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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO BOX 6100
Parliament House
Canberra ACT 2600

Via email legcon.sen@aph.gov.au

Dear Committee Secretary

Submission to the Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Thank you for the opportunity to make this submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

I am an Associate Professor at the School of Law. I have been researching and teaching in the area of migration and refugee law for around 15 years. I am also a legal practitioner and registered migration agent and regularly practice in these areas. I have a particular interest in the issue of Refugee Status Determination and quality assessment and have provided advice on these matters to the UNHCR, the Australian DIBP and the Government of Nauru.

The current Bill contains significant and far reaching changes to the *Migration Act 1958* in terms of the processing of asylum seekers and in the interpretation and application of the definition of a refugee. Due to time constraints this submission focuses on some of the amendments contained in Schedule 4 of the Bill.

Thank you for considering this submission. Please do not hesitate to contact me if you require any clarification or have further questions.

Yours sincerely,

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Introduction

1. Schedule 4 of the Bill introduces amendments that significantly amend the current regime for the determination of whether a person is eligible for the grant of a protection visa. The new procedures apply to people who are "unauthorised maritime arrivals" and who arrived in Australia after 12 August 2012. The Bill introduces a "fast track procedure". It is understood that there will be tight timelines for the submission and consideration of an initial application by the Department of Immigration and Border Protection (DIBP). The code of procedure is not yet developed. Applications that are refused will automatically be referred to a limited review by a newly created Independent Assessment Authority (IAA) and in some cases access to independent review of primary decisions will be excluded altogether. Fast track applicants will not be permitted to seek review with the Refugee Review Tribunal of their protection visa decisions.

2. It is to be noted that the government and the DIBP are facing significant and unique challenges in fairly and expeditiously processing a legacy backlog of some 30, 000 cases. This group have been Many of those in the backlog have been waiting for almost two years for their protection claims to be assessed. This group have not had the opportunity to work during this period, no right to work combined with the ongoing uncertainty has caused them significant mental distress.[1] The government has indicated that only the most vulnerable will have access to legal assistance in preparing their claims for protection.[2] This will place additional administrative burdens on DIBP decision makers in determining claims for protection.

3. There are a number of challenges associated with progressing such a significant backlog of cases. Delays in processing are undesirable and it is important that the decision making and review process is fair and has integrity. I am aware that the DIBP has in recent years focussed much time and attention on improving the quality of its primary decision making and has introduced a number of quality assurance processes. They are to be commended for their efforts in this area.

4. In the second reading speech the Minister for Immigration and Border Protection stated that the current system of review has lead to delays in the processing and ultimate removal of unsuccessful asylum seekers. A fast track system is being introduced in order to efficiently deal with unmeritorious claims.

5. It is accepted by states and the UNHCR that effective return policies and practices are essential to the maintenance of credible asylum determination systems and that claimants who do not succeed in establishing an entitlement to protection must expect to be removed. The introduction of a system to fast track applications may not have the desired effect. In study of refugee decision making in the United States immigration law

[1] Lisa Hartley and Caroline Fleay, *Policy as punishment: Asylum seekers in the community without the right to work,* Centre for Human Rights Education, Curtin University, Feb 2014 http://apo.org.au/research/policy-punishment-asylum-seekers-community-without-right-work;

[2] Minister for Immigration and Border Protection, "End of taxpayer funded immigration advice to illegal boat arrivals saves $100 million", 31 March 2014, http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm

expert Professor Stephen Legomsky noted that the effect of the introduction of reforms in the United States designed to increase efficiency did not really have the desired outcome

> "Efficiency comprises both using fiscal resources wisely and minimizing elapsed time. As for the efficient use of resources, the picture is mixed. On the one hand, the tight budgetary constraints on EOIR have forced both immigration judges and the BIA to decide massive numbers of cases. Moreover, the procedural shortcuts that these caseloads prompt adjudicators to adopt have enabled them to decide cases very quickly. In those senses, efficiency might be perceived as high.
>
> "On the other hand, BIA reforms instituted in 2002 have triggered a flood of petitions for review in the courts of appeals. As a result, the courts have had to duplicate much of the BIA's appellate review--a highly inefficient result. In fiscal year 2008, the BIA handed down 34,812 appeals from decisions of immigration judges. In that same year the courts of appeals received 10,280 petitions for review of BIA decisions --an approximate appeal rate of 30 percent. Those petitions for review comprised 17 percent of the combined caseloads of the courts of appeals and have created a now well-documented crisis for the federal courts. The problem is not merely the overtaxing of the judges; caseload pressures have required massive increases in the legal staffs, the clerks' offices, and the circuit executives' offices, as well as government prosecutorial resources."[3]

The challenge and importance of good quality RSD

6. The purpose of the RSD process is to determine whether a person falls within the definition of a refugee or are owed other complementary *non-refoulement* obligations. The determination of whether a person is a refugee or is a person to whom we owe complementary protection has profound implications for the individual and members of their family.

7. The UNHCR has identified that the effectiveness of an RSD function depends both upon:
   - The fairness and integrity of the RSD procedures; and
   - The quality of the RSD decisions.[4]

8. It should be acknowledged that the process of RSD is extremely difficult, complex and challenging.

   > "The decision makers have one of the most difficult decision making roles in the Commonwealth because:
   >
   > - the knowledge base changes regularly and the decision maker must apply current law and current and reliable country information;
   > - the decision maker must assess the social, political and cultural information about the country of origin (COI);
   > - the process is inquisitorial so the decision maker must be well prepared, have good questioning skills, the ability to assess evidence and the

[3] Stephen Legomsky, "Restructuring Immigration Adjudication" (2010) 59 Duke Law Journal 1635, 1646

[4] UNHCR, *Procedural standards for refugee status determination under UNHCR's mandate* (2005)

ability to manage the process including the use of interpreters. They must enable the applicant to fully explain their claims;

- when evidence is taken with the assistance of an interpreter, issues may be lost in translation and it can be more difficult to assess credibility so the decision maker must manage the interpretation services carefully;
- the applicant will probably come from a different culture to that of the decision maker and will be recounting experiences of persecution. They may have mental health or other issues. The decision maker must be cross culturally aware and manage any issues that arise.
- often there is little to corroborate the applicant's account of what happened to them and the decision maker must determine what happened in the past and is likely to happen in the future;
- they must follow the principles of natural justice
- the decision must clearly explain why the decision was reached."[5]

9. In 2012 Sue Tongue was commissioned by the DIBP to examine the RSD process at the primary and review level. She examined a sample of 153 primary and review decisions to determine quality and assess reasons for reviews allowed (overturns).[6] In doing so she was examining the "non-statutory" RSD system used by the government prior to 2012. In summary she found

> "Reasons for reviews being allowed (overturns) are: new law, new information, new grounds, new claims (including new evidence), agents' contribution, applicants' focus, different application of policy, different application of expert evidence and lapse of time. Decision makers' attitudes, and the fact that review is available, were raised as potential factors, however the review found no evidence of this and further work may be required to test these claims.
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> "Divergences in practice between DIAC and IPAO causing reviews allowed were: country of origin information (COI); credibility assessments and legal information….
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> "External factors causing reviews allowed are time, agents, and possibly, interpreters."[7]

10. In the current Bill an IAA is to conduct a review of the original decision on the papers. The IAA is prohibited from considering any new information for the purposes of making a decision unless there are "exceptional circumstances". This term is not defined in the draft legislation. The Explanatory Memorandum states that this could be where "there is a significant change of conditions in the applicant's country of origin that means the applicant may now engage Australia's protection obligations."[8]

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[5] Sue Tongue, *Review of refugee decision making within the current POD process*, 12 June 2012 http://www.immi.gov.au/media/publications/research/_pdf/review-refugee-decision-making.pdf, 10

[6] In doing so she was examining the "non-statutory" RSD system used by the government prior to 2012. However some of her comments and findings are relevant to the current RSD processes.

[7] Sue Tongue, *Review of refugee decision making within the current POD process*, 12 June 2012 http://www.immi.gov.au/media/publications/research/_pdf/review-refugee-decision-making.pdf, 4

[8] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [722]

11. The limited form of review may mean the following factors identified by Sue Tongue would either not be able to be raised upon review or would be difficult to identify and assess in the suggested limited reform model (where no interview of the individual takes place).[9]

    a. Different findings on credibility. Many decisions are overturned on review the basis of different credibility findings. There may be a number of reasons for this including: inexperienced primary decision makers, reviewers more skilled at creating a dialogue with visa applicants or late disclosure of information if a person has suffered torture or trauma (such as rape). There is a great deal of research which discusses the difficulties of credibility assessments in the RSD process.

        > "[A]n applicant's reticence, hesitancy, comportment and attitude are not objective indicators of credibility. They can be equally indicative of post traumatic stress. Behaviour is a poor determinant of truthfulness and accuracy, particularly if decision makers interpret it with inadequate regard for gendered or culturally specific assumptions, or where the disparity in educational grounding creates a mismatch of expectations and understandings. Refugee determinations raise heightened concerns regarding misunderstandings arising from linguistic, cultural or mental health issues."[10]

    b. Different country of origin information. While the Explanatory Memorandum states that a "significant change" in a country may constitute "exceptional circumstances" in my view this constitutes too high a bar. Often COI is not straightforward and sources may contain contradictory information.

        > "The sample showed the divergence in COI on the risk of persecution by the Taliban of ethnic Hazaras. This COI has been cited in several court decisions that have considered related procedural fairness issues. On 6 August 2007, a Christian Science Monitor article referred to the 'golden age' for Hazaras, meaning that it was safe for them to return to Afghanistan. In July 2009 UNHCR Eligibility guidelines for assessing international protection needs of asylum seekers from Afghanistan were issued. A 2010 UNHCR report listed profiles of those who might be at risk. DFAT cables of February and September 2010 were relevant. On 20 May 2010 Professor William Maley of ANU gave a five page opinion saying the situation for Hazaras 'could easily be dire' and Mr Thomas Ruttig's essay, with a similar view, was cited. The uncertainty caused by this divergence was often mentioned in consultations. Another example of divergence given was COI on Egyptian Coptic Christians."[11]

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[9] Sue Tongue, *Review of refugee decision making within the current POD process*, 12 June 2012 http://www.immi.gov.au/media/publications/research/_pdf/review-refugee-decision-making.pdf, 16.

[10] Hunter, Jill; Pearson, Linda; San Roque, Mehera and Steel, Zac. 'Asylum adjudication, mental health and credibility evaluation.' (2013) 41 *Federal Law Review* 471, 495.

[11] Sue Tongue, *Review of refugee decision making within the current POD process*, 12 June 2012 http://www.immi.gov.au/media/publications/research/_pdf/review-refugee-decision-making.pdf, 16.

c. Legal issues. Should this Bill be passed it will codify certain aspects of the definition of a refugee. In an environment where the majority of applicants will not have the assistance of a migration agent to make submissions as to the interpretation and application of the new law to their case a review body conducting a thorough review is even more important to provide guidance and consistency on the interpretation of the law.
d. Time. If this is a fast track process and applicants are not given sufficient time to prepare their applications or seek pro bono assistance to prepare their statements it will clearly impact upon their ability to articulate claims at a primary level. Applicants may not be aware of what is important to raise in respect of their claims due to a lack of understanding of the criteria for protection.
e. Interpreters. The quality of interpreting may vary; poor interpreting influences the quality of an interview. TIS can have difficulty keeping pace with the need for skilled interpreters. Problems can also arise if a visa applicant finds that they are not comfortable discussing their claims with interpreters from particular ethnic backgrounds or gender. Without an interview on review errors in interpreting may never be discovered.

12. A further concern is that the IAA will employ reviewers who will not be at the same level as the current RRT members. It is understood that they will be employed at the level of EL2. It is at the moment unclear as to what the level of qualifications will be. You would expect such reviewers should have a high level of experience and qualifications given the fact that they will be working in a review environment which is not before been seen in an Australian context and dealing with a complex caseload who will be largely unrepresented.

Excluded Fast Track Review Applicants

13. After an initial assessment of protection claims that are unsuccessful at first instance the DIBP may determine that an individual is excluded from being able to seek independent review.

> ***excluded fast track review applicant*** means a fast track applicant:
>
> (a) who, in the opinion of the Minister:
>
> (i) is covered by section 91C or 91N; or
>
> (ii) has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or
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> (iii) has made a claim for protection in a country other than Australia that was refused by that country; or
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> (iv) has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or
>
> (v) makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application; or

(vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

(b) who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(a).

14. It is difficult to exclude a person who has sought protection from another country or the UNHCR who has been previously refused protection. Many countries have significantly different systems for RSD from Australia. The UNHCR RSD system is also not the equivalent of that used in Australia. It is unclear as to what is meant by "refused" and when that may have occurred. A better approach would be to allow for an individualised review of that decision rather than refuse the person access to independent review.

Manifestly unfounded claim for protection

15. Unfortunately the Bill does not provide a definition of what is meant by "manifestly unfounded".

16. Several countries have also introduced procedures for what has been variously termed "clearly abusive"/ "manifestly unfounded"/"bogus"/"fraudulent" claims. Often the term "accelerated" or "expedited" procedures" is used – there is no common definition at international law. The expression is used to indicate that there may be procedures to process some applications faster than others.

17. In its EXCOM Conclusion No. 30 (XXXIV), UNHCR recognised that applications for refugee status from individuals who clearly have no valid claim are burdensome to the affected countries. Conclusion No. 30 allowed that:

> …national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum. (d)

18. UNHCR qualified this by recognizing the need for appropriate precautions to guard against erroneous decision-making; namely, that the applicant is given a complete personal interview, that the manifestly unfounded or abusive nature of an application be established by the competent authority, and, that the applicant is given the right of appeal against a negative decision.

19. This has been problematic as there are no common criteria for determining what a "manifestly unfounded" claim is. While the UNHCR has stated that it should be defined as "those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum."[12] The European Council Directive 2005/85/EC *on minimum standards on procedures in Member States for granting and withdrawing refugee status* considers a claim as 'manifestly unfounded' include situations where the safe country of origin or safe third country concepts apply, where "the applicant has not produced within a reasonable degree of certainty his/her identity or nationality…", and where "the applicant has made inconsistent, contradictory, unlikely or insufficient representation which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution…" (art.23(4)(c), (f) and (g)).

20. This is a broader concept than that set out by the UNHCR and the way that countries have chosen to operationalise the concept has been a cause of concern Johannes Van der Klaaw of UNHCR stated:

> If the term "manifestly unfounded application" were to be reserved to those claims which have no relation to the refugee definition, the notion would be applicable only in a limited number of asylum claims such as those lodged for reasons of economic deprivation, flight from prosecution or immigration purposes. Assessing whether the claim is lacking in credibility generally requires a material examination[13]

21. The UK has procedures utilising both a fast track procedure for claims that are seen to be "unfounded" and for claims from certain specified countries. Accelerated procedures were introduced as the government had a view that "the UK was a particularly favoured destination for 'bogus' asylum seekers because of its relaxed approach to the process for determining refugee status, which allowed for long delays, and because of the benefits available during that process."[14] The UNHCR has conducted two audits of the fast track procedures.[15] The audits found the following issues with the procedures:

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[12] EXCOM Conclusion No. 30 (XXXIV) at (d)

[13] van der Klaauw, J. (2001) Towards a common asylum procedure. In Guild, E. and Harlow, C. eds. Implementing Amsterdam: Immigration and Asylum Rights in EC Law, pp.165-193 at 180

[14] Sawyer and Turpin, "Neither Here Nor There: Temporary Admission to the UK" (2005) 25 *IJRL* 688-728, the article notes that this finding was "was not however reflected in a Home Office-funded research report, which found that asylum seekers did not generally know about the benefits system in the UK and aimed to reach a place of safety, their destination being influenced rather by issues of long-distance travel or the directions of agents. Those able to choose their destination preferred the UK because they had friends or relatives there, because they believed it to be a safe, tolerant, democratic country, because of longstanding — often colonial — links between their country of origin and the UK or because they could speak English or wished to learn. Conversely, the study found that its respondents had little detailed knowledge of the UK's benefits systems or how they compared to other places, and in any event wished to support themselves. (Vaughan Robinson and Jeremy Segratt *Home Office Research Study 243: Understanding the Decision-Making of Asylum Seekers* Home Office Research, Development and Statistics Directorate, 2002)."

[15] 2010 report: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/First_Quality_Integration_Project_Report_Key_Findings_and_Rec_01.pdf and 2008 report

- Poor quality decision-making. Of particular concern is that UKBA insufficiently appreciates the limited opportunities for asylum seekers in detention to support their claims by evidence and documentation, and demands an inappropriate threshold of proof.

- Safeguards to identify vulnerable and traumatised individuals were inadequate. UNHCR identified vulnerable people and applicants with complex cases which were not suitable for being decided quickly. This includes individuals who claim to be victims of rape or trafficking.

- Concerns around the fact that asylum seekers from conflict-affected countries such as Afghanistan were regularly being routed into the detained fast track. UNHCR's view was that claims from persons originating from countries experiencing indiscriminate violence should be assessed with the utmost care.[16]

22. The Explanatory Memorandum provides some guidance as to the meaning of "manifestly unfounded".

> "This provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia's asylum process in an attempt to avoid removal. It is the Government's position that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation."[17]

23. This definition seems to go beyond that which the UNHCR could fall within such a claim. The concern would be how DIBP officers would make findings that clearly differentiate between finding that a person does not face a "real chance" of persecution[18] and a finding that a person has a claim that is "without substance or no plausible basis". According to the test in the EM a person may well raise claims relevant to *non-refoulement* obligations but be assessed to have a "weak" case. This is different from a situation as set out by the UNHCR of a person who does not make claims related to the Convention at all. It is proper in the former case for an individual to have access to review in order to allow for a further consideration of their claims. There is a risk that particularly vulnerable groups (such as those suffering from mental illness, disability, age, youth) may have difficulty establishing a clear case, particularly if they are

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http://webarchive.nationalarchives.gov.uk/20100503160445/http:/www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/qualityinitiative/unhcr-report-5?view=Binary

[16] N. Kelly. 'International refugee Protection Challenges and Opportunities' (2007) *International Journal of Refugee Law* 401, 426

[17] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [722]

[18] The High Court of Australia in *Chan v MIEA*(1989) 169 CLR 379 established that the fear of being persecuted is well founded (in the objective sense) if there is a "real chance" of persecution. In explaining the "real chance" test the Justices discussed that in order to establish a real chance a claim must be plausible and substantial.

unrepresented, and may well not be able to articulate their case clearly at the primary stage.

24. To use terms such as those set out in the Explanatory Memorandum such as cases without substance and lacking plausibility are not ones that should be used in this context. It is important that a clearer definition is provided in order to guide decision makers.

Final observations

25. The introduction of accelerated procedures has been problematic in other countries: claims involving credibility determination and/or those that involve complex questions of fact and law can be decided in a manner without due process safeguards such as the opportunity to seek legal advice, access to qualified interpreters, sufficient opportunities to prepare cases and a meaningful opportunity to appeal negative decisions. Even with access to legal advice it is difficult to have sufficient time to prepare evidence and obtain any documentation. There are also difficulties distinguishing those who may be more vulnerable due to age, health, gender, disability and torture. The problem is whether or not it is possible for accelerated procedures to be both fair *and* efficient.

26. The channeling of certain groups of applications through specific procedures with reduced safeguards creates the risk of *refoulement* if Australia is not careful to ensure that domestic provisions properly reflect its obligations under international law.

27. The UNHCR has cautioned on the use of accelerated procedures that

> Member States should not dispense with key procedural safeguards or the quality of the examination procedure to meet time limits or numerical targets. Sacrificing key procedural safeguards and/or setting short time limits for the examination may result in flawed decisions which will defeat the objective of an efficient asylum procedure, as they may prolong proceedings before the appeal instance.[19]

28. In fact UNHCR policy does **not** allow its own offices to follow this path, prohibiting accelerated rejection of manifestly unfounded claims in mandate status determination. UNHCR's Procedural Standards (section 4.6.4):

> Claims that appear to be manifestly unfounded … should be processed under normal RSD procedures, and should not be referred to Accelerated RSD Processing procedures. As access to Accelerated RSD Procedures involves giving staffing and scheduling priority to certain categories of Applicants over other registered Applicants, it should be reserved for Applicants who have compelling protection needs.[20]

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[19] UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, http://www.unhcr.org/4deccc639.pdf

[20] UN High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, available at: http://www.unhcr.org/refworld/docid/42d66dd84.html

29. Refugee Status Determination Watch summarised UNHCR's position on accelerated procedures succinctly:

> UNHCR argued … that there should be a distinction between prioritizing certain cases, and thus deciding them earlier, and abbreviating procedures by compromising on due process protections to make the process faster at the expense of fairness. Acceleration is okay, UNHCR said, but abbreviation is not.
> In essence, UNHCR's RSD policy calls for *accelerated protection*, identifying categories of vulnerable applicants who should have their RSD cases decided (quite likely favorably) sooner than others, while governments tend to expedite in order to reject cases quicker.[21]

[21] http://rsdwatch.wordpress.com/2010/05/31/when-unhcr-demands-more-of-itself-accelerated-procedures/