REFUGEE ADVICE & CASEWORK SERVICE

1-3 Eurimbla Ave
Randwick NSW 2031
Phone: [02] 8355-7227
Fax: [02] 8004-3348
admin@racs.org.au
www.racs.org.au

8 October 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Migration and Maritime Powers Amendment Bill (No. 1) 2015

The Refugee Advice & Casework Service (**RACS**) is a specialised refugee community legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the Migration and Maritime Amendment Bill (No. 1) 2015 (the **Bill**). Our submission focuses on those provisions that affect our clients.

1. Summary

Each of the four schedules of the Bill propose to modify provisions of Australian law that were subject to significant amendments in 2014 that had adverse consequences for asylum seekers and other non-citizens in Australia.

While many of the amendments proposed in the Bill are for the purpose of improving coherency and consistency or resolving legislative oversights, they also compound the unfairness caused by some of the changes made in 2014.

2. Character and cancellation provisions: Schedule 2

Provisions of the Migration Act (the **Act**) that relate to cancellation of visas were significantly overhauled by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (the **Character Act**). In relation to the amendments contained in that legislation RACS and other submitters to the Committee variously cited concerns about:[1]

[1] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Character_and_Visa_Cancellation_Bill_2014/Report> (accessed 2 October 2015).

- the lowering of the thresholds for visa cancellation or refusal on character grounds;
- the introduction of mandatory visa cancellation provisions;
- the expansion of the Minister's personal discretionary powers to overturn decisions of the Administrative Appeals Tribunal or Departmental officers;
- bars on access to merits review; and
- the risk of prolonged and indefinite detention of refugees.

There has been a dramatic rise in the number of people in immigration detention as a result of visa cancellation in the period since the passage of the Character Act. While they do not reveal the power under which a person's visa was cancelled, the most recent statistics released by the Department show that the number of people in detention as a result of visa cancellation at 31 August 2015 was five times higher than it was 12 months earlier.[2]

RACS considers that the provisions proposed in Schedule 2 the Bill exacerbate some of the existing failures in relation to procedural fairness in the framework for character cancellation and refusal. Examples of this are the amendments in the Bill that would broaden the application of s 501BA, which contains the Minister's new power to overturn (without natural justice requirements) decisions of the Administrative Appeals Tribunal or Departmental officers to revoke a mandatory cancellation decision.[3]

We echo our submission in relation to the Character Act that while RACS supports a visa cancellation system which protects the Australian community from harm flowing from serious criminal conduct, that system must have adequate procedural safeguards to ensure that decisions are fair and just, and that people are not detained unfairly or arbitrarily.

This framework is of particular importance to RACS' clients, former clients and other refugees and asylum seekers in Australia because Australian law allows the period of detention resulting from cancellation to continue indefinitely.

The Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum to the Bill cites Departmental processes for review and the Minister's non-compellable powers (to allow a visa application or grant a visa) as measures that protect against arbitrary detention. In the context of the trend toward greater Ministerial discretion to cancel or refuse and fewer opportunities for meaningful oversight or review of those decisions, RACS considers that it is inappropriate to rely on non-compellable discretions.

The proposed amendments to the definition of *character concern* in section 5C of the Act are another example of the extension of the changes implemented by the Character Act. In bringing the definition of *character concern* into line with the character test as amended by the Character Act, the Bill significantly expands the scope of the application of *character concern*. The relevant definition currently specifies that a non-citizen is of character concern if, for example:

> (d) in the event that the non-citizen were allowed to enter or to remain in Australia, there is a significant risk that the non-citizen would:
> (i) engage in criminal conduct in Australia; or
> (ii) harass, molest, intimidate or stalk another person in Australia; or
> (iii) vilify a segment of the Australian community; or
> (iv) incite discord in the Australian community or in a segment of that community; or

[2] Department of Immigration and Border Protection, Immigration Detention and Community Detention Statistics Summary 31 August 2014, 6 (93 people); Department of Immigration and Border Protection, Immigration Detention and Community Detention Statistics Summary 31 August 2014, 7 (505 people).

[3] For example, Schedule 2 Items 5-8.

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Schedule 2 would omit the word *significant* in the first part of this definition such that a person would face the impossible task of showing that there is no risk in order to avoid the application of the definition.[4] The definition is also expanded significantly in other ways that we addressed in our submission on the Character Act.[5]

The effect of a person satisfying this definition includes that the disclosure of their personal information by the Department for certain purposes is a permissible disclosure under section 336E. The proposed expansion of the definition could therefore make the disclosure of the personal information in accordance with section 336E lawful in relation to almost any non-citizen. While we acknowledge that the proposed definition would be consistent with the form of the character test as amended by the Character Act, this demonstrates the incredible breadth of potential application of these definitions.

3. Bar on further protection visa applications: Schedule 3

Schedule 3 amends section 48A of the Act, which gives effect to the policy position that a person should not be allowed to make repeat applications for a protection visa. This section was amended on multiple occasions in 2014:

- The *Migration Amendment Act 2014* (passed in May 2014) amended section 48A with the effect that a further application would be invalid even it was made in reliance upon different grounds or criteria. For example, the amendment has had the effect that a person whose previous protection visa application was decided before the introduction of the complementary protection criterion (in 2012) could not make a further protection visa application in order to have their claims assessed against the complementary protection criterion (or any other criterion). This amendment introduced subsection 48A(1C).
- The *Migration Legislation Amendment Act (No. 1) 2014* (passed in September 2014) amended section 48A with the intention that in no circumstances could a person make a further protection visa application without Ministerial permission even where that person had no knowledge of the earlier application. This amendment introduced subsection 48A(1AA).

In comparison to the breadth of those amendments, the change to section 48A proposed in the current Bill would have relatively narrow application. The Bill seeks to retrospectively address the fact that the introduction of subsection (1AA) was not accompanied by provision extending to it the application of subsection (1C). The government has therefore identified a gap in which an applicant might, for example, attempt to argue that section 48A does not prevent a further application because:

- the application is made relying on a different criterion to the previous application; and
- the applicant had no knowledge of the previous application.

We reiterate here why such an absolute formulation of section 48A has the capacity to cause serious unfairness to some protection visa applicants, especially children. Protection

[4] Schedule 2 Items 1-2.

[5] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Submission 2: Refugee Advice and Casework Service, 28 October 2014, 1-5, available at <http://www.aph.gov.au/DocumentStore.ashx?id=de448c40-85f4-4c6f-b932-a21c2160fe40&subId=301185> (accessed 2 October 2015).

visa applications are the primary mechanism by which Australia assesses protection status in order to ensure compliance with its international protection obligations. Despite this, the current form of s 48A is not designed to ensure that protection claims are assessed accurately and fairly, but to bar the further application of any person who has previously been listed as an applicant on an application, irrespective of the circumstances.

RACS made submissions to the Committee in relation to both the *Migration Amendment Act 2014*[6] and the *Migration Legislation Amendment Act (No. 1) 2014.*[7] Our submission on the latter contained the comments in relation to the effect of subsection 48A(1AA) and its equivalent provision in relation to applications for other visa classes:

> Instances of unfairness can arise where people become statutorily barred from making further visa applications based on something they had no control over and of which they had no knowledge.
>
> As the Court in *Kim*[8] makes clear, this is unlikely to be relevant for children of younger years. However for young people under 18 years of age with capacity, including capacity to providing consent and capacity to form an intention, it is unwise to legislate that such matters can never be considered in relation to future visa applications.
>
> Visa applicants under 18 years of age are not a uniform group, and it seems prudent to allow for some consideration of factors such as level of understanding, intelligence, competence, knowledge, family conflict and mental incapacity.
>
> RACS supports the general proposition that a person's claims to be a refugee should be processed efficiently and fairly, and that merits assessment of their case at Departmental and Tribunal level ought to, ordinarily take place only once rather than repeatedly.
>
> However the changes proposed to the law by the Bill are not required to achieve these ends within the numbers of repeat applications by former child visa applicants, and go too far in legislating to exclude all considerations of mental incapacity or competence in every case. To legislate that these considerations can never be considered could easily create unintended consequences.[9]

Our submission contained the following case study by way of example:[10]

> A 16 year old girl remains in conflict with her father due to family violence and remains living in a refuge with her mother. She is included in an unmeritorious visa application without her knowledge by her father, which is refused. When her mother includes her on a subsequent meritorious visa application as her dependent, she is informed that the application by the daughter is invalid due to the father's previous application.

[6] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment Bill 2013, Submission 4: Refugee Advice and Casework Service, 13 January 2014, available at <http://www.aph.gov.au/DocumentStore.ashx?id=1b493dc6-a834-45ef-8c26-15e5a3ade11f&subId=31861> (accessed 2 October 2015).

[7] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Legislation Amendment Bill (No. 1) 2014, Submission 1: Refugee Advice and Casework Service, 28 April 2014, available at <http://www.aph.gov.au/DocumentStore.ashx?id=ea53a388-9149-4a02-bb5c-e1cf1e6a5e38&subId=251993> (accessed 2 October 2015).

[8] *Kim v Minister for Immigration* [2013] FCCA 1526.

[9] At 4-5.

[10] At 4.

The amendments in Schedule 3 will reinforce the position that there is no enforceable right for the circumstances of a child in these circumstances to be taken into account.

Retrospectivity

RACS is concerned by the retrospective application of the amendments to section 48A proposed in Schedule 3. The amendments are expressed to commence on 25 September 2014: the day on which the relevant provisions of the *Migration Legislation Amendment Act (No. 1) 2014* came into effect.[11] As such, the Bill would retrospectively render invalid any previous or ongoing protection visa applications which are currently not invalid but which fall within the gap that Schedule 3 proposes to patch.

RACS supports the principle that migration laws should be prospective and transparent, and we consider that it is a fundamental principal of the rule of law that the government in all its actions is bound by rules that are fixed and certain. This position would be offended by the passage of legislation to extinguish existing rights arising from a visa application that has been lodged in reliance on the current position of the law.

4. Attempted removal of non-citizens and return to Australia: Schedule 1

Schedule 1 of the Bill deals with visa-free re-entry and a bar on further applications for visas (including protection visas) in relation to people who are brought back to Australia after their attempted removal. These are matters already provided for in the Act.[12] The Bill would change the circumstances in which these exceptions apply, expanding them from the narrow context of when a person is *refused entry* into the destination country, to broader circumstances in which a person might fail to enter the other country or the removal might not be completed for other reasons.[13] The explanatory memorandum states that this is intended to allow for greater flexibility in returning a removed non-citizen to Australia.[14]

Although the existing interaction between sections 42 and 48 is already designed to have the effect that a person does not gain a fresh right to make a valid protection visa application when they are returned to Australia after they have been refused entry into a destination country after removal, the proposed expansion of the circumstances contemplated by the legislation is an appropriate opportunity to comment on this position as a matter of policy.

As observed in the Explanatory Memorandum to the Bill, the bars on further visa applications in section 48 and 48A do not apply for life.[15] They only apply while the non-citizen remains in Australia. In relation to protection visas, this position recognises that the reasons for which a person may apply for protection may change over the course of that person's lifetime, and that it is appropriate for significantly different circumstances to be assessed on their individual merits. Although it may be appropriate for a bar on further applications in this context to apply broadly to other visa classes, protection visas are a unique case because the circumstances of an attempted removal that was not completed may fundamentally change a person's eligibility for the grant of the visa.

[11] Schedule 3 Part 1 of the Bill.

[12] Section 42(2A)(d) of the Act.

[13] Schedule 1 Item 2 of the Bill: proposed paragraphs 42(2A)(d)-(da).

[14] Explanatory Memorandum, 9.

[15] Explanatory Memorandum, 10.

For example, the circumstances contemplated by the amendments in Schedule 1 – including situations in which a person is refused entry into their country of origin when accompanied by Australian officials – may have significant implications for whether that person faces a risk of harm in that country in the future. Aborted attempts at removal resulting in a person being brought back to Australia will foreseeably attract significant attention from the authorities of the destination country in some cases. For people who fear harm at the hands of the authorities of that country, this may constitute a significant change in circumstances.

Administrative, non-statutory assessments of changes to the probability and nature of the harm that may be faced by such a person are not accompanied by the necessary procedural safeguards to ensure that they can be relied upon to achieve compliance with Australia's protection obligations.

5. Maritime powers and the Convention on the Law of the Sea: Schedule 4

RACS endorses the submission of Kaldor Centre for International Refugee Law in relation to Schedule 4 of the Bill.[16] In particular, we are concerned that rather than ensuring the exercise of powers under the *Maritime Powers Act 2013* in a manner consistent with Australia's obligations under the UN Convention on the Law of the Sea, the Bill appears to authorise actions that in fact breach those obligations.

Please do not hesitate to contact us for further information or clarification.

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per

Tanya Jackson-Vaughan
Executive Director

Scott Cosgriff
Senior Solicitor

[16] Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015, Submission 1: Kaldor Centre for International Refugee Law, 6 October 2015, available at <http://www.aph.gov.au/DocumentStore.ashx?id=a9cd9c6b-9355-4162-8ef6-4859e7b38037&subId=403513> (accessed 7 October 2015).