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8 October 2015

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Dunstone

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

The Asylum Seeker Resource Centre (**'ASRC'**) thanks the Senate and Constitutional Affairs Legislation Committee for the invitation to make submissions on the Migration and Maritime Powers Amendment Bill (No.1) 2015 (**'the Bill'**).

We have significant concerns in relation to the impact of these proposed amendments; specifically:

- *Visa cancellations on character grounds:* The injustice of the previous changes to the character cancellation provisions are further entrenched, including in circumstances where the Minister exercises his power to overturn the decision of a merits review tribunal. Asylum seekers may be indefinitely detained and prevented from returning to Australia as a result of the Minister's exercise of power under these amendments;
- *Bars to further applications for vulnerable asylum seekers:* The unfair barring of the most vulnerable asylum seekers (minors, with mentally impairment and domestic violence victims) for subsequent applications is put beyond doubt, and will apply to applications already determined;
- *Application rights of individuals unsuccessful removed from Australia barred*: Where the Australian government attempts to remove asylum seekers from Australia but this is not successful, asylum seeker will not be able to have the fact of their failed removal considered as a part of an existing or new application, despite the fact that a refusal to allow their entry in the destination country may be further evidence of their claim for protection;
- *Extension of powers under the Maritime Powers Act:* The purported extension of powers under the *Maritime Powers Act 2013* which may not be consistent with Australia's obligations under international law and may further jeopardise our international standing and our relationships with our neighbors.

Our full submission on these issues is attached. Thank you again for the opportunity to contribute to this important inquiry and please do not hesitate to contact me should you require any further information,

Yours sincerely

Kon Karapanagiotidis
CEO
ASRC.

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

1. Background

The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ over 70 staff and rely on over 1000 dedicated volunteers. We deliver services to over 1,500 asylum seekers at any one time.

Our submission is based on 14 years of experience working with asylum seekers in Victoria.

2. Visa cancellation on 'character grounds'

The amendments proposed under Schedule 2 of the Bill relate to a range of character-related provisions, specifically visa cancellation on 'character grounds'. In 2014, the *Migration Amendment (Character and General Visa Cancellation) Act 2014* made significant amendments to the character provisions and created new powers to refuse or cancel visas on 'character grounds'. At the time of the consideration of that legislation, the ASRC raised its significant concerns to this Committee in relation to those changes (in submissions dated 31 October 2014), which included:

- Increase of ministerial powers to cancel visas without proper procedural safeguards in place;
- Significant reduction in the threshold for visa cancellations, including removal of the need for a 'significant' risk, and on the basis of 'reasonable suspicion' ;
- Capacity of the Minister to reverse at their discretion a decision by a merits review tribunal;
- Mandatory cancellation which does not permit the consideration of individual circumstances; and
- Significant risk of decisions resulting in indefinite detention (based on a 'reasonable suspicion' that an individual may be subject to a character cancellation) or breach of Australia's non-refoulement obligations.

These concerns have unfortunately proved to be very well-founded. There has been a significant increase in the number of individuals in detention as a result of these provisions, often in circumstances relating to criminal charges issues before a person has been convicted by a court. This undermines the fundamental principles of the criminal justice system which apply to all other Australians.

Case study[1]

Prakash was living in the community on a bridging visa while his protection application was being determined. While in the community, he was charged with assault. As a result of this charge, his bridging visa was cancelled and he was detained.

The charges against him were eventually dropped. He remains in detention as he no longer has a visa which allows him to live lawfully in the community. He has never been found guilty of an offence and, by his detention, has been effectively denied the right to bail which would have been afforded an Australian citizen.

Visa cancellation powers

The current Bill seeks to further entrench the unfairness of these already very broad provisions by extending their application to the Minister's power to cancel a visa granted by a delegate or by a decision of the AAT (s.501BA). It is concerning that the Minister has been granted the power to overturn a decision of a review tribunal, in circumstances where the rules of natural justice have been legislated not to apply (s.501CA(3)). However, the amendments proposed under Schedule 2 would amplify the impact of the Minister's cancellation powers even further, ensuring grave and unfair consequences for those subject to them. The proposed amendments in Schedule 2 would mean that those subject to the Minister's cancellation power could be:

- Detained if there is a mere 'reasonable suspicion' that their visa will be subject to cancellation under the Minster's power (Schedule 2, Item 7);
- Not informed of the timeframe under which to make further application (as otherwise required under s.195), or the duration of their detention (as otherwise required under s.196) (Schedule 2, Item 8).

Both of these outcomes are highly problematic. In relation to the first element, indefinite detention is a real possibility for an individual who is subject to the Minister's decision. Indefinite detention is always concerning, but particularly when it occurs as a result of a Ministerial discretion exercised in contrast to a fuller and fairer review process that has already been concluded. It should be noted that this Bill also seeks to change the jurisdiction empowered to review the Minister's decision from the Federal Circuit Court to the Federal Court (Schedule 2, Item 12), consistent with the character amendments made in 2014. This represents a limiting of the process for review, reducing an individual's opportunity to fully ventilate their claims. It also provides these people with incomplete review, as compared with people whose visas are cancelled pursuant to s 501.

In relation to the second element, it cannot be assumed that applicants would know the timeframes in which they have to make a further application or remember it if advised of it previously (as anticipated in the Explanatory Memorandum). It is also particularly unlikely for the individual to have access to external advice given the

[1] Names and some personal details have been changed.

serious challenges of accessing clients in detention quickly and effectively. Given the potentially life-threatening consequences of removal if no other application is lodged, asylum seekers should not be intentionally deprived of information relating to the further options open to them and should have a full opportunity to exercise the rights available to them. People in detention must be advised about their rights to apply for any visas, otherwise they may be detained because they did not know of an option.

Further, one particularly unfair aspect of the cancellation powers is that they allow the Minister to cancel a visa in circumstances where the individual is unfit to stand trial, but where they have been found by a Court to have "committed" an offence. This is deeply troubling as such a finding, under Victorian legislation, is "a qualified finding of guilt and does not constitute a basis in law for any conviction for the offence to which the finding relates". The reason for this qualified finding is, in part, because an unfit person is unable to run a defence such as an alibi or self defence because, by reason of their disability, they are unable to rationally participate in a trial. This power allows people who may be "not guilty" of an offence to have their visa cancelled because they have a disability and have been unable to defend themselves at trial. Further, people unfit are inherently vulnerable (they are defined as people who cannot understand what a plea of guilty is, and what a trial is to a sufficient level to participate in the trial) and Australia should not deport these people for that reason. This runs contrary to the tenant of the criminal law that a person is innocent until proven guilty, targets those with a disability and should not be enacted for the sake of consistency in the Act.

Definition of 'character concern'

Schedule 2 of the Bill seeks to amend the definition of section 5C which relates to 'character concern'. The definition at section 5C is relevant in relation to the disclosure of identifying information because such information can only be lawfully disclosed as a permitted disclosure in relation to individuals who are a 'character concern'. The proposed amendment will mean that a broader range of individuals can have their personal information lawfully identified, at a much lower bar.

In summary, while the amendments described above are consequential to the Character Act amendments of 2014, it is important to note that those 2014 provisions significantly increased ministerial power, lowered the threshold for visa cancellations and purported to negate the application of natural justice. Extending their operation further cements the unfairness of the original amendments to circumstances that include the Minister's power, which is only reviewable in the Federal Court.

3. Bars on further applications by minors, domestic violence victims and those with mental impairment

Last year, changes were made last year to section 48A which saw the imposition of a bar on further applications for protection by individuals who have previously had an

application made on their behalf, including by minors and those with a mental impairment. These amendments even extended to barring from further application applicants who were unable to understand the initial application (s.48A(1AA)). While the provisions specifically refer to minors and those with mental impairment, they are drafted so widely that they can apply to victims of domestic violence, who may have been included in the application of their abuser.

It is likely these changes would prevent people who had an application made on their behalf, from applying again despite any change to their circumstances. In the ASRC's experience, it is only in rare circumstances where a person would seek to make a separate and subsequent application, for instance if they are a minor who becomes an adult or is frightened to disclosure the full extent of their claims to family members, a victim of domestic violence who is later able to act independently of their abuser, or someone with a mental illness who has become well again.

The effect of Schedule 3 of the current Bill would further amend these provisions and would be twofold:

a) to put beyond any doubt that the bar to further applications applies to minor and those with a mental impairment (though the provisions would also be wide enough to apply to domestic violence victims) irrespective of the new grounds on which they might apply; and
b) to ensure the bar applies to applicants whose initial applications were decided prior to the legislative changes currently proposed.

The first aspect further entrenches the manifest unfairness of the original amendments towards the most vulnerable people. Preventing those who, through no fault of their own, were unable to even understand the terms of the original application made on their behalf from any further application amounts to a complete failure to provide the most vulnerable people with the opportunity to have their claims for protection determined in a fair and reasonable manner, and in manner in accordance with the standards the Australian community would expect.
The second element is also deeply problematic as applicants would not have been aware of a ban on further applications at the time of their initial application, and accordingly would not have been able to receive any advice on their inability to make further applications on new grounds.

Case study[2]
Brenda, aged 15 and her sister Mary, aged 17, arrived in Australia with their parents from Papua New Guinea. Brenda and Mary's father, Peter, wanted to lodge a protection application that included his wife and children based on this claims for protection, lest the family be separated.
Peter's claims for protection were not strong. However, his daughters were deeply afraid of returning to Papua New Guinea because of the traditional practice in their community of child marriage. Peter, as a senior member of the community, was

[2] Names and some personal details have been changed.

involved in this traditional practice and his daughters were afraid to raise their concerns to their father.
Brenda and Mary would both be able to seek protection in Australia in their own right. However, under the changes proposed, they would not have the opportunity to raise make this subsequent application and could be sent back to Papua New Guinea to face the very practices which they feared.

Case study[3]
Ahmed came to Australia from Iran with his parents as a young child. His father lodged a protection application which included Ahmed as an applicant when Ahmed was 12 years old. The protection application was based on this father's claims for protection. While his father's application was being determined, Ahmed attended school in Australia, learned English and developed an Australian accent. In his teenage years, Ahmed became interested in politics in his home country, and developed outspoken views strongly against the Iranian government.
Ahmed's father's application for protection was eventually unsuccessful; however in the intervening years, Ahmed had himself developed claims that would likely attract Australia's protection obligations.
Under the changes proposed, Ahmed would be unable to have his own claims for asylum considered, and could be returned to Iran despite the life-threatening risks he would face.

4. Amendments related to removals

Schedule 1 of the Bill would bar asylum seekers whose removal from Australia is unsuccessful from making a further application for protection on their return to Australia. The most likely reason a deportation would be unsuccessful would be if the returning country refused to accept a person back.

The ASRC is strongly against the Australia's government's attempt to remove asylum seekers from Australia to their country of origin in circumstances where asylum seekers are have limited opportunity to have their claims heard fully and fairly. In relation to removals that are not accepted by the receiving country, the very fact of the country's refusal to accept an individual could well constitute significant support to an applicant's claim for protection; for example, evidence of statelessness.

However, the amendment would mean 'an individual is taken to have been continuously in the migration zone' despite the attempted removal; that is, the Bill essentially deems the failed removal to never have happened, despite the fact that circumstances arising from it could be highly relevant to an individual's claim for protection.

The Explanatory Memorandum to the bill states that the purpose of this amendment is to 'ensure that where an attempt to remove a non-citizen has been made, but that removal was not completed, the non-citizen does not gain an advantage'. On the

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contrary, this provision severely disadvantages asylum seekers as it ignores an important aspect of their claim, undermines the principle of natural justice and means highly relevant information to an individual's protection claim cannot be considered.

5. Amendments relating to maritime powers

The ASRC maintains its strong disagreement with the dangerous process of 'turning back the boats', and the veil of secrecy under which such removals are currently cloaked. Adding further concern is the proposed amendment under Schedule 4 of the Bill, which purports to extend the operation of the *Maritime Powers Act 2013* into the territorial waters and archipelagic waters of another country.

The Explanatory Memorandum of the Bill states that the intention is only to authorize the operation of the Act in circumstances of passage that are already permitted under international law. However, the proposed amendment only requires that a relevant officer or the Minister *considers* that the passage of a vessel is in accordance with international law; that is, *actual* compliance with international law is irrelevant. This amendment represents a clear attempt to derogate from Australia's responsibilities under international law and could further erode Australian's standing as a responsible international actor as well as jeopardize relationships with our neighbours.