Refugee Council of Australia

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE *MIGRATION AMENDMENT BILL 2013 [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 and refugee background communities, and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment Bill 2013 [Provisions].* Our submission focuses on two of the three schedules of amendments contained in this Bill: the introduction of a statutory bar against further Protection Visa applications and the series of changes regarding adverse security assessments of Protection Visa applicants. In RCOA's view, these amendments are unnecessary and unwarranted given the nature of the applications affected, the existence alternative mechanisms to achieve the Bill's stated aims and the inadequacy of alternative safeguards. We are also concerned that the amendments will have the effect of restricting opportunities to seek protection and removing decisions regarding Protection Visa applications from independent review, both of which could place people seeking protection at risk of *refoulment* and bring Australia in breach of its international obligations.

1. Statutory bar against further Protection Visa applications

1.1. According to the explanatory memorandum accompanying this Bill, the amendments outlined in Schedule 2 aim to address issues arising from the case of *SZGIZ v Minister for Immigration and Citizenship*, with the proposed statutory bar against further Protection Visa applications set to affect the small number of asylum seekers whose applications for refugee status were refused prior to the introduction of Australia's complementary protection framework on 24 March 2012. The protection claims of these asylum seekers have thus never been assessed against complementary protection criteria, a practice which is now standard for all Protection Visa applications. The circumstances of this particular group of asylum seekers are therefore unique, in that their cases have not been as comprehensively assessed as those determined after 24 March 2012. Furthermore, presuming that Australia's complementary protection framework remains in place into the future, it is unlikely that these unique circumstances will arise again in the future. We do not believe that statutory amendments are necessary to deal with this legacy caseload.

1.2. RCOA notes the Government's assertion that some asylum seekers in these circumstances have lodged complementary protection claims "despite not having any legitimate complementary protection claims and despite the lack of any real prospects

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of engaging Australia's protection obligations". RCOA has seen no evidence to suggest that this is the case. Even if this assertion can be substantiated, however, we believe it would be neither reasonable nor fair to deny *all* of these asylum seekers – many of whom may have entirely genuine and valid protection claims – the opportunity to have their complementary protection claims fairly assessed, on the basis that *some* of their number have made unmeritorious claims. It is a basic standard of fairness that a case should be judged on its own merits, not on the basis of the actions of others in similar circumstances. Any unmeritorious claims would be easily identified through the statutory status determination process; indeed, assessment of merit is the express purpose of this process. Moreover, given the small size and unique circumstances of this particular caseload, the costs involved in processing their cases are unlikely to be excessive and the number of unmeritorious cases lodged is unlikely to be high.

1.3. While the Government claims, in the absence of a statutory bar, this group of asylum seekers will have up to four opportunities to apply for a Protection Visa, the likelihood of this occurring is minimal. No legal assistance is available to these individuals and anecdotal evidence suggests that most are experiencing substantial mental health issues due to prolonged detention and are not equipped to advocate for themselves and engage at the level required by these provisions. Moreover, out of the four criteria for the grant of a Protection Visa stipulated in the *Migration Act 1958*, two require the applicant to be a member of the same family unit as a person who has been granted a Protection Visa. In all likelihood, the basis on which these asylum seekers would be able to lodge a further Protection Visa application would be complementary protection needs – an assessment of which, as noted above, is now standard practice in Australia for all Protection Visa applications.

1.4. While the Australian Government argues that additional "safeguards" exist to prevent the forcible return of people who are at risk of significant harm on complementary grounds, we do not accept that these processes offer adequate means of assessing complementary protection claims. We refer the Committee to our submission to the inquiry into the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*, which provides detailed feedback on this issue, in particular the inadequacy of the discretionary and non-compellable Ministerial intervention process.

1.5. In the absence of a robust statutory framework for the assessment of complementary protection claims, this group of asylum seekers are in danger of being returned to situations where their lives may be at risk or they may face torture or other cruel, inhuman or degrading treatment or punishment. Denying these asylum seekers access to an independent, statutory assessment of their claims could thus bring Australia in breach of its obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Given the grievous nature of the human rights violations to which these asylum seekers could potentially be exposed, we believe that the consequences of introducing a statutory visa bar would far outweigh the consequences of processing a few unmeritorious visa applications.

2. Impact of adverse security assessments on eligibility for a Protection Visa

2.1. In RCOA's view, the Minister's existing powers to refuse or cancel a visa under Section 501 of the *Migration Act 1958* are sufficient to allow for the refusal or cancellation of a visa for individuals who present a significant threat to national security or the safety of the Australian community. RCOA is not persuaded that there is any need to introduce an additional restriction on Protection Visa eligibility for individuals who have

received adverse security assessments from the Australian Security Intelligence Organisation (ASIO).

2.2. The current provisions under Section 501 allow for an individualised assessment of the level of risk posed by a particular visa applicant. Conversely, the amendments proposed in this Bill would introduce a blanket bar on Protection Visa eligibility for anyone who had received an adverse security assessment, irrespective of the level of risk they may pose to the Australian community. RCOA believes that any decision to refuse or cancel a Protection Visa should be based on an individualised risk assessment, as is the case for all other categories of permanent visa.

2.3. RCOA accepts that adverse security assessments are not issued lightly and would involve matters of a serious nature, thus it is unlikely that an individual who had received an adverse assessment would successfully pass the character test. However, there have been exceptions in the past, such as in the case of Mohammad Faisal Al Delimi. RCOA has consistently advocated for reviews of adverse security assessments by an independent body and, if an assessment is overturned, for recognised refugees be granted protection. We maintain this position and so oppose this proposed reform.

2.4. RCOA notes that there are currently more than 50 people in detention who have been found to be refugees but have been denied a Protection Visa due to having received an adverse security assessment. Existing legislation has proved sufficient to deny visas to these individuals. RCOA therefore fails to see the need for any additional restrictions that put out of question any flexibility of approach to individuals with adverse ASIO assessments.

2.5. We are particularly concerned by this proposed restriction given the lack of transparency and procedural fairness in the security assessment process, as discussed in further detail below.

3. Review of decisions

3.1. RCOA sees no justification for amendments which would prevent the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) or Administrative Appeals Tribunal (AAT) from reviewing decisions to refuse or cancel a Protection Visa on the basis of an adverse security assessment. We accept that national security concerns may necessitate deviations from standard practice in terms of how review processes are conducted. However, given that the AAT already has the power to review adverse security assessments in some circumstances, we see no reason why reviews of decisions to refuse or cancel a visa on national security grounds could not be feasible.

3.2. RCOA has long voiced concerns about the lack of procedural fairness accorded to refugees who have received adverse assessments. We believe that it is unacceptable for any person who has received an adverse assessment, or had a visa refused or cancelled on this basis, to be denied the opportunity to respond to the case against them or seek review of their circumstances. Furthermore, access to review mechanisms are often particularly important to refugees: as they do not have the option of returning to their countries of origin due to fear of persecution, the likely consequence of a visa refusal or cancellation is indefinite mandatory detention, potentially for the term of their natural life. We do not believe the Bill gives adequate consideration to these consequences.

3.3. RCOA does not accept the assertion made by the Australian Government in the statement of compatibility with human rights accompanying this Bill that the indefinite

detention of individuals who have received adverse security assessments is consistent with Article 9 of the International Covenant on Civil and Political Rights. The decision to detain in these circumstances is based on the mere existence of an adverse security assessment and consequent denial or cancellation of a visa, not on an individualised assessment of the level of risk posed by an individual. The indefinite detention of people who have been refused a Protection Visa on national security grounds therefore cannot be considered reasonable, necessary and proportionate to the security risk they pose, as no assessment is conducted to determine that this is indeed the case. In RCOA's review, the denial of access to review mechanisms to refugees who have had a visa refused or cancelled on national security grounds would be unacceptable in any case, let alone in the absence of strategies to mitigate the serious consequences of a visa refusal or cancellation.

3.4. As set out above, RCOA is on record on a number of occasions as objecting to the lack of fairness in the security assessment process. RCOA rejects the assertion that existing review mechanisms are sufficient to ensure procedural fairness in the security assessment process, in particular the argument that the Independent Reviewer of Adverse Security Assessments process provides an adequate means of monitoring "the initial issue of and continuing need for an adverse security assessment". While this process plays an important role in assisting to review security assessments of refugees facing indefinite detention, it does not provide an adequate substitute for a statutory review process.

3.5. As noted in our submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012*,[1] a key weakness of the Independent Reviewer process is that any recommendations made will not be binding. Given that, in cases where an adverse security assessment is found to be unwarranted, the Independent Reviewer cannot compel any form of redress (including release from detention), it is questionable whether this process can ensure meaningful outcomes. Additionally, as a non-statutory process, the Independent Reviewer model cannot provide a consistent or long-term solution to the lack of procedural fairness in decision-making on security assessments. RCOA's stance was subsequently endorsed by the Committee, which affirmed in its report on the inquiry that "the right of refugees to seek independent review of adverse security assessments is of such importance that it should not merely be an administrative process".[2]

3.6. Additionally, RCOA does not accept that judicial review provides an adequate substitute for independent merits review. Judicial review serves a fundamentally different function in that it considers whether a case was assessed in accord with relevant laws, not whether the case itself has merit. As such, judicial review is not analogous to the merits review processes provided by the RRT and AAT. We also reject the argument that the review process for adverse security assessments available under the *Australian Security Intelligence Organisation Act 1979* provides a sufficient safeguard for Protection Visa applicants. This review process is only available to permanent residents of Australia, while the amendments this Bill seeks to introduce will primarily affect individuals who are in the process of applying for a Protection Visa and thus are not permanent residents of Australia.

3.7. RCOA acknowledges that access to review processes would not necessarily resolve the situation of refugees who have had a visa refused or cancelled due to an adverse

[1] See RCOA's full submission at http://www.refugeecouncil.org.au/r/sub/1212-ASIO.pdf
[2] See the Committee's view in Chapter 3, paragraph 3.37 at http://bit.ly/K7o2EX

security assessment, as the reviewer may uphold the original finding. However, we believe that access to robust statutory review processes is essential to ensuring that these individuals are treated fairly and humanely, in line with Australia's international human rights obligations, most particularly since the alternative for some is detention for the term of their natural life.

4. Recommendations

4.1. In light of the concerns outlined in this submission, RCOA believes that the passing of this Bill would undermine refugee protection and various determination processes without achieving any benefits. As such, RCOA recommends that the amendments laid out in Schedule 2 and Schedule 3 of the Bill not be passed.

4.2. RCOA is also unconvinced that there is adequate evidence to justify the reform measures outlined in this Bill. For this reason, RCOA strongly recommends that the *Migration Amendment Bill 2013 [Provisions]* in its entirety not be passed.