23 January 2014

By e-mail: legcon.sen@aph.gov.au

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

Dear Committee Secretary

Re: Submission regarding the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

I write to you to regarding the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* ("the Bill) and my concerns over firstly, the very real and adverse broad implications the Bill will have should it be enacted into legislation and secondly, the discreet and adverse implications for a cohort of asylum seekers who have sought to engage Australia's protection obligations for the last 4 years.

From the outset the current Complementary Protection provisions as provided in s.36(2)(aa) of the *Migration Act 1958* reflect Australia's international obligations under the:

- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and
- The Convention on the Rights of the Child (CROC).

The provisions also make possible for:

- principles of procedural fairness, and
- the rule of law in Australia

to be adhered to and upheld.

Should the Bill be enacted into law and the assessment of often complex complementary protection claims returned to a discretionary, non-transparent and non-reviewable process, the above will be undermined and subverted.

On a practical level, if the Bill is passed, it will leave a seminal and unanimous judgment of the Full Federal Court delivered on 20 March 2013 in the case of *SZQRB v Minister for Immigration and Citizenship* and upheld by the High Court of Australia in December 2013, without effect.

This decision found that the Department of Immigration's own assessment of obligations pursuant to the international treaties above, was not done in accordance with procedural fairness or the law.

Asylum seekers at the point of removal from Australia who had not had their complementary protection claims properly assessed according to law, would now be able to do so.

Should this cohort be denied this opportunity, the grave and adverse implications of their removal cannot be understated.

For a group of asylum seekers within this cohort, these implications would be particularly acute given their experiences of the refugee determination process and their long-term immigration detention in Australia.

I seek to bring to your attention the plight of this group and what the Bill would mean for them.

Background:

In 2012, the Brigidine Asylum Seeker Project, Curtin University's Centre for Human Rights Education, lawyers including the writer and other advocacy groups around Australia, began assisting a small group of Afghan asylum seekers of Hazara ethnicity who had been refused refugee status in Australia ("the group").

Some in the group live in the community on a Bridging Visa E (several of which have expired and have not been renewed in accordance with current government policy), others are in community detention and others remain in an immigration detention facility.

This group is comprised of more than 70 Afghan asylum seekers of Hazara ethnicity, who have been identified as being affected by clear systemic and procedural failures in assessment of their refugee claims.

Concerns:

This group were Irregular Maritime Arrivals (IMAs) who arrived in Australia throughout 2010 and were:

- detained on Christmas Island and in other immigration detention centres for long periods of time;
- precluded under s.46A(1) of the *Migration Act 1958* from making a valid application for a Protection Visa;
- permitted by the Minister to apply for refugee status under the non-statutory Refugee Status Assessment (RSA) process but not found to be owed protection;

- permitted to seek review of the primary decision under the Independent Merits Review (IMR) process but were not found to be owed protection following the IMR process.

The group were:

- excluded from an internal DIAC initiative in early 2011 that led to internal review of a cohort of refusal decisions. Over 100 asylum seekers were found to be owed protection as a result;
- allocated to IPOA decision makers who found against 98% of Afghans whose cases came before them;
- **excluded from a reviewable assessment of claims under Complementary Protection provisions which were incorporated into the Migration Act on 24 March 2012;**
- subjected to a DIAC internal, non-reviewable International Treaties Obligations Assessment (ITOA) process that afforded no natural justice – the subject of *SZQRB v Minister for Immigration and Citizenship*.

Some of the group accessed judicial review but were unsuccessful for various reasons including poorly prepared applications given questionable representation under the IAAAS. This often led to adverse findings of credibility. Judicial Review is unable to address refusal decisions that are based on a lack of credibility. Questionable decision makers throughout this period under former IMA and IPAO processes also featured in several of decisions affecting the group.

All this occurred while many experienced lengthy periods of time in Australian immigration detention facilities and suffered attendant mental health consequences.

The only thing separating this group from removal from Australia is the fair and proper assessment of their complementary protection claims. This arguably can only take place under transparent and reviewable processes.

1. Exclusion from the operation of the Migration Act 1958

From the time of their arrival in 2010 the group were excluded from the operation of the *Migration Act 1958*, and the non-statutory processes to which they were subjected are inconsistent with the guarantee of Article 2(3) of the ICCPR.

The majority of the RSA and IMR refusal decisions for the group (the non-statutory decision making process that applied at that time) were made between April 2010 and August 2011.

Prior to 2010, the overwhelming number of asylum seekers from Afghanistan were approved in their refugee claims. The majority of these Applicants were Hazara.

From April 2010 until August 2011 the approval rate fell significantly. This was the period of time in which the group was refused in their RSA and IMR applications and during which there were a very small number of decision makers who were refusing almost all Afghan applications for protection.

The Department of Immigration and Citizenship's (DIAC) annual statistics confirm that:

- In 2008-2009 the rate of acceptance of Afghan asylum seekers was 100%;
- In 2009-2010 the rate of acceptance of Afghan asylum seekers was 77.9%;
- In 2010-2011 the rate of acceptance of Afghan asylum seekers was 37.7%.

Following the High Court case of *M61/69* (which confirmed that procedural fairness had been denied to a great many asylum seekers under the RSA/IMR process), the Government implemented a number of policy and legislative changes. This was in recognition of large delays in processing and demonstratively unlawful decision making [see section 2].

2. Pre Review Examination (PRE) – introduced 22 August 2011

A departmental Pre Review Examination (PRE) of cases awaiting an IMR commenced on 22 August 2011.

With the exception of a few individuals, the majority of the group were excluded from these changes.

The purpose of the PRE was to identify any new information or supporting documents that became available since the asylum seeker was notified of a negative primary refugee assessment and to determine whether Australia owed protection obligations to that person.

The PRE was introduced in recognition of the passage of time clients were awaiting an IMR hearing and previously demonstrated poor decision making.

About 40% of cases finalised under the PRE were found to be owed protection. The Department of Immigration then ceased the PRE process after a couple of months as a case backlog was ameliorated. It was an ad hoc administrative response that came and went, arbitrarily affecting cases. However, it resulted in a very significant number of Afghan asylum seekers being found to be owed protection. Those who were not found to be owed protection proceeded to a new merits review structure – the Independent Protection Assessment Office (IPOA).

Afghan asylum seekers who were unsuccessful at the PRE almost exclusively were allocated reviewers who were refusing 98% of cases from Afghan asylum seekers. Many were refused on the basis of credibility, after spending very long periods in detention, and judicial review can rarely remedy findings made on this basis.

Those who were not afforded a PRE were arbitrarily deprived of a remedy. This is arguably a violation of Articles 6 and 7 of the ICCPR.

3. Complementary Protection Provisions IMAs now entitled to apply for Protection Visas – introduced 24 March 2012.

On 24 March 2012 Complementary Protection provisions came into operation under s.36(2)(aa) of the *Migration Act 1958*.

These provisions specifically enshrine Australia's non-refoulement obligations under the ICCPR, the CAT and the CROC and state that a non-citizen is not to be removed from Australia to a country where there is a real risk that the non-citizen will suffer significant harm.

In addition, from this date all IMAs were entitled to apply for a Protection Visa and to seek review to the Refugee Review Tribunal (RRT) in accordance with onshore statutory procedures applying to asylum seekers.

The group were excluded from these new statutory processes. While a strictly legalistic response could be taken that this group cannot benefit from later changes to the law, the egregious consequences this group faces if returned to Afghanistan cannot support such a response.

Complementary protection provisions are critical in assessing claims which fall outside the scope of the *Refugees Convention*.

Those who did not qualify for assessment of their claims for Complementary Protection have, for many years, had resort to a non-reviewable Ministerial Intervention process that affords no natural justice or procedural fairness. Despite the introduction of Complimentary Protection claims as part of every application for protection from 24 March 2012, the previous Ministerial process was maintained for the group – known as the International Treaties Obligations Assessment (ITOA).

4. The impact of the ITOA

All of the group received a negative ITOA. This process did not allow for asylum seekers to be heard in relation to being returned to Afghanistan or have adverse information put to them. Not one ITOA assessment led to a reversal of a previous refusal decision. This was despite new or strong evidence and more current country information being available.

Not one ITOA led to the identification of protection against *refoulement* under Articles 6 and 7 of the ICCPR.

All ITOA assessments concluded that these asylum seekers could be removed to Afghanistan.

As Dr Cordula Droege[1] argues:

> The state that is planning to transfer a person to another state must assess whether there is a risk of violation of his or her fundamental rights, regardless of whether the person has expressed a fear or not. If the risk is considered to exist, the person must not be transferred. To ensure that the assessment is performed in a diligent manner and that the person in question will be duly heard, procedural obligations are essential. While these obligations are not contained in humanitarian law, both human rights law and refugee law stipulate that persons who are to be transferred have the right to challenge the transfer decision before an independent and impartial body – that is, independent of the one that took the decision. This procedural right is based on

[1] Cordula Droege, 'Transfers of detainees: legal framework, non-refoulement and contemporary challenges' *International Review of the Red Cross,* Volume 90 Number 871, September 2008.

general principles of human rights law, including the right to a remedy and the requirement of a fair hearing.[2]

5. Human rights concerns for Hazara asylum seekers should they be removed

The concerns regarding the ITOA assessment were remedied in *SZQRB*.

The only way to mitigate against further injustice to the group is to allow the assessment of their complementary protection claims under independent and reviewable processes.

The Ministerial process is not such a process.

The group above faces significant harm including death or torture if deported to Afghanistan given reliable and authoritative country of origin information that is being used by DIBP and the RRT in its current decision making. This information highlights grave concerns for the human rights situation in Afghanistan and the current situation for Hazaras, including those from Ghazni province where the majority of the group are from.

Allowing the group to be removed to Afghanistan would expose them to

- arbitrary deprivation of life under Article 6; and/or
- torture or cruel, inhuman or degrading treatment under Article 7 of the ICCPR.

The UN Human Rights Committee's General Comment 6 on Article 6 and General Comment 20 on Article 7 support the proposition that the principle of non-refoulement admits of no exceptions.

In addition, all of these asylum seekers have spent lengthy periods in immigration detention facilities in Australia. There is authoritative research that concludes long term and indefinite detention has harmful consequences for asylum seekers. For example, Rees et al conclude that '*there is consistent evidence that prolonged detention, together with harsh conditions in centres, contribute independently to adverse mental health outcomes'*.[3]

Many of the asylum seekers in the group above have suffered such mental health outcomes and these have been aggravated given their ongoing fears of removal.

Some of the group are currently receiving intensive support from mental health services and on medication.

[2] See ICCPR, Articles 2(3), 13; ECHR, Article 13; ACHR, Article 27; Article 1 of Protocol No. 7 to the ECHR; Human Rights Committee, Mansour Ahani v. Canada, Communication No. 1051/2002, 15 June 2004 paras No. 6, No. 8, UN Doc. CCPR/C/80/D/1051/2002, paras 10.6–10.8; Committee against Torture, Ahmed Hussein Mustafa Kamil Agiza v. Sweden, Communication No. 233/2003, 24 May 2005, UN Doc. CAT/C/34/D/233/2003, para. 13.7; Committee against Torture, Concluding observations: Australia, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; Committee against Torture, Conclusions and recommendations: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 20 ; ECtHR, Chahal, above note 9, paras. 151–152; Report of the Special Rapporteur on Torture, above note 7, para. 29; Inter-American Commission on Human Rights, Decision of 28 October 2002, 'Extension of precautionary measures (N. 259) regarding detainees in Guantanamo Bay, Cuba', and Resolution No. 1/06 on ' Guantanamo Bay precautionary measures ' of 28 July 2006, para. 4; see also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 2002, para. 394.

[3] S. Rees, D. Silove, J. Phillips & Z. Steel, "Asylum-seekers and Psychiatric Injury", *Precedent,* Issue 99, Jul/Aug. 2010, 14-19, p.19.

In many cases the ITOAs overlooked the mental health status of those who were detained for long periods of time. Those whose mental health is in a poor state may not have access to adequate mental health services in Afghanistan and are therefore at risk of further serious deterioration upon return.[4]

Given what this group has endured, their complementary protection claims must be assessed in a fair, legal and reviewable manner. Arguably this cannot take place in a politicised Ministerial process.

6. Conclusion

This group has been subjected to a progressively discredited continuum of unfair, ad-hoc and in some cases unlawful decision making, and has been excluded from processes that reflect the rule of law in Australia that are in accordance with our international obligations.

This 'legacy' case load must have their complementary protection claims properly and fairly assessed including by access to the Refugee Review Tribunal in accordance with law.

I ask that the Committee give these matters its serious consideration and should further information be required, please do not hesitate to contact me.

Yours faithfully

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[4] There have been cases decided by the European Court of Human Rights where lack of access to adequate medical services in the claimant's country of origin where the claimant's health was at serious risk upon return could amount to "inhuman treatment" in breach of article 3 of the European Convention on Human Rights. See D v United Kingdom [1997] ECHR 25; Ahmed v Austria [1996] ECHR 413.