RILC **Refugee & Immigration Legal Centre Inc**

Submission to Senate Legal and Constitutional Committee Inquiry into

Migration Amendment (Protection and Other Measures) Bill 2014

1. Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre (**RILC**) is a specialist, non-profit community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia.[1] Since its inception 25 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration Advice and Application Assistance Scheme ('IAAAS'). RILC has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 RILC welcomes the opportunity to make submissions to the Senate Legal and Constitutional Affairs Committee (**the Committee**) inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014 (**the Bill**). We set out below our key concerns with the amendments to the *Migration Act* 1958 (**the Act**) proposed by the Bill.

2. Outline of submissions and recommendations

2.1 Migration Amendment (Protection and Other Measures) Bill 2014 contains a range of measures which would:

- Seriously erode existing substantive and procedural safeguards for people seeking asylum under Australian law.
- Substantially downgrade Australia's compliance with its obligations under international law, which risks serious violation of those obligations.
- Facilitate refusal of protection applications using technical procedural measures without due consideration of Australia's international protection obligations.
- Create a significant risk that people will be denied a fair and proper assessment of their protection claims and, in turn, be refouled to the prospect of persecution or other forms of serious harm.

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ('RACS') and the Victorian Immigration Advice and Rights Centre ('VIARC') which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

Further:

- No compelling case has been made out as to why the proposed amendments are necessary.
- The full consequences of the Bill are unclear, given that the Government is yet to introduce its foreshadowed legislation in relation to a new 'fast track' refugee status determination system, which is clearly of direct relevance to this Bill.

Our principal concerns relate to the follows proposed provisions of the Bill, which, for the reasons set out below, we recommend should not be passed:

- Responsibility in relation to protection claims (proposed s 5AAA)
- Consequences for failing to establish identity and for using bogus documents (proposed new sections 91W, 91WA and 91WB)
- Protection applications by family members (proposed section 91WB)
- Consequences for failure to raise all claims and evidence to the Department (proposed section 423A)
- Complementary Protection - the risk threshold (proposed section 6A)
- Principal Member Directions – (proposed sections 353B and 420B)
- Oral decisions and statements of reasons (proposed section 368D and 430D)
- Failure to appear and reinstatement (proposed sections 362B and 362C and 426A and 426B)

3. Responsibility in relation to protection claims (proposed s 5AAA)

3.1 Currently, under Australian law,[2] a burden of proof does not expressly lie with either the asylum seeker or the decision-maker. Proposed section 5AAA seeks to impose a formal burden of proof on an applicant for a protection visa which makes it their sole responsibility to specify all particulars of the claim and to provide sufficient evidence to establish a claim.

3.2 This provision is fundamentally inconsistent with long-established principles and practices of Australian administrative and refugee law, international law and UNHCR policies and guidelines; these sources of law and policy make clear that to the extent any burden of proof applies, it is a *shared duty* – shared between the claimant and the decision-maker.

3.3 The *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of*

[2] Neither the *Migration Act*, nor the common law, expressly provide for burden of proof to lie with an applicant or the Minister.

Refugees (January, 1992) (**UNHCR Handbook**) stipulates that while an applicant bears a burden of proof, ultimately, "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner". Relevantly, the Handbook states:

> It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. 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. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. [3]

3.4 The requirement of a shared duty of proof in relation to ascertaining claims is generally consistent with Australian law. Under Australian administrative law, as a general rule, nobody bears an onus of proof in administrative proceedings. Further, the High Court of Australia has confirmed that no formal legal burden or standard of proof applies in the context of claims for refugee protection.[4] These decisions are made by an administrative decision maker under an inquisitorial process made *outside* the adversarial processes of a court in which issue is joined between parties, and whereby it would be inappropriate to apply a burden or onus of proof to either party.[5] It would be inconsistent with current code of procedure for decision-making under the Migration Act, which, for example, expressly contemplates that decision makers may seek further information in relation to an application.[6] This position also finds footing in international law.[7]

3.5 The displacement of these legal principles and UNHCR guidelines should be accompanied by clear and compelling reasons and evidence for the need, none of which have been advanced or are otherwise apparent.

3.6 To the contrary, RILC is concerned that the removal of any responsibility or obligation to assist in specifying particulars or establishing claims means that decision-makers would be given licence to avoid undertaking a full and proper of assessment potentially significant protection claims.

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[3] UNHCR Handbook [196]. See also, UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December, 1998; and UNHCR Submission into this current Inquiry, dated 12 August, 2014, paras 12-18.

[4] See, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1.

[5] See, for example, *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 (27 June 2014) at 34.

[6] See, for example, ss 56 and 424 of the Migration Act.

[7] See, for example, the approach taken in UK Courts, and other European Union jurisdictions.

3.7 While an asylum seeker clearly bears significant responsibility for explaining their claims, substantial fairness requires the onus to be shared with the decision-maker who should play an active role in eliciting and clarifying the claims. This is primarily because asylum seekers are commonly in a positon of significant vulnerability. The refugee assessment process is alien, involving complex legal, evidentiary and procedural issues which are difficult to understand and engage with. In RILC's experience, asylum seekers commonly face serious obstacles in the presentation of their claims, which may include: language, education, cultural background, torture or trauma, remote detention or other special vulnerabilities, such as those experienced by children, the elderly or people with serious psychological and/or physical impairment. Other, more practical matters, such as lack of probative documents or ability to investigate or research pertinent issues, can also impede proper presentation of a person's case.

3.8 The dangers of a burden of proof resting solely on an applicant are manifest. For example, many asylum seekers who we have assisted are initially unable to fully articulate relevant claims for protection. Despite having strong fears of return to their homeland, people often experience great difficulty with characterising those fears within the terms of the applicable law and procedures. A range of factors operate here. They include:

- lack of understanding of the relevance of claims and how to explain them;
- fear of authorities in Australia due to past experiences of persecution;
- fears for the fate of family or others stuck in precarious situations overseas;
- difficulty in recalling and/or recounting traumatic experiences (including victims of torture or sexual violence); and
- diminished capacity due to age (e.g. children) or those suffering from severe psychological or physical illness.

For example, we have assisted many unaccompanied minors who are unable to articulate their protection claims without significant efforts by the decision maker to elicit and clarify the relevant evidence upon which to make the decision.

3.9 Further, legal assistance can often prove vital in overcoming such obstacles and aiding proper presentation and assessment of protection claims. The recent withdrawal of publicly-funded legal assistance by the Government for people who have arrived without a valid visa compounds the potential adverse impact of the proposed provision. While we note that the State of Compatibility with Human Rights provides limited acknowledgement that some people may need legal assistance to make their claims, the assertion that this will be possible through either private migration agent services or under the revised IAAAS scheme for people who arrived on valid visas is largely unrealistic and unfounded. In RILC's experience, most asylum seekers are unable to access legal assistance due to financial and other forms of disadvantage, and the levels of IAAAS funding are manifestly inadequate to meet the longstanding and acute need for legal help in this area.

3.10 Ultimately, this provision creates the very real risk of inadequate and incomplete assessment of valid protection claims which could result in people being wrongly refused and returned to danger, in violation of Australia's non-refoulement obligations.

4. Consequences for failing to establish identity and for using bogus documents (proposed new sections 91W, 91WA and 91WB)

4.1 The proposed new sections 91W, 91WA and 91WB would create new grounds for refusal of a protection visa, being where an applicant provides bogus identity or nationality documents, or either destroys or fails to provide such documents, and where her or his explanation and/or steps taken to provide such documents is not considered 'reasonable' by the decision-maker.

4.2 These provisions are fundamentally inconsistent with Australia's protection obligations, given they could result in refusal of protection based solely on 'identity' or other documents, without addressing the central legal question: whether a person is at risk of persecution. A person could be expelled to face persecution purely because of adverse findings about 'identity' documents. This would violate Australia's non-refoulement obligations.

4.3 A refusal under these provisions would render any assessment of protection need a residual matter, subject only to the personal, discretionary and non-compellable decision of the Minister of the day. This would fundamentally undermine the current legislative framework for protection cases, which contemplates an administrative *law-based* assessment, not one conducted through the exercise of personal non-compellable Ministerial discretion.

4.4 The provisions also seek to create presumptions which are at starks odds with key legal principles, policies and practice, including:

- The UN Refugees Convention, which provides that States must not penalise asylum seekers for entering without valid documents.[8]
- UNHCR Guidelines, which acknowledge that the refugee experience itself often mitigates against people obtaining identity or travel documents, and that an asylum seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt of statements that are not susceptible to proof, documentary or otherwise.[9]

4.5 Consistent with our experience, many asylum seekers are unable to obtain valid documents for entirely explicable reasons, which are often directly related to and driven bywell-founded fears of persecution for themselves or family left behind. These include:

- The authorities of their home country have refused to issue identity or travel documents;

[8] See, for example, UN Refugees Convention, Article 31.
[9] UNHCR Handbook [196] and [203].

- The process of seeking relevant identity documents – either before or after they have fled - could bring them or their family or community to the attention of the authorities and thereby heighten the risk of persecution.

4.6 In RILC's experience, many asylum seekers have no option but to obtain 'bogus' documents to facilitate their ability to flee from the threat of persecution. In our experience, it also the case that people destroy or dispose of identity documents for reasons which, rather than casting doubts over their claims, should be considered entirely consistent with those fears. For example, people are often motivated by fears of retribution from authorities or smugglers en route to Australia, or the fear of return to the seat of persecution.

4.7 Current provisions for the assessment of identity and credibility – including relevant documents – are more than adequate. The process is already onerous, and provides an express provision for an adverse inference to be drawn. The imposition of additional procedural complexity, as proposed, is only likely to compound the significant disadvantage, vulnerability and potential for unfairness which asylum seekers currently experience.

4.8 In this regard, we further note that the scope and application of 'reasonable explanation' provisions are ill-defined. We are concerned that the application of this test lacks proper safeguards against the real potential for decisions which deny visas to people in need of protection purely by reason of deficiencies in their documents.

5. Protection applications by family members (proposed section 91WB)

5.1 The proposed section 91WB prevents the grant of a protection visa on the basis of being the member of the family unit of a person who has already been granted a protection visa. Such a person would have to apply for a protection visa in their own right.

5.2 This provision is inconsistent with and potentially violates the well-established principle and practice of family unity and reunification, which allows for 'derivative' refugee status and protection in international law and policy.[10] This international legal principle, which recognises family as a fundamental unit of society and which should be afforded protection by the State and society, provides that, if one family member is found to be a refugee, other close family members should protected and family unity maintained because of their family link.[11] Derivative status is also recognised under Australia's migration legislation.[12]

[10] See, for example, UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, available at: http://www.refworld.org/docid/42d66dd84.html

[11] See, for example, preamble to the Refugees Convention.

[12] See, for example, section 36(2)(b) of the *Migration Act*.

5.3 The provision also seeks to deter and/or penalise 'irregular' entry and boat arrivals[13]. Whatever the means of arrival in Australia, the overriding considerations which should apply are the protection of people at risk of persecution, and the upholding of the principle of family as a fundamental unit of society. This provision could potentially result in permanent separation of close family, including parents and their children. No compelling case has been made for the necessity of this provision.

6. Consequences for failure to raise all claims and evidence to the Department (proposed section 423A)

6.1 The proposed section 423A requires that the presiding RRT Member draw an adverse inference for claims raised or evidence given which was not before the Department.

6.2 This provision is an unwarranted and potentially serious restriction on the ability of claimants to present their full claims at merits review, and be afforded a fair hearing.

6.3 Many asylum face barriers to properly understanding the process and presenting their claims.[14] Fear, trauma, confusion and lack of comprehension of procedural requirements, inadequate resources to obtain evidence or provide submissions are key factors which can often lead to late disclosure of claims.

6.4 Given the difficulties which many people experience when undergoing the refugee assessment process, it is common for claims to be elaborated or raised for the first time on review. The likelihood of this is heightened for people who are particularly vulnerable, such as victims or torture, trauma or sexual violence.

6.5 In our experience, past suffering and trauma often impedes a person's ability to recollect or to fully disclose. Given these matters, there is no justification for creating a presumption which requires the Tribunal to draw an adverse credibility inference. RILC's central objection does not relate to assessing the credibility of claims disclosed later, but rather, to the compulsion to draw an adverse inference. This would involve the imposition of an inappropriate and unreasonable expectation which comprises an additional and unnecessary procedural hurdle.

6.6 There are well-established international and domestic guidelines and laws for the assessment of credibility, which include the proper treatment of late disclosure of claims and individual vulnerabilities.[15] These are more than adequate; no case has been made out as to the need for specific laws to direct the Tribunal on what are properly matters of ordinary credibility assessment.

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[13] See Explanatory Memorandum to the Bill, Attachment 1, Statement of Compatibility with Human Rights, p 8. We note that this does not make reference to air arrivals, though they, too, would be caught by the provision.

[14] See above, under heading 2.

[15] See, for example, MRT-RRT *Gender Guidelines*, MRT- RRT *Guidance on the Assessment of Credibility*
MRT- RRT *Guidance on Vulnerable Persons*

6.7 This provision potentially erodes important procedural and substantive safeguards to ensure that Australia does not violate its protection obligations and endanger lives.

7. Complementary Protection - the risk threshold (Schedule 2; proposed section 6A)

7.1 The provision would raise the risk of harm threshold from a 'real chance' (which requires a real and not a far-fetched or fanciful possibility, but can be as low as 10%), to a 'more likely than not' test (which would require a balance of probabilities test involving more than a 50% chance of suffering significant harm).

7.2 This would impose an unacceptably high threshold of risk-assessment which is fundamentally at odds with:

- The well-established, lower threshold standard under international law.[16]
- The lower threshold test in comparable jurisdictions such as the UK and New Zealand.[17]
- The test for refugee protection under Australian law which has, since 1989,[18] applied a 'real chance' test. There is no sound reason why different tests should be applied to what is ultimately the central question under both refugee and complementary protection: whether a person is at risk of serious human rights abuse.
- A 'more likely than not test' would significantly increase the risk of Australia returning people to persecution or other forms of life-threatening harm, in violation of its non-refoulement obligations.
- No case has been made out as to why the risk threshold and margin for error on what are often life or death matters should be so radically increased for people seeking complementary protection.

8. Tribunal processes and administration

8.1 Principal Member Directions - Proposed sections 353B and 420B

8.1.1 The proposed sections 353B and 420B would enable the Principal member to issue 'guidance decisions' in the Migration Review Tribunal (**MRT**) and Refugee Review Tribunal (**RRT**) which must be complied with by Tribunal Members, unless the facts and circumstances of a relevant review application are clearly distinguishable from the guidance decision.

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[16] See, for example, *UNHCR Submission to the Inquiry Senate Legal and Constitutional Committee into Migration Amendment (Protection and Other Measures) Bill 2014*, 12 August, 2014.

[17] See, for example, *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, [1988] AC 958.

[18] *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379.

8.1.2 These provisions have the potential to seriously undermine the proper functioning of the Tribunals as independent merits review bodies. Each Member's capacity to perform their primary statutory function of assessing an individual's review application in light of the available evidence and relevant legal principles in order to reach the correct or preferable decision could be severely compromised. While we acknowledge the aim of promoting consistency in decision-making, and its importance in the administration of justice, they should not be at the expense of a proper assessment of the merits of each individual case. In RILC's experience, boiler-plate precedents have the real tendency to result in structural limitation to the inquiry, and, in turn, a serious misapplication of relevant law, policy to the facts of the particular case. This general concern is heightened by the nature of other proposed restrictions on procedural and substantive rights in the present Bill. This includes provisions relating to the burden of proof, and late disclosure of claims. Put simply, the combined effect of these provisions could well result in an asylum seeker never receiving a proper assessment of claims.

8.1.3 We are particularly concerned about the absence of proper procedural safeguards in relation to quality assurance, currency of decisions (legal and factual), adequate resourcing and appropriate application of guidance decisions. In this regard, we note that recently, the country information research unit of the RRT was disbanded, and its resources shifted to the Department of Immigration.

8.2 **Oral decisions and statements of reasons (proposed section 368D and 430D)**

8.2.1 Our principal concerns in relation the proposed sections 368D and 430D in relation to oral reasons are as follows.

8.2.2 Many applicants will experience difficulty in understanding the reasons if they are only given orally. Cases commonly involve complex and highly technical factual and legal analysis and findings. In RILC's experience, applicants often struggle to understand key elements of their decision, even after detailed explanation.

8.2.3 Applicants may also not understand the need to request written reasons within the limited time period. The consequence of failing to obtain a written statement of reasons could seriously compromise a person's capacity to seek judicial review, particularly given the significant costs of obtaining a transcript of the oral statement which would be necessary in order to seek legal advice about prospects for judicial review in the event that a written statement was not obtained.

8.2.4 Provision of oral reasons only would also diminish accountability and transparency of Tribunal decision making.

8.2.5 Ultimately, these provisions could have the indirect and unintended consequence of restricting a person's existing statutory rights to seek judicial review.

8.3 **Failure to appear and reinstatement (proposed sections 362B and 362C and 426A and 426B)**

8.3.1 The proposed dismissal power may, in some circumstances, deny a person the ability to receive a fair hearing of their claims because of circumstances beyond their control; for example, due to serious illness or impairment, failure to receive notification or failure to understand the statutory requirements.

8.3.2 In addition to our general concerns about the dismissal powers, we submit that the seven day time limit to request reinstatement is too short, particularly given the circumstances of disadvantage and vulnerability of many applicants and their need to seek legal assistance in understanding and asserting their rights. In RILC's experience, there is high risk that some people will inadvertently fail to apply within time or make a valid request within the form required.

8.3.3 These provisions could also have the grave consequence of denying a person a decision on their review application due to non-appearance, even where the person has lodged further information in support of their review application and fails to attend the hearing because of circumstances beyond their control such as ill-health, failure to receive notification of the hearing or mistake.

8.3.4 Provisions of this nature, while potentially achieving efficiencies, also risk denying a fair hearing to people on issues relating to matters as grave as protection from persecution or family reunion. This is manifestly too high a cost.

Refugee & Immigration Legal Centre
(September 2014)