

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children.

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Excellency,

We have the honour to address you in our capacities as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the human rights of migrants; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children pursuant to Human Rights Council resolutions 24/7, 26/7, 26/19, 25/13 and 26/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014** and the **Migration Amendment (Character and General Visa Cancellation) Bill 2014** which are reported by being scrutinized by the Senate's Legal and Constitutional Affairs Committee.

According to the information received:

The Government introduced two pieces of legislation, the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Bill 2014 and the Migration Amendment (Character and General Visa Cancellation) Bill 2014 to Parliament, on 25 September and 24 September 2014 respectively.

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 provisions include:

Schedule 6 which will mandate the retrospective classification of children born in Australia as 'Unauthorised Maritime Arrivals' (UMAs), if one of their parents is a UMA.

Schedule 1 which would grant the Minister of Immigration and Border Protection exceptional powers to detain people at sea and to transfer them to countries of the

Minister's choosing without the scrutiny of Parliament and with limited opportunities for judicial review.

Schedule 7 which would place a quota ceiling on the number of protection visas that can be issued in a year allowing the Minister of Immigration and Border Protection additional powers to suspend the processing of protection visas once the quota is reached.

Schedule 5 which would remove references to the Refugee Convention from the 1958 Migration Act to create a 'new, independent and self-contained statutory framework', which sets out the Government's own interpretation of its protection responsibilities.

Schedule 4 which articulates an intention to introduce 'rapid processing' and 'streamlined review arrangements' which provide limited access to merits review and would end access to the Refugee Review Tribunal (RRT) process.

Schedule 5 which amends the Migration Act and creates a duty on officers to remove unlawful citizens under section 198, even if this would violate *non-refoulement* obligations.

Schedule 2 and 3 which will create a range of visas, including the Temporary Protection Visas and Safe Haven Visas, in lieu of providing permanent visas and protection to refugees.

The Migration Amendment (Character and General Visa Cancellation) Bill, introduced to Parliament on 24 September 2014, will tighten controls on the issuance of visas on the basis of character and risk assessments.

In light of the information described above, and whilst acknowledging that the legislative process is ongoing and welcoming the intention to reduce the very high existing caseload and extensive timelines in processing migrants, we are gravely concerned that these Bills, if passed, could lead to significant and multiple violations of international and human rights law.

A number of these provisions, including Schedules 1, 5 & 7 of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and provisions in the Migration Amendment (Character and General Visa Cancellation) Bill, risks significant and systemic violations of the *non-refoulement* principle contained within international legal instruments ratified by Australia.

Schedules 1, 5 & 7 of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and provisions in the Migration Amendment (Character and General Visa Cancellation) Bill also risk placing migrants and asylum seekers in situations of detention prohibited by international law, either at sea or in offshore processing centres.

Further to these fundamental concerns about the risk of violations in relation to *non-refoulement* and detention, a number of provisions have significant additional human rights implications:

The provision in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 that aims at retrospectively classifying children born in Australia as ‘Unauthorised Maritime Arrivals’ is not in accordance with the principle of the best interests of the child.

The reported quota ceilings on the number of protection visas issued by the Ministry of Immigration and Border Protection are not in adherence with international standards. These quota ceilings could create the potential for asylum seekers’ visa applications to be treated differently depending on the time of the calendar year they are made as opposed to their merits, therefore risking contravention of the right to equality before the law.

The removal of the references to the Refugee Convention in the 1958 Migration Act rescinds on former protections provided within domestic law and provides alternative interpretation of Australia’s legal obligations to asylum seekers that do not adhere to international standards and principles.

The introduction of ‘rapid processing’ and ‘streamlined review arrangements’ and the correlative denial of access to merits review lowers the standard of previous protections provided by the Refugee Review Tribunal (RRT) and duty of officers to remove unlawful citizens creates the potential of discriminating against asylum seekers.

Whilst we welcome that the Temporary Protection Visas and Safe Haven Visas will provide access to work rights and a range of key services, these visas do not offer a sustainable solution for asylum seekers. They require a new protection application to be made each time a visa runs out, contributing to ongoing psychological distress and interference in the applicant’s family life. They also risk creating a two tier system with differentiations in the rights enjoyed by those on full protection visas and these new mechanisms.

The Migration Amendment (Character and General Visa Cancellation) Bill creates broad and punitive provisions in relation to visa refusal and cancellation. Grounds for the refusal or cancellation of visas include previous criminal activity in any country, providing incorrect information in a visa application and associations with people or groups who have been or may have been involved in criminal conduct. The inclusion of criminal offenses from abroad with no corresponding safeguard to undertake due diligence in relation to the actual circumstances of each case risks penalising and/or resulting in the detention of people that have been charged or prosecuted criminally for acts relating to their legitimate exercise of their human rights. People could be fleeing persecution from countries where homosexuality, or peaceful assembly and association is criminalised, or where the independence of the judiciary is not respected. Additionally,

this measure risks further misidentifying victims of trafficking and endangering their right not to be prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

Article 10 of this Bill states that the Minister can revoke or refuse a visa when they “reasonably suspect” (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person involved in criminal conduct”. These broad powers to refuse and cancel visas on the basis of people’s previous participation in or link to associations or groups, regardless of whether they have been involved in any form of criminal activity, risks compromising the right to freedom of peaceful assembly and association.

Such provisions in the Migration Amendment (Character and General Visa Cancellation) Bill are in contradiction of the principle of presumption of innocence. The lack of clarity of the provisions could also risk the politicised and biased use of controls, and be in violation of the principle of legality. Furthermore the powers awarded to the Minister and the lack of provisions for merits review and legal challenge of relevant ministerial decisions does not give the appropriate level of oversight to Australia’s judiciary.

In addition it is not clear how the information gathered from asylum seekers to assess risk and make decisions in relation to visa refusals and cancellations will be used and what safeguards will be put in place to protect vulnerable people in situations of irregular migration. Privacy and confidentiality are of particular importance to people who have left their home country because of persecution and abuses of their human rights due to the risk of reprisals towards family members and sensitivities related to prior trauma.

Overall, we are concerned that the proposed legislation contributes to an all-consuming discourse of criminalization in relation to irregular migration. We would like to reiterate the evidence cited in the joint communication sent on 27 March 2014, which showed that treating migrants with dignity and respect for their human rights contributes to constructive engagement with the immigration process. The overall proposed legislative changes also strengthen controls within what is already, as described by the Special Rapporteur on the human rights of migrants’ predecessor, “one of the strictest immigration detention regimes in the world”. In addition, the reported derogation of formally recognized rights and legal protections proposed by the Bills undermines Australia’s commitment to the foundational principles of international law and human rights.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the provisions of the two Bills are in accordance with Australia's obligations under international human rights law, particularly with regard to the rights of migrants, victims of trafficking, asylum seekers and children, as well as broader fundamental standards and principles such as the non-derogability of international human rights standards.
3. Please provide specific details about how the proposed Bills will respect the international obligations of Australia, in particular the principle of non-refoulement, the principle of the presumption of innocence, the principle of the best interest of the child and international standards regarding the arrest and detention of people.
4. Please explain whether any analysis and/or consultation has been undertaken to assess the impact of these proposed legislative changes on the human rights of vulnerable migrants. Please share the outcome of any such analysis or consultation.
5. Please indicate whether the proposed Bills have been reviewed in light of Australia's international human rights obligations.

As this matter will soon be considered by your Excellency's Government's Parliamentary Standing Committee on Legal and Constitutional Affairs, we request that you share a copy of this letter with the Committee and we would appreciate receiving a response within 30 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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Gabriela Knaul
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Juan E. Méndez
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degrading treatment or punishment

Maria Grazia Giammarinaro
Special Rapporteur on trafficking in persons, especially women and children

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would also like to recall a number of provisions included within the International Covenant on Civil and Political Rights which provide protection to irregular migrants and asylum seekers:

Article 6 (1), “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

Article 9 (4), “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is no lawful.”

Article 10, (1), “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

Article 17 (1), “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

Articles 21 and 22 states “that the right of peaceful assembly shall be recognized and that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”.

Article 26, establishes equality before the law without discrimination on any grounds, stating: “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.

We would also like to draw your Excellency’s Government’s attention to Article 3 of the 1987 Convention Against Torture, which Australia ratified in 1989 which refers to the internationally recognized principle of non-refoulement, which provides that, “[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”.

Moreover, we would like to draw the attention of your Excellency’s Government to the thematic report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/25/60), which states that, “[t]he non-refoulement obligation is a specific manifestation of a more general principle that States must ensure that their actions do not lead to a risk of torture anywhere in the world [...and that t]here is a clear negative obligation not to contribute to a risk of torture.

The principle of non-refoulement is also established in Article 33 of the 1951 Refugee Convention, which Australia ratified in 1954.

In addition, we would like to recall a number of provisions within the 1989 Convention on the Rights of the Child, which Australia ratified in 1990, that protect children who are seeking refugee status and/or in situations of irregular migration, as well as those whose parents are irregular migrants:

Article 2, (2) “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”.

Article 3, which is also a foundational principle of the Convention states: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislation bodies, the best interests of the child shall be a primary consideration.”

Article 8 protects children’s right to nationality stating: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”.

Article 9 protects the unity of the family: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.

Article 22 provides specific protection for children seeking refugee status: “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

Article 37 compels States Parties to ensure that children are protected from torture or other cruel, inhuman or degrading treatment or punishment and provides protection for children in situations of potential detention:

“(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the

needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

In addition, in its general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child stated that unaccompanied and separated children should not, as a general rule, be detained, and detention cannot be justified solely on the basis of their migratory or residence status, or lack thereof, nor should they be criminalized solely for reasons of irregular entry or presence in the country.

In this connection, we would like to recall the para. 10 of the GA res. 62/156 which “urges States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations and take into account, in conformity with their international obligations and commitments, the principle of the best interest of the child and family reunification”;

We would like to refer your Excellency to the Recommended Principles and Guidelines on Human Rights and Trafficking, launched by the Office of the United Nations High Commissioner for Human Rights in 2002.

Guideline 2 reiterates that States should ensure "that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons" and that "trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody".

Guideline 4 urges States to consider: “ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons” and “ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family”.

We would also like to recall a number of recommendations made by a number of the human rights mechanisms on the detention of irregular migrants. As discussed by the Human Rights Committee in 2013, the ongoing detention of irregular migrants is a breach of Articles 7 and 9 of the ICCPR, which prohibit cruel, inhuman and degrading treatment and arbitrary detention, and requires that detainees must have access to a court to review the lawfulness of their detention, respectively. We wish to recall your

Excellency's Government of the recommendations made by international human rights mechanisms directly on these issues and with some recommendations focusing specifically on Australia – notably the Committee on Economic, Social and Cultural Rights (E/C.12/AUS/CO/4 (2009), para. 25), the Human Rights Committee (CCPR/C/AUS/CO/5 (2009), para. 23), the United Nations Working Group on Arbitrary Detention (A/HRC/7/4, para. 52), E/CN.4/2003/8/Add.2 para 64 the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20/Add.4, p. 23) and the Special Rapporteur on trafficking in persons, especially in women and children (A/HRC/20/18/Add.1, para. 17-19, 80-81).