



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

7 October 2015

Dear Chair,

UNICEF AUSTRALIA SUBMISSION RE MIGRATION AND MARITIME POWERS AMENDMENT BILL (NO. 1) 2015 [PROVISIONS]

UNICEF Australia is grateful for the opportunity to provide comments to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the *Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]*.

1. About UNICEF Australia

UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation, abuse and HIV. UNICEF is unique among world organisations and unique in our rights based and participatory approach to working with children and young people. UNICEF Australia is the national committee for UNICEF in Australia and has a dual mandate of raising funds to advance the rights of all children and advocating for the rights of all children by improving public and government support for child rights and international development.

2. Parameters of this submission

Schedule 3, Part 1 of the *Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]* (The Amendment)

This is a brief submission to focus on this particular amendment which would “insert a reference to subsection 48A(1AA) in subsection 48A(1C) to clarify that a person who has previously been refused a protection visa application that was made on their behalf (e.g. because they were a minor at the time), cannot make a further protection visa application irrespective of the ground on which the further protection visa would be made or the criteria which the person would claim to satisfy, and irrespective of the ground on which the previous protection visa application was made.”¹ UNICEF Australia is particularly concerned about this amendment due to its high potential to impact adversely upon children.

Additional areas of concern

UNICEF Australia will limit this submission to the aforementioned amendment however briefly notes our concerns with:

¹ The Parliament of the Commonwealth of Australia, House of Representatives, *Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]*, Explanatory Memorandum, page 1.

- Schedule 2, together with the operation of the Migration Amendment (Character and General Visa Cancellation Act 2014) - This amendment which widens the circumstances in which any person, including a child, could be subject to immigration detention under section 189 of the *Migration Act 1958* based on character grounds.
- Schedule 1 - UNICEF Australia is broadly concerned about the amendments contained in Schedule 1 of the Bill in so far as they seemingly serve to prevent children (and others) from lodging an application for a protection visa within Australia risking breach of Australia's obligations under the *Refugees Convention*.

3. Summary

UNICEF Australia is concerned by the amendments contained in Schedule 3, Part 1 of the *Migration and Maritime Powers Amendment Bill (No. 1) 2015* due to:

- 1) The particular impact that this amendment could have on children, namely, to seemingly strengthen the statutory bar against further application/s for a protection visa; and
- 2) The lack of a mechanism (and subsequent review by an independent and impartial body) that would allow for further meritorious applications to be lodged and assessed. A non-compellable and non-reviewable Ministerial discretion as that provided for by section 48B is not sufficient to ensure that a further application could be lodged by a child or person experiencing mental impairment.

4. Recommendation

UNICEF Australia recommends that the **Migration and Maritime Powers Amendments Bill (No.1) not be passed** and that the policy intention to bar all further applications for protection visas be revisited, particularly in so far as it affects children and persons experiencing a mental or cognitive impairment such that an application has been lodged on their behalf. In recognition of the particular barriers faced by both children and persons experiencing a mental or cognitive impairment and the subsequent reliance that these people might have on others, the *Migration Act* should allow further applications to be lodged (including subsequent merits review) so as to ensure that meritorious applications can be lodged, received and duly assessed.

UNICEF Australia encourages the Australian Government to ensure that all persons applying for refugee status, and, in particular, children, are provided a fair and due process with sufficient flexibility and safeguards to ensure non-refoulement in all circumstances.

5. Applicable international law obligations

UNICEF Australia's submission is informed by the following human rights treaties to which Australia is a party:

- *Convention on the Rights of the Child (1990)* (in particular, articles 2, 3, 12 and 22);
- *Convention (1951) and Protocol (1967) Relating to the Status of Refugees*;
- *International Covenant on Civil and Political Rights (1966)* (in particular, articles 6 and 7);
- *Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (1987)* (in particular, article 3); and
- *Convention on the Rights of Persons with a Disability* (in particular, articles 5, 7, 11 and 15).

Also relevant is General Comment No. 6 *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* published by the UN Committee on the Rights of the Child.

6. Impact of the Amendment on children's right to claim asylum

Schedule 3, Part 1 of the *Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]*

UNICEF Australia is deeply concerned by the statutory bar which effectively prevents those who had previously been refused a protection visa application that was made on their behalf (i.e. because he or she was a child at the time or, as the Explanatory Memorandum states, he or she had a mental impairment) from making a further application for a protection visa. This general bar, which would seemingly be strengthened by the amendments contained in Schedule 3 (if passed), risks preventing meritorious applications from being assessed, potentially resulting in children and persons experiencing mental impairment (along with adults who are subject to the same bar) being denied a protection visa in circumstances where protection is in fact owed by Australia. UNICEF Australia is concerned that this bar is inconsistent with Australia's obligations under the *Convention on the Rights of the Child*, the *Convention Relating to the Status of Refugees* (1967), the *International Convention on Civil and Political Rights* and also the *Convention on the Rights of Persons with a Disability*.

UNICEF Australia acknowledges the *Migration and Maritime Powers Amendment Bill (No. 1) 2015* indicates that no exception for children or others was intended to the bar provided in subsection 48A(1C).

However, it is concerning that the bar, as provided by existing section 48A and seemingly extended by the amendments now proposed, functions to prevent **all** further applications from being made, regardless of whether they are meritorious or unmeritorious. There is no flexibility or opportunity for an applicant, who might still be a child, to demonstrate why a further application should be lodged or the legitimacy of his or her claims for protection. This essentially creates a "one shot" system whereby an applicant (including a child) has one opportunity only to apply for protection. For a child, levels of maturity, understanding and participation at the time an adult lodges an application on their behalf may unfairly prejudice the strength of that child's sole application allowed under this system. A non-compellable and non-reviewable Ministerial discretion as that provided for by section 48B is not sufficient to ensure that a further application could be lodged by a child or person with a mental impairment.

The practical and problematic effect of this bar was previously highlighted by the Parliamentary Joint Committee on Human Rights, which stated that the bar, as initially provided by the Migration Legislation Amendment (No. 1) 2014, operates to "...prevent a minor or person who did not know of or understand the nature of the application because of an intellectual impairment from making a further application **despite having a valid independent protection claim** (for example, that if returned to a country they would face a real risk of torture or other serious harm). This will be the case where:

- The person has previously been included in a family member's protection application and there has been no independent assessment of that person's protection claims;
- The person has no knowledge of the previous application made on their behalf;
- The person has not had the opportunity to be substantively involved in the preparation of the protection claim in accordance with the capacity to contribute to the making of that protection claim nor make representations on their own behalf; and

- Potentially, the person did not consent to the previous application being made on their behalf and the person had the legal capacity to provide such consent” (emphasis added).²

Similarly, the Legal and Constitutional Affairs Legislation Committee raised concerns in its report on the *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, stating “...the committee remains concerned about the potential impact on children and people with a mental impairment seeking to make a subsequent visa application in circumstances where these individuals are unaware of a previous application having been made on their behalf. **In the committee’s view, it would be unfair to prevent these individuals from making a subsequent visa application**” (emphasis added).³ The committee went on to recommend that “...the Commonwealth government consider additional safeguards to ensure that children and people with a mental impairment are not unfairly prevented from making a subsequent visa application in circumstances where they are unaware of a previous application having been made on their behalf”.

The statutory bar, which will potentially be further strengthened by the Amendment, will therefore operate to effectively remove safeguards against non-refoulement of children and other persons with valid protection claims.⁴ UNICEF Australia stresses that this is not acceptable and risks inconsistency with the *Convention on the Rights of the Child* and the *Refugees Convention*.

This statutory bar is particularly concerning in respect of unaccompanied minors who can be very dependent on others to act in their best interests and who can face extreme difficulty in establishing their status due to lack of maturity and/or the fact that their claim for refugee status might have arisen from circumstances relating to a family member/s. Unaccompanied minors seeking asylum, along with all children seeking asylum, are entitled to receive appropriate protection and humanitarian assistance consistent with article 22 of the *Convention on the Rights of the Child*.

UNICEF Australia shares the concerns raised by the Legal and Constitutional Affairs Legislation Committee, the Parliamentary Committee on Human Rights and others⁵ which emphasise that the bar in section 48A creates a real risk that persons with a valid claim for protection, including children, will be unable to seek that protection and will therefore risk return to persecution and/or serious harm. UNICEF Australia strongly urges the Australian Government to ensure that all persons applying for refugee status, and, in particular, children, are provided procedural and substantive safeguards to ensure non-refoulement in all circumstances.

7. Contact

For more information please contact Tara Broughan, UNICEF Australia Advocacy Manager

² Parliamentary Joint Committee on Human Rights *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 13-29 May 2014, Legislative Instruments received 8 March – 30 May 2014, Seventh Report of the 44th Parliament*, 18 June 2014 at 1.127.

³ The Senate, Legal and Constitutional Affairs Committee, *Migration Legislation Amendment Bill (No. 1) 2014 [Provisions]*, August 2014, at para 2.28.

⁴ Such was recognised by the Parliamentary Joint Committee on Human Rights *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 13-29 May 2014, Legislative Instruments received 8 March – 30 May 2014, Seventh Report of the 44th Parliament*, 18 June 2014 at 1.133.

⁵ See, for example, Human Rights Law Centre, Salvos and RACS submissions in respect of the *Migration Legislation Amendment Bill (No. 1) 2014*.