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*Migration Legislation Amendment Bill (No. 1) 2014*  
Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee

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28 April 2014

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## Human Rights Law Centre

The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building.

It is an independent and not-for-profit organisation and donations are tax-deductible.

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## 1. Executive Summary

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1. The Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) has asked for submissions in relation to its inquiry into the *Migration Legislation Amendment Bill (No. 1) 2014 (Bill)*.
2. Many of the proposed reforms in the Bill will impact on visa administration and processing and are best addressed by immigration casework services.
3. The Human Rights Law Centre (**HRLC**) is specifically concerned with the proposed amendments to section 48A of the *Migration Act 1958* (Cth), which increase the risk of Australia failing to meet its international human rights obligations.
4. The proposed amendments to section 48A would prevent asylum seekers who did not know of, or understand, an original protection visa application made on their behalf (because, for instance, they were mentally impaired or a minor) from making a further application. As a consequence, an individual who has protection claims which through no fault of their own were not included in the original application will be prevented from making a fresh application raising these claims. They may be returned to harm without any legal right to have their protection claims properly assessed.
5. The proposed amendments therefore compromise Australia's ability to meet obligations under international law to not return people to a risk of serious harm.
6. The HRLC recommends that the amendments to section 48A not be passed.

## 2. Overriding principle of *non-refoulement*

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7. Australia has obligations under the *Refugee Convention* and various international human rights laws<sup>1</sup> to not return people to territories where they would be at risk of serious human rights violations (i.e. the obligation of *non-refoulement*).
8. These obligations are absolute and non-derogable.
9. It is therefore vital that the processes established to determine whether asylum seekers are genuinely at risk if removed from Australia are effective, transparent, and contain sufficient safeguards against mistakes.

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<sup>1</sup> Including the *International Covenant on Civil and Political Rights*; the Second Optional Protocol to the *International Covenant on Civil and Political Rights on the Abolition of the Death Penalty*; the *Convention on the Rights of the Child*; and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

10. A fair, robust asylum processing system will always involve a degree of administrative burden. However, where fundamental rights are at stake, the overriding concern must be to ensure that no individual is returned to a risk of serious harm.

### 3. Extension of prohibition on further protection visa applications

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#### 3.1 Prohibition of further application regardless of circumstances

11. Section 48A of the *Migration Act 1958* (Cth) currently prohibits an individual whose application for a protection visa has been refused from making a further application for a protection visa.
12. The proposed amendments to s 48A in Schedule 1 of the Bill expressly extend this bar on subsequent applications to individuals who have been refused a protection visa even where they did not know about or understand the nature of the original visa application made on their behalf because of a mental impairment or because they were a minor.
13. The effect of the proposed reforms will be that vulnerable people with genuine claims will be precluded from raising them in a fresh visa application, simply because a previous application not raising those claims (which they did not understand and which may have been made by someone else without their permission) was refused.
14. Consequently, they may be removed from Australia and returned to harm without their legitimate protection claims being properly assessed.
15. The amendments may have a significant impact on particular applicants who have applications made on their behalf. A child who has been included as a dependent applicant in a protection visa application made by their parent without any specific protection claims being made in relation to the child will be unable to make a further protection visa application, even if they have their own independent, protection claims.<sup>2</sup>
16. The ability to make a further application in such circumstances does not impose an unreasonable administrative burden. Rather, it provides an important safeguard against the possibility that someone is returned to a risk of serious harm.
17. While the Minister for Immigration and Border Protection would still retain a personal, non-compellable discretion to not return such individuals, a personal discretion which can't be compelled or reviewed is a grossly inadequate safeguard against the return of vulnerable people to serious harm.

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<sup>2</sup> This example is given in the Statement of Compatibility with Human Rights, attached to the Explanatory Memorandum of the Bill.

### 3.2 The purported justification for the reforms

18. The Statement of Compatibility with Human Rights claims the reforms are necessary because without them “it would theoretically be possible” for the parents of minors or guardians of people with a mental impairment to make repeat protection visa applications on their behalf. There is no suggestion that this risk is any more than theoretical.
19. A speculative risk of administrative inconvenience does not justify barring minors and people with mental impairments from raising genuine protection claims which, through no fault of their own, have not been raised previously.
20. Further, even if the theoretical risk of repeated frivolous claims were to materialise, such claims can be dealt with on their merits through the proper process. The risk of a few meritless claims does not justify legislatively barring all claims.
21. The proposed reforms prioritise administrative convenience over a correct decision where protection from serious harm may be at stake. As a matter of international law, administrative convenience does not justify derogating from non-derogable protection obligations.
22. For these reasons, the HRLC recommends that the proposed amendments to section 48A not be passed.
23. As a matter of both law and principle, the goal of our processing system must be the protection of those genuinely in need, not their expeditious removal. The HRLC therefore also recommends that the existing scope of section 48A be reviewed to ensure that vulnerable people are not arbitrarily precluded from raising genuine protection claims in the name of administrative expedience.