



Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

7 August 2014

Dear Committee Secretary,

**Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014**

Australia's current onshore refugee status determination (RSD) process is a fair and responsive system. It takes into account the complex and varied challenges faced by applicants and governments alike when processing claims for asylum.

It includes a robust and independent system of review that ensures transparency and accountability in RSD decision making. This RSD process has served the Australian public and the asylum seeking community well over many decades.

The ASRC is concerned by the amendments raised in this Bill and our submission to the Inquiry outlines these concerns in detail.

Please do not hesitate to contact should you require any further information.

Yours Sincerely

Kon Karapanagiotidis OAM  
CEO

## **The Migration Amendment (Protection and Other Measures) Bill 2014**

### **1. Summary**

The Government asserts that the *Migration Amendment (Protection and Other Measures) Bill 2014* (“the Bill”) will ‘increase efficiency and enhance integrity in the onshore protection status determination process’.

The Asylum Seeker Resource Centre (“ASRC”) refutes this assertion and argues that the proposed changes will unfairly weigh the refugee status determination (“RSD”) process against asylum seekers and disregard the complex circumstances that underpin refugee claims.

Australia’s current onshore RSD process is a fair and responsive system. It takes into account the complex and varied challenges faced by applicants and governments alike when processing claims for asylum. It includes a robust and independent system of review that ensures transparency and accountability in RSD decision making. This RSD process has served the Australian public and the asylum seeking community well over many decades.

The inclusion of biometrics and other background and security checks has added further rigour to Australia’s system, helping to ensure that non-refugees are effectively identified and returned to their home country.

The proposed amendments will undermine Australia’s fair and reasonable approach to assessing refugee claims and potentially deny natural justice to asylum seekers.

Asylum seekers are often emotionally and psychologically vulnerable upon arrival to Australia. Many have fled their homes in a hurry to escape persecution, have suffered torture and trauma and are without documentary evidence of their identity and experiences. It is crucial that Australia’s RSD system allows decision-makers to consider the particular circumstances of each applicant’s case in order to make a fair and reasonable determination.

The ASRC strongly opposes the proposed changes in this Bill. Not only do they seek to address a non-existent integrity issue, they also remove decision-makers’ ability to consider the unique circumstances of each asylum seeker by introducing unfair and unnecessary evidentiary and other requirements. Several of these changes also place an unnecessarily

high burden on vulnerable applicants to establish their claims upfront and include disproportionately harsh penalties for providing false or no identity documents.

The emphasis of this Bill is contrary to the humanitarian purpose of Australia's protection visa scheme and undermines the spirit of the 1951 Refugee Convention. The real outcomes of these measures may also be contrary to the purpose of achieving 'efficiency', as the further codification of decision-maker duties makes the system more complex and could in fact become a burden to the process.

The ASRC bases this assessment on 13 years of experience gained as Australia's largest provider of aid and services to asylum seekers. This assessment is made with an understanding of both the legal and human reality of seeking asylum in Australia.

## **2. Consideration of the most concerning aspects of the Bill**

Our submission focuses on six major proposed changes that will serve to undermine the legal integrity of Australia's RSD system and will effectively penalise asylum seekers who face common evidentiary challenges. We have included cases studies to demonstrate how individuals will be affected by the changes.

### **2.1 Complementary protection**

This Bill proposes to insert new section 6A, which will change the test for whether a person seeking complementary protection will face significant harm if returned to their home country from being a "real chance" to "more likely than not". This means a person must be considered to have a 50% or more chance of facing significant harm if returned, rather than the previously accepted 10% chance of harm, before their claim is accepted.

*The ASRC strongly opposes the amendment of this test.*

This amendment would have the absurd and disturbing outcome that if a person faced as high as a 49% chance of arbitrary detention, death or torture, that person would be sent back to their home country. It is wholly inappropriate and inhumane for the Australian Government to return people under these circumstances.

Further, this change would create separate threshold tests for the 'refugee' and 'complementary protection' limbs of the protection visa process. The current test for both limbs is whether someone will face a 'real chance' of persecution if returned, which is measured as a 10% or more chance of harm. The proposed change will require decision-makers to adopt two separate tests – a 'real chance' test for refugee claims (10% or more chance of harm) and a 'more likely than not' test for complementary protection claims (50% or more chance of harm).

This two-test system will put a greater burden on decision-makers, both administratively and psychologically, without improving the integrity of Australia's RSD process, but rather serving to undermine it. Two different tests when all people applying on either refugee or complementary protections grounds are fleeing harm is inconsistent and will undermine fair, robust and consistent decision making.

The 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”<sup>1</sup>*

Given the overriding humanitarian objective of granting protection both under the Refugee Convention and complementary protection, and the fact that the consequences for wrongfully returning an individual to face harm are life-threatening for both categories of individuals, it would be illogical and dangerous for the same decision maker to have to apply two different standards of proof to the same set of facts for the same applicant which, if applied incorrectly, will result in life-threatening danger for the applicant and a breach of international law by the Australian state.

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<sup>1</sup> UNHCR Comments, *Draft Complementary protection Visa Model: Australia*, January 2009, [http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09\\_000.pdf](http://www.unhcr.org.au/pdfs/UNHCRPaper6Jan09_000.pdf) Paragraph 25.

The ASRC submits that this amendment should be rejected and that the 'real chance' test should be kept in relation to complementary protection.

## **2.2 Bogus documents**

Under the new proposed sections 91W and 91WA, asylum seekers who have used bogus identity documents and cannot provide a reasonable explanation for doing so will have their applications refused.

*The ASRC strongly opposes this amendment.*

Of greatest concern is that this proposed measure fails to take into account certain fundamental facts about the reality of seeking asylum. These facts include:

- That many asylum seekers regularly flee their homes in a hurry, without the time to collect their identity and other documents;
- That asylum seekers are often forced to flee for their lives by whatever means necessary, including the use of false documents;
- That governments routinely seek to control minorities and opposition groups by denying them passports;
- That requesting identity documents after an asylum seeker has fled their country can raise interest in that person and their family remaining in their home country, making such inquiries too dangerous to carry out; and
- That asylum seekers are inherently vulnerable.

Several decision making guidelines and international standards take these truths into account.

For example, Article 31 of the Refugee Convention clearly states that asylum seekers should not be penalised for arriving without valid travel documents. The Refugee Review Tribunal's (RRT) *Guidance on the Assessment of Credibility* ("Credibility Guidelines") also takes these facts into account, recognising that "the use of false documents does not necessarily mean that an applicant's claims are untrue."<sup>2</sup> While it is possible for asylum seekers to provide a 'reasonable explanation' for the provision of false or no documents, it is unclear from the Bill as to what answers will be reasonable.

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<sup>2</sup> Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, section 9.4, available at: <http://www.mrt-rrt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>.

Secondly, this amendment is unnecessary as decision-makers at both the departmental and review stage already consider the veracity of identity, nationality and citizenship documents as part of the determination process. This can include requesting a forensic examination of documents, researching particular documents or taking into account the failure to produce documents. The RRT's Credibility Guidelines contain several provisions for considering false or other documents.<sup>3</sup> The proposed amendment will remove the ability of decision-makers to make a considered decision on the provision of false or no documents and the circumstances under which this may have occurred and instead forces them to immediately refuse such applications.

Finally, this amendment undermines the ability of decision-makers to take a common sense, holistic approach to considering all the evidence before them. The RRT's own Credibility Guidelines recognise the need for an individualised approach in this area of decision making.<sup>4</sup> Asylum seeker cases are always unique and decision-making must reflect this.

The ASRC submits that this amendment should be rejected and that the current process of allowing decision-makers to take into account the provision of false or no documents as an aspect of their final decision should stand.

### **Case Study**

Pa is a man from Myanmar. While at university he organised a protest that was supported by an opposition party. During the protest government officials arrived and started arresting all of Pa's classmates. Pa managed to run and hide in the house of a friend from the political party.

The next day Pa found out that his house had been raided, his brother was arrested and police were looking to arrest Pa as well. Knowing people who had been detained and tortured without charge for years, Pa realised he had to flee Myanmar. While in hiding, his friend organised a tourist visa to Australia for Pa and completed all the English paperwork. Pa could not read English and so did not understand what was being submitted but he was told he had to sign and, having no other option, Pa did.

<sup>3</sup> Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, section 9, available at: <http://www.mrt-rt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>.

<sup>4</sup> Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, section 2.2, available at: <http://www.mrt-rt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>.

Now Pa is seeking asylum and has found out that his friend submitted false documents with his tourist visa application. Pa can't explain where these documents came from as his friend did it all for him.

*Under these proposed amendments it is likely that Pa would have his application refused even if it was accepted that he would be persecuted on return to Myanmar.*

### **Case Study**

Mohamed is a man from Iran. When he was 19 he realised he was gay. He knew he could never tell anyone because it wasn't accepted and the law wouldn't protect him. Mohamed had a secret relationship with a close friend from school but the shame they both felt meant it ended quickly.

At 25 Mohamed found an underground gay group and one day he finally struck up the courage to attend. While at the meeting a community group came in yelling hateful things at the men. It quickly turned violent but Mohamed managed to run away. Arriving at his high school friend's house, Mohamed was very afraid. He knew he had been seen. He was sure he would be beaten to death or arrested if he showed his face again as he had read about this happening in the media.

Luckily, Mohamed's friend knew someone who could obtain a tourist visa for him to come to Australia. Knowing that he had no other option to escape, Mohamed paid money and stayed in hiding while the visa was processed.

Now Mohamed is seeking asylum in Australia and he has found out false documents were submitted with his tourist visa application. One of these documents was a marriage certificate. Mohamed can't explain where this document came from as another person prepared all the documents.

*Under these proposed amendments it is likely that Mohamed would have his application refused even after it was accepted that he would be persecuted on return to Iran.*

### 2.3 Full and early disclosure requirements

Under section 5AAA, the onus will be on asylum seekers to provide in full particulars of their refugee claims and sufficient evidence to substantiate their claims.

*The ASRC strongly opposes this amendment.*

Section 5AAA seeks to put the full burden of establishing a claim on the asylum seeker, in the face of a complex and ever-changing determination process. This is entirely contrary to the United Nations High Commissioner for Refugees view of decision-making in this field:

*“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.”<sup>5</sup>*

It is the experience of the ASRC that applicants for protection visas need full legal representation in order to understand the legal process and make decisions on what information is relevant to disclose. Funded assistance under the Immigration Advice and Application Assistance Scheme is limited and many asylum seekers navigate what is already a complex system without the necessary legal support as they cannot afford migration agent fees.

Under the current RSD process, asylum seekers who apply for protection without legal assistance are already at a level of disadvantage. What goes some way to address this disadvantage is the shared duty of decision-makers in Australia’s RSD process to ensure the right questions are asked of the applicant and that all relevant information is disclosed. Without this safety measure in place, unrepresented applicants will be at a further disadvantage as they will be required to understand the legal framework upon which their case is decided, make decisions about what to disclose and articulate each aspect of their claim.

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<sup>5</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, paragraph 196, available at: <http://www.unhcr.org/3d58e13b4.html>.



### **Case study**

Margaret is a young woman from Papua New Guinea. She was married to John who beat and violently raped her for over 20 years.

Now Margaret is seeking asylum in Australia. She did not disclose the rapes in her interview at the Department of Immigration because she did not realise it was important and she had no lawyer to advise her. In PNG, violence towards women is the norm. She was also suffering from post-traumatic stress disorder which impacted on her ability to give evidence and on her understanding the importance of disclosing everything that had happened to her in PNG.

Margaret only realised at the RRT stage that she should have disclosed more information about the rapes. Now, through the support of her community worker, she has learned that marital rape is a crime.

*Under these proposed amendments it is likely that Margaret would face a negative credibility assessment because she did not understand all the information that was relevant to disclose.*

### **2.4 Early disclosure**

Under the new section 423A asylum seekers must disclose the full particulars of their claims at the departmental stage or risk a negative credibility assessment.

*The ASRC strongly opposes this amendment.*

The proposed introduction of section 423A exacerbates the problems outlined in 2.3 above, as it requires applicants to disclose everything that is relevant at the departmental stage, or else risk a negative assessment. When read together, the proposed amendments mean that asylum seekers must know what is relevant to disclose and ensure it is disclosed at first instance.

The introduction of section 423A is wholly unnecessary, as the RRT already takes into account late disclosure of information in its assessment of an applicant's credibility. It may choose to disregard the information that was disclosed late or it may apply a negative credibility assessment of the applicant. To guide its process, the RRT uses its Credibility Guidelines and its *Guidance on Vulnerable Persons* ("Vulnerability Guidelines").

The introduction of section 423A would remove the ability of decision-makers to make their own finding on late disclosure in light of all the evidence before them and weighs the process towards the RRT making a negative inference.

The Vulnerability Guidelines recognise the difficulty of early disclosure, stating that a person may experience “*hesitancy to disclose due to fear of reliving experiences, shame, guilt, or anger about having to prove experiences of violence or injustice.*”<sup>6</sup>

The Credibility Guidelines also note that “there may be good reasons why new information or claims are presented by applicants at a later stage in the application process. These reasons may include stress, anxiety, inadequate immigration advice and uncertainty about the relevance of certain information to an applicant’s claims.”<sup>7</sup>

It is the experience of the ASRC and of the refugee law sector more generally, that there are a host of reasons why individuals may not disclose particular information at first instance.

For example:

- A lack of understanding as to what is relevant;
- A lack of appropriate immigration advice;
- Shame or guilt about past experiences, for example, rape;
- Fear of authorities;
- Trauma resulting in an avoidance or disassociation of experiences; and
- Other mental health and cultural factors inhibiting disclosure.

The ASRC disagrees with the Minister for Immigration (“the Minister”) Scott Morrison, that there will only be a “small number of vulnerable individuals”<sup>8</sup> who are affected by this amendment. Asylum seekers by their nature are vulnerable people and many will be affected by one or more of the above-listed factors which will impact their ability to disclose.

If, as the Minister states in his second reading speech, the purpose of this new provision is for “*timely, efficient and quality protection outcomes*” then ASRC recommends a review of

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<sup>6</sup> Refugee Review Tribunal, *Guidance on Vulnerable Persons*, paragraph 93, available at: <http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=93fc0ac3-6487-49d5-be3d-996871575c23>.

<sup>7</sup> Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, section 1.37, available at: <http://www.mrt-rrt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>.

<sup>8</sup> Commonwealth, *Parliamentary Debates House of Representatives*, 25 June 2014, 8 (Scott Morrison).

internal processes rather than requiring vulnerable and traumatised asylum seekers to disclose deeply personal and difficult past experiences at first instance.

In fact, the ASRC experiences approximately a 75% overturn rate at the RRT. Better training of decision-makers at the primary stage would remove the need for review of many protection visa matters and in our view would be an appropriate means of improving efficiency.

### **Case Study**

Meaza is a woman from Ethiopia. She was imprisoned during a general round-up by authorities in Ethiopia during a political protest because of her ethnicity. She was detained for seven days during which time she was sexually assaulted by the authorities.

Maeza did not report this to the authorities in Ethiopia because it was the authorities who had assaulted her. Nor did she disclose this to her husband because of the deep shame she felt as a result of societal stigmas about rape victims.

Now Maeza is seeking asylum in Australia. During her legal appointments to prepare her protection visa application, she did not discuss her time in prison in detail or the sexual assault because of her shame.

After months of working with her lawyers, building trust and receiving counselling support, Maeza finally felt ready to disclose her assault. This was shortly before her Refugee Review Tribunal hearing.

*Under these proposed amendments it is likely Maeza would face a negative credibility assessment even though late disclosure of sexual assault is very common, particularly in cultures where there is deep shame associated with rape.*

## **2.5 Family Unit**

By inserting section 91WB, this Bill will mean people will no longer be able to apply for a protection visa on the grounds that a family member has already been found to be a refugee.

*The ASRC strongly opposes this amendment.*

The introduction of section 91WB is at odds with the government's stated purpose of improving efficiency in the RSD process and with international law, which is built upon protecting the family unit.<sup>9</sup>

In the ASRC's experience, asylum seekers in Australia often learn that their immediate family in their home country have faced harm due to their relationship with the asylum seeker. This can be because family members are imputed with the same views as the asylum seeker or because it is believed the family members are hiding the asylum seeker or withholding relevant information.

This amendment will force members of the same family unit to apply for protection individually, even if a family member has already received their protection visa. It is hard to see how this will create efficiencies or enhance integrity in decision-making, as it will in fact require decision-makers to effectively take each family member's case through the entire determination process separately. For each family member's case, they will need to consider circumstances that were found to engage Australia's protection obligations for the first family member. This will embed inefficiency and duplication into the system.

Further, in recognition of both the importance of the family unit and the reality that family members of asylum seekers are often at risk, the Refugee Convention specifically considers and directs governments on how to deal with family units. The Convention specifically directs governments to ensure the "*unity of the refugee's family is maintained, particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country*".<sup>10</sup> This amendment undermines the Refugee Convention in relation to family reunion.

The ASRC submits that this amendment should be rejected and that the existing provisions in the Migration Act that protect the family unit remain.

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<sup>9</sup> The Universal Declaration of Human Rights, 1948, article 16(3), International Covenant on Civil and Political Rights, 1966, article 23(1), and American Convention on Human Rights, 1969, article 17(1) each state that 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

<sup>10</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, B.

## **Case Study**

Yasmeen is a woman from Bahrain. Her husband, Ahmed, was tortured by the government for his opposition support but he managed to escape to Australia, leaving her behind. 'Wait', Ahmed kept telling her, 'soon Australia will grant me protection and I will bring you over'. But the process took too long and the authorities finally found her. They interrogated her, asking after her husband. Afterwards they beat and sexually assaulted her, leaving her for dead. In the haze that followed, Yasmeen's trusted friends helped her out of the country.

Now Yasmeen is in Australia and has learnt that during her ordeal and journey to Australia, Ahmed was granted a protection visa.

*Under these proposed amendments Yasmeen would have to apply for a protection visa and establish her own refugee or complementary protection claims separately to her husband's. This is despite it being regularly established that direct family members of refugees are often themselves at risk.*

*Not only is this proposed amendment contrary to international law, it is inefficient as individuals like Yasmeen are clearly deserving of protection and applying separately would unnecessarily re-traumatise Yasmeen by asking her to recall her painful experiences.*

## **2.6 Refugee Review Tribunal guidance decisions**

Under the proposed section 420B, the RRT will be forced to follow guidance decisions set by the Principal Member.

*The ASRC strongly opposes this amendment.*

The RRT is a body skilled in making decisions on a case by case basis, reflecting the complex and varied nature of refugee matters. Section 420(2) of the Migration Act 1958 states that the RRT is not bound by technicalities, legal forms or rules of evidence and must act according to the substantial justice and merits of the case.

This proposed amendment weakens Australia's robust RSD process by removing the RRT's ability to make independent decisions based on an individual's unique set of circumstances and experiences and requiring it to follow prescribed guidance decisions. While there is a provision allowing for Members to distinguish their particular matter, the amendment states it must be 'clearly distinguishable' without adequately defining what this means.

In the view of the ASRC, the RRT is a well-functioning body that produces robust and thorough decisions. Accordingly this amendment has no utility.

The ASRC submits that this amendment should be rejected and the independence of the RRT should be preserved.