

REFUGEE AND IMMIGRATION LEGAL CENTRE

PRESS RELEASE

FEDERAL GOVERNMENT ATTEMPTS TO DOWNGRADE AUSTRALIA'S COMMITMENT TO REFUGEES

PROPOSED CHANGES

The Federal Government intends to introduce a package of legislative measures which will drastically affect refugees and asylum seekers in Australia. Proposed changes include:

- Legislatively defining and restricting the word 'persecution', which is the standard of harm faced by refugees.
- Imposing a requirement that flight from persecution must be 'predominantly' for a Refugee Convention reason
- Allowing decision makers to draw adverse inferences if a person takes an affirmation to tell the truth and **not** an oath according to their religious beliefs without an explanation that is deemed 'reasonable' by the Department of Immigration
- Ignoring actions taken by an asylum seeker in Australia which may result in harm to them in their home country if they are assessed as having been made in 'bad faith'
- Imposing an additional character test taking into account 'low level criminal convictions' before a Temporary Protection Visa holder can be eligible for permanent residence

NARROWING OUR OBLIGATIONS TO REFUGEES AND ASYLUM SEEKERS

The Refugee and Immigration Legal Centre is alarmed by the Federal Government's proposed changes to the application of the Refugee Convention in Australia. These changes will have the effect of

- *Legislatively narrowing the definition of who is a refugee in ways that are inconsistent with the intent and purpose of the Refugee Convention*
- *Restricting the role of Australian Courts in interpreting the Refugee Convention*
- *Adding additional and unwarranted layers to an already complex, rigorous and thorough refugee determination system*
- *Expanding the categories of persons who may be held in limbo with Temporary Protection Visas*
- *Effectively penalising asylum seekers for exercising fundamental human rights in Australia such as the right to participate in demonstrations or protests at human rights abuses in their own country*

- *Forcing persons to justify their behaviour if they chose to take an affirmation rather than an oath according to their religion*
- *Imposing an onerous additional character test for refugees which has no basis in the Refugees Convention*
- *Providing the Department of Immigration with new powers to make decisions as to a person's 'predominant reason' for fleeing persecution, whether someone has a 'reasonable reason' for not having documents with them and why they have not given evidence by oath according to their religious beliefs*

A DOWNGRADE OF REFUGEE PROTECTIONS IN AUSTRALIA

In the year of the 50th Anniversary of the Refugees Convention, the Federal Government is sending a strong signal that it intends to downgrade its international commitment to refugees. By redefining parts of the Refugee Convention in Australia's domestic law, the Federal Government is imposing additional hurdles on a particularly vulnerable category of persons - namely asylum seekers.

If every signatory to the Refugee Convention decided to impose additional requirements on asylum seekers according to its own domestic agendas, the Convention would become unworkable. Such an approach would be inconsistent with the protective intent of the Refugee Convention and would have the effect of retarding the UNHCR's objective of encouraging a consistent and humanitarian approach to the refugee crisis.

The proposed changes are a direct attack on the role of the Federal and High Court. In short, the Government is saying that the Courts cannot be trusted to responsibly interpret the Refugee Convention. By defining phrases within Australia's domestic law, the Government is attempting to impose a straitjacket on an international treaty designed to be flexible enough to deal with changing circumstances and developments in human rights law.

For media inquiries or comment contact Martin Clutterbuck at the Refugee and Immigration Legal Centre on 9483 1144 or 0409 025 799.

In order to offer full comment, RILC would need to see the detail of the legislation proposed. We consider the proposed changes to be so serious that they require public debate and submissions. We make the following comment based on details contained in the Ministerial Press Release of 13 August 2001. RILCs position is as follows:

1. Defining persecution

Legislative amendments will provide a test for persecution as “serious harm” which will restrict the definition to include the elements of threat to life or liberty, or significant physical harassment or ill-treatment, or significant economic hardship that threatens a person’s capacity to subsist, where the persecution feared is part of a systematic or discriminatory conduct directed against that person.

It is undesirable to exhaustively and prescriptively define a term that is designed to respond and evolve according to changed circumstances and developments in human rights law. No less an authority than the High Court in the case of *Chan* recognized the inherent difficulty of exclusively defining the variety of measures which could constitute persecution. This is precisely why the original drafters of the Convention did not define the term and why the Convention remains relevant after 50 years.

It is not appropriate to try to codify an international instrument that must remain flexible and responsive in order to deal with the changed circumstances of persons in need of protection. The Convention was not framed to be amended by the sleight of hand of State Parties.

2. Predominant motivation for persecution

Legislation will be introduced to provide that persecution must have occurred “by reason of” a Refugees Convention ground for protection obligations to be owed to a person, by requiring that the predominant motivation for the persecution must be for a Refugees Convention reason

The Refugees Convention is designed to protect persons with a well-founded fear of persecution for reason of their race, religion, nationality, membership of a particular social group or political opinion. Courts have found that protection obligations are owed to a person if a person is persecuted for reason of a Convention ground. The Immigration Department would restrict our protection obligations to persons who are persecuted for ‘predominantly’ a Convention reason.

This measure is completely inconsistent with the protective intent of the Refugees Convention and is not justified by a plain reading of the Convention which states only that a person must have a fear of persecution for a Convention reason. Imposing

additional requirements and trying to second guess a persecutor's possible motivations in persecuting someone is fraught with danger and has no basis in the Refugees Convention.

RILC opposes this measure as an attempt by the Government to place extra hurdles in the way of asylum seekers by way of conducting a pointless exercise in grading or categorising the motivations of a persecutor. The amendment could result in an asylum seeker being sent back to a country where they face a real chance of Convention-related persecution merely because they have been persecuted for a variety of reasons.

3. Defining a 'particularly serious crime'

Legislation will be introduced to provide a definition of a 'particularly serious crime' for the purpose of excluding people who are convicted of such crimes and who constitute a danger to the community from the benefit of Australia's protection under the Refugees Convention as offences carrying the death penalty, life imprisonment or a maximum sentence of at least three years imprisonment.

There is a good reason why the term 'particularly serious crime' has not been interpreted in the Refugees Convention. The term must be considered in accordance with evolving concepts of international criminal and human rights jurisprudence and is not capable of simplified quantification in the way that the Department of Immigration are proposing.

An assessment as to whether or not a person constitutes a danger to the Australian community must be based upon the particular circumstances of the individual. Exhaustively defining the parameters of a 'particularly serious crime' will have the effect of backing decision-makers into a corner in circumstances which may demand consideration of wider factors, including international human rights standards.

The 'character test' as defined in s 501 of the Migration Act is an example of a vague and unduly prescriptive attempt to define character issues. This test excludes persons who are considered to be at risk of engaging in future criminal activity and excludes persons who the Minister reasonably suspects have been associated with persons who are involved in criminal conduct. Any genuine refugee who has been 'smuggled' to Australia in order to seek protection could potentially be excluded for having associated with 'people smugglers' under restrictive character provisions. This would be inconsistent with the fundamental right to seek asylum and to take appropriate measures to access protection.

Whilst persons in immigration detention are subject to the same refugee determination assessment procedures as asylum seekers in the community, the explicit reference to crimes committed by persons in detention appears to be an attempt further punish asylum seekers who have already been detained in a manner inconsistent Australia's international human rights obligations.

The Government has recently legislated to increase the penalties for offences committed in detention. This in itself is a regrettable development within the context of continuing

criticisms of Australia's policy of mandatory detention. Excluding genuine refugees from protection under the Convention on account of offences that may have been committed due to the environment they have been placed in may breach our international obligations under the Convention.

4. AAT Ministerial Humanitarian Discretion

Legislation will be introduced to provide for a Ministerial public interest intervention power following Administrative Appeals Tribunal decisions in relation to Refugee Convention exclusion issues under Articles 1F, 32 and 33(2) of the Refugees Convention and protection visa decisions under character grounds under the Migration Act 1958.

The introduction of a Ministerial Humanitarian discretion following a negative decision of the Administrative Appeals Tribunal is welcomed. However RILC re-iterates its position that the Ministerial Humanitarian power is a completely inadequate and flawed mechanism for the consideration of any international humanitarian treaty obligations Australia may have to an asylum seeker.

5. Sur Place Claims

Legislation will be introduced to provide that any action taken by a person in Australia shall not be used or taken into account in determining whether Australia owes them protection obligations unless they satisfy the Minister that any such actions were done in good faith and not to strengthen their protection claims.

Measures which purport to ignore actions taken by asylum seekers in Australia which may place them in danger in their home country run counter to the intents and purposes of the Refugee Convention and are inconsistent with a number of recent Federal Court decisions.

Most particularly, the Federal Court decision in *Mohammed* makes it clear that the central issue is whether someone has a well-founded fear of persecution - not what the motivation is for a particular action by a refugee outside their home country.

The proposed measures could result in a person with a well founded fear of persecution being returned to a situation of persecution because of an arbitrary decision made by the Department of Immigration as to whether they have acted in good or bad faith.

This measure will act as a severe deterrent for asylum seekers (including Temporary Protection visa holders) wishing to exercise their democratic freedoms and protest against human rights abuses occurring in their own countries.

It is a basic principle of international human rights law that a person has a right to be protected from harm either by the authorities in their country of nationality or in their

country of temporary residence. This is particularly important for refugees who have a well founded fear of persecution in their home country.

This legislation would seek to remove that protection for refugees and allow for their return home even if they had an objectively well-founded fear of persecution. Warning refugees from countries such as Iraq and Afghanistan that they are not automatically entitled to protection if they choose, for example, to criticise persecutory regimes in their own home countries is an exercise in double standards.

6. **Low Level Criminal Offences as a De Facto Character Test**

New legislation would provide that a person is not granted a permanent protection visa for four years after the date of any conviction in Australia, whether during detention or in the community, for a criminal offence carrying a maximum penalty of imprisonment of twelve months or more.

Proposed new provisions attempt to prevent asylum seekers (including Temporary Protection Visa holders) from being accepted as permanent residents (and being reunited with their spouse and children) for four years after they have committed a minor criminal offence. This is an unnecessary and unwarranted measure superfluous to the already rigorous character checking measures built into the Refugees Convention and in turn Australia's migration laws. There is no justification for this approach within the Refugees Convention.

There are currently 4 levels of character screening for asylum seekers in Australia. An asylum seeker is first assessed as to whether or not they are barred from protection under the character exclusion clauses in the Refugee Convention. Secondly they are required to obtain an Australian Federal Police Clearance. Thirdly they are required to undergo an ASIO check. Finally, they are required to obtain a police clearance from any third country where they have lived for more than 1 year in the last 10 years.

Additionally an Australian permanent resident can be deported if they have committed a serious criminal offence within the last 10 years. Further, an application for Australian citizenship can be refused on character grounds. Current practices are sufficient and appropriate to deal with persons of character concern.

RILC is concerned that such a measure could create an 'underclass' of refugees who, on account of their uncertain temporary status and lack of social and family support, become trapped within in a perpetual cycle in which any minor offences they committed would result in the postponement for four years of measures which would allow them to build new lives – namely with family support as well as regularised immigration status. Such measures would constitute an entirely disproportionate response to any minor offence committed.

Furthermore, this amendment would have the effect of imposing a double penalty on a person who commits a minor criminal offence. An asylum seeker would not only be punished by the courts, but be punished by being denied family reunion with spouse and children for four years.

7. Adverse inferences for taking an affirmation instead of an oath

Legislation will be introduced to provide that unauthorised arrivals and protection visa applicants may be required to provide information on which they rely by oath or affirmation, and that the Minister may draw adverse inferences as to the veracity of such evidence or claims should an applicant, when required fail to provide evidence on oath or affirmation in a form appropriate for any religious persuasion.

(a) Compulsion to make a sworn statement

Unauthorised arrivals and protection visa applicants are already cautioned upon arrival in Australia as to the penalties for providing false and misleading information to officers of the Department of Immigration. Information provided at this stage is recorded (either on tape or in documentary form) and may be used against an applicant if they later provide inconsistent information. These safeguards are appropriate. The refugee determination process is an inquisitorial, not adversarial, process and is not subject to the rules of evidence. Evidence with respect to a person's refugee claims may be provided in a variety of different forms based on principles of reliability and relevance.

There is little value in forcing a recently arrived asylum seeker who has fled from a situation of persecution and who has little or no understanding of the Australian legal system to make a sworn statement. If this approach is to be taken, a detainee must be first provided with legal advice as to the Australian legal system and the nature of the immigration or refugee determination process. RILC is concerned to ensure that sworn statements made by unauthorised arrivals and asylum seekers when they are at their most vulnerable are not later used in an inappropriate way or forum.

(b) Adverse inferences from failure to take an oath according to religious persuasion

If it is offensive to suggest that a person may be lying because they decline to take an oath according to their religious beliefs and instead elect to give an affirmation to tell the truth. This runs counter to the well established practice of giving people an option to take an oath or affirmation in court proceedings. Additionally, it indicates a deep and profound misunderstanding of the use of holy books, texts and practices in different religions. Important cultural and religious beliefs and practices should not be linked to subjective judgements by the Department of Immigration as to what is 'reasonable'.

The entire refugee determination process is designed to be based on more sophisticated means of assessing credibility than drawing negative conclusions according to whether an oath or affirmation has been given.

8. Adverse inferences for failure to possess identity documentation

Legislation will provide that in a claim for a protection visa, the Minister may, in the absence of a reasonable explanation for the non-possession of acceptable identifying documentation, draw adverse inferences as to the veracity of claimed identity an/or nationality.

The Department of Immigration proposes to be able to draw adverse inferences if an asylum seeker arrives undocumented and provides an explanation for the lack of documentation that is considered unreasonable. These measures will effectively stigmatise and potentially disadvantage an undocumented arrival for a situation over which they may have no control.

UNHCR Guidelines on the Procedures and Criteria for Determining Refugee Status (“UNHCR Guidelines”) recognise that there are many circumstances in which asylum seekers may arrive undocumented. Persons fleeing persecution from the authorities of their home country are generally not in a position to be able to obtain official documentation from their persecutors. In addition, identification documents have little or no relevance in certain societies especially those ravaged by civil war and where the need for documentation runs secondary to survival.

From our experience, persons who have been ‘smuggled’ to Australia are in most cases entirely dependant upon smugglers who make travel arrangements and who often withhold documentation from asylum seekers or destroy false documents before the journey to Australia.

In any event, the refugee determination process already contains mechanisms for assessing an asylum seeker’s credibility and for considering the reasons for non-availability of documentation. There is no justification for giving the Department of Immigration an additional discretion to determine what is and what is not reasonable.

9. Additional refugee Applications by persons who are members of the family unit

Legislation will be introduced to provide that a person who is a dependent member of the family unit of a principal applicant cannot lodge their own protection visa claims once the principal applicants claims have been decided (and refused, without seeking the permission of the Minister.

The Federal Court has recently found that dependant family members of a principal applicant can lodge their own refugee applications even after the refusal of the claims of the principal applicant.

Commonly, all relevant refugee claims are lodged at the beginning of the refugee determination process. It is desirable to maintain the right of a dependent family unit member to lodge an application for refugee status at any time if they have individual claims. There may, for example, be situations where a female spouse of a male applicant for refugee status does not lodge her own claims initially for complicated and often sensitive cultural reasons. Such a person should not be denied the opportunity of putting their own individual claims of persecution forward at a later stage merely because a decision has been taken on the claims of another member of the family unit. This is inconsistent with the stated policy of the Department of Immigration (and the UNHCR Guidelines) that all refugee claims are (and should be) assessed on their individual merits.

Whilst the Minister proposes to allow dependent family members to be allowed to put forward refugee claims at a later stage if there are compelling reasons, the Minister's non-compellable discretion is an inadequate and inappropriate safeguard. The Ministerial discretion should not be the legislative gateway for refugee applicant's being allowed to present their circumstances on a first occasion. The inherent dangers of a bar on allowing individuals to present their own refugee claims outweighs any potential advantage to be gained by a person in obtaining a short period of additional time in Australia whilst that application is considered.

DIMA should be asked on how many occasions dependant family members have later lodged their own claims. They should be asked to provide statistical evidence for their assertion that asylum seekers would deliberately try to prolong their refugee applications in this way.

10. Change of address by Temporary Protection Visa holders

Legislation will provide that a temporary protection visa holder is to notify the Department of Immigration and Multicultural Affairs of any change of address within 14 days.

The requirement already exists for persons with ongoing immigration applications to keep the Department of Immigration notified of their change of address. There seems no reason to impose this requirement on persons without an ongoing immigration application. The Department already has comprehensive powers to investigate instances of immigration fraud in the Australian community without having to compel Temporary Visa holders to notify of all changes of address.

It is ironic that a class of persons to whom the Federal Government denies free English language tuition are required to advise the Department in English of all and any changes of address.

11. Access to TPV following cancellation

Legislation will provide that a former TPV holder who had had their visa cancelled for any reason will, if they apply again for protection, be eligible for grant only of a TPV in the first instance.

RILC is entirely opposed to the concept of Temporary Protection Visas. TPVs are an inappropriate means of protecting genuine refugees. They prolong the displacement of a refugee and are in breach of the principle of family unity contained in the Refugees Convention by restricting family sponsorship for at least 3 years.

For further comment, please contact Martin Clutterbuck or David Manne of the Refugee and Immigration Legal Centre on (03) 9483 1144