant. (emphasis added)⁵

5 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, [196]-[197][available at: <http://www.refworld.org/docid/4f33c8d92.html> [accessed 6 July 2014].

1.173 The committee considers that the new provision would risk shifting away from the shared duty articulated in the UNHCR *Handbook*. The proposed provision therefore raises concerns from the perspective of Australia's non-refoulement obligations. The effective and thorough assessment of the claims to protection against non-refoulement is a fundamental aspect of the obligation. The committee notes that the obligation of non-refoulement requires the provision of procedural and substantive safeguards to ensure that a person is not removed in contravention of non-refoulement obligations (along with the general obligation to provide effective remedies for breaches of human rights under article 2 of the ICCPR).⁶

1.174 The committee notes that the new provision may have significant adverse consequences from a human rights perspective if an asylum seeker was unaware of the requirement to 'specify all particulars of his or her claim' or the asylum seeker was particularly vulnerable (for example, children or persons with disabilities). The committee notes that language barriers and experiences of trauma may compound problems in this regard.

1.175 The committee notes that the statement of compatibility sets out a range of matters which could be considered to be safeguards for vulnerable groups in the context of proposed section 5AAA. The statement of compatibility outlines that asylum seekers may make private arrangements to be represented by a registered migration agent. It explains that those asylum seekers who have arrived in Australia 'lawfully' (which the committee takes to mean with a valid visa) and who are 'disadvantaged and face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme'.⁷ The statement of compatibility points to the provision of what it describes as 'a small amount of additional support to illegal arrivals who are considered vulnerable, including unaccompanied minors', although it concedes that the Department of Immigration and Border Protection is still considering what this might entail.⁸ The statement of compatibility further asserts that departmental policies and procedures will take into account whether an asylum seeker is from a vulnerable group and asylum seekers will be made aware of the requirement that they 'provide sufficient evidence to establish the claim'.⁹

1.176 The committee does not consider that the matters set out in the statement of compatibility such as potential migration agent assistance with the initial application, undecided 'additional support' for vulnerable asylum seekers or unspecified departmental policies taking 'into consideration' identified vulnerable

6 ICCPR, articles 2 and 7 and CAT, article 3. See also, for example, Concluding Observations of the Human Rights Committee, Portugal, UN Doc. CCPR/CO/78/PRT (2003), at para 12.

7 EM, Attachment A, p.4.

8 EM, Attachment A, p.4.

9 EM, Attachment A, p.4.

asylum seekers could provide sufficient safeguards in the context of proposed section 5AAA either for asylum seekers generally or those who may be particularly vulnerable. The committee is concerned that proposed section 5AAA risks abdicating the duties of government, as specified by the UNHCR, in the assessment of protection claims.

1.177 The committee notes that the statement of compatibility fails to make a specific and rigorous assessment of whether, due to the proposed inclusion of section 5AAA, there are sufficient procedural and substantive safeguards to ensure that a person is not removed in contravention of Australia's non-refoulement obligations.

1.178 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of the proposed section 5AAA with Australia's non-refoulement obligations under the ICCPR.

Altering the test for determining Australia's protection obligations

1.179 Schedule 2 of the bill seeks to alter the way in which Australia implements its non-refoulement obligations under the ICCPR and CAT. The explanatory memorandum for the bill notes that this amendment is proposed in response to a recent Federal Court case,¹⁰ in which the court held that the risk threshold an applicant must meet to enliven Australia's protection obligations under the Migration Act is that there must be 'a real chance that [a person would] suffer significant harm...were he to be returned to [his country of origin]'. New section 6A provides:

The Minister can only be satisfied that Australia has protection obligations in respect of the non-citizen 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.

1.180 In the second reading speech on the bill, the minister explained that the words 'more likely than not' will be taken to mean that there is 'a greater than fifty percent chance that a person would suffer significant harm in the country they are returned to'.¹¹ Accordingly, Australia's protection obligations would be invoked only where there is a greater than 50 per cent chance that a person would be subject to death or torture.

1.181 The statement of compatibility explains:

It is the Government's position that the risk threshold applicable to the non refoulement obligations under the CAT and ICCPR is higher than the

10 *Minister for Immigration and Citizenship v SZQRB1* [2013] FCAFC 33.

11 Minister for Immigration and Citizenship, Second Reading Speech, Migration Amendment (Protection and Other Measures) Bill 2014, *Senate Hansard*, p. 9.

'real chance' test. While there is some difference of opinion in international fora and amongst the various national implementations of these obligations, applying the risk threshold of more likely than not is considered to be an acceptable position which is open to Australia under international law. The 'more likely than not' threshold reflects the Government's interpretation of Australia's obligations. As courts have applied a lower risk threshold that is inconsistent with this interpretation of Australia's obligations, it is necessary to give express legislative effect to this interpretation.¹²

1.182 In support of its assessment of the measure as compatible with Australia's non-refoulement obligations, the statement of compatibility states:

While these amendments engage with Australia's *non refoulement* obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR, the amendments seek only to clarify Australia's interpretation of these obligations in light of judicial decisions which interpreted the applicable risk threshold in a different manner. The amendments will not operate to deny Australia's protection to any person who engages Australia's *non refoulement* obligations under international law.¹³

1.183 The committee notes that it commented on the issue of the appropriate standard for assessing complementary protection claims in its *Fourth Report of the 44th Parliament*.¹⁴ The committee reiterates its assessment in that report regarding the international human rights standards for assessing non-refoulement obligations. The following additional comments are provided.

1.184 The committee considers that the assessment of the compatibility of this measure with Australia's non-refoulement obligations under the ICCPR and CAT is based on a misunderstanding of established interpretations of these obligations under international law. In particular, the committee notes that, in 1997, the UN Committee against Torture stated:

Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.¹⁵

12 Statement of compatibility, Attachment A, pp 8-9.

13 Statement of compatibility, Attachment A, p. 9.

14 PJCHR, *Fourth Report of the 44th Parliament*, 18 June 2014, p 51 at pp 55-57, paras 3.41-3.48 (Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013).

15 UN Committee against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, A/53/44, annex IX, (21 November 1997).

1.185 The UN Human Rights Committee has considered the 'real risk' of harm test in relation to articles 6 and 7 of the ICCPR. In the case of *Pillai v Canada*, the Human Rights Committee stated:

Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, [...], demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a 'necessary and foreseeable consequence' of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture.¹⁶

1.186 Further, the United Nations High Commissioner for Refugees (UNHCR) stated in 2009, in relation to the proposed Australian complementary protection regime:

UNHCR is of the view that there is no basis for adopting a stricter approach to proving risk in cases of complementary protection than there is for refugee protection. The difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face, are all arguments in favour of adopting an approach that is no more demanding for people potentially in need of complementary protection than it is for refugees. It would be desirable to include the standard of proof in legislation to ensure consistency.¹⁷

1.187 In terms of the analysis in the statement of compatibility that the test for non-refoulement has been the subject of 'difference of opinion in international fora and amongst the various national implementations of these obligations',¹⁸ the committee notes that this appears to refer to the approaches taken in Canada and the USA. As noted above, the UN Human Rights Committee disagreed with Canada's approach to interpreting the real risk test under the ICCPR.

1.188 In relation to the USA, the committee notes the USA issued an 'understanding' (being a statement as to how a State party intends to interpret its obligations) when it ratified the CAT, noting that it was adopting the 'more likely than not' standard in relation to its non-refoulement obligations in respect of torture. The United States government did this in order to align the standards adopted under its complementary protection legislation assessment procedures with the standard applicable under its law relating to assessment of claims under the Refugee

16 *Pillai v Canada* (Communication No. 1763/2008), CCPR/C/101/D/1763/2008, (9 May 2011), http://www.worldcourts.com/hrc/eng/decisions/2011.03.25_Pillai_v_Canada.pdf

17 UNHCR, *Draft Complementary Protection Visa Model: Australia UNHCR Comments* (January 2009). http://www.unhcr.org/au/pdfs/UNHCRPaper6Jan09_000.pdf (accessed 8 July 2014)

18 Statement of compatibility, Attachment A, pp 8-9.

Convention. Australia issued no such understanding when it ratified the Convention against Torture.¹⁹ Moreover, the Committee against Torture noted that the 'more likely than not' standard adopted by the USA involves a much stricter standard than that reflected in that committee's jurisprudence on the interpretation of the CAT.²⁰

1.189 The committee notes that a number of countries have adopted approaches consistent with the international jurisprudence cited above. For example, in New Zealand, the Immigration and Protection Tribunal New Zealand has held:

...as to the 'in danger of' threshold, it signals a degree of risk which is less than the balance of probabilities but more than mere speculation or conjecture...It is a threshold analogous to the real chance threshold long-established in refugee law.²¹

1.190 In the United Kingdom, when considering a case regarding non-refoulement and a potential violation of article 3 (torture) of the European Convention on Human Rights (ECHR), the UK Supreme Court stated:

It is well established that a breach of Article 3 of the ECHR is proved where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment (*Vilvarajah v UK* (1991) 14 EHRR 248 para 103)...It would add considerably to the burdens of hard-pressed immigration judges, who are often called upon to decide claims based both on the Refugee Convention and the ECHR at the same time, if they were required to apply slightly different standards of proof to the same facts when considering the two claims.²²

1.191 In the Australian context, the committee also understands that when interpreting Australia's obligations to extradite individuals who are convicted or suspected of criminal offences under extradition treaties, the government does not apply a *more likely than not test* when considering the risk of the death penalty or torture.

1.192 Accordingly, as the committee has previously commented,²³ the committee considers that the international jurisprudence in relation to Australia's non-refoulement obligations does not support the proposed interpretation set out in Schedule 2 of the bill.

19 See CAT/C/SR.427, para 9 (2000).

20 Committee against Torture, Summary Record of the First Part (Public) of the 424th Meeting, 10 May 2000, 24th Sess, CAT/C/SR.424 (9 February 2001), para 17.

21 *AK (South Africa)* [2012] NZIPT 800174 (16 April 2012).

22 *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, para 12-13.

23 See, Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament* 18 March 2014, 'Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013', pp 55-57 (paras 3.41-3.48).

1.193 The committee therefore considers the proposed amendments in Schedule 2 of the bill to be incompatible with Australia's non-refoulement obligations under the ICCPR and CAT.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage – quality of law test

1.194 Proposed section 423A of the bill would provide that, where a new claim or evidence is raised at the review stage that was not placed before the original decision maker, the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'.

1.195 The statement of compatibility explains that the 'measure is intended to encourage all protection visa applicants to raise their claims and provide supporting evidence as soon as possible, in order to avoid unnecessary delays in deciding an application'.²⁴ The measure is assessed as compatible with Australia's non-refoulement obligations as follows:

This measure meets Australia's *non refoulement* obligations under the CAT and ICCPR ... A protection visa applicant has ample opportunity to present claims and supporting evidence to justify claims to international protection before a primary decision is made on their application. Claims and evidence may be provided when the application is lodged, during interview, on request from a decision-maker, or at the applicant's own initiative at any point before a primary decision has been made.²⁵

1.196 However, the committee is concerned that there are insufficient procedural and substantive safeguards to ensure that this proposed provision does not result in a person being removed in contravention of non-refoulement obligations. For example, people who are fleeing persecution or have experienced physical or psychological trauma may not recount their full story initially (often due to recognised medical conditions such as post-traumatic stress disorder), or else may simply fail to understand what information might be important for their claim.

1.197 Further, the committee is concerned that the proposed provision appears to be inconsistent with the fundamental nature of independent merits review and, to that end, would seem to depart from the typical character of merits review tribunals in Australia. In particular, the committee notes that the function of the RRT as a merits review tribunal is to make the 'correct and preferable' decision in a supporting context where applicants are entitled to introduce new evidence to support their applications. However, proposed section 423A would limit the RRT to facts and claims provided in the original application, and require (rather than permit) the

24 EM, Attachment A, p. 4.

25 EM, p. 5.

drawing of an adverse inference as to credibility in the absence of a 'reasonable explanation' for not including those facts or claims in the original application.

1.198 As noted above, the provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.²⁶ The committee considers that the requirement to draw an unfavourable inference in relation to the credibility of a claim or evidence raised at the review stage is inconsistent with the effectiveness of the tribunal in seeking to arrive at the 'correct and preferable' decision.

1.199 The committee therefore considers that proposed section 423A is incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

1.200 The committee notes that human rights standards require that interferences with rights must have a clear basis in law. This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible for people to understand when the interference with their rights will be justified.

1.201 In the committee's view, what constitutes a 'reasonable explanation' for the purpose of the unfavourable inference not being drawn by the RRT is not well defined.

1.202 The committee therefore requests the advice of the Minister for Immigration and Border Protection on whether the measure, as currently drafted, meets the standards of the quality of law test for human rights purposes.

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.203 The bill would amend the Migration Act to provide that an asylum seeker who fails or refuses to comply with a request to provide proof of identity, nationality or citizenship, without reasonable excuse, may have their protection claims refused (proposed section 91W). Proposed section 91WA would provide an additional refusal power where an asylum seeker provides a bogus document for the purpose of establishing identity, or has caused the disposal of their identity documents.²⁷

26 International Covenant on Civil and Political Rights, article 2. See Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, p 45, at pp 49-51, paras 1.188-1.199 (committee comments on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013), and *Fourth Report of the 44th Parliament*, 18 March 2014, p 51, at pp 55-57, paras 513.41-3.47 (comments on Minister's response to committee views on Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013).

27 For consideration of a similar measure, see Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, 18 June 2014, 'Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]', pp 49-51 (paras 1.188-1.199).

1.204 The statement of compatibility acknowledges that the measure engages Australia's non-refoulement obligations, and concludes that it is compatible with those obligations because they 'will not of themselves operate to deny Australia's protection to any person who engages Australia's non refoulement obligations under international law'.²⁸ It states:

In circumstances where section 91W or section 91WA lead to an application being refused, an assessment of Australia's non refoulement obligations will still be undertaken. Where a person is found to engage protection obligations but did not comply with the amended section 91W or new section 91WA, their application for a protection visa would be refused. However, Australia's non-refoulement obligations would still apply despite the applicant being ineligible for a protection visa. In such cases it is open to the Minister of Immigration and Border Protection to exercise his or her non-compellable powers under the Migration Act 1958 to grant a visa.

1.205 However, while the committee acknowledges the importance of ensuring the integrity of the onshore protection status determination process (including the need to properly establish the identity of applicants), the committee is concerned that the measure may be inconsistent with the effective and thorough assessment of persons qualifying as entitled to protection against non-refoulement in accordance with the applicable international law standards. This is particularly the case with a person who may fail to establish their identity and is refused on that basis (as opposed to one who provides a bogus document).

1.206 In particular the committee notes that, due to their special situation asylum seekers who are fleeing persecution will frequently not possess personal or identity documents. An asylum seeker may not be in a position to obtain a passport or other identity documents in circumstances where they fear persecution. The committee notes that the Refugee Convention acknowledges that asylum seekers often arrive in prospective asylum countries without a valid passport or identity documents and provides a range of protections to asylum seekers in these circumstances.²⁹

1.207 The committee notes that the statement of compatibility identifies the minister's discretionary and non-compellable powers under the Migration Act to grant a visa as enabling Australia to comply with its non-refoulement obligations, notwithstanding the proposed amendments.³⁰ However, as the committee has previously noted, the existence of ministerial discretion (and administrative review processes) does not sufficiently protect against the risk of refouling a person with valid protection claims in breach of Australia's non-refoulement obligations. The

28 EM, Attachment A, p.6.

29 See 1951 Refugee Convention articles 25, 27, 28, 31.

30 EM, Attachment A, p.6.

committee considers that such discretionary and non-compellable powers (which are non-reviewable) in relation to visa protection claims are insufficient to satisfy the standards of 'independent, effective and impartial' review required to satisfy Australia's non-refoulement obligations under the ICCPR and the CAT, given the irreversible nature of the harm that might occur to persons from a breach of these obligations.

1.208 The committee therefore considers that the proposed amendments to section 91W and new section 91WA are likely to be incompatible with Australia's obligations of non-refoulement under the ICCPR and CAT.

Obligation to consider the best interests of the child

1.209 Under the Convention on the Rights of the Child (CRC), States parties are required to ensure that, in all actions concerning children, the best interests of the child is a primary consideration.³¹

1.210 This principle requires active measures to protect children's rights and promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights. It requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.

1.211 Under article 10 of the CRC, Australia is required to treat applications by minors for family reunification in a positive, humane and expeditious manner. This obligation is consistent with articles 17 and 23 of the ICCPR, which prohibit interference with the family and require family unity to be protected by society and the state.

Responsibility of asylum seeker to provide evidence for claims

1.212 As noted above, the bill would insert a new section 5AAA to provide that asylum seekers have responsibility to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'. The objective of the measure is described as 'encouraging individuals to specify the particulars of their claim as early as possible'.³²

1.213 The statement of compatibility identifies the best interests of the child as engaged by the proposed measure. In support of its assessment of the measure as compatible with the obligation to consider the best interests of the child it states:

...the Government is of the view that the aim of encouraging individuals to specify the particulars of their claim as early as possible is legitimate and should be applied to all persons seeking protection in Australia. As such

31 Article 3(1).

32 EM, Attachment A, p.4.

section 5AAA is a reasonable and proportionate measure in achieving this aim and to the extent that this measure may engage the above Articles any limitation is reasonable, necessary and proportionate.³³'

1.214 However, the committee notes that it is recognised in both international and domestic law that children have different capacities to adults. The committee is concerned that it may be particularly difficult for children, including unaccompanied minors, to provide evidence, as required by proposed section 5AAA, due to their age, vulnerabilities and capacity.

1.215 In this respect, the committee notes that the objective of the measure as described in the statement of compatibility does not provide a systematic analysis or explanation of how the measure will, of itself, encourage or support children to specify the particulars of their claims, taking into account the special vulnerabilities of children.

1.216 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.³⁴ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.217 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 5AAA with the best interests of the child, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

33 EM, Attachment A, p. 6.

34 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issue, at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 15 July 2014].

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.218 As noted above, proposed section 423A of the bill would provide that, where a new claim or evidence is raised at the review stage that was not placed before the original decision maker, the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'.

1.219 The statement of compatibility explains that the 'measure is intended to encourage all protection visa applicants to raise their claims and provide supporting evidence as soon as possible, in order to avoid unnecessary delays in deciding an application'.³⁵

1.220 The committee considers that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because it may negatively impact on the merits review of a child's application for protection. The committee is concerned that because children have special vulnerabilities as compared to adults, they may be more likely to fail to understand what information is important to their claim and may have limited capacity to present it. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

1.221 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.222 The committee notes that a systematic analysis or explanation of how the measure will, of itself, encourage children to raise their claims and provide supporting evidence as soon as possible, taking into account the special vulnerabilities of children, is particularly relevant to the human rights assessment (legitimate objective) of this measure.

1.223 The committee therefore requests the advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 423A with the obligations in relation to best interests of the child, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**

35 EM, Attachment A, p. 4.

- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Power to refuse visa application for failure to establish identity, nationality or citizenship

1.224 As noted above, the bill would amend the Migration Act to provide that an asylum seeker who fails or refuses to comply with a request to provide proof of identity, nationality or citizenship, without reasonable excuse, may have their protection claims refused. Proposed section 91WA would provide an additional refusal power where an asylum seeker provides a ‘bogus’ document for the purpose of establishing identity or has caused the disposal of their identity documents.

1.225 The committee considers that the proposed measure potentially limits the obligation to consider the best interests of the child as a primary consideration. This is because the measure will effectively prevent Australia from assessing claims for refugee protection according to the tests as set out in international law. However, the statement of compatibility provides no assessment of this potential limitation on human rights.

1.226 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.227 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of proposed section 91W and section 91WA with the obligation in relation to the best interests of the child, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Restrictions on applications for protection visa by member of same family unit

1.228 Schedule 1 of the bill would insert a new provision, section 91WB, which provides that a protection visa may be granted only on the basis of the applicant being a member of the same family unit as a protection visa holder, if the applicant applied for the protection visa before the primary protection visa holder was granted their protection visa. The purpose of this amendment appears to be to discourage parent's sending their child to Australia by boat unaccompanied.

1.229 The statement of compatibility identifies the measure as engaging and potentially limiting the rights of the child under article 10 of the CRC (and the rights to family life protected by article 17 and 23 of the ICCPR). In support of its assessment of the measure as compatible with human rights, it identifies the objective of the measure as being to encourage 'people to enter and reside in Australia using regular means, thereby preserving the integrity of the migration system and the national interest', and notes:

Article 10 of the CRC requires that applications for family reunification made by minors or their parents are treated in a positive, humane and expeditious manner. However, Article 10 does not amount to a right to family reunification. 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.³⁶

1.230 The statement of compatibility also notes that children separated from their families continue to be able to apply for family reunification under the offshore Humanitarian Programme. However, the committee notes that Migration Amendment (2014 Measures No. 1) Regulation 2014 removed the concession for unaccompanied minors, which allowed their families to come to Australia under the special humanitarian programme (SHP) without having to meet the compelling reasons criterion.

1.231 The committee acknowledges that non-citizens do not have a stand-alone right to family reunification under international human rights law. The committee notes, however, that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia. The bill seeks to limit those rights. The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide a detailed and context-specific assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.232 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 2 of the bill with the obligation to consider the best interests of the child as a primary consideration and, particularly, how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**

- **the measures are proportionate to that objective.**

Further barriers to permanent protection

1.233 Schedule 3 of the Bill inserts a barrier into the Migration Act preventing 'unauthorized maritime arrivals' on a temporary protection visa of some kind from making an application for a permanent visa unless the minister determines that it is in the public interest.

1.234 The committee notes that this means that people granted a temporary visa or bridging visa which contains no right to travel or sponsor family members is precluded from applying for any other category of visa unless the minister determines it is in the public interest for such a visa to be granted.

1.235 The committee notes that the engagement of the rights of the child in relation to this specific measure is not identified. As those on temporary protection visas and bridging visas are denied family reunification rights, this engages the rights of the child under article 10 of the CRC and article 17 and 23 of the ICCPR.

1.236 The committee acknowledges that non-citizens do not have a standalone right to family reunification under international human rights law. The committee notes, however, that the Migration Act currently provides a number of measures that seek to preserve, where appropriate and reasonable, the family unity of those seeking protection in Australia. The bill seeks to limit those rights. The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provide an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective. The committee notes that to demonstrate that a limitation is permissible, legislation proponents must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective.

1.237 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of Schedule 3 of the bill with the obligation to consider the best interests of the child and, particularly, how the measures are:

- **aimed at achieving a legitimate objective;**
- **there is a rational connection between the measures and the objective; and**
- **the measures are proportionate to that objective.**

Right to equality and non-discrimination

1.238 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).³⁷ These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.239 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.³⁸

1.240 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.241 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that State parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.242 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

Responsibility of asylum seeker to provide evidence for claims

1.243 As stated above, the bill would insert a new provision which provides that asylum seekers have responsibility to 'specify all particulars or his or her claim' and 'to provide sufficient evidence to establish the claim'.

1.244 The statement of compatibility identifies the rights to equality and non-discrimination as engaged by the proposed amendments.³⁹ The committee notes that the statement of compatibility sets out a range of matters which could be

37 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

38 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

39 EM, Attachment A, p. 6.

considered to be safeguards for persons from vulnerable groups in the context of the proposed section 5AAA. The statement of compatibility asserts that:

- asylum seekers may make private arrangements to be represented by a registered migration agent.
- asylum seekers who have arrived in Australia 'lawfully' (which the committee takes to mean with a valid visa) and are 'disadvantaged and face financial hardship may be eligible for assistance with their primary application under the Immigration Advice and Application Assistance Scheme'.⁴⁰
- a small amount of additional support may be available for 'arrivals who are considered vulnerable'. Although the form of support is yet to be determined.⁴¹
- departmental policies and procedures will take into account whether an asylum seeker is from a vulnerable group.⁴²

1.245 The committee notes that these measures, according to the information provided, are either undecided, unspecified or contingent. The committee therefore considers that the proposed section 5AAA may have a disproportionate or unintended negative impact on persons with a disability.⁴³ The committee notes that a person with particular disabilities may be less easily able to comply with the requirement 'specify all particulars of his or her claim' and 'to provide sufficient evidence to establish the claim'.

1.246 The committee further considers the proposed section 5AAA may have a disproportionate or unintended negative impact on women. The committee notes that women may be more likely than their male counterparts to have claims based on persecution which has been suffered in the home or private sphere. Due to the nature of the harm women may have suffered, it may be potentially more difficult for women in these circumstances to obtain documentary evidence of the harm they have experienced, their activities and status in society.⁴⁴

1.247 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of Section 5AAA with the rights to equality and non-discrimination.

40 EM, Attachment A, p.4.

41 EM, Attachment A, p.4.

42 EM, Attachment A, p.4.

43 See Parliamentary Joint Committee on Human Rights, *Seventh Report of the 44th Parliament*, June 2014, pp 34 - 38, paras 1.136-1.163 (committee comments on Migration Legislation Amendment Bill (No. 2) 2014 and the rights of persons with disabilities)

44 D Singer, 'Falling at each hurdle: assessing the credibility of women's asylum claims in Europe' in J Millbank, C Dauvergne and E Erbel (eds) *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014), p.100.

Requirement for Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to evidence or claims raised at the review stage

1.248 As stated above the bill would provide that if a new claim or evidence is raised at the review stage that was not placed before the original decision maker then the Refugee Review Tribunal (RRT) is to draw an unfavourable inference about the credibility of the claim or the evidence. The unfavourable inference is only to be drawn if the RRT is satisfied that the asylum seeker 'does not have a reasonable explanation'. The statement of compatibility identifies the rights to equality and non-discrimination as engaged by the proposed amendments.⁴⁵

1.249 However, the committee is concerned that proposed section 423A may have a disproportionate or unintended negative impact on persons with a disability. The committee notes that a person experiencing particular disabilities, in some circumstances, may be less able accurately provide evidence or repeat evidence.

1.250 The committee therefore requests the further advice of the Minister for Immigration and Border Protection on the compatibility of section 423A with the rights to equality and non-discrimination.

Right to a fair trial and fair hearing rights

1.251 The right to a fair trial and fair hearing are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. Circumstances which engage the right to a fair trial and fair hearing may also engage other rights in relation to legal proceedings contained in Article 14, such as the presumption of innocence and minimum guarantees in criminal proceedings.

Responsibility of asylum seeker to provide evidence for claims

1.252 The committee notes that the right to a fair hearing in article 14(1) of the ICCPR may not generally apply to immigration decisions. However, the issue here relates to the bill's impact on existing determinations which have arisen from the exercise of existing statutory rights of review. As such, the committee considers that the retrospective application of these provisions constitutes a limitation on article 14(1) of the ICCPR and requires adequate justification.

RRT power to dismiss an application for failure to appear

1.253 Proposed section 362(1A) enables the RRT to dismiss an application where the asylum seeker fails to appear before the RRT after being invited to do so.

45 EM, Attachment A, p. 6.

Proposed s 362(1C) requires the RRT to, on application, reinstate if it considers it appropriate to do so.

1.254 The committee considers that the power under proposed section 362(1A) may constitute a limitation on the right to a fair hearing in article 14(1) of the ICCPR. The statement of compatibility provides no analysis of limitations on article 14(1) in the context of the proposed power to dismiss an application.

1.255 The committee therefore seeks the advice of the Minister for Immigration and Border Protection as to whether the proposed RTT to dismiss an application is compatible with on the right to a fair hearing in article 14 of the ICCPR, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**