DISSENTING REPORT BY AUSTRALIAN GREENS

Introduction

1.1 The Senate inquiry into the *Migration Amendment (Protection and Other Measures) Bill 2014* revealed a barrage of concern from the community, human rights advocates and legal experts. Whilst the bill at face value seems technical in nature it is everything but. This bill carries with it the very real likelihood of Australia deporting people back to danger, in turn breaching our obligations under international law. The bill seriously compromises the integrity of Australia's rigorous protection determination system, erodes procedural safeguards and puts Australia at risk of breaching its non-refoulement obligations.

1.2 Those who arrive on our shores seeking protection are extremely vulnerable and have often experienced persecution and suffered torture and trauma. The amendments proposed in this bill disregard the realities of fleeing persecution and dismiss the very real and complex nature of the needs of people seeking asylum and the support they require.

1.3 The bill is nothing more than another attempt by the Government to limit Australia's responsibilities to those seeking protection. The Australian Greens do not accept that there is any evidence to justify the amendments proposed in this bill and do not believe it does anything to 'enhance the integrity and fairness of Australia's onshore protection status determination process'. In fact, it does the opposite.

1.4 Evidence provided to the committee made it clear that the bill should not be passed by the Parliament as it breaches various international protocols and treaties, misunderstands the refugee status determination process, has significant adverse impacts on people in genuine need of protection, including the real risk of refoulement due to an unjustifiable increase in the risk threshold, and denies applicants a proper and fair assessment of their protection claims.

1.5 The Australian Greens acknowledge the great concern raised by members of the community and experts in the sector and for the reasons outlined below, do not support the passage of this bill.

Burden of Proof

1.6 The amendments proposed by this bill state that the burden of proof will rest solely on the applicant to prove that they are a person to whom Australia has protection obligations and that sufficient evidence must be provided in the first instance to establish that claim. The shifting of the burden of proof has been widely criticised by legal experts and human rights advocates.

1.7 As noted by many of the submitters and witnesses the amendment is in complete contradiction to the United Nations High Commissioner for Refugee's Guidelines for decision making, which states that:

> 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.
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> It is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognised.[1]

1.8 As was raised by the Human Rights Law Centre in their evidence to the committee the amendments require asylum seekers to master, what the UN recognises as, the art of the 'hardly' possible.[2]

1.9 The bill dismisses the realities of fleeing persecution and the vulnerabilities of those who reach Australia seeking protection. This, combined with the Government's recent cuts to legal advice for asylum seekers who arrive in Australia irregularly, means that those in genuine need of protection will be automatically disadvantaged and at risk of being returned to danger should they be unable to prepare and defend their claims on their own.

1.10 As stated by Mr David Manne, CEO of the Refugee and Immigration Legal Centre:

> It is often very difficult for people in those circumstances to understand what is required and how to present it. That is why the conventional position in international law and under our system is that the duty of establishing claims, the duty of listing those claims and evaluating them is a shared duty between the applicant and the decision maker.[3]

1.11 Of particular concern is how these changes will affect vulnerable groups, including women and children. The Parliamentary Joint Committee on Human Rights clearly stated that the proposed changes "may have a disproportionate or unintended negative impact on women" owing to the increased likelihood of their claims being based on persecution occurring in the home or private sphere making if difficult for applicants to prove.[4]

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1 UN High Commissioner for Refugees, 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.

2 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 28.

3 Mr David Manne, Refugee and Immigration Legal Centre, P*roof Committee Hansard*, 5 September 2014, p. 6.

4 Parliamentary Joint Committee on Human Rights, Ninth Report of the 44th Parliament, p. 53.

1.12 Seeking to amend the Act to shift the burden of proof goes against international law and the reputable body responsible for the protection of refugees, the UNHCR, and should not be accepted.

Increasing the risk threshold to 'more likely than not'

1.13 Significantly increasing the risk threshold for people who are fleeing harm puts Australia at an increased risk of deporting those who are in genuine need of protection back to danger. Under the proposed amendments asylum seekers will have to prove that they have a greater than 50 per cent chance of being tortured or killed. Should a person have a 40 per cent chance of being returned to serious harm then they will be deported.

1.14 These changes are in contravention to international and human rights law, in particular the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment* (CAT) and the principle of non-refoulement to which Australia is party.

1.15 The amendments proposed refer to people who are seeking protection on complementary grounds, that is, people who are not captured by the Refugee Convention but are still deserving of protection as they are fleeing serious harm such as torture, honour killings or female genital mutilation. The proposed amendments will mean Australia's protection obligations will only be engaged when the Minister considers it 'more likely than not' that the person will suffer significant harm if returned.

1.16 As stated by Mr Manne:

> The proposed 'more likely than not' test would ultimately significantly increase the risk of Australia making the wrong decision on whether or not somebody should be protected from serious harm. The test raises the real prospect of returning people to persecution or other forms of life-threatening harm, in violation of our non-refoulement obligations. That is the bottom line here.[5]

1.17 Despite the government and Department's attempts to downplay the quantitative measurement of the risk threshold throughout the inquiry, it is clear from the evidence provided to the committee that the 'more likely than not' threshold will result in a significantly higher test than the current 'real risk' or 'substantial grounds' threshold.

1.18 As stated by Mr Webb:

> [the] 'more likely than not' test is a higher test than real risk or substantial grounds and, to put that beyond doubt, the UN Committee Against Torture has specifically said that the 'more likely than not' standard is a higher test

5 Mr David Manne, Refugee and Immigration Legal Centre, P*roof Committee Hansard*, 5 September 2014, p. 2.

> than the substantial grounds test that the committee has advocated in its interpretation of the convention against torture.[6]

1.19 This unacceptably high threshold is at odds with Australia's international obligations, the lower threshold test which has been well established and applies in comparable countries like the UK and New Zealand, and significantly increases Australia's chances of violating its non-refoulement obligations.

Bogus Documentation

1.20 Should an applicant provide fraudulent documentation or is unable to prove their identity, under this bill, their application for protection will be denied. This amendment ignores the realities of seeking asylum and goes against the basic principles of the Refugee Convention.

1.21 As highlight by many of the submitters there are many reasons that people are unable to obtain identity documents or may not have the correct documentation when they arrive in Australia, such as their home government refusing to issue documentation to persecuted groups, being too afraid to request documentation from the government they are fleeing, and having no time to obtain documentation due to fleeing persecution.[7] To propose such an amendment dismisses the experiences of those fleeing persecution.

1.22 Further to this, the amendments contravene article 31 of the Refugee Convention which prohibits governments from penalising refugees who arrive without authorisation. As raised by Mr Webb:

> The Refugee Convention recognises what these reforms ignore – that is, the basic legal and moral duty to protect a person is not diminished just because a person arrives without certain paperwork or with fake documents.[8]

1.23 Amendments of this nature will result in genuine refugees being denied protection purely on the basis that they were unable to provide the 'right' documentation. This will put Australia at risk of returning refugees back to their persecutors.

Family Reunion

1.24 Family reunification is a fundamental human right under international law and a requirement of the Refugee Convention. The amendments proposed in Item 11,

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6 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 31.

7 The Refugee Council of Australia, Submission 11, p. 4.

8 Mr Daniel Webb, Human Right Law Centre, *Proof Committee Hansard*, 5 September 2014, p. 27.

subsection 91W,compromise this right and will mean that the family members of a protection visa holder will be unable to apply for a protection visa on the basis that they are a 'member of the same family unit'.

1.25 It is well known that the spouses and children of those found to be in genuine need of protection in Australia are highly likely to face similar threats or harm. As stated by Refugee Advice and Case Works Service (RACS) '(t)his is because harm to a person's family is one of the most common threats a person can receive by those perpetrators of serious harm'.[9]

1.26 The amendments also raise serious concerns for unaccompanied minors who will be unable to be reunited with their families under these amendments. The only option minors and other persons will have to be reunited with their loved ones will be through the humanitarian program which has significantly long wait times (up to five years for children who are separated from their families). In their evidence to the inquiry the Law Council of Australia stated these changes will be further exacerbated by the government's recent changes to family reunion for protection visa holders which includes:

> Removing 4,000 additional Family Stream places for people found to be owed protection in Australia to reunite with immediate family members announced as a measure in the 2014-15 budget; the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 (Cth) that removes parent visa subclass 103, the aged parent visa subclass 804, the aged dependent relative visas subclasses 114 and 838, the remaining relative visas subclasses 115 and 835, and the carer visas subclasses 116 and 836, and the fact that, as noted by the NSW Bar, since July 2013, fees for sponsors have increased up to 500%.[10]

1.27 Removing pathways for family reunion for vulnerable refugees compromises Australia's international obligations relating to family unification and puts unaccompanied minors at risk of being separated from family members for excessively long periods of time.

New claims or evidence before the Refugee Review Tribunal (RRT)

1.28 Amendments proposed in section 423A will require the RRT to refuse protection if new evidence or claims are provided that were not previously raised with the Department. This amendment fails to take into consideration the vulnerabilities of those who come to Australia seeking protection and the reasons why some people may not or were unable to provide all necessary evidence in the first instance.

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9 RACS, http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-The-Migration-Amendment-Protection-and-Other-Measures-Bill-2014-25-June-2014.pdf

10 Law Council of Australia, Submission 9, pp. 31– 32.

1.29 As noted by the ANU College of Law, Migration Law Program in their submission:

> A failure to disclose earlier claims or evidence would be particularly common in relation to family violence or gendered-violence claims. Applicants may be reluctant to disclose evidence due to the traumatic nature of such claims and a fear and mistrust of authorities.[11]

1.30 The amendments ignore the lived experiences of asylum seekers and refugees who come to Australia seeking protection.

Tribunal processes

Guidance decisions, oral decisions and statements of reason and power to dismiss for non-attendance

1.31 The proposed amendments in Schedule 4 of the bill will undermine the independence of the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT) and deny applicants procedural fairness.

1.32 Many submitters raised concerns about the amendments that would enable the Principal Member to issue guidance decisions. Mr Hoang from the ANU College of Law stated in his evidence to the committee:

> This unnecessarily fetters the discretion and independence of tribunal members to consider the merits of a particular case. The bill is completely silent on the circumstances on which a guidance decision would be issued by the principal member of the RRT and exactly what parts of a decision would be binding on tribunal members.[12]

1.33 Similarly, concerns were raised about amendments that would see only oral decisions handed down by the RRT and MRT. Written decisions would only be available if specifically requested. In their experience Refugee Immigration and Legal Centre stated that:

> Applicants often struggle to understand key elements of their decision, even after a detailed explanation…and may also not understand the need to request written reasons within the limited time period. The consequence of failing to obtain a written statement of reasons could seriously compromise a person's capacity to seek judicial review.[13]

1.34 The proposed power to dismiss a person's case on the basis of non-attendance denies a person the ability to receive a fair hearing and could potentially breach Australia's international obligations. The committee heard clear evidence from experts

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11 ANU College of Law, Migration Law Program, Submission 8, p. 7.

12 Mr Khanh Hoang, ANU College of Law, Migration Law Program, *Proof Committee Hansard*, 5 September 2014, p. 27.

13 Mr David Manne, Refugee and Immigration Legal Centre, additional documents, p. 9.

in the sector that there are a number of reasons that people may be unable to attend a hearing and that a seven day timeframe for reinstatement fails to take into consideration the obstacles that many asylum seekers face.

Retrospectivity

1.35 It is important to note that the provisions in this bill are drafted to apply retrospectively. Should this bill be passed people who have applications on foot will be disadvantaged despite at all times meeting the criteria for a visa grant prior to the change. Evidence provided to the committee by the RRT and MRT states that there are currently 4,400 cases that will be affected should this bill pass.[14]

1.36 As stated by Amnesty International these amendments will:

> Adversely impact a large cohort of individuals who have always complied with the criteria for their protection applications. The changes will mean that they are found to no longer meet these requirements, simply because the goalposts have moved around them. This is plainly unfair and must not be allowed to come into effect.[15]

1.37 The retrospective nature of this bill is unnecessary and will result in thousands of people being disadvantaged due to the goal posts shifting.

Conclusion

1.38 The bill is nothing more than another attempt by the Government to limit Australia's responsibilities to those seeking protection. The Australian Greens do not accept that there is any evidence to justify the amendments proposed in this bill and do not believe this bill does anything to 'enhance the integrity and fairness of Australia's onshore protection status determination process'. In fact, it does the opposite.

1.39 This bill carries with it the very real likelihood of breaching Australia's non- refoulement obligations and deporting people back to danger due to the increase in the risk threshold to over a 50 per cent chance of experiencing significant harm. The bill is inconsistent with international standards, it misunderstands the refugee status determination process, has significant adverse impacts on people in genuine need of protection and denies applicants a proper and fair assessment of their protection claims.

1.40 The Australian Greens acknowledge the community concerns regarding the implications of this bill and for the reasons stated, do not support the passage of this bill.

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14 Migration Review Tribunal – Refugee Review Tribunal, answer to question on notice, 10 September 2014, p. 1.

15 Ms Sophie Nicolle, Amnesty International Australia, *Proof Committee Hansard*, 5 September 2014, p.11.

Recommendation 1:

1.41 The Australian Greens recommend that the Australian Government at all times act within the law and abide by Australia's international and human rights obligations.

Recommendation 2:

1.42 The Australian Greens recommend that the Australian Government reaffirm its commitment to the Refugee Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment.

Recommendation 3:

1.43 The Australian Greens recommend that the Senate reject the bill.

Senator Sarah Hanson-Young
Australian Greens