I am grateful for the opportunity to answer this committee's request for opinions regarding Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010 (henceforth known as 'Migration Amendment Bill 2010'). I submit my opinion on the specific provision known as s4AAA of the Migration Amendment Bill 2010 as a concerned citizen familiar with the fundamental principles governing refugee rights and public law.

S4AAA Migration Amendment Bill 2010 is as follows;

*(1) The section establishes the principles that are to apply to persons seeking asylum in accordance with this Act (the **asylum seeker principles**).*

(2) The asylum seeker principles established in this section are based on principles contained in international conventions and treaties to which Australia is a signatory, as they relate to refugees and asylum seekers.

(3) The asylum seeker principles are:

(a) immigration detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of such detention, including the appropriateness of both the accommodation and the services provided, must be subject to regular review;

(b) detention in immigration detention facilities must only be used as a last resort and for the shortest practicable time;

(c) people in immigration detention must be treated fairly and reasonably within the law;

(d) living conditions in immigration detention must ensure the inherent dignity of the human person.

(4) Any person making any decision about refugees, asylum seekers, immigration detention or a related matter under this Act, or a under a regulation or other instrument made under this Act, must have regard to the asylum seeker principles set out in subsection (3).

Importance of procedural fairness

The importance of a rights-centric discourse in the formulation of refugee policy stems from the state's failure to secure those rights normally afforded to its citizens. For people experiencing a breakdown in the relationship between state and citizen, there is no longer an ability to depend on the state to deliver upon their normative obligations. Indeed, the plight of the refugee has in mind the situation where the state itself has become the source of persecution. In such cases, it is fairly necessary that an alternative source of rights be established to compensate for the loss of a state's protection. These rights should constitute a comprehensive alternative to the protection of the state, as well as accounting for the unique vulnerability arising out of the stateless condition of refugees.

Amongst those rights considered to be fundamental to the protection of the refugee is the right of

non-refoulement. Refoulement refers to the event where a country returns a genuine refugee to face certain persecution, and finds it original expression in article 33 of the Refugee Convention ('RC'). Having been recognised in a slew of subsequent instruments, non-refoulement has since established itself at an absolute minimum as a principle of soft law[1], with certain opinions arguing for its elevation to jus cogens status.[2] At the very least, general consensus within the international community, whilst not always accompanied by state practice acknowledges the essentiality of non-refoulement amongst refugee rights.[3] The seminal importance of non-refoulement amongst the arsenal of refugee rights stems from its effect to secure a wide ambit of rights universal to the human condition as a result of its precedent acknowledgement. It is fair to say that all remaining rights refugees are privy to are to a certain extent conditional upon the initial recognition of non-refoulement.

Far from being mutually exclusive principles, effective practice of non-refoulement is predicated upon the principles that constitute procedural fairness. Although a determination process is necessary to identify whether an asylum-seeker is in fact a refugee, it should not be confused as a prerequisite for the conferral of refugee status. Given the Refugee Convention[4] accords refugee status at a point where an individual fulfils the definition criteria regardless of its formal recognition, a country is discharged of its non-refoulement obligation(s) only where it has complied with the principles that comprise the concept of procedural fairness.[5] This is recognised upon the basis that the principles of procedural fairness represent a generally accepted standard that a country has undertaken all reasonable measures to determine whether an individual is a refugee.

Procedural fairness also encompasses the minimum standards a country must observe in its treatment of asylum-seekers while determining their status. Specifically, these standards establish detention of asylum-seekers to be used only as a last resort,[6] and imply a certain standard necessary to the processing of an applicant's claim.[7] While significant attention has been devoted to examining the duration of detention, the presumption that an asylum-seeker is entitled to certain physical conditions during detention is also relevant to a holistic discussion on procedural fairness. As is the case with mandatory and indefinite detention, certain rights relating to the treatment of asylum-seekers are explicitly secured in the Refugee Convention. Others (namely the right to reasonable living conditions during detention) can be inferred from the general obligation not to penalise refugees for their method of arrival.[8]

Australia's obligation to accord procedural fairness to refugees is not merely a matter of honouring the international instruments it is party to, but also stems from the importance it has traditionally attached to the principals of procedural fairness throughout its own judicial history. Procedural fairness as a principle is secured by the existence of the Constitution, which insists on the authority of Ch III courts to review administrative decisions in all but the most extraordinary situations.[9]

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1 *Non-Refoulement* UN Excom [6] (XXVIII) 1977
2 Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law (*3rd ed, 2007) 2.5.1
3 *Non-Refoulement* UN Excom [6] (XXVIII) 1977
4 *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, art 1A (entered into force 22 April 1954)
5 *General Conclusion on International protection* UN Excom [87(K)] (XXVIII) 1977, *General Conclusion on International protection* UN Excom [99(n)] (XXVIII) 1977
6 Eloise Dias, 'Punishment by another name? Detention of non-citizens and the separation of powers' (2004) 15 *Public Law Review* 17
7 Ibid.
8 *Convention relating to the Status of Refugees,* opened for signature 28 July 1951, art 31 (entered into force 22 April 1954).
9 *Commonwealth of Australia Constitution Act,* s75.

Similarly, the inferred existence of the separation of powers doctrine prevents the use of detention as an administrative tool where the link to a regulatory purpose becomes so tenuous as to amount to practical punishment.[10]

Ultimately, this country's migration policies must reflect the sanctity in which it regards human life. The consequences likely suffered by returning a refugee to a country directly or indirectly involved in their persecution are so severe that every possible effort should be made to give effect to procedural fairness during the determination process.

Australia's current approach

It is unfortunate that this country's dedication to accord procedural fairness to asylum-seekers has fallen below expectations, at times markedly so. Australia's current approach to asylum-seekers , particularly those arriving by boat, is characterised by an intention to withhold fundamental protections otherwise extended not just to all Australians, but any who might find themselves within its borders. Powers to excise territory and process asylum-seekers offshore established during 2001 amendments to the Migration Act operate to exclude offshore-arrivals from the jurisdiction of the Constitution. These measures did not merely deprive offshore-arrivals of the legal recourse normally available in response to administrative decisions, but also put them beyond the physical assistance of civil groups.[11] Delegation of the determination process to private officials is a further attempt by the government to divest itself of the obligation to accord procedural fairness to asylum-seekers.

The use and conditions of detention asylum-seekers are subjected to similarly fail to comply with Australia's commitments towards asylum-seekers. All asylum-seekers who arrive in excised territory are subject to mandatory detention as offshore arrivals, and are offered no assurances as to the length of detention.[12] The living conditions in detention centres are themselves the subject of popular criticism, largely as a result of centres being filled beyond capacity. Ironically, overpopulation within detention centres is an inadvertent result of successive governments disregarding their obligations towards asylum-seekers by insisting on offshore processing and suspending the processing of applications.

Despite its brevity, it is nevertheless evident from this description that Australia's migration policy offends a number of the international obligations it is party to. The mandatory detention of asylum-seekers designated as off-shore arrivals breaches art 31 RC to refrain from penalising refugees for their illegal entry, and art 26 ICCPR's guarantee of equal protection before the law to all persons. The practice of indefinite detention breaches art 9(4) ICCPR. The measures Australia has taken to prevent refugees from accessing the courts contravenes art16 RC. Ultimately, these infractions should also be seen as breaches non-refoulement, upon the assumption of it necessarily implying a process that delivers procedural fairness.

In addition, Australia's migration policy breaches values guaranteed by the Constitution. Mandatory detention and indefinite detention both exceed restrictions upon Executive functions to preclude punitive actions as a consequence of the separation of powers doctrine. The variety of ways Australia has sought to exclude asylum-seeker decisions from the jurisdiction of the courts also compromise the court's absolute authority to review a decision by the Executive. Despite the generality of this analysis, it is nevertheless evident that Australia's disregard of procedural fairness

10 Eloise Dias, 'Punishment by another name? Detention of non-citizens and the separation of powers' (2004).
11 Mary Crock, 'First term blues: Labor, refugees and immigration reform' *(2010)* 17 *Australian Journal of Administrative Law 205 211.*
12 Savitri Taylor, 'Sovereign power at the border' (2005) 16 *Public Law Review* 55.

in right of the refugee is in breach of its international and domestic obligations.

Recent actions suggest that little attempt has been made by Australia to make good on its obligations towards refugees on either front. The moratorium in April 2010 on all visa applications from Afghanistan or Sri Lankan was implemented at a time where the international community was in general acknowledgement of the plight of applicants from both countries, making a breach of non-refoulement highly likely during that time.[13] Moreover, as alluded to previously the effect of the moratorium has only exacerbated overpopulation in detention centres, engendering further breaches of procedural fairness.[14]

While absolute certainty is impossible without access to confidential policy discussions, Australia's continuing refusal to acknowledge its obligations towards refugees seems to stem from a reluctance both major parties to appear 'soft' on asylum-seekers.[15] Despite the efforts made to correct the misconception that asylum-seekers in general constitute a significant risk to national security, rhetoric from both sides encourages the perception that a punitive approach is the sole effective solution migration policy should be founded upon. As a result of its bilateral support, a harsh approach towards asylum-seekers has excluded discussion on more constructive alternatives. The decision to sideline a bill proposing complementary protection while legislation to penalise people smugglers is fast tracked is a case on point.[16]

Arguably the biggest disappointment has been the failure to dismantle the legislative machinery permitting the establishment of offshore processing centres. In light of the recent agreement between Malaysia and Australia for an exchange of asylum-seekers and refugees,[17] the reappearance of abuses once common to the Nauru offshore processing centre is an ominous possibility. It is urgently requested that migration policy cease to be made solely on the basis of political gain, and that due consideration be given to Australia's obligations towards refugees.

Migration Amendment Bill 2011

Migration Amendment Bill (Strengthening the Character test and other provisions) 2011 (henceforth known as' Migration Amendment Bill 2011') is an invariable by-product of the current political paradigm. Migration Amendment Bill 2011 intends to broaden grounds upon which the Minister may refuse to grant or cancel a visa. Specifically, the amendments inter alia seek to automatically deem asylum-seekers convicted of any criminal act during detention to have failed the character test, activating the Minister's discretionary power to cancel visas.[18] Migration Amendment Bill 2011 is a response to the recent riots at the Christmas Island and Villawood detention centres.[19] Particularly worrying is Migration Amendment Bill 2011 in its current form will operate retrospectively to apply to asylum-seekers who participated in the earlier riots.[20] Fundamentally, its operation to construct default failure of the character test from all variety of criminal conduct without affording a right of reply to the applicant only further exposes the determination process to criticism that procedural fairness is continually ignored.

13 Ibid, 209.
14 Ibid.
15 Ibid.
16 Ibid, 208.
17 Law Council of Australia 'Law Council voices concern over Australia Malaysian asylum seeker agreement' (Media Release, 6 June 2011).
18 Explanatory memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill (Cth) 2011
19 Ibid.
20 Explanatory memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill (Cth) 2011, item 6.

International law offers scant ground for the establishment of a law in the character of Migration Amendment Bill 2011 to rest upon. Although art 1F RC envisions a situation where an individual's refugee status is terminated on the 'strong consideration' of their engagement in particular conduct, these do not extend to cover Migration Amendment Bill 2011 which constructs grounds to cancel protection for all criminal conduct.

Even less likely is support within domestic authority to be found for Migration Amendment Bill 2011, with the very validity of the bill suspected of breaching constitutional principles. Determination of whether an asylum-seeker passes the character test is currently undertaken by the Refugee Review Tribunal ('RRT'). As with the majority of administrative tribunals, decisions by the RRT are subject to review in right of the original jurisdiction of Ch III courts, including review for decisions on questions of law. By automatically constructing failure of the character test from any criminal conduct by an asylum-seeker, Migration Amendment Bill 2011 prevents asylum-seekers from accessing the courts upon relevant questions of law through the RRT, potentially contravening the court's constitutional authority of judicial review.

The assumption that the Christmas Island and Villawood riots only arose for want of effective deterrents within the Migration Act also deserves scrutiny. Such a notion ignores the considerable body of evidence that suggests a causal connection between the government's repeated failure to respond to concerns regarding treatment of asylum-seekers in detention and the subsequent riots. Despite detailed criticism regarding the conditions asylum-seekers endured within processing centres documented in a 2009 report by the Australian Human Rights Commission,[21] indecisiveness over migration policy reform ostensibly stemming from the afore-mentioned reluctance to appear 'soft' on asylum-seekers has prevented this government from moving to definitively resolve these concerns. Further failure to increase security personnel despite their knowledge of increasing frustration by detainees forced to endure longer periods as a result of the 2010 moratorium indicates a wilful blindness on the part of the government which directly contributed to the severity of the riots.[22]

A bill which proposes to punish asylum-seekers for any sort of criminal conduct committed during detention by summarily establishing a grounds for cancelling protection is not the answer to preventing future riots. It finds little basis in international and domestic law, and merely facilitates an evasion of the obligations this government has to provide appropriate living conditions to asylum-seekers during detention. There is a manifest injustice in punishing people for their behaviour that has arisen only through this government's initial failure to honour those obligations. This is the case even more so when alternative means to voice concerns have been denied. The riots should stand as an indictment of the difficulties inherent in providing adequate conditions when detention centres are established in remote areas in an effort to restrict assistance available to asylum-seekers. Without attending to the root factors which give cause to violent conduct within detention centres, there is no guarantee that similar incidents will not arise in the future.

S4AAA amendment

21 Australian Human Rights Commission, *Immigration detention and offshore processing on Christmas Island* (2009).
22 Paige Taylor and Paul Maley 'How Christmas Island time-bomb was ignored' *The Australian* March 26, 2011.

Amendment s4AAA Migration Amendment Bill 2010 offers an alternative to the prevailing fixation on punitive measures to address the challenges posed by asylum-seekers by directly confronting the lack of procedural fairness that has characterised the Migration Act of recent memory. In particular, s4AAA confronts the uncertainty over whether decision makers are taking an appropriate account of the rights Australia is obliged to afford towards refugees. S4AAA intends to do so by placing definite limits on the discretion afforded to relevant decision makers. The discretion accorded to administrators so named in the Migration Act has been characterised with a broadness that has been described as "*almost impossible for anyone to show that the administrator has acted otherwise than in accordance with those powers."*[23] In other words, discretionary power has been extended to a point where judicial review is unable to ensure that procedural fairness has been observed. The establishment of broad discretionary power has been particularly effective in limiting the areas where judicial review may be brought to bear, in light of authority that establishes the courts will not presume judicial review where the decision to exercise power itself is discretionary.[24] Considering such powers are deemed to be 'non-compellable and non-reviewable[25] and include the power to waive the bar on visa applications[26] and to issue visas to offshore arrivals[27] the consequences for asylum-seekers where procedural fairness has been disregarded are significant. In the absence of the court's inability to ensure procedural fairness is accorded to asylum-seekers, an alternative source of protection must be found.

The specific mechanism by which s4AAA proposes to secure procedural fairness for asylum seekers is as follows; Decision-makers will be required by legislation to have regard to 'asylum-seeker principles' as they appear in s4AAA(3) for all relevant decisions (s4AAA(4)). The asylum-seeker pri nciples each articulate a specific principle of procedural fairness-

- *Unacceptability of indefinite detention;*
- *detention is only to be used as a last resort and for the shortest practicable time;*
- *Asylum-seekers must be treated fairly and reasonably during detention;*
- *living conditions in detention must ensure the inherent dignity of the human person.*

In addition to establishing definite limits on discretionary power by requiring decision-makers to have regard to the asylum-seeker principles, s4AAA may also open up a broader number of decisions to judicial review, including those previously protected by a privity clause. The strict interpretation of privative clauses favoured by the courts[28] will ensure that where a decision-maker ignores the explicit requirement to have regard to the asylum-seeker principles (s4AAA(4)) that the offending decision will be subject to judicial review, regardless of its purported coverage by a privative clause. Importantly, an adverse finding against the decision-maker will expose them to the usual range of administrative remedies, including prohibition of the enforcement of the initial decision.

The benefits of s4AAA will be further considered with respect to the following areas;

a) The category of decision-makers likely affected;
b) The sort of decisions likely affected.

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23 Savitri Taylor, 'Sovereign power at the border' (2005) 16 *Public Law Review* 55, 61.
24 Mary Crock and Daniel Ghezelbash, 'Due process and rule of law as human rights: The High Court and the "offshore" processing of asylum seekers' *(2011) 18 Australian Journal of Administrative Law 101, 105.*
25 Ibid.
26 *Migration Act 1958 (Cth)* s46A
27 *Migration Act 1958 (Cth)* s195A
28 *R v Blakeley; Ex parte Assn of Architects, Engineers, Surveyors & Draughtsmen of Australia* (1950) 82 CLR 54, 90.

Category of Decision-makers

Quite obviously, s4AAA would apply to limit the generous discretion enjoyed by the minister in right of his administrative powers. The broad discretion afforded to the ministerial office to determine the issuance of protection visas and the location of detention have been amongst the Migration Act's most contentious features. The breadth of this discretion is on display under s46A MA, which confers ministerial discretion to lift the bar on offshore-arrival visa applications, and s195A MA, which collectively confer the power to issue visas to applicants to the minister. It is relevant to note that accompanying amendments intending to repeal any mention of offshore arrivals may extinguish the minister's discretion with regard to any decisions made under s46A MA. It can be said with reasonable certainty where the minister is named as the relevant decision-maker, s4AAA will likely constrain discretion by requiring all decisions to account for the asylum-seeker principles.

S4AAA is likely to similarly constrain discretion accorded to departmental officers. S4AAA will obviously apply where department officials, are identified within the Migration Act as being the relevant decision-maker. However, it is likely that s4AAA will act to constrain a departmental officer even in circumstances not expressly described in the Migration Act, as ordinary rules of agency presume their assumption of ministerial identity, along with its incumbent limitations.[29]

Less certain is whether private administrators will be required to observe the asylum-seeker principles. The current process has placed private corporations in charge of processing applications from offshore arrivals through the Refugee Status Assessment ('RSA') and Individual Merit Review ('IMR') systems. Historically, these administrators have evaded obligations established by the Migration Act on grounds that their private status insulates subsequent decisions from legislative requirements.[30] Moreover, the court's silence on whether private administrators could be treated as delegates of the minister in the same manner departmental officers,[31] questions the reliability of any method attempting to establish a duty to observe Migration Act obligations for private administrators through principles of agency.

The court's reticence to give a firm answer however should not dissuade attempts to find alternative measures to shaft responsibility to private administrators within the current framework. The increasing interplay between the government and private enterprise is producing similar scenarios in a greater number of jurisdictions, and a pursuit of an approach which pierces through government obfuscation through the use of a private proxy should not be avoided in the area of refugee law. At this point, it is useful to note that at least in the ADJR Act considerable weight is given to the character of the decision, rather than the identity of the decision-maker to be integral in determining the fundamentally administrative identity of the decision-maker.[32] Upon this interpretation, attempts to insulate decisions from legislative obligations by out-sourcing fundamentally administrative responsibilities to private enterprise is likely to be ineffective. On this assumption, it is likely that the requirements of s4AAA will also have to be observed by private administrators as well .

29 *Carltona Ltd v Commrs of Works* [1943] 2 All ER 560 (CA)
30 Savitri Taylor, 'Sovereign power at the border' (2005) 16 *Public Law Review* 55
31 *Plaintiff M61/2010E v Commonwealth of Australia & ORS, Plaintiff M69 of 2010 v Commonwealth of Australia & ORS* [2010] HCA 41
32 *Hamblin v Duffy* (1981) 50 FLR 308

Recent events only increase the urgency in requiring private administrators to observe Migration Act obligations like s4AAA. Up until recently, the court's decision in M61/M69[33] would likely have provided a basis for tethering decisions made under the RSA and the IMR to the minister's consideration of using his discretionary powers conferred by s46A and s195 MA to award visas.[34] The reasoning behind this decision was the result of the minister's announcement that the power established under s198A MA would not be used to transport asylum-seekers to 'declared countries' for processing.[35] Having removed the possibility of relocating offshore-arrivals to a different country, the discretionary power in s46A and 195A to confer a visa in practice was automatically activated in right of every asylum-seeker. This brought all decisions made under the RSA and IMR under the Migration Act and its pursuant obligations. Under this arrangement, it would be impossible to rely on the discretionary nature of the power in ss46A and 195A to insulate private administrators from observing s4AAA in the future.

However, the announcement of an agreement with Malaysia for the exchange of asylum-seekers in return for refugees is removes the assurance that s198A MA would no longer be used to deport asylum seekers. This no longer makes ministerial consideration of s46A MA and s195 MA powers to award visas automatic, extinguishing the connection between ministerial discretion and private decision-makers. With RSA and IMR decisions no longer bound to consider the obligations recognised in the Migration Act, it once again becomes imperative to discover an approach allowing future operation of s4AAA to bind decisions made by private administrators.

What (decisions) are affected?

It is apparent that the asylum-seeker principles expressed in s4AAA are designed to have a particular impact upon decisions related to detention. Decisions relating to detention of offshore arrivals have been a particular focus of the broad discretion afforded to the minister to act 'in the public interest', and as such potentially constitute a significant number of decisions where procedural fairness has been disregarded. The particular susceptibility of decisions relating to detention to abuses of process is illustrated in fact by the sheer number of pending cases with grounds of action founded in failure to accord procedural fairness emphasize the need for s4AAA in this particular area.[36] By expressly establishing the asylum-seeker principles be considered by all relevant decision-makers, s4AAA clarifies the ambiguity surrounding breaches of procedural fairness establishing a reviewable issue of law. As a matter of practical importance, clarity on this issue may reduce the amount of cases that must be heard by a court on this ground.

In particular, the presence of s4AAA(3)(i) to account for appropriate living conditions fills a long-time gap in judicial discussion as to its importance. The difficulty of requiring detention centres to be of a certain standard stems for the absence of any clear domestic principle in support,[37] despite the veritable body of international opinion arguing otherwise. Arguments to establishing a minimum standard for living conditions had previously been attempted by characterising the length of detention as a particular condition of detention in the hope that a residual recognition for the physical conditions would also arise.[38] S4AAA gets rid of the need for this convoluted reasoning by

33 *Plaintiff M61/2010E v Commonwealth of Australia & ORS, Plaintiff M69 of 2010 v Commonwealth of Australia & ORS* [2010] HCA 41
34 Mary Crock and Daniel Ghezelbash, 'Due process and rule of law as human rights: The High Court and the "offshore" processing of asylum seekers' *(2011) 18 Australian Journal of Administrative Law 101, 107.*
35 Ibid.
36 Ibid, 111.
37 Eloise Dias, 'Punishment by another name? Detention of non-citizens and the separation of powers' (2004) 15 *Public Law Review* 17
38 Ibid.

establishing the principle as a matter of legislative requirement. Considering the role substandard living conditions at Christmas Island played in precipitating the riots, the impact of s4AAA(3)(i) actively works to diminish the chances of a similar incident from reoccurring in the future.

However, as alluded to previously it is unclear as to the extent decisions on detention made by private administrators in the RSA and IMR processes would be bound by s4AAA. Although all decisions relating to detention undertaken by departmental officials leading up the minister's final word will be required to observe a future s4AAA, the general delegation of the RSA and IMR systems may prevent otherwise relevant decisions from being affected. Following a survey on the related topic of the disparity in recognition rates of refugees between offshore and onshore asylum-seekers, the possibility of significant applications suffering from a lack of procedural fairness is altogether possible.[39] Without further efforts to reign in the RSA and IMR processes, implementation of s4AAA will be of minimal value against these decisions.

Conclusion

This country boasts a strong tradition of valuing the principles of procedural fairness in the belief that everyone is afforded certain rights. However, it is hard to reconcile this history with the approach currently taken in Australian migration policy, whose intention is to thoroughly remove basic privileges asylum-seekers may access otherwise beholden to all Australians. Moreover, the popularity of harsh, punitive approaches within the current political climate has prevented more constructive remedies from being discussed.

S4AAA of the 2010 Migration Amendment Bill establishes a bulwark against future administrative abuses. It secures basic principles of procedural fairness that are currently ignored by limiting the extent to which administrators are able to shield decisions from judicial review via discretionary power. However, s4AAA's potential will only be fulfilled if its application can include the significant number of decisions also made by private administrators.

39 Savitri Taylor, 'Sovereign power at the border' (2005) 16 *Public Law Review* 55