



## Refugee Council of Australia

### **SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE MIGRATION LEGISLATION AMENDMENT BILL 2014 [PROVISIONS]**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 170 organisations and 700 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Legal and Constitutional Affairs Legislation Committee inquiry into the *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*. We are concerned that this Bill could have significant implications for people fleeing persecution by: preventing people with genuine protection concerns from being able to lodge further Protection Visa applications; broadening the scope for involuntary repatriation without including adequate safeguards to protect asylum seekers against *refoulement*; and allowing information obtained under search warrants to be shared with administrative decision-makers to whom the safeguards and oversight mechanisms applicable under criminal law may not apply.

#### **1. Limitations on further applications for Protection Visas**

- 1.1. RCOA has a number of concerns relating to the proposed changes to section 48A of the *Migration Act 1958*, regarding further applications for Protection Visas. The most significant of these relates to the amendments stipulating that a further Protection Visa application may not be lodged regardless of whether the asylum seeker knew about, or understood the nature of, the application because they were a minor or due to a mental impairment.
- 1.2. While RCOA appreciates the need to maintain the integrity of Australia's visa systems, we believe that this should be done in a manner which affords procedural fairness to visa applicants and strikes an appropriate balance between preventing fraudulent or disingenuous applications and ensuring that people in genuine need of protection are able to access it. Under the proposed amendments, some asylum seekers will effectively be denied the right to have a fair hearing of their claims, placing them at serious risk of *refoulement*.
- 1.3. Individuals who, due to their age or the state of their mental health, were unable to understand the visa application process or were not even aware that an application had been lodged on their behalf – and thus may not have had any opportunity to put forward information relevant to their claims – will be specifically barred from lodging a further visa application. A process which denies this opportunity to particularly vulnerable groups of asylum seekers due to factors entirely beyond their control can hardly be described as procedurally fair.

- 1.4. If an asylum seeker has not had the opportunity to put forward all information relevant to their protection claim and have this claim assessed through a robust status determination process, either because they did not understand the process or were not aware that an application had been made on their behalf, their protection needs cannot be accurately assessed. As such, they may be found not to be in need of protection when they do in fact have a genuine fear of persecution or ill-treatment and could be returned to situations where their life, safety or freedom is under threat.
- 1.5. RCOA is particularly concerned about the potential impacts of these amendments in light of recent changes to eligibility for the Immigration Advice and Application Assistance Scheme (IAAAS). In March, the Government announced that asylum seekers who arrive in Australia without a valid visa will no longer have access to free advice and application assistance under the IAAAS, and that those who do arrive with a valid visa will have access to the IAAAS at the primary stage only. Members of RCOA have expressed concern that this policy change may place asylum seekers, particularly those who have additional vulnerabilities (such as poor mental health), at greater risk of being exploited by unscrupulous or fraudulent migration agents – and, consequently, at greater risk of being denied a fair hearing under the proposed amendments.
- 1.6. RCOA rejects the assertion that the Minister’s personal, non-compellable powers under section 48B of the *Migration Act 1958* provide adequate protection against *refoulement* for people subject to section 48A. A non-reviewable process which relies on the discretion of a single Minister, based on powers which the Minister is under no obligation to exercise, does not provide a sufficient safeguard against forcible return of refugees to situations of persecution and danger.
- 1.7. Additionally, RCOA believes that the rationale for these amendments has not been sufficiently explained or justified. While the Explanatory Memorandum accompanying this Bill claims that the amendments are necessary to preserve the integrity of Australia’s visa systems, it presents no evidence demonstrating that the extant wording of the *Migration Act 1958* has significantly undermined the integrity of these systems. Moreover, we do not accept that allowing asylum seekers to lodge a subsequent Protection Visa application if their first application was lodged without their knowledge or consent would in any way threaten the integrity of Australia’s visa processes. On the contrary, ensuring that all asylum seekers are able to have a fair hearing of their claims would help to ensure the integrity of these processes.

## **2. Implications for children**

- 2.1. RCOA is deeply troubled by the potential impacts of the proposed amendments to section 48A on children and young people, as we do not believe the Bill has been sufficiently informed by best interests considerations (as required by Article 3 of the Convention on the Rights of the Child). The Statement of Compatibility with Human Rights accompanying this Bill asserts that it is appropriate in the circumstances for “Parliamentary intent” and “public expectations” to take precedence over best interests considerations, due to fears that parents may “use and exploit” their children to prolong their own stay in Australia. In RCOA’s view, it is completely unacceptable to act against a child’s best interests simply on the basis of public opinion or because that child’s parents have acted unethically.
- 2.2. Moreover, the potential consequences for a child affected by the proposed amendments could be forcible return to a situation where their life, safety or freedom is under threat. We cannot see how these consequences could possibly be considered less important than the imperative to conform to “public expectations” or maintain the integrity of a visa

system. A far stronger justification is needed to act against a child's best interests when such fundamental rights are at stake.

- 2.3. RCOA is also concerned by the assertion in the Statement of Compatibility that the proposed amendments would help to protect family unity by ensuring "consistent immigration outcomes" for all family members. While we strongly support the preservation of family unity, we do not believe that this can be used as a justification to ignore the protection needs of individuals within that family unit. Furthermore, Australia's existing visa regime is sufficiently flexible to allow for preservation of family unity in cases where family members have differing protection needs. Decision-making on visa matters which results in family separation is a matter of discretion, not an inevitability.

### **Recommendation 1**

*RCOA recommends that the proposed amendments to Section 48A of the Migration Act 1958 be removed from the Bill.*

## **3. Removal of unlawful non-citizens**

- 3.1. RCOA is concerned that the proposed changes to section 198(5) of the *Migration Act 1958* could place asylum seekers who have not yet had an opportunity to lodge a Protection Visa application at risk of *refoulement*. The Statement of Compatibility with Human Rights claims that these amendments will not affect asylum seekers who were not immigration cleared or who arrived in Australia by boat, as they are not subject to section 195 of the Act. In RCOA's view, however, the Bill does not include adequate safeguards to ensure that this will indeed be the case.
- 3.2. The proposed amendments to subsection 198(5) which would provide a safeguard against *refoulement* for some asylum seekers, relate only to people who are entitled to apply for a visa under section 195 of the *Migration Act 1958* or to apply under section 137K of the Act for revocation of a visa cancellation. As such, this safeguard would not apply to people who are not entitled to lodge a visa application under section 195, including those who were not "immigration cleared" upon arrival in Australia or who first arrived in at an excised offshore place. As a result, the proposed amendments to subsection 198(5) would protect only some of the people who may be subject removal from Australia under this provision.
- 3.3. There are currently thousands of asylum seekers living in Australia who are precluded from lodging a Protection Visa application by virtue of Australia's excision policy. It is unclear from the proposed amendments how these asylum seekers will be protected against *refoulement* given that they cannot access the safeguard under subsection 198(5).
- 3.4. We also do not accept that Australia's pre-removal clearance procedure can provide an adequate safeguard against *refoulement* for these asylum seekers. This procedure does not allow for a thorough assessment of protection claims, nor is it subject to the same forms of independent review as a visa determination process. As such, it cannot provide a substitute for a robust, statutory refugee status determination process. RCOA believes that additional safeguards are needed to ensure that all asylum seekers, regardless of their mode of arrival, are protected against *refoulement*.

### **Recommendation 2**

*RCOA recommends that, at a minimum, the safeguards proposed to be introduced into section 198(5) should be available to all asylum seekers, including those who have not yet had the opportunity to lodge a valid Protection Visa application.*

#### **4. Use of material obtained under a search warrant**

- 4.1. RCOA believes that further clarification is needed as to the operation of the proposed amendments allowing for material obtained under a search warrant issued under the *Crimes Act 1914* to be used in decision-making relating to visas and citizenship. Neither the Bill itself nor its Explanatory Memorandum provide sufficient information as to why this amendment is needed or how it will operate in practice. This is of serious concern given the significant differences in the legislative regime governing the use of search warrants for the purpose of investigating criminal activity and the legislative regime governing the determination of a person's visa status.
- 4.2. Part 1AA of the *Crimes Act 1914* prescribes specific criteria for when a search warrant can be sought, who can authorise the use of such a warrant, what use can be made of that information, how that information is to be stored and under what circumstances it can be shared and with whom. These provisions generally require that a clear connection be established between the use or sharing of information and the prevention, investigation or prosecution of a criminal offence. They are also subject to reporting requirements and independent oversight mechanisms, as well as penalty provisions for the misuse or unauthorised disclosure of such information. These provisions are designed to ensure that, in the exercise of these powers for law enforcement purposes, the fundamental rights of those subject to the warrant – including the rights to privacy and a fair trial – are also preserved.
- 4.3. Under the proposed amendments, however, information obtained under search warrants will be made available to administrative decision-makers and used for purposes which extend well beyond preventing, investigating or prosecuting a criminal offence. In addition, the proposed amendments do not include any specific oversight or reporting requirements, such as those relating to privacy considerations, the destruction of material no longer required or penalties for misuse of information.
- 4.4. The potential for these amendments to have a significant impact on refugees and asylum seekers is also considerable, given the importance of confidentiality to people fleeing persecution. For these individuals, the revelation of information about their whereabouts and activities in Australia could place not only them, but also family members and friends still living in their country of origin, at serious risk. As such, it is all the more important their personal information is used, disseminated and stored with sufficient regard for confidentiality.
- 4.5. Furthermore, as with the proposed amendments to section 48A, the Explanatory Memorandum does not provide any evidence indicating that current mechanisms are insufficient to allow for the sharing of information on criminal matters that may be relevant to decision-making on visas or citizenship. Unless such evidence can be presented, RCOA is of the view that it would be unwise to make sensitive information about criminal matters more readily available to administrative decision-makers operating under a less stringent regulatory framework.

#### ***Recommendation 3***

*RCOA recommends that:*

- a) *The Australian Government provide evidence of the need to introduce the provisions set out in Schedule 5 of the Bill;*
- b) *In the absence of adequate evidence, the amendments set out in Schedule 5 be removed from the Bill.*