



SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

SUBMISSION ON THE MIGRATION AND MARITIME POWERS AMENDMENT BILL (No. 1) 2015

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 200 organisations and around 1,000 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 on the Migration and Maritime Powers Amendment Bill (No. 1) 2015 and its likely impact on refugees, asylum seekers and humanitarian entrants. We express the following concerns with this Bill:

- The Bill compounds the grave unfairness of recently introduced provisions relating to powers to refuse or cancel visas on 'character' grounds. These changes include: automatic cancellation of visas on certain grounds, new personal powers of the Minister to set aside decisions by the Administrative Appeals Tribunal or Departmental officers, and increasing the circumstances in which a person would fail the 'character test'.
- The powers have the practical effect of depriving a person of liberty and the right of residence in this country at the virtually unfettered discretion of the Minister, without any real review.
- In 2015, there has been a dramatic rise in the number of visa cancellations and consequent detentions. This includes refugees and asylum seekers who are now facing the prospect of indefinite detention as they cannot be removed. Indeed, this Bill expressly would require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or even if the visa decision is unlawful.
- This Bill compounds the grave unfairness of provisions passed last year which mean a child or a mentally ill person who was not responsible or did not understand their refugee claim can never apply again for a refugee claim. This Bill makes clear that they cannot apply again even if there are new or different reasons for that claim.
- This Bill legitimises the Australian Government's attempts to return people to countries (such as Afghanistan and Iran) which have not agreed to accept them. The effect of such a policy is deeply traumatising both to the individual involved and their networks and communities in Australia. Such a policy also undermines our foreign relations.
- Schedule 4 of this Bill also threatens to undermine our foreign relations by appearing to authorise the turnbacks of boats into another country's waters, if the Minister declares (even wrongly) that this is consistent with the law of the sea.

We have detailed our concerns further below.

1. Visa cancellations on character grounds

1.1. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (Character Act) introduced new powers to refuse or cancel visas on 'character' grounds (that is, on grounds related to a person's character or criminal record). The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more, or was convicted of a sexually based offence involving a child (s 501(3A) of the *Migration Act 1958* (Cth)). The Character Act also creates new personal Ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the Department (see ss 133A, 133C, 501BA). In addition, the Act significantly decreased the threshold under which a person would fail the 'character test' and increased the Minister's powers to cancel visas on the basis of incorrect information.

1.2. Significant concerns about this Act were raised before this Committee by RCOA (see attached) and other submitters, including the Australian Human Rights Commission.¹ These concerns included:

- The very real risk of prolonged indefinite detention, especially in relation to refugees who cannot be removed to their country of origin due to the risk that they may face persecution or other forms of serious harm in their country of origin, and stateless people who have no country which is obliged to accept them.
- The mandatory nature of the visa cancellation powers, which significantly decreases the capacity of the system to consider the individual circumstances of a case before a person is detained.
- The very low thresholds for visa cancellation, which trigger visa cancellations even in the absence of a real risk to the community.
- The continued trend towards increasing the personal discretionary powers of the Minister, including to reverse carefully made decisions by merits review tribunals.

1.3. These concerns have increased since the introduction of the Character Act. There has been a very significant increase in the number of people being detained as a result of visa cancellations. This has included people on permanent refugee visas as well as on bridging visas, and stateless people, all of whom are now at risk of indefinite detention. As at 31 August 2015, there are 505 people being detained as a result of visa cancellations.² Although it is unclear how many of these were the result of cancellations on 'character' grounds, we understand that this would be a significant proportion.

1.4. RCOA has surveyed its members to gather initial information on his rapid increase in visa cancellations. Significant concerns so far raised include:

- Failure to recognise vulnerabilities – visa cancellations have occurred despite significant histories of psychiatric illness, disabilities, or statelessness.
- Disproportionate punishment – people have had their visas cancelled in circumstances where they were given good behaviour bonds by the court, and for drink driving.
- Unreasonable prolonging of detention – people have been subject to detention since early 2015 and have not yet been allocated an officer to process their case.
- Inadequate processes – people serving time in prisons are given very little notice (generally a day's notice) before they are moved into detention.
- Lack of access to legal advice or representation – while people are given a form to respond to the Minister within 28 days, there is a lack of free legal advice or representation.
- Unduly punitive enforcement – there have been reports of handcuffs being used, and transfers to Christmas Island.
- Increased risks in detention centres – the increased numbers of visa cancellations has led to a change in the composition of detention population.

¹ Australian Human Rights Commission, *Submission into the Inquiry on the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Submission No 8, 28 October 2014.

² Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 August 2015, <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-Aug-2015.pdf>

1.5. We have already seen these visa cancellation provisions result in a death in Yongah Hill, with a refugee whose visa had been cancelled burning himself to death.³ There are also concerns that the mixing of detainees with visa cancellations contributed to the death of another young asylum seeker in August 2015.⁴

1.6. Among other things, Schedule 2 of the current Bill would:

- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or even if the visa decision is unlawful (Sch 2, item 9);
- extends a ban on most further visa applications in cases where the Minister has personally cancelled a visa (Sch 2, item 18);
- automatically cancel or refuse any other visas in cases where the Minister has personally set aside a decision by the Administrative Appeals Tribunal or a Departmental officer (Sch 2, item 19); and
- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the Minister under ss 501B, 501BA (Sch 2, item 20).

1.7. While Schedule 2 of the current Bill is framed as merely extending certain provisions that applied to earlier cancellation powers, RCOA is concerned that this does not reflect the lack of procedural fairness and absence of procedural safeguards in the new cancellation powers. We also express concern that some of these provisions apply retrospectively, without adequate justification.

Recommendation 1

RCOA recommends that Schedule 2, items 9, 18-20 not be passed, and that the Committee consider the justification for the other provisions in Schedule 2.

2. Bars on further applications by children and the mentally ill

2.1. RCOA reiterates its concerns regarding the changes made last year to section 48A of the *Migration Act 1958* (Cth), which preclude a person from making a further application for a protection visa after a protection visa is refused or cancelled. One change made last year prevented a further application even if, at the time of the first application, the person was a child or unable to understand the application (for example, due to their mental health) (see s 48A(1AA)). Another change made last year prevented a further application even if the second application was based on different grounds (see s 48A(1C)).

2.2. The effect of this Bill would be to make it clear that the bar on further applications applies even if the person is both a child (for example) and makes an application on different grounds. For example, a gay teenager who would be subject to persecution in his home country may not have disclosed this to the parent making an application. However, he would be prevented from making a future application on this basis. This Bill therefore compounds the existing unfairness of s 48A(1AA) and (1C).

2.3. Both of the previous changes, and the current Bill, reflect a failure to understand the realities of the refugee determination process. For many asylum seekers, it is very difficult to prepare a complete protection visa application, given the consequences of their persecution, the complexity of the refugee status determination process, and the difficulties of living in a new country on a bridging visa. These difficulties have been compounded by the very significant changes made under the 'fast tracking' process of refugee status determination introduced last year, and the removal of access to free legal advice and representation for most asylum seekers. The changes to section 48A only make it even more difficult for the most vulnerable to ensure that their claims for protection are fairly heard.

³ 'Burned Yongah Hill Afghan detainee dies in WA hospital', *WA Today*, 17 September 2015, <http://www.watoday.com.au/wa-news/burned-yongah-hill-afghan-detainee-dies-in-wa-hospital-20150916-gjoikx.html#ixzz3nHdT0IXQ>

⁴ 'Young asylum seeker dies at WA's Yongah Hill immigration detention centre', *ABC News*, 1 August 2015, <http://www.abc.net.au/news/2015-08-01/young-asylum-seeker-dies-at-yongah-hill-detention-centre/6665422>.

Recommendation 2

RCOA recommends that Schedule 3 not be passed.

3. Removals without the agreement of the receiving country

3.1. RCOA expresses significant concern that Schedule 1 of this Bill imposes a bar on further visa applications by asylum seekers whom the Australian Government has unsuccessfully attempted to return. It is a matter of public record that the Australian Government has been attempting to return asylum seekers to Afghanistan and Iran. This is despite the position of both governments that they will not accept forced returns,⁵ and despite significant concerns about the deteriorating security situation in Afghanistan.

3.2. Schedule 1 appears to legitimise the Department's practice of seeking to return asylum seekers without first obtaining the consent of the receiving country. Clearly, such abortive returns are deeply traumatising for the individuals involved, as well as their networks and communities within Australia. As well, such a policy can only undermine Australia's foreign relations and international standing.

3.3. Further, the fact that a government refuses to accept a person could be fresh evidence of persecution by that country of the individual, or could be evidence that the receiving country does not accept that the person is a national of that country. In such a case, it would be entirely appropriate to reconsider whether the original decision was correct, particularly since the consequence of such a visa bar would be potentially indefinite detention.

4. Maritime powers in breach of international law

4.1. Schedule 4 of this Bill appears to authorise the exercise of maritime powers in the territorial waters and archipelagic waters of another country. RCOA is concerned that this is intended to authorise the extension of Operation Sovereign Borders into Indonesian territorial waters, potentially in breach of Australia's obligations under international law.

4.2. RCOA notes that the stated intention is that this only authorises the exercise of powers permitted under the law of the sea, such as 'innocent passage' or 'transit passage'. We note that, while the law of the sea would not appear to permit any use of the detention or related interdiction powers in relation to Operation Sovereign Borders,⁶ this is not made clear in the provision.

4.3. Further, the provision does not in fact require that the exercise of powers can be justified under the law of the sea. Instead, all that is required is that the officer or the Minister 'considers' that it is permitted under the law of the sea, whether or not it is in fact permitted. We support the Andrew & Renata Kaldor Centre for International Refugee Law's submission in this regard.

Recommendation 3

RCOA recommends that Schedule 4 of the Bill be amended to ensure that it is consistent with international law.

⁵ See 'Australia defies Afghanistan as asylum seeker forcibly repatriated 'Asylum seeker forcibly returned to Afghanistan after appeals exhausted', *ABC News*, 24 August 2015, <http://www.abc.net.au/news/2015-08-11/afghan-asylum-seeker-in-limbo-ahead-of-forced-repatriation/6689578>; *The Guardian*, 12 August 2015, <http://www.theguardian.com/australia-news/2015/aug/12/asylum-seeker-forcibly-returned-to-afghanistan-after-appeals-exhausted>; 'Embassy probing Iranian forced return', *SBS News*, 14 August 2015, <http://www.sbs.com.au/news/article/2015/08/14/embassy-probing-iranian-forced-return>; 'Iran denies forced return of refugees in Australia', *Mehr News Agency*, 20 Jun 2015, <http://en.mehrnnews.com/news/108038/Iran-denies-forced-return-of-refugees-in-Australia>.

⁶ For a discussion of the application of the law of the sea to Operation Sovereign Borders, see Andrew & Renata Kaldor Centre for International Refugee Law, *Submission into the Inquiry into the Breach of Indonesian Territorial Waters*, Senate Legal and Constitutional Affairs Committee, 19 March 2014, http://www.kaldorcentre.unsw.edu.au/sites/default/files/kaldor_centre_submission_inquiry_into_breach_of_territorial_waters_final.pdf