RACS REFUGEE ADVICE & CASEWORK SERVICE

4 August 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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To the Committee

Migration Amendment (Protection and Other Measures) Bill 2014 Submission by the Refugee Advice & Casework Service (Aust) Inc.*

RACS welcomes the opportunity to provide comment on those provisions of the *Migration Amendment (Protection and Other Measures) Bill 2014* (the **Bill**) that are most relevant to our service and our clients.

RACS identifies that the Bill would operate to substantially undermine the role of Protection (Class XA) visas as the central legal mechanism for the observation of Australia's international protection obligations. It is foreseeable that several amendments will result in the refusal of protection visa applications in circumstances in which Australia clearly has protection obligations to the applicant. We consider that the proposed changes affecting protection visa applications will create real injustice for some applicants and significantly increase the risk of Australia failing to comply with its international obligations.

In addition to those provisions that relate to protection visa applications specifically, the Bill proposes an increasingly formulaic and judicial mode of assessment of protection obligations

* The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

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that RACS considers will have a negative impact on the quality of decision making for the purpose of compliance with Australia's non-refoulement obligations.

1. Burden of proof in relation to protection obligations (section 5AAA)

1.1 The Bill would create a new section 5AAA that seeks to clarify that it is the responsibility of a non-citizen to specify all particulars of his or her protection claims and provide sufficient evidence to establish those claims. The section further seeks to identify that the Minister does not have any responsibility or obligation to specify, or assist in specifying, any particulars of a non-citizen's claims or establish, or assist in establishing, the claim. RACS considers that the proposed section 5AAA is unnecessary and should not be adopted.

1.2 With respect to the responsibility of advancing claims, Australian courts have repeatedly held that the Protection visa process, particularly with reference to the Refugee Review Tribunal, is inquisitorial in nature, with no onus on the Minister or the Tribunal.[1] While both the Tribunal and the Department have a power to obtain information,[2] there is no general obligation on either to make any inquiries.[3]

1.3 The obligations on decision-makers are found in a code of procedures in the *Migration Act 1958* (Cth) (the **Act**) and are limited to putting certain adverse information to an applicant.[4] The Tribunal has the additional obligation of inviting a review applicant to attend a hearing.[5] The question of who bears any burden of proof is further addressed by the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (the **UNHCR Handbook**) which identifies that any burden of proof lies on the person seeking protection with the duty to "ascertain and evaluate all the relevant facts [being] shared between the applicant and the examiner".[6]

1.4 The key difficulty with the proposed section 5AAA is that there will be instances where an asylum seeker, for a variety of reasons including language and mental illness, may not be able to adequately articulate or advance a claim for protection. The current case law requires decision-makers to consider a claim that is not only articulated but one that clearly arises on the evidence and material.[7] In reframing the nature of the assessment of whether an individual is a person to whom Australia has protection obligations at Australian law, the proposed section 5AAA would result in derogation from this principle and lead to a process

[1] See for example: *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53.
[2] Sections 56 and 424 of the Act.
[3] *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39. The Court did however observe that a failure to make an "obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review".
[4] See sections 57, 424 and 424AA of the Act.
[5] Section 425 of the Act.
[6] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, available at http://www.unhcr.org/3d58e13b4.html (accessed 1 August 2014).
[7] *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263 (16 September 2004).

that is likely to undermine quality refugee status determination and may lead to a breach of Australia's *non-refoulement* obligations.

Recommendation

1.5 RACS recommends that the Bill be amended to omit the proposed section 5AAA.

2. Retrospective effect of amendments

2.1 The drafting of specific provisions has the effect that the Bill applies retrospectively to protection visa applicants whose applications have not been finally determined and other asylum seekers whose protection status is yet to be resolved.

2.2 Like refugee status assessments more broadly, protection visa applications are not instantaneous assessments. In practice, a decision as to whether the visa will be granted or refused can routinely be reached several years after the time of application. The application of the amendments contained in the Bill to the circumstances of those whose applications are ongoing would significantly prejudice a very large number of applicants. The Bill creates a legal situation in which a person who applied for a protection visa several years ago and who has always met all existing criteria for the grant of the visa can or must be refused the visa due to the amendments proposed in the Bill.

2.3 This can be witnessed in relation to the following amendments:

- Retrospective changes to the legal significance of evidence or statements previously provided by asylum seekers in relation to identity and identity documents may result in the mandatory refusal of applications (section 91WA).[8]
- Retrospective application of a higher standard of proof in relation to the probability of significant harm (for the purposes of the complementary protection provisions in section 36) may have the effect that applicants who have already given evidence and who are eligible for protection under the existing complementary protection provisions are both refused a protection visa and no longer considered to be a person to whom Australia has protection obligations.[9]
- Retrospective application of the proposed section 91WB (to remove the membership of the same family unit as a protection visa holder from the criteria for the grant of a protection visa) will lead to the refusal of the going applications of applicants who currently satisfy all existing requirements for the grant of the visa.[10]

2.4 The retrospective application of the Bill thereby undermines the legal processes that have applied to existing but unfinalised applications. Given the high potential for manifestly unjust outcomes, there is no compelling reason as to why the Bill should have retrospective effect. In particular, many of the provisions are stated by the Explanatory Memorandum to be intended to discourage certain behaviours in the future, such as the provision of false documents or the destruction of genuine documents. These goals are not served by the retrospective application of these changes to existing applications.

[8] This provision is addressed below at section 4.
[9] This provision is addressed below at section 6.
[10] This provision is addressed below at section 5.

Recommendations

2.5 RACS recommends:

- That the Bill should apply only to applications made on or after the commencement of the Bill.
- That the Committee should require the Commonwealth to justify the retrospective effect of the Bill.

3. New claims or evidence at the review stage (section 423A)

3.1 The Bill introduces a new section 423A which requires the Tribunal to draw an inference unfavourable to the credibility of a claim or evidence if the Tribunal is satisfied that the applicant does not have a reasonable explanation as to why the claim was not raised, or the evidence was not presented, before the primary decision was made.

3.2 RACS considers that the proposed section 423A unnecessarily imposes a mandatory statutory consideration upon what is currently for the Tribunal, as part of its review function, an unfettered power to examine evidence and make appropriate findings on credibility. It is currently open to the Tribunal to consider new information and determine, having regard to its nature and reasons given for the delay, what weight, if any, should be given to new information. RACS considers this to be an appropriate and efficient means of achieving the legislative intention of the proposed section 423A.

3.3 Notably, the proposed section does not appear to permit the Tribunal to consider the nature, relevance or reliability of the evidence. That is to say, the Tribunal may be required to give no weight to evidence that it considers credible and relevant, simply because there is no reasonable explanation for the delay in producing it. This brings about an artificial review process that may result in the denial of protection visas to persons to whom Australia clearly has protection obligations and may lead to breaches of Australia's *non-refoulement* obligations.

3.4 The proposed section 423A requires the Tribunal to consider whether any reasons given by an applicant amount to a "reasonable explanation" for the delay in raising a claim or providing evidence. While the Bill provides little guidance on this issue, in RACS' experience, there are many reasons why an asylum seeker may not have advanced claims or evidence until the review stage. These reasons include, among other things, not having access to legal advice in relation to the relevance of certain information or evidence and, in turn, not appreciating the relevance or significance of certain evidence; being incapable of revisiting incidents of torture and trauma; gender-related or cultural reasons and fear of authority. While the reasons for not advancing a claim or other evidence are relevant considerations for the Tribunal in determining the credibility of new evidence, RACS considers that the Tribunal must be permitted to consider the evidence or claim for itself before drawing any inferences as to its credibility. The Tribunal regularly makes adverse findings in circumstances in which claims or evidence are provided in circumstances which cast doubt on their reliability. Requiring the RRT to draw an adverse inference on credibility as a matter of course unnecessarily fetters the status of the Tribunal as not bound by

technicalities, legal forms or rules of evidence, and bound to act according to substantial justice and the merits of the case.[11]

Case example 1 – Additional evidence obtained in response to refusal

Khaled fears persecution in his country of origin because of his role in an opposition political party. He provided with his application his membership certificate and certain photographs as evidence of his activities in the party. His application was refused at the primary level because the delegate did not believe that he in fact held his claimed role within the party. After the decision, Mohammad approached the party in the country of origin, whose leaders wrote a letter corroborating his stated role in the party. Khaled provided the original copy of the letter to the Tribunal, which accepts that it is genuine. Khaled stated that he did not think it would be necessary to obtain this additional evidence until after he realised that his claimed profile was in doubt. Under the proposed s 423A, the Tribunal must consider whether this is a "reasonable explanation" and if not, draw an unfavourable inference in relation to its credibility, irrespective of its actual view of the genuineness of the document. Would Khaled's application be refused?

Recommendation

3.5 RACS recommends that the Bill be amended to omit the proposed section 423A.

4 Significance of identity documents and fraudulent documents in the assessment of protection visa applications

4.1 Sections 91W and 91WA of the Bill require the Minister to refuse to grant a person a protection visa if the person:

- does not provide evidence of their identity when requested; or
- provides a "bogus document" of their identity, nationality or citizenship; or
- has caused documentary evidence of their identity, nationality or citizenship to be destroyed;

and

- the Minister does not think that they have provided a "reasonable explanation"; or
- the Minister is not satisfied that the person has taken "reasonable steps" to obtain evidence of their identity.

4.2 These provisions would affect any person in Australia who has already applied for a protection visa, or who would apply for a protection visa in the future.

4.3 The Explanatory Memorandum states that the purpose of this amendment is to "create a refusal power" in the circumstances outlined above in order to encourage protection visa applicants to assist with authenticating their identity and to discourage applicants from providing false documents or destroying genuine documents.

[11] Section 420(2) of the Act.

4.4 RACS agrees that establishing an asylum seeker's identity is a critical factor in determining whether a non-citizen engages Australia's protection obligations. However, RACS considers that this amendment is entirely unnecessary because the power to refuse a protection visa application in these circumstances already exists. Further, the amendment will cause serious negative consequences for the Department in that it will create significant administrative burden, delay in the assessment of protection visa applications, and is likely to lead to the refusal of visas for the most genuine and vulnerable refugees.

Existing power of refusal and penalties for false documents

4.5 Robust assessments of a person's identity and identity documents are already a routine part of the protection visa application process and the power to refuse an application as a result of inadequate evidence of identity already exists.

4.6 Section 36 of the Migration Act provides that in order to be granted a protection visa, the Minister must be satisfied that the applicant is a person in respect of whom Australia has protection obligations. Departmental policy states that a decision-maker must robustly assess a person's claimed identity before recording in the decision record whether they have reached the requisite level of satisfaction.[12]

4.7 In the process of reaching the requisite level of satisfaction, decision-makers are required to thoroughly assess an applicant's identity, citizenship and nationality. This necessarily involves requesting identity documents, assessing the authenticity of identity documents, and, making enquiries of the applicant in circumstances in which a person cannot or does not provide identity documents, or provides documents suspected to be fraudulent.

4.8 In addition, the existing section 91W allows an officer to request an applicant to provide identity documents and creates an express power to draw "any unfavourable inference", if the person fails to comply with the request.

4.9 As such, the existing powers are broad and permit a decision-maker to refuse to grant a Protection visa for any reason that causes them not to be "satisfied" that the applicant is a person to whom Australia has protection obligations. If a decision-maker believes that an applicant has not answered questions about their identity honestly and openly, has made false statements about their identity, has provided false documents of any kind, or has not provided honest reasons for why they cannot obtain identity documents, this can and does currently lead the decision-maker to find that the applicant has not provided credible information about their protection claims in general and, therefore, to not be "satisfied" that the applicant is a person to whom Australia has protection obligations.

4.10 In addition, other sections of the Act provide severe penalties for providing false or misleading information about a person's identity. Section 234 makes it a criminal offence for a person to provide false or misleading information or documents to a Commonwealth officer in connection with a visa application, with a maximum sentence of 10 years imprisonment. Section 107 allows the Minister to cancel a person's visa if he believes that a person

[12] Department of Immigration and Border Protection, Procedures Advice Manual, P. 16/07/2014 - > PAM3 - MIGRATION ACT > PAM - Identity, biometrics and immigration status > Assessing the identity of visa applicants; P. 16/07/2014 - > PAM3 - REFUGEE AND HUMANITARIAN > PAM: The Protection Visa Procedures Advice Manual > PVPAM - IDENTITY AND BIOMETRICS.

provided incorrect information in their visa application or provided bogus documents to an immigration officer.

Consequences of refusal based on identity

4.11 The effect of these amendments is to create a process for assessing a person's identity that is separate from and additional to the identity assessment process that is an inherent part of assessing a person's protection claims. The new provisions create an additional ground for refusing a protection visa application, similar to the existing grounds relating to satisfying health criteria and satisfying security and character checks.

4.12 The Explanatory Memorandum states that a person will be assessed to determine whether they are a person in respect of whom Australia has protection obligations even if ultimately they are refused a visa based on these new identity assessments. This means that a person could be found to be a refugee through the existing rigorous process for assessing their identity, documents and credibility, but they could be subsequently refused a protection visa because an explanation they gave about a document or the reason for being unable to obtain a document is not considered to be a "reasonable explanation".

4.13 The Explanatory Memorandum states that in these cases, the government would not forcibly return the person to their home country. However, there is no clear visa pathway for such a person in existing law and section 48 of the Act would prevent such a person from applying from other classes of visa. Absent any clear articulation in the Bill or Explanatory Memorandum as to the proposed treatment of an applicant in these circumstances, the new provisions could result in such a person remaining in detention indefinitely or being granted ongoing temporary visas, creating life-long costs in terms of administration, healthcare, and social dysfunction.

Administrative burden and complexity

4.14 As outlined above, a decision-maker is already required to refuse to grant a protection visa if they are not "satisfied" that the applicant is the person that they claim to be. The new provisions will only affect applicants in respect of whom the decision-maker is satisfied of their identity and satisfied that they engage Australia's protection obligations.

4.15 Therefore, the practical impact of these amendments is that, in every case where a person is found to be a refugee, decision-makers will be required to engage in a detailed and complex assessment of the person's individual circumstances, applying multiple standards of proof involving assessments of "reasonableness" and "suspicion". Decision-makers will be required to comply with natural justice requirements by informing applicant of concerns and inviting comments.

4.16 Due to the fact that the refusal power is mandatory, these complex and lengthy assessments will be required to be undertaken in relation to every single applicant for a Protection visa, including every member of a family unit, and even where the decision-maker is otherwise satisfied that the person has provided credible evidence of their identity and claims. This will create significant and unnecessary additional administrative burden and delay in the assessment of protection visa applications, particularly when applicants are not represented by migration agents.

4.17 There is also a lack of clarity about how these assessments will take account of complex circumstances.

Case example 2 – Previous engagements with the Department

Joe came to Australia as the holder of a student visa. An agent prepared the student visa application and, unknown to Joe, obtained false documents in relocation his previous education history in order to support the application. After Joe had been in Australia for around six months, conditions in his country of origin deteriorated and a civil war has now been ongoing for several years. Joe applied for a protection visa in early 2013 and provided genuine evidence of his identity and protection claims. Would his visa application be required to be refused under s 91WA because false documents were previously provided by an agent?

Case example 3 – Family groups

George and Tina came to Australia by boat with their baby daughter, Marie. They were allowed to apply for a protection visa and have been found to be refugees. They are now waiting for the visa to be granted. An immigration officer asks them to provide identity documents for all three family members. They call their uncle back home and ask him to send the documents. The uncle can only find the birth certificates for George and Tina, not for their baby Marie. The immigration officer asks them why and tells them that Marie's visa application could be refused if they don't take reasonable steps to obtain identity documents. Tina and George are terrified that this will mean that Marie is taken away from them, so they ask the uncle to get a false birth certificate. Would Marie's visa application be refused because her parents provided a false document? Given that the uncle cannot find Marie's birth certificate, what would constitute "reasonable steps" to obtain the birth certificate?

Case example 4 – Stateless applicant

Aaron arrived in Australia with no identity documentation other than an identity card granted to him by the UNHCR. He is stateless, and a member of an ethnic minority in his country of origin to whom government authorities refuse to grant identity documents. In the course of his protection visa application an officer of the Department requests that Aaron produce documentary evidence of his identity, nationality or citizenship. Aaron fails to comply with the request because there is no avenue available to him for obtaining any such evidence. It is clear that Aaron is a person to whom Australia has protection obligations. The proposed section 91W(3)(b) allows the decision-maker to avoid the refusal of the application if Aaron has taken reasonable steps to produce such evidence. Aaron is not aware of any steps that he might take. Would Aaron's visa application be refused because he has not taken "reasonable steps" to produce documentary evidence of his nationality or citizenship? What would constitute "reasonable steps" in his circumstances?

Case example 5 – Multiple documents

Peter applied for a protection visa and provided several identity documents including his birth certificate, citizenship certificate, national ID card, and military service card. The Department assessed the authenticity of the documents and found them all to be genuine except for the citizenship certificate, which was found to be a fake. The personal details in the citizenship certificate are consistent with the other documents and the other documents also state his citizenship. Peter simply responds by saying he doesn't know anything about this. Would his protection visa be refused because he has not provided a reasonable explanation for providing a bogus document?

4.18 Given the significant consequences if a refugee is refused a protection visa (indefinite detention or temporary visa status), it is imperative that legal framework offer greater clarity and guidance about what constitutes a "reasonable explanation" or "reasonable steps". Due to the complex nature of the standards that are to be applied, developing appropriate policy guidelines for decision-makers to follow in making these assessments will be very difficult, and the complexity involved in applying these standards will create significant room for error and consequential judicial challenge in the courts.

4.19 For these reasons, RACS believes that the mandatory refusal provisions are unnecessary and will lead to undesirable consequences. If the refusal power in relation to fraudulent documents was not mandatory but was discretionary, many of these complications could be avoided.

Breach of international obligations

4.20 Australia has an obligation to refrain for penalising asylum seekers who arrive without valid travel documents. This obligation, contained in Article 31 of the Refugees Convention, recognises the fact that it is not always safe or possible for asylum seekers to obtain travel documents.

4.21 The mandatory refusal provisions in the proposed sections 91W and 91WA place unnecessary focus on the narrow question of the reasonableness of applicants' explanations of their inability to obtain certain documents and the genuineness of the documents they have provided. Neither the Bill nor the Explanatory Memorandum offer any guidance on in what circumstances, including among those set out below, an explanation will be considered to be a reasonable explanation for the purposes of the proposed provisions. For many refugees, obtaining travel documents or identity documents is simply not possible. There are also many reasons why genuine and honest people are required to obtain false documents and why refugees may have destroyed documents. These reasons for this can include:

- Fear of persecution at the hands of the very authorities responsible for granting passports or issuing identity documents.
- Governments' unwillingness to issue documentation to certain groups, such as stateless persons or certain ethnic minorities.
- The need to pay large sums of money or to bribe officials in order to obtain identity documents.

- The urgency of flight from countries of origin due to imminent threats or in circumstances of war and conflict.

- Refugees who are unable to obtain genuine documents for the reasons outlined above, are compelled to obtain false documents in order to survive in their home country or another country, or in order to flee to another country.

- It is common for people from some countries to have documents that are incorrect in some way because processes for issuing official identity documents are not rigorous; births may not be registered; there may be no process for verifying a person's information; official processes are susceptible to fraud and manipulation; officials may be corrupt or place little emphasis on recording accurate information.

- People smugglers may confiscate documents or require people to destroy their documents in order to protect smuggling networks. In circumstances in which documents are retained by smugglers, the asylum seeker may be instructed by the people smuggler to tell Australian officials that the asylum seeker discarded the document.

- Refugees may discard their documents out of fear. Misinformation and rumours about Australian immigration policy has caused some asylum seekers to believe that they will be immediately removed if they arrive with travel documents.

- Some asylum seekers might destroy documents simply because other people are doing it and they are nervous about deviating from the group or assume that others know best.

4.22 RACS believes that this amendment will lead to refugees being unfairly penalised. Indeed, those refugees who do not have identity documents or who have used false documents could be the most vulnerable refugees and those to whom Australia most obviously has protection obligations.

4.23 The use of false documents does not necessarily mean that a person is attempting to "game the system". Existing law already allows decision-makers to investigate why a person may have used false documents and if they believe that a person has not been truthful about their identity, they can find that they are not satisfied that the person is a person to whom Australia has protection obligations.

4.24 Indeed, RACS considers that there is a risk that these amendments will *increase* fraud within the immigration system. According to a report by the UNHCR and the European Commission, "unreasonably high expectations on the applicant to submit documentary evidence may unwittingly encourage applicants to submit documentary evidence, including false documents, in support of all asserted material facts at all costs".[13]

Case example 6 – Documents obtained through fraud of a third person

[13] UNHCR and European Refugee Fund of the European Commission, *Beyond Proof: Credibility assessment in EU asylum systems*, 2013, p20, availability at: http://www.unhcr.org/51a8a0299.pdf.

David is a 19 year old boy from Afghanistan. His family fled to Pakistan as refugees when he was young. Many years ago, his elder brother risked his life to go to Afghanistan to get ID cards for the whole family in order to be able to access education and food rations in Pakistan. David gave the card to Australian authorities when he arrived. The Department of Immigration told him it was false and asked him how he obtained it. David said his brother obtained it in Afghanistan. He later found out that his brother obtained false ID cards because it was cheaper than bribing officials to obtain real ones. Would David's protection visa application be refused because he provided a bogus document?

Case example 7 – Fear of smugglers

James came to Australia by boat two years ago. Before getting on the boat in Indonesia, the people smugglers told everyone to destroy their passports because the Australian government would send them home if they were found with passports. As James had himself heard that the Australian government returns some asylum seekers immediately, he believed this could be true. In Australia, he was allowed to apply for a protection visa and was found to be a refugee. Would his protection visa application be refused because he destroyed his passport?

Unacceptably low standard of proof for what constitutes a bogus document

4.25 The Bill amends section 5 of the Act to adopt the existing definition of "bogus document" (in section 97) for broader application throughout the Act. The definition provides that a "bogus document" is a document that the Minister "reasonably suspects" was not issued to the person; or, is counterfeit or has been altered without authorisation; or, was obtained because of a false or misleading statement, even if the person did not know the statement was false or misleading.

4.26 RACS considers that the standard of "reasonably suspicion" is too low, because it does not require the Minister to engage in any meaningful assessment of the authenticity of a document. RACS believes that the standard should be raised to one of "reasonable belief" to require the Minister to have evidence for believing that a particular document is bogus, inviting an applicant to comment on that evidence, and providing reasons for any finding that the Minister reasonably believes a document is bogus. The standard of "reasonable belief" would bring this definition into harmony with other provisions of the Act.

Case example 8 – Dispute as to whether document is bogus

Petra applied for a protection visa and provided the Department with her passport and marriage certificate. The Department of Immigration told her that her marriage certificate is reasonably suspected of being a bogus document. She does not agree that it is false because, after their marriage, she and her husband went to the registry office and applied for the certificate in person. Would her visa application be refused because she has not provided a "reasonable explanation" for providing a "bogus document"?

Recommendations

4.27 RACS recommends:

- That the Bill be amended to omit the proposed sections 91W and 91WA.
- If this recommendation is not accepted, RACS recommends that the provisions of the amendment should be changed such that:
  - the refusal power is discretionary and not mandatory;
  - the standard for what constitutes a "bogus document" is changed from "reasonably suspects" to "reasonably believes";
  - the Minister is required to provide reasons as to why a document is considered a "bogus document" and to give the applicant a reasonable opportunity to comment or respond;
  - the Minister should be required to provide publically accessible guidelines as to how documents are to be assessed and whether a person has provided a "reasonable explanation" or has taken "reasonable steps".

5 Eligibility for protection visa as member of the same family unit as a protection visa holder

5.1 The effect of the proposed section 91WB is that if a family member of a person who holds a protection visa applies for a protection visa, they cannot be granted the visa on the basis of their identity as a member of the family unit of the existing protection visa holder. Under this amendment, such a person's protection visa application must be refused unless they are found to engage Australia's protection obligations in their own right.

5.2 This amendment will affect refugees in Australia who currently hold a protection visa and who have an immediate family member who is also in Australia and who has subsequently applied for, or who wants to apply for, a protection visa. The proposed provision has no affect on the eligibility of family members of a refugee in the case that the family members have applied for a protection visa as a family unit. As such, the amendment discriminates against family members who did not arrive in Australia and apply for protection at the same time.

5.3 Under existing law, an immediate family member of a refugee who holds a protection visa can apply for and be granted a Protection visa if they meet the definition of being a "member of the same family unit". A "member of the same family unit" includes:

- a spouse or partner of a person who holds a protection visa;
- a dependent child of a person who holds a protection visa;
- a parent of a dependent child who holds a protection visa;

- a relative of a person who holds a protection visa who is dependent on the visa holder, does not have their own partner and is usually resident with the visa holder; or

- a relative of a person who holds a protection visa where the visa holder is dependent on the first person, the visa holder does not have their own partner, and the visa holder is usually resident with the first person.

5.4 This amendment means that where these family members are already in Australia and able to lodge a valid protection visa application, they cannot be granted the visa on the basis of their family relationship.

5.5 The Explanatory Memorandum observes that in some cases, family members may be able to apply for another class of visa under the family stream. This statement fails to take into account that this option is available to very few of those who would be affected by the proposed section 91WB, as they are not eligible for another class of visa. The number of people in this situation is likely to have increased recently due to legislative and policy changes that have severely restricted the availability of visas for family members of refugees in Australia. Currently:

- The only family stream visas are those for: children under 18 or full-time students under 25; spouses or partners and their children; parents who have more than half of their children in Australia.

- All of these visas have application fees that are often prohibitively expensive for people from refugee backgrounds. The parent visa applications cost more than $40,000.

- Children under 18 cannot sponsor their parent(s) under any family stream visa.

- All of the family stream visas require the applicant to meet strict health criteria which exclude anyone who has a medical condition or disability that is likely to result in significant health care costs.

- Only offshore applicants can apply for humanitarian stream split-family visas. These visas are extremely limited in number and applications for family sponsorship by protection visa holders are given lowest priority. In practice, these applications are not processed until the sponsor becomes an Australian citizen. In addition, these visas are not available to family members of any person who arrived by boat after 13 August 2012.

5.6 As such, RACS considers that the proposed section 91WB will have serious negative consequences for refugees and their immediate family members in Australia who are not able to apply for, or be granted, another type of permanent visa. While this amendment is likely to affect a comparatively small number of families, in of the cases to which it will apply it is likely result in the lengthy separation of families on the basis of the timing of the family members' protection visa applications.

Immediate family members will be permanently separated

5.7 Existing law ensures that where some members of a family unit hold protection visas and some do not, the family is able to remain together in Australia where the non-protection visa holders are able to make a valid protection visa application. There are no other categories of visas that are readily available to immediate family members of recognised refugees.

5.8 The proposed amendment is contrary to the principal of family unity. Family unity is a fundamental human right under international law. The UNHCR Executive Committee has stated that "every effort should be made to ensure the reunification of separated refugee families".[14] Article 10 of the Convention on the Rights of the Child states that applications for family reunion by refugee children or their parents must be treated in a positive, humane and expeditious manner. Family unity is particularly important for people from refugee backgrounds because it can assist them to overcome past experiences of separation, loss and trauma and it is essential for enabling refugees to rebuild their lives. Prolonged separation from family members in Australia has been found to have profound negative consequences for a person's mental health and wellbeing.[15]

5.9 The proposed changes will cause enormous distress and hardship for a small number of already traumatised families and children. The people who are most likely to rely on the existing law, and therefore are most likely to be negatively affected by the proposed changes, are children who are recognised refugees, and the vulnerable families who are in financial hardship and who have health problems or disability.

Case example 9 – Parents of children who are refugees

Talitha is a 25 year-old woman from Somalia who applied for a protection visa in Australia because she feared violence from her husband in Somalia. After two years, her protection visa application was refused. During this time she became pregnant and had a baby girl in Australia. Concerned about the harm her daughter might face upon return, Talitha applied for a protection visa on behalf of her daughter. Her daughter was recognised to be a refugee and was granted a protection visa. The daughter is now an Australian permanent resident. In the meantime, changes to her situation meant that Talitha was given the opportunity to make a valid application for a protection visa. She is currently awaiting a decision. Under existing law, Talitha would be eligible for the visa because she is the mother of her child, a protection visa holder. However, the proposed section 91WB would mean she could not be granted the visa on this basis. Talitha cannot apply for any other class of visa.

Case example 10 – Family members arriving at different times

The Ling family hold protection visas in Australia. The parents were political activists and escaped their country of origin three years ago. They have three children. When they fled, they took their two youngest children with them, but could not afford to take their eldest son,

[14] UNHCR ExCom, Conclusion No. 24.
[15] See for example: G Marston, Temporary Protection Permanent Uncertainty (Melbourne: Centre for Applied Social Research, Royal Melbourne Institute of Technology, 2003).

Michael, who at the time was 16-years-old. In the urgency of fleeing the country, the family took the difficult decision to send Michael to live with his grandmother in another province. Earlier this year, his grandmother passed away. Wanting to join his family in Australia, Michael applied for and was granted a Student visa. He is now living with his parents and siblings in Australia. With no family members in his country of origin, Michael wants to stay with his family in Australia. Under existing law, Michael could apply for and would be eligible for the grant of a protection visa on the basis of his relationship to his parents. After the proposed amendments pass, he could not be granted a protection visa unless he was found to be a person to whom Australia owes protection obligations.

If his application was refused, Michael would have no choice but to return to the country of origin. Michael is unable to apply for a child visa because he has recently turned 18 and has not been studying since the time he finished school.

The impacts of the proposed changes are disproportionate to the intended outcome

5.10 The Explanatory Memorandum states that there is currently "a lack of clarity about whether a family applicant can apply for a Protection visa on the basis of being in the same family unit as the family visa holder after the grant of a Protection visa to the family visa holder" and this amendment is intended to clarify the law.

5.11 RACS considers that this statement is misleading and, in fact, the law in this area is quite clear and permits a member of the same family unit of a person who holds a protection visa to apply for and be granted a protection visa based on their family relationship. The real intention of the proposed amendments is not to clarify the law but to fundamentally change the law and to remove the only certain option that some families have for remaining together in Australia.

5.12 Another possible rationale for this amendment is to prevent family members of refugees from applying for a protection visa where they could apply for another visa under the family stream. This rationale has not been articulated in the Explanatory Memorandum. In RACS' experience, as only a small minority of refugees' family members are eligible for other types of permanent visas, the number of these cases is extremely small.

5.13 RACS considers that the effects of the proposed section 91WB are disproportionate to the outcome that they are intended to achieve. Family unity is a fundamental value that is currently recognised in the law and this should not be sacrificed for the sake of addressing a very limited and essentially administrative issue.

5.14 The Explanatory Memorandum states that separated families are able to continue to apply for family reunification under the offshore Humanitarian Programme and an example is given of unaccompanied minors who are granted protection in Australia who are separated from their parents. RACS believes that this statement needs clarification because the vast majority of unaccompanied minors who seek protection in Australia have arrived by boat. As such, their applications under the Humanitarian Programme are given lowest processing priority. Further, any person who arrived by boat after 13 August 2012 is not eligible to make an application under the Humanitarian Programme at all.

5.15 The Explanatory Memorandum states that one of the reasons for this amendment is that the 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". RACS believes that this statement is misleading because asylum seekers (including children) who arrive by boat are already barred by law from applying for a protection visa without the permission of the Minister. In addition, any boat arrival from 19 July 2013 is subject to mandatory third country transfer and resettlement. As the protection visa framework is not relevant to recent or prospective boat arrivals, existing law cannot be seen to provide any incentive for people to come by boat.

Recommendations

5.16 RACS recommends:

- That the proposed section 91WB be removed from the Bill.
- If this recommendation is not accepted, RACS recommends that the Bill be amended in two ways:
  - The restrictions on being granted a protection visa should only apply to people who are assessed as being eligible for the grant of a permanent visa under the family stream.
  - The requirement that the Minister "must" not grant the protection visa should be changed to a discretion that the Minister "may" not grant the protection visa subject to the person being assessed as eligible for another category of visa.

6 Complementary protection

6.1 The proposed section 6A and the amendments to section 36(2) seek to change the threshold for assessing the probability of whether a person would face significant harm under the complementary protection provisions of the Act. The Bill would change the relevant standard from whether there is a "real risk" of significant harm to whether there it is "more likely than not" that a person would suffer significant harm.

6.2 Unlike other provisions of the Bill that create additional circumstances in which a protection visa application can be refused, this amendment goes to the more fundamental question of whether a person is someone in respect of whom Australia has protection obligations at all.

6.3 RACS believes that the proposed amendment creates unnecessary complexity for decision-makers by creating a threshold for assessing the risk of harm under complementary protection provisions that is different to the threshold for assessing the risk of harm under Refugee Convention provisions. The proposed amendment will lead to the perverse outcome that a person who has a 10 per cent chance of being tortured for a Convention reason (i.e. religion, political opinion, nationality, ethnicity, membership of a particular social group) may be recognised as a person in respect of whom Australia has protection obligations, but a person with a 49 per cent chance of being tortured for other motivations could be lawfully returned to the place in which they fear harm.

6.4 We also observe that if the Parliament were to pass both this Bill, and the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (which would operate to remove complementary protection from the criteria for a protection visa), the proposed, more onerous standard would continue to be applicable in relation to assessments of Australia's obligations, for example in the context of requests for Ministerial intervention under section 417 of the Act.

Recommendation

6.5 RACS recommends that the proposed section 6A and amendment to section 36(2)(aa) be removed from the Bill.

RACS would welcome any opportunity to provide further information to the Committee in relation to any aspect of the Bill or this submission.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

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