Chapter 3

Key Issues

Schedule 1: Amendments relating to maritime powers

3.1 Submitters to the inquiry expressed concerns regarding the provisions set out in Schedule 1.[1] These concerns were not limited to particular provisions and were aimed at the collective effect passing the amendments would have on operations carried out on the high seas.

3.2 As noted by the Refugee Council of Australia:

> …these amendments aim to give the Minister for Immigration extraordinary powers to detain people at sea (both within Australian water and on the highs seas) and to transfer them to any country or even a vessel of another country that the Minister chooses, without scrutiny from either Parliament or the Courts.[2]

3.3 As with other Schedules to the Bill, submitters expressed concerns regarding the Government's decision to clarify the scope of its obligations under international law.[3] The Human Rights Law Centre argued that the provisions aimed at broadening maritime enforcement powers may lead to the Government choosing not to comply with international law.[4]

3.4 The Law Council of Australia (LCA) shared these concerns and noted that these provisions 'increase the likelihood that the exercise of powers under the Maritime Powers Act will violate Australia's obligation to respect the sovereignty of other states'.[5] The LCA also questioned whether the new powers allowing for the removal and detention of a vessel or aircraft either inside or outside the migration zone were contrary to human rights law and amounted to arbitrary detention.[6]

3.5 Of most concern to some submitters was the proposed removal of procedural fairness guarantees and the limitations on the court's ability to invalidate executive

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1 Human Rights Law Centre, *Submission 166*, pp 2-6; Castan Centre for Human Rights Law, *Submission 137*, pp 2-9; Amnesty International, *Submission 170*, pp 2-3; Law Council of Australia, *Submission 129*, pp 12-19; Australian Red Cross, *Submission 164*, p. 19 and Refugee and Immigration Legal Centre, *Submission 165*, pp 24-25.

2 Refugee Council of Australia, *Submission 136*, p. 1.

3 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp 4-5; Refugee Advice and Casework Service, *Submission 134*, pp 5-7; Refugee and Immigration Legal Centre, *Submission 165*, pp 24-25 and Law Council of Australia, *Submission 129*, p. 15.

4 Human Rights Law Centre, *Submission 166*, pp 2-3.

5 Law Council of Australia, *Submission 129*, p. 15.

6 Law Council of Australia, *Submission 129*, p. 16.

actions.[7] The Refugee and Casework Service (RACS) argued that the lack of judicial oversight and Parliamentary scrutiny was particularly concerning:

> Irrespective of any view of the relevance of international law obligations, RACS believes that the Committee should exercise extreme caution in relation to legislation that proposes to allow the prolonged detention of any person in the absence of Parliamentary or judicial oversight.[8]

3.6 The department addressed the majority of these concerns in its submission to the inquiry.[9] In addressing the concerns raised regarding the extension of the Minister's power, the department stated that:

> These amendments do not seek to create new powers beyond what is already available to maritime officers- instead, they clarify the intended operation of those powers and their relationship with other law. Limited new powers are provided to the Minister personally to ensure that the executive has appropriate oversight of matters significant to Australia's sovereignty, national security and overarching national interests.[10]

3.7 The department also clarified what matters would constitute national interest:

> …the term "national interest" has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Only the Executive arm is appropriately and adequately placed to make assessments about what is often a complex range of diverse considerations[11]

3.8 The department also provided justification with regards to proposed sections 22A and 75A which provide that a failure to consider international obligations will not invalidate the exercise of certain powers under the *Maritime Powers Act*:

> Parliament did not legislate to make international obligations a relevant consideration, as a matter of domestic law, for the exercise of maritime powers. These amendments put this beyond doubt. The Government remains committed to Australia's international obligations, including non-refoulement obligations and the obligations arising under the *United Nations Convention on the Law of the Sea*. New sections 22A and 75A do not absolve Australia of its obligation to comply with international law, and the Government does not resile from responsibility for actions take under

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7 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp 6-7; Refugee Advice and Casework Service, *Submission 134*, p. 7. and Law Council of Australia, *Submission 129*, p. 16.

8 Refugee Advice and Casework Service, *Submission 134*, p. 7.

9 Department of Immigration and Border Protection, *Submission 171*.

10 Department of Immigration and Border Protection, *Submission 171*, p. 5.

11 Department of Immigration and Border Protection, *Submission 171*, p. 6.

> the *Maritime Powers Act*. However, it is the Government's position that it is the Executive Government which is best placed to decide how to comply with these obligations, particularly in light of the full range of considerations surrounding operation activities at sea.[12]

3.9 At the public hearing, departmental officials reiterated that the introduction of these provisions does not mean that the Government will not comply with international law:

> The government's compliance with our international obligations is of course made up of various factors, some of which is provided for in the legislation, some is provided for in policy and some is provided for in practice. Whilst these provisions are dealing with the manner in which we deal with asylum seekers, you need to look at the total practice of the government in meeting its international obligations. It is quite clear in the explanatory memorandum—it is stated on several occasions—that the government has no intention of breaching its international obligations, in particular the non-refoulement obligation.[13]

3.10 In its submission, the department clarified that none of these provisions would result in vessels being left at sea or people put in dangerous situations:

> New subsections 69(2) and (3) and new section 75C have attracted criticism as apparently allowing the "abandonment" of a vessel on the high seas, and allowing the trespass into other countries' territorial sea. This is incorrect. These amendments are intended to make it clear that a destination need not be *in* a country (which, when read with the definition of 'country' in section 5, includes that country's territorial sea or, where relevant, archipelagic waters). The Government's policy relating to Suspected Illegal Entry Vessels is to remove them to a place outside Australia's contiguous zone *where it is safe to do so*. The professional mariners of the Royal Australian Navy and the Marine Unit of the Australian Customs and Border Protection Service view the safety of life at sea as their highest duty as mariners. An extraordinary amount of work goes into ensuring that operations take place in safety, and not a single life has been lost at sea as a result.[14]

Schedules 2 and 3: Introduction of new types of visas and changes to visa applications

3.11 Both schedules 2 and 3 of the Bill make changes to Australia's current visa regime. Submitters were most concerned with the provisions in Schedule 2 which

12 Department of Immigration and Border Protection, *Submission 171*, pp 5-6.

13 Ms Vicki Parker, General Counsel, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 61.

14 Department of Immigration and Border Protection, *Submission 171*, pp 6-7.

allow for the re-introduction of Temporary Protection Visas (TPVs) and the introduction of Safe Haven Enterprise Visas (SHEVs).[15]

3.12 A number of witnesses at the public hearing argued that TPVs were not a suitable long-term solution for refugees.[16] Mr Khanh Hoang, from the ANU College of Law, argued that TPVs are discriminatory and are inconsistent with the broad objectives of the refugee convention:

> Temporary protection is usually provided by states to address situations that do not squarely fall within the convention or where people are fleeing from generalised violence or other emergency situations. It is the practice of most states to grant permanent protection to those who are found to be convention refugees.
>
> By contrast, the TPV effectively discriminates against people who come by boat and who have been found to be refugees by ensuring that they will never be granted a permanent protection visa. If we want to talk about certainty for people then we say that the temporary protection visa and the safe haven enterprise visa do the exact opposite of providing certainty.[17]

3.13 The Refugee Council of Australia argued that there is no justification for introducing TPVs on the basis of deterrence and that it will lead to numerous families being separated:

> Families who are known by the government to be experiencing the impacts of persecution will be separated indefinitely. The family member in Australia will be trapped: having to decide whether to remain safely here, away from the place where it is accepted that they will face persecution, while other family members are highly unsafe, or to return at great risk to themselves.[18]

3.14 While acknowledging the need to process the vast number of asylum claims that have yet to be assessed, the Law Council also noted that TPVs are inconsistent with its own asylum seeker policy:

> If TPVs are to be reintroduced, to be consistent with international obligations, the Law Council would support them as only constituting a

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15 Human Rights Law Centre, *Submission 166*, pp 15-16; Refugee Council of Australia, *Submission 136*, pp 4-6; Migration Law Program, Australian National University, *Submission 168*, pp 6-7; Refugee Advice and Casework Service, *Submission 134*, pp 8-16; Amnesty International, *Submission 170*, pp 3-5; Law Council of Australia, *Submission 129*, pp 19-25; Australian Red Cross, *Submission 164*, pp 6-11 and Refugee and Immigration Legal Centre, *Submission 165*, pp 17-20.

16 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp 8-9; Refugee Advice and Casework Service, *Submission 134*, p. 9; Amnesty International, *Submission 170*, p. 4 and Australian Human Rights Commission, *Submission 163*, pp 34-35,

17 Mr Khanh Hoang, Associate Lecturer, Migration Law Program, ANU College of Law, *Committee Hansard*, 14 November 2014, p. 37.

18 Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, *Committee Hansard*, 14 November 2014, p. 44.

> form of 'bridging visa' while people await the determination of their claim. However, they should not be supported as the final outcome once an individual has been found to engage in protection obligations.[19]

3.15 Submitters also were opposed to the introduction of SHEVs.[20] The ANU College of Law argued that the SHEV does not provide a durable solution for refugees:

> The requirement to work three and half years without income support is particularly onerous. In addition, we query how likely it is that SHEV holders would be eligible for permanent skill[ed] or family visas. These visas require applicants to obtain a high level of English, have their skills recognised by professional bodies and often require high visa application fees.[21]

3.16 The Refugee Council of Australia expressed concerns that the eligibility criteria for SHEVs is to be specified by way of delegated legislation:

> …under Section 46AA(2)(a)(b), the legislation stipulates that a valid application for a SHEV cannot be made without the Government first prescribing criteria by regulation. The amendments in the Bill do not specify a timeframe for the introduction of this regulation. As the legislation does not require the Minister to introduce the regulations necessary to bring the SHEV into existence, the legislation does not guarantee that TPV-holders will have access to SHEVs, as the decision about when or whether to introduce the regulations will rest with the Minister.[22]

3.17 In its submission, the department stated that 'TPVs strike an appropriate and effective balance between the provision of safety from persecution and the removal of an incentive for illegal arrivals'.[23] The Department argued that it is this element of discouragement that makes it necessary for the granting of temporary as opposed to permanent protection visas.[24]

3.18 The department also highlighted that asylum seekers would not be returned to their home country under any circumstances while they continued to engage Australia's protection obligations.[25]

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19 Law Council of Australia, *Submission 129*, p. 20.

20 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp 8-9; Australian Human Rights Commission, *Submission 163*, p. 42; Human Rights Law Centre, *Submission 166*, pp 15-16 and Refugee Council of Australia, *Submission 136*, pp 4-6;

21 Migration Law Program, Australian National University, *Submission 168*, pp 6-7,

22 Refugee Council of Australia, *Submission 136*, p. 5.

23 Department of Immigration and Border Protection, *Submission 171*, p. 7.

24 Department of Immigration and Border Protection, *Submission 171*, p. 7.

25 Department of Immigration and Border Protection, *Submission 171*, p. 7.

3.19 In his second reading speech, the Minister provided clarification on eligibility criteria for SHEVs:

> IMAs granted a SHEV will be required to confine themselves to designated regions (either a State or Territory government, local government, or employer can request to be designated), identified through a national self-nomination process. The visa will be valid for five years, and like the TPV will not include family reunion or the right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies and will have access to the same support arrangement as a TPV holder.[26]

3.20 The department noted that 'the SHEV will come into effect in April 2015 following necessary amendments to the Migration Regulations 1994'.[27] At the public hearing, departmental officials noted that the Minister was still undertaking consultation with stakeholders in relation to SHEV visas:

> …the requirements for the SHEV are the same as for a temporary protection visa, insofar as it is a protection visa and the person holding it needs to have been assessed to be a refugee. The complicated part of it is in the pathway to other visas, which is obviously what the intent of the visa is for. The complicated part of that is in articulating the definition of regional Australia… and also what accesses to social services count towards meeting the requirements for the visa or not. We need to come up with a very clear list of that.[28]

3.21 In response to questions from the committee regarding the operation of SHEVs, the department has provided a detailed fact sheet which has been published on the committee's website. The committee thanks the department for providing this fact sheet.

Schedule 4: Fast track assessments

3.22 As noted in Chapter 2, Schedule 4 would—if passed—insert a new 'fast track review process' for reviewing refused protection visa applications.

3.23 Submitters emphasised the importance of merits review in refugee status determination processes,[29] pointing to departmental statistics that show that, when it

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26 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, *House of Representatives Hansard*, 25 September 2014, p. 10546.

27 Department of Immigration and Border Protection, *Submission 171*, p. 7.

28 Ms Karen Visser, Director, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 56.

29 Australian Human Rights Commission, *Submission 163*, p. 24; Refugee and Immigration Legal Centre, *Submission 165*, pp. 1, 2; Human Rights Law Centre, *Submission 166*, p. 13.

comes to applications for protection visas, up to 87% of first instance rejections are overturned on review.[30]

3.24 Submitters were concerned, however, that the fast track régime would 'truncate the refugee status determination process by removing safeguards that operate to ensure each claim is fairly and carefully assessed on its merits'.[31] This was said to create an 'inherent risk…that an applicant with legitimate claims will nevertheless fail and be returned' to an 'appreciable risk of serious human rights abuses such as targeted killings and torture'.[32] It was argued that this risk was heightened by the other fundamental changes made by the Bill,[33] other migration legislation currently before the Parliament,[34] the removal of all funding for the Immigration Advice and Application Assistance Scheme in respect of people who arrive in Australia without a valid visa, and the replacement of that scheme with 'a handful of short brochures'.[35]

Reviews conducted by the Immigration Assessment Authority

3.25 Submitters were concerned that reviews conducted by the Authority would not be sufficiently robust because:

- applicants would be required to 'provide a complete statement of their claims for protection during their first engagement with an officer of the department',[36] but there are many legitimate reasons why applicants might not disclose all relevant information in their application. These could include:
    - a lack of knowledge of what information is relevant (particularly to the new definition of 'refugee' that the Bill seeks to insert into the *Migration Act*);

30 Law Council of Australia, *Submission 129*, p. 29; Refugee and Immigration Legal Centre, *Submission 165*, p. 2; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 10.

31 Law Council of Australia, *Submission 129*, pp. 25, 27; Refugee and Immigration Legal Centre, *Submission 165*, p. 1.

32 Law Council of Australia, *Submission 129*, pp. 11, 25; Australian Red Cross, *Submission 164*, pp. 11-12; Refugee and Immigration Legal Centre, *Submission 165*, p. 2.

33 Law Council of Australia, *Submission 129*, p. 4.

34 Law Council of Australia, *Submission 129*, p. 31; Amnesty International, *Submission 170*, p. 7. These submissions are referring to the Migration Amendment Legislation (Regaining Control of Australia's Protection Obligations) Bill 2014, which seeks to remove the statutory process for complementary protection assessment, and the Migration Amendment Legislation (Protection and Other Measures) Bill 2014, which seeks to increase the test for complementary protection claims to 'more likely than not', or greater than 50% chance of harm on return.

35 Law Council of Australia, *Submission 129*, p. 4; Australian Human Rights Commission, *Submission 163*, pp. 26-28; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 9.

36 Australian Human Rights Commission, *Submission 163*, pp. 18, 26; Australian Red Cross, *Submission 164*, p. 12.

- a lack of access to documentation;
- a lack of legal advice and understanding of the Australian legal system;
- a lack of education, literacy and English language skills;
- mental illness, including that brought on by torture or trauma; and
- a lack of trust in government officials caused by persecution that they may have suffered at the hands of the government in their home country;[37]

- the process excludes recognised procedural fairness guarantees, such as the right to be heard, to present and challenge evidence and conclusions, and to clarify misunderstandings;[38]
- the process does not involve a hearing, which will make it very difficult for the Authority to evaluate the decision-maker's conclusions about the applicant's credibility;[39]
- because the Authority is not able to receive further information (except in undefined 'exceptional circumstances'[40]), it risks missing crucial factual developments that bear on the applicant's claim for protection, including changes of circumstances in their home country;[41]
- the Authority's objective would be to provide a review that is 'efficient and quick'.[42] It would not, unlike the Migration Review Tribunal and the Refugee Review Tribunal, be required to provide a review that is 'fair' and 'just'. [43] This was said to be 'sacrificing accuracy of decision making for speed';[44] and

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37 Law Council of Australia, *Submission 129*, p. 30; Australian Human Rights Commission, *Submission 163*, pp. 25-26; Australian Red Cross, *Submission 164*, p. 12; Refugee and Immigration Legal Centre, *Submission 165*, p. 9.

38 Law Council of Australia, *Submission 129*, p. 28; Refugee and Immigration Legal Centre, *Submission 165*, p. 9.

39 Australian Human Rights Commission, *Submission 163*, p. 28; Refugee and Immigration Legal Centre, *Submission 165*, p. 9.

40 Refugee and Immigration Legal Centre, *Submission 165*, p. 7;

41 Law Council of Australia, *Submission 129*, p. 29; Australian Human Rights Commission, *Submission 163*, pp. 25-26; Refugee and Immigration Legal Centre, *Submission 165*, pp. 7-8.

42 The Bill, Schedule 4, Item 21 (proposed subsection 473FA(1)). Law Council of Australia, *Submission 129*, p. 28; Australian Human Rights Commission, *Submission 163*, p. 29; Australian Red Cross, *Submission 164*, p. 13; Refugee and Immigration Legal Centre, *Submission 165*, p. 7.

43 *Migration Act 1958*, sections 353 & 420.

44 Australian Human Rights Commission, *Submission 163*, p. 20; Human Rights Law Centre, *Submission 166*, p. 13.

- if an application were remitted for reconsideration because the Authority found that the applicant was entitled to be granted a protection visa, the Minister would be under no obligation to grant one.[45]

3.26 In addition, the Australian Human Rights Commission expressed concern that there is no limit to the classes of person that could become subject to the fast track review process. The Minister would be able to expand the categories of applicant subject to fast track review without Parliamentary oversight and could, by this process, ultimately replace the Refugee Review Tribunal entirely.[46]

3.27 The department responded to many of these concerns in its submission to the inquiry. It explained that the fast track régime

> …has been designed to deter abuse of the review system through the late presentation of claims that could reasonably have been presented earlier, particularly where this is done in order to prolong failed asylum seekers' stay in Australia. It is consistent with the amendments in the Migration Amendment (Protection and Other Measures) Bill 2014 which clarify the responsibility of asylum seekers to specify the particulars of their claim, deliver the consistent message that it is extremely important to provide sufficient evidence and information to establish protection claims upfront, and will create an effective, efficient process.[47]

3.28 In relation to concerns that fast track reviews will not respect due process, the department submitted that:

- 'Fast track applicants will have the opportunity to articulate their claims in a full and confidential interview with a specially trained Onshore Protection decision-maker';[48] and
- 'Given the short period of time elapsing between a refused decision being referred by the department to the [Authority] and a review being completed (expected to take two weeks) and the resultant limited period in which an applicant's circumstances could change during that time, it is anticipated that the [Authority] will very rarely exercise its power to seek new information of its own volition while reviewing a case'.[49]

Applicants excluded from the process

3.29 Submitters also expressed concern about the range of people who would be excluded from the fast track process and would not have access to any kind of merits review. These concerns included:

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45 The Bill, Schedule 4, Item 21 (proposed section 473CC).

46 Australian Human Rights Commission, *Submission 163*, p. 25.

47 Department of Immigration and Border Protection, *Submission 171*, p. 14.

48 Department of Immigration and Border Protection, *Submission 171*, p. 13.

49 Department of Immigration and Border Protection, *Submission 171*, pp. 13-14.

- that the Minister would be able to exclude people from the fast track process (and prevent them accessing any form of merits review) based merely on a suspicion;[50]
- in relation to people thought to have had protection refused in Australia or elsewhere, that they may still be a genuine refugee. There might, for example, have been a material change in circumstances between applications for protection or the prior refusal may have been in a country that does not observe the same assessment procedures and standards as Australia;[51]
- in relation to people who were thought to have made a 'manifestly unfounded claim', that this phrase is not defined and is 'capable of an infinite variety of arbitrary and subjective interpretations';[52] and
- in relation to people who are thought to have used a bogus document without reasonable explanation, that—although the Bill does recognise that asylum seekers may need to rely on bogus documents to flee persecution—'[i]t is unclear how the asylum seeker is in a position to judge the point in time at which the facilitation of safe passage has ended and the first opportunity to resile from a bogus document has arrived'.[53] Furthermore, 'first instance decision-makers often decide that documents are false or fraudulent without any evidence from experts'.[54]

3.30 Specific concerns were raised about the Minister's non-reviewable power to expand the class of people excluded from the fast track review process. The Australian Human Rights Commission noted that there is no limit to the people who could be excluded from any form of merits review and that 'the Minister could ultimately entirely prevent any recourse' to merits review.[55]

3.31 Similarly, in relation to the Minister's power to issue conclusive certificates to prevent decisions in individual cases from being reviewed, there were concerns that that this 'could potentially empower the Minister to prohibit merits review of all decisions refusing to grant a protection visa'.[56]

3.32 In relation to these concerns, the department noted that:

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50 Law Council of Australia, *Submission 129*, pp. 27-28.

51 Law Council of Australia, *Submission 129*, p. 30; Refugee and Immigration Legal Centre, *Submission 165*, pp. 3-4.

52 Refugee and Immigration Legal Centre, *Submission 165*, p. 6.

53 Australian Human Rights Commission, *Submission 163*, p. 32.

54 Refugee and Immigration Legal Centre, *Submission 165*, pp. 6-7.

55 Australian Human Rights Commission, *Submission 163*, p. 31; Refugee and Immigration Legal Centre, *Submission 165*, p. 3.

56 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 10.

> It is the Government's policy that if refused fast track applicants are found to have put forward claims that indicate they have previously been refused protection, already have protection available elsewhere or have unmeritorious claims, prompt resolution of their status should be a priority.[57]

3.33 The Department also submitted that:

> Excluding these applicants from merits review will stop unmeritorious claims being considered by the [Authority] which could otherwise lead to delays in departure and an inefficient and costly use of resources. As the majority of [irregular maritime arrival] cases in the backlog relate to people from known refugee producing countries, the percentage of cases expected to fall under the definition of an excluded fast track review is small. The vast majority of refused cases are expected to be reviewed by the [Authority].
>
> It is the Government's position that there are sufficient procedural safeguards in place for ensuring all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent assessment process while ensuring priority is given to identifying applications that present legitimate claims and in turn, asylum seekers who require Australia's protection.
>
> The introduction of a different process for dealing with unmeritorious claims will not curtail a fast track applicant's ability to seek protection, nor their ability to access judicial review. Rather, these measures will place further emphasis on the importance for all protection visa applicants to fully and truthfully articulate all of their protection claims at the earliest possible opportunity.[58]

3.34 Finally, many submitters expressed the view that the fast track review process would, in fact, slow down the assessment process because it would give rise to a backlog of judicial review applications in the High Court.[59] At the public hearing, representatives of the Law Council of Australia submitted that

> …the proposed amendments—especially the removal or restriction of merits review—are likely to lead to more judicial review applications to the High Court. This will undoubtedly lead to further inefficiencies, thereby conflicting with the bill's stated intention and prolonging the process of determining Australia's protection obligations.[60]

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57 Department of Immigration and Border Protection, *Submission 171*, p. 14.

58 Department of Immigration and Border Protection, *Submission 171*, p. 15.

59 Law Council of Australia, *Submission 129*, pp. 4, 30; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 10. The Bill excludes decisions that have been or might be subject to fast track review from the jurisdiction of the Federal Circuit Court: Schedule 4, Item 22.

60 Ms Carina Ford, Steering Group, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 14 November 2014, p. 2.

3.35 Furthermore:

> [A]t the moment, the courts show quite a degree of deference to the [Refugee Review Tribunal's] fact-finding processes because they have a set of reasons, they know there is a process that is undertaken—an interview—and there is at least a level of interaction.
>
> I suspect what you will find under this new process is that those comforts to the courts will no longer be there, so the courts may be more ready to intervene and grant judicial review, which will just start the whole process again.[61]

Schedule 5: Australia's obligations under international law

3.36 As noted in the previous chapter, Schedule 5 would—if passed—amend the *Migration Act* to explicitly provide that Australia's *non-refoulement* obligations are irrelevant to the removal of unlawful non-citizens under section 198 and to replace references to the Refugees Convention with a new statutory definition of 'refugee'.

Irrelevance of non-refoulement *obligations to removal*

3.37 In relation to the first proposed change, submitters expressed concern that it does not accord with Australia's *non-refoulement* obligations under the Convention.[62] They argued that it would increase the risk of people being returned to a real risk of harm, particularly in the case of asylum seekers who had been excluded from the fast track review process.[63]

3.38 The department submitted that the amendment did nothing more than re-establish the 'historical understanding' that the obligation to remove under section 198 was 'unconstrained by reference to Australia's international obligations'.[64] Furthermore:

> Australia will continue to meet its *non-refoulement* obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. For example, Australia's *non-refoulement* obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.[65]

3.39 Submitters disagreed that this was sufficient, arguing that:

- unauthorised maritime arrivals may only make a visa application if the Minister—in his or her discretion—allows one to be made;

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61 Mr Shane Prince, Member, Law Council of Australia, *Committee Hansard*, 14 November 2014, p. 8.

62 Law Council of Australia, *Submission 129*, p. 35; Human Rights Law Centre, *Submission 166*, p. 1; Castan Centre for Human Rights Law, *Submission 137*, p. 12.

63 Law Council of Australia, *Submission 129*, p. 35; Australian Red Cross, *Submission 164*, p. 17.

64 Department of Immigration and Border Protection, *Submission 171*, pp. 15-16.

65 Explanatory Memorandum, p. 166.

- other legislation before the Parliament proposes removing *non-refoulement* obligations under treaties other than the Refugees Convention from Australia's protection visa scheme;
- the fast track review régime will increase the risk that people are wrongly found not to be refugees; and
- the powers that the department points to are discretionary, non-compellable and non-reviewable. They do not need to be exercised fairly, or at all.[66]

3.40 Furthermore, some submitters pointed out that the obligation to remove in section 198 ' requires removals to be carried out in a range of circumstances, including where people may not have applied for visas or had their protection needs considered through a visa process at all'.[67]

Statutory definition of 'refugee'

3.41 In relation to the codification of the definition of 'refugee', submitters expressed concern that this was inconsistent with Australia's obligations. This was because the creation of an 'independent and self-contained statutory refugee framework'[68] was said to be inconsistent with article 42 of the Convention (which prohibits Australia from departing from the definition of 'refugee' in article 1) and with the principles of treaty interpretation more generally.[69]

3.42 It was also suggested that the proposed definition is narrower than—and therefore inconsistent with—the definition in the Convention for a number of reasons.[70]

3.43 It was first argued that, although international law does recognise that a person may be refused protection if they are able to avoid persecution by relocating to another part of their home country, such 'internal relocation' must be reasonable. Whatever internal relocation is reasonable must be assessed on a case-by-case basis. By removing the reasonableness requirement and requiring applicants to show that their persecution extends to all areas of their home country, proposed

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66 Australian Human Rights Commission, *Submission 163*, pp. 9-10; Human Rights Law Centre, *Submission 166*, pp. 9-10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 12.

67 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 12.

68 Department of Immigration and Border Protection, *Submission 171*, p. 17.

69 Australian Red Cross, *Submission 164*, p. 15; Human Rights Law Centre, *Submission 166*, p. 10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 14-15.

70 Australian Human Rights Commission, *Submission 163*, pp. 7, 12; Human Rights Law Centre, *Submission 166*, p. 10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 15.

subsection 5J(1)(c) was said to be inconsistent with Australia's obligations and was said to risk forcing people to relocate to places where they have no family, ethnic, cultural or linguistic ties if they cannot meet what the UNHCR has described as an 'impossible burden'.[71]

3.44 Second, it was suggested that, although it is true that a person may be refused protection if there is effective state protection in their home country, proposed subsection 5J(2)(a) lowers the bar from the protection that *would* be available to the applicant to the protection that *might* be available and 'require[s] decision-makers to conclude that no person from a country with a functioning criminal justice system can ever have a well-founded fear of persecution'.[72]

3.45 Third, it was argued that there is no basis in the Convention for expanding the concept of effective protection to include that which is provided by non-state actors (such as warlords, peacekeepers or private security services), as proposed subsection 5J(2)(b) seeks to do.[73]

3.46 Fourth, there was said to be no requirement in proposed subsection 5J(2) that the protection (whether from the State or non-state actors) be 'stable effective or durable'.[74]

3.47 Fifth, it was argued that the prospect, enlivened by proposed subsection 5J(3), that a person could be refused protection on the basis that they could take reasonable steps to modify their behaviour and avoid persecution—including by acting discreetly—is not consistent with the existing Australian case law and the UNHCR's

71 Law Council of Australia, *Submission 129*, p. 36; Australian Human Rights Commission, *Submission 163*, pp. 12-13; Australian Red Cross, *Submission 164*, pp. 16-17; Refugee and Immigration Legal Centre, *Submission 165*, pp. 12-13; Human Rights Law Centre, *Submission 166*, pp. 10-11; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 15-16; Castan Centre for Human Rights Law, *Submission 137*, pp. 9-10.

72 Refugee and Immigration Legal Centre, *Submission 165*, pp. 13-14; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 16-18.

73 Australian Human Rights Commission, *Submission 163*, pp. 13-14; Refugee and Immigration Legal Centre, *Submission 165*, pp. 14-15; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 18-19; Castan Centre for Human Rights Law, *Submission 137*, p. 10.

74 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 19-20

position that persons should not be 'expected or required to suppress their political or religious views or other protected characteristics to avoid persecution'.[75]

3.48 The sixth reason why the proposed definition of 'refugee' was said to be narrower than the definition in the Convention was that the definition of 'particular social group consisting of family' in proposed section 5K, which precludes family as a social group capable of being persecuted where the original family member was targeted for a non-Convention reason, has been criticised by the United States Court of Appeals as 'erecting artificial barriers to asylum eligibility'.[76]

3.49 Finally, the definition of 'particular social group other than family' in proposed section 5L was said to be narrower than is permitted in the Convention because it is limited to groups that have shared characteristics that are 'innate', 'immutable' or 'fundamental'. It could exclude, therefore, 'private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, members of a labour union or students', all of which are currently considered social groups the persecution of which can give rise to protection obligations.[77]

3.50 Submitters also opined that the detailed and extensive case law on the Convention's definition of 'refugee' has led to a relatively stable and certain understanding of the word.[78] They expressed concern that the new definition would 'almost certainly encourage litigation for further judicial clarification' of concepts such as 'fundamental', 'innate' and 'immutable'.[79]

3.51 In its submission, the department explained that '[i]t is intended that this framework not be subject to the interpretations of international law by the Courts, which may seek to expand the scope of the Convention or introduce interpretations that go beyond what Parliament intended'.[80] This is intended to create 'a clearer and more transparent framework for decision makers to use to make more accurate and consistent refugee assessments'.[81] Furthermore, the department submitted that:

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75 Law Council of Australia, *Submission 129*, p. 38; Australian Human Rights Commission, *Submission 163*, pp. 14-15; Australian Red Cross, *Submission 164*, p. 16; Refugee and Immigration Legal Centre, *Submission 165*, pp. 16-17; Human Rights Law Centre, *Submission 166*, pp. 11-12; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, p. 20; Castan Centre for Human Rights Law, *Submission 137*, pp. 11-12.

76 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 20-21.

77 Australian Human Rights Commission, *Submission 163*, pp. 15-17; Refugee and Immigration Legal Centre, *Submission 165*, pp. 15-16; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 21-22.

78 Refugee and Immigration Legal Centre, *Submission 165*, p. 12.

79 Law Council of Australia, *Submission 129*, p. 38; Australian Human Rights Commission, *Submission 163*, p. 15.

80 Department of Immigration and Border Protection, *Submission 171*, p. 17.

81 Department of Immigration and Border Protection, *Submission 171*, p. 17.

> Currently, the Migration Act only makes direct reference to an applicant being required to engage Australia's protection obligations under the Refugees Convention as a criterion for the grant of a Protection visa. How a person satisfies this criterion is set out in policy guidance and an extensive body of complex case law, which is not readily accessible to asylum seekers or other interested parties. By creating a statutory refugee framework that sets out a clear, transparent set of criteria asylum seekers will be better able to identify the circumstances that are required in order for them to engage Australia's protection obligations. This will enhance an asylum seeker's ability to make and establish their claims for protection in line with the criteria set out in the Migration Act.[82]

3.52 In relation to some of the specifics of the definition of 'refugee' objected to by submitters, the department explained that:

- 'the internal relocation principle no longer encompasses a 'reasonableness' test which assesses whether it is reasonable for a person to relocate to another area of the receiving country' because 'Australian case law has broadened the scope of the 'reasonableness' test to take into account the practical realities of relocation such as diminishment in quality of life or potential hardship';[83]
- '[t]he breadth of [the current approach to social groups other than family] has led to long lists of increasingly elaborate potential particular social groups being drawn for the purposes of protection visa applications thereby making implementation of the term complex and difficult for decision makers to apply';[84]and
- in relation to requiring people to modify their behaviour, '[i]t is the Government's position that the purpose of the Refugees Convention does not extend to protecting conduct that might give rise to a false imputation of an opinion, belief, membership or origin unless either that conduct is an expression of a Convention related characteristic or it would not be reasonable for the person to modify their behaviour in the circumstances'.[85]

Schedule 6: Newborn babies

3.53 Schedule 6 would—if passed—amend the *Migration Act* to seek to ensure that unlawful non-citizen children have the same status and are subject to the same removal power as their parents.

82 Department of Immigration and Border Protection, *Submission 171*, p. 17.

83 Department of Immigration and Border Protection, *Submission 171*, p. 20.

84 Department of Immigration and Border Protection, *Submission 171*, p. 21.

85 Department of Immigration and Border Protection, *Submission 171*, p. 23.

3.54 A number of submitters referred to the high-profile case of Ferouz.[86] As explained by the Law Council of Australia:

> Ferouz's parents are stateless (Rohingyas from Myanmar) and were sent to Nauru, contrary to medical advice after a doctor examined his mother on Christmas Island and alerted the Department to her high risk pregnancy. Ferouz's mother was flown to the Australian mainland shortly after arriving in Nauru, and Ferouz was born in Brisbane. As such, he has an Australian birth certificate and has spent every day of his life in Australia.[87]

3.55 Maurice Blackburn, a law firm that currently 'acts for around 100 babies who were born in Australia to parents who are [unauthorised maritime arrivals] and/or transitory persons' and who 'are currently held in detention on Christmas Island and on the Australian mainland',[88] explained that, if Schedule 6 is passed:

> (a) All 100 babies would be retrospectively deemed to be [unauthorised maritime arrivals], because their parents entered Australia by sea.
>
> (b) All 100 babies would therefore retrospectively lose their right to apply for a permanent Protection Visa.
>
> (c) All 100 babies "must" be taken to Nauru or Manus "as soon as reasonably practicable". Some may qualify for SHEVs or/TPVs under other amendments proposed in the Bill, but only if the Minister allows the babies and their parents to apply for protection here in Australia.
>
> (d) At least 16 of these 100 babies would be retrospectively deemed to be transitory persons, because their parents have previously been detained on Nauru and/or Manus.
>
> (e) At least these 16 babies would not be eligible for TPVs/SHEVs under other amendments proposed the Bill, as their parents have been brought to the mainland from Nauru or Manus, and the Minister has said that he will not be allowing these babies and their families to apply for protection in Australia. If the amendments are passed, there is no way that these babies and their families could remain in Australia.
>
> (f) Around 31 of these 100 babies, who "must" be taken to Nauru or Manus, are eligible to apply for Australian citizenship…These babies "must" be taken to Nauru or Manus, unless they are granted Australian citizenship. Even if they are granted Australian citizenship, their families "must" be taken to Nauru or Manus as a result of the Ferouz amendments.[89]

3.56 Submitters expressed concern about the general policy stance taken by Schedule 6. In particular, they expressed views that:

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86 Law Council of Australia, *Submission 129*, pp. 42-44; Australian Human Rights Commission, *Submission 163*, p 48; Maurice Blackburn, *Submission 43*.

87 Law Council of Australia, *Submission 129*, p. 42.

88 Maurice Blackburn, *Submission 43*, p. 4.

89 Maurice Blackburn, *Submission 43*, p. 4.

- babies born in Australia should not be taken to regional processing centres that are not equipped to deal with them. Doing so is not in their best interests and 'has significant impacts on the full physical emotional and cognitive development of children and young people, extending long into their post detention futures';[90]
- Schedule 6 'creates other risks of family separation by deeming a baby born in Australia to be an 'unauthorised maritime arrival' if only one parent is an 'unauthorised maritime arrival'';[91] and
- Schedule 6 penalises children for the decisions made by their parents.[92]

3.57 Concerns were also expressed about the fact that these provisions apply retrospectively to children who have already been born.[93]

3.58 The department explained in its submission that '[i]t has long been the case in Australian immigration law that newborn children are given the same visa status as their parents at birth'.[94] Furthermore:

> In terms of both preventing asylum seeker families from applying for permanent visas and making them subject to offshore processing, it is important to maintain consistency of migration status within the family unit, where this is possible. Nomenclature is less important than the need for children to have a migration status that is consistent with that of their parents, where this is possible.
>
> It has also been argued that, as newborn children did not make the decision to travel to Australia illegally, they should not be "punished" for this, and that classifying them as UMAs is not a deterrent to their arrival. These measures are not intended to punish or deter newborn children. Rather, they assist in maintaining family unity and in implementing a number of the Government's migration policies.[95]

3.59 The committee also expressed some concern about the retrospective application of these provisions. The department responded to these concerns in explaining why the provisions are necessary:

> The rationale for giving these measures retrospective application is to clarify the government's existing position and the intention of the legislation, which is that children of unauthorised maritime arrivals (UMAs), born in Australia, are already included within the existing definition of UMA in the Migration Act.

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90 Australian Red Cross, *Submission 164*, p. 18; Human Rights Law Centre, *Submission 166*, p. 7; Maurice Blackburn, *Submission 43*, p. 4.

91 Australian Human Rights Commission, *Submission 163*, pp. 48, 50.

92 Australian Red Cross, *Submission 164*, p. 18.

93 Law Council of Australia, *Submission 129*, p. 39.

94 Department of Immigration and Border Protection, *Submission 171*, p. 24.

95 Department of Immigration and Border Protection, *Submission 171*, p. 25.

Although the amendments operate retrospectively, they do so to explicitly capture those persons the legislation is already intended to capture.

Upon commencement of the amendments, it will be clear that children born in Australia or in a Regional Processing Country (RPC) to at least one UMA parent are UMAs and have always been UMAs. It will remain the case, however, that if a child born in Australia has an Australian citizen or permanent resident parent the child will be an Australian citizen by birth.

It is also necessary to ensure that all UMAs, regardless of the date of their arrival, have a migration status consistent with their children, as far as possible. This will mean that, if a UMA is to be removed from Australia, the UMA's removal will not be frustrated because a non-UMA child family member makes a valid application for a visa, solely for the purpose of frustrating this removal. Delivering consistency of migration status between a parent and a new born child is a long standing approach taken in many circumstances within the Migration legislation.

Any prior visa application made by children affected by these amendments will be taken to have been made invalidly, where the Minister did not expressly allow it. Ensuring that such applications will be taken to have been made invalidly upon the commencement of the amendments will also remove the incentive for applications to be lodged on behalf of the Australian-born children of UMAs prior to the commencement of the amendments.

If children of UMAs are able to make a valid application for a permanent protection visa, it renders ineffective the application bars in the Migration Act, central to achieving a variety of desired policy outcomes including regional processing. This will likely lead to a difference in treatment within the family unit if the application bar, preventing the relevant UMA parents from applying for a permanent protection visa, is not lifted. Alternatively, if the application bar is lifted to allow all other members within that family unit to apply for a permanent protection visa, the Government's policy position on UMAs would be contradicted to the detriment of current, successful, anti-people smuggling strategies.

Similarly, the retrospective application of the measures also clarifies that children of UMAs arriving on or after 13 August 2012 are subject to transfer to a RPC. This means the Government will not have to consider the risk of separating a newborn baby from their UMA parents who are subject to transfer, or alternatively the consequences of keeping the family unit together in Australia contrary to the Government's policy position that such UMAs will not be processed or resettled in Australia. The deterrent effect of that policy would be reduced if UMAs who have children in Australia were not able to be transferred for offshore processing.

The retrospective effect of the amendments will not however affect applications in respect of which the Minister has previously intervened to allow a valid application to be made. Accordingly, on-hand applications

> that the Minister has already allowed to proceed can continue to be assessed.[96]

Potential for statelessness

3.60 At present, a stateless child born in Australia is eligible for Australian citizenship.[97] The Explanatory Memorandum notes that it is not the government's intention to alter a child's eligibility for Australian citizenship.[98] Submitters expressed concern, however, that the obligation to take such a child to a regional processing country 'as soon as reasonably practicable' could infringe on the child's ability to apply for Australian citizenship.[99] Maurice Blackburn, referring to the Ferouz case, submitted that:

> In addition to applying for a Protection Visa, Ferouz has applied for Australian citizenship. His application was made pursuant to section 21(8) of the *Australian Citizenship Act 2007 (Cth)*, which states that a person is eligible to apply for Australian citizenship if they are:
>
> > (a) born in Australia; and
> >
> > (b) are stateless, meaning they are not eligible for citizenship in another country.
>
> …
>
> Ferouz satisfies the criteria set out…above. He was born in Australia and he is stateless. This is because, as members of the Rohingyan ethnic minority, the government of Myanmar denies their right to citizenship of that country. Little wonder the United Nations regards the Rohingyan people as one of the most persecuted minorities in the world. In total, Maurice Blackburn acts for around 31 Rohingyan babies who are similarly eligible to apply for Australian citizenship.
>
> Ferouz submitted his citizenship application in December 2013. Ten months later, and despite several requests for action, the Department has still not advised the outcome. This is well outside the Department's normal service standards.
>
> Despite being born in Brisbane, and being eligible to apply for Australian citizenship, Schedule 6 to the Bill – if passed – places Ferouz at risk of transfer to Nauru unless he is granted citizenship.
>
> Even if Ferouz is granted Australian citizenship, his family "must" be taken to Nauru or Manus as a result of the Ferouz amendments.[100]

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96 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, pp 6-7.

97 *Australian Citizenship Act 2007*, subsection 21(8).

98 Explanatory Memorandum, p. 31.

99 Australian Human Rights Commission, *Submission 163*, p. 52.

100 Maurice Blackburn, *Submission 43*, pp. 5-6.

3.61 More generally, submitters also expressed concern that newborn children could be removed from Australia before their birth can be registered.[101] They explained that '[b]irth registration is an important tool for the prevention of statelessness because it establishes a legal record of where a child was born and who his or her parents are'.[102] Removing children born in Australia before their birth can be registered could mean that they are at risk of statelessness.

3.62 In its submission, the department offered some clarification of the rights granted to stateless persons to apply for citizenship, and of the benefits of extending the definition of 'transitory person':

> As with other children born overseas, if the child of a UMA is born in an RPC to an Australian citizen or permanent resident, that child will be eligible to apply for Australian citizenship by descent. As with other stateless children born in Australia, stateless UMAs born in Australia are entitled to apply for, Australian citizenship. For children born in Australia, an application for citizenship based on statelessness made on behalf of the child, being a UMA, will be assessed in the same way as all such applications.
>
> The amendments will extend the definition of 'transitory person' to:
>
> - children born to UMAs in an RPC; and
> - children born in Australia to UMAs who have been transferred to Australia from an RPC.
>
> Such children need to be included in the definition of 'transitory person' to enable them to be brought to Australia for a temporary purpose, such as to undergo specialist medical treatment or to accompany a parent brought to Australia for a similar purpose.[103]

Unlawful non-citizens born to air arrivals

3.63 Furthermore, the Australian Human Rights Commission argued that Schedule 6 'would not address the anomaly that babies born in Australia to unlawful non-citizens who arrived in Australia by air would be liable to be detained and then taken to a regional processing country'.[104] This anomaly was explained as follows in the Commission's submission to this committee's inquiry into the Migration Amendment (Protecting Babies Born in Australia) Bill 2014:

> This result [that a non-citizen child born in Australia is deemed to be an unauthorised maritime arrival] seems to apply regardless of how the baby's parents came to be in Australia. For example, it appears that if a woman arrives in Australia by air, overstays her visa and gives birth to a child who

101 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 24-25.

102 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 24.

103 Department of Immigration and Border Protection, *Submission 171*, p. 26.

104 Australian Human Rights Commission, *Submission 163*, pp. 48, 49-50.

> is not a citizen of Australia, then the child will be deemed to have 'entered Australia by sea' and be liable to be detained and then taken to a regional processing country.[105]

3.64 The committee also raised concerns regarding the status of a child born in Australia where one parent has arrived by boat and the other parent is an Australian citizen. The department clarified that 'as with other children born in Australia, if the child of a UMA is born in Australia to an Australian citizen or permanent resident, that child will be an Australian citizen at birth'.[106] The department noted that this specific provision 'is contained within Section 12 of the *Australian Citizenship Act 2007*, which is unaffected by the Bill':

> One of three conditions under new subsection 5AA(1A) provides that "the person [the child] is not an Australian citizen at the time of birth", ensuring that this is of paramount importance in consideration of the status of the child. This is further clarified in a note under that new subsection (note 4), which directly references section 12 of the Australian Citizenship Act 2007. That section, in turn provides that when a person is an Australian Citizen at the time of their birth they are unaffected by this Bill.[107]

3.65 The department also advised the committee as why the Bill refers to 'one parent', as opposed to 'parents':

> There are a number of scenarios in which a child may be born to a parent who is a UMA. The intended objectives of these amendments would not be achieved if they were limited to the children of two UMA parents. For example, if a pregnant UMA arrived in Australia and the father of the child did not travel to Australia, the child born in Australia would not be a UMA if the definition was limited to children with two UMA parents.[108]

Schedule 7: Caseload management

3.66 As noted in the previous chapter, Schedule 7 seeks to:

- remove the 90-day period within which decisions on protection visa applications must be made by the Minister and the Refugee Review Tribunal;[109]
- empower the Minister to impose suspensions and caps on visa processing (including protection visa processing) by non-disallowable legislative instrument;[110] and

105 Australian Human Rights Commission, *Submission 163*, p. 47.

106 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 2.

107 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 2.

108 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 3.

109 The Bill, Schedule 7, Items 4 & 14.

- remove provisions that require the Minister to report specified information about applications for protection visas and decisions made concerning such applications to Parliament on a regular basis.[111]

3.67 Submitters argued against the removal of the 90-day limit and reporting requirements, pointing to the fact that the Howard government introduced them on the basis that they would

> …enable protection visa application processing to be more rigorously overseen at all stages of decision making to identify and minimise the impacts of any factors which could delay finalisation of applications.[112]

3.68 The department submitted that the 90-day period

> …is an unnecessary regulatory burden that, while it may provide transparency at one level, duplicates standard protection reporting which is publically available on the departmental website and provides clear and easily accessible information and advice on all aspects of protection visa processing.[113]

3.69 In relation to the suspension of processing and the capping of the number of protection visas that can be issued, submitters expressed concern that such measures 'may lead to prolonged detention as those who fall outside of the cap [or whose applications are not processed] will have to wait, either for Ministerial discretion to waive the waiting period, or for the cap to be lifted in the next calendar year'.[114] It was noted that 'previous governmental decisions freezing granting of protection visas has resulted in noticeable increases in self-harming behaviour and other mental and physical harm to those affected'.[115]

3.70 The department explained that these measures will assist with the appropriate management of the onshore component of the protection visa programme and will 'help to ensure that only the planned number of visas is granted in a given year and that there is not a budget overspend for the department or a range of other agencies with programmes and services associated with the Humanitarian programme'.[116]

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110 The Bill, Schedule 7, Items 5-10.

111 The Bill, Schedule 7, Items 13 & 15.

112 Refugee and Immigration Legal Centre, *Submission 165*, p. 21, quoting Explanatory Memorandum, Migration and Ombudsman Legislation Amendment Bill 2005, para. 35.

113 Department of Immigration and Border Protection, *Submission 171*, p. 28.

114 Australian Red Cross, *Submission 164*, p. 19; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, *Submission 167*, pp. 26.

115 Refugee and Immigration Legal Centre, *Submission 165*, p. 21.

116 Department of Immigration and Border Protection, *Submission 171*, p. 28.

Committee comment

3.71 The committee is grateful for the large number of thoughtful and detailed submissions that it received. It has considered the concerns that have been raised. The committee has also considered, however, the fact that the government has a clear mandate to give full effect to its border protection policies. So far, those policies have enjoyed a good measure of success in stopping the boats. One thing that they have been unable to achieve, however, is to clear the backlog of protection visa applications that have been made by the unauthorised maritime arrivals that arrived during the previous government's time in office. The department has estimated that it would take seven years to process these applications.[117] The government believes that legislative change is required to clear that backlog and the committee agrees. It is for that reason that the committee recommends that the Bill be passed.

3.72 The committee believes that there are, however, ways in which the Bill could be improved.

3.73 In relation to the provisions of Schedule 6 that would provide that the Australian-born children of unauthorised maritime arrivals are themselves unauthorised maritime arrivals, the committee has noted concerns about the unintended consequences that could result if the births of such children are not registered before they are removed from Australia. In the interests of ensuring that such children are not rendered stateless because they cannot prove where they were born and who their parents are, the committee recommends that—as a matter of administrative practice at least—the Department ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.

Recommendation 1

3.74 In relation to the amendments contained in Schedule 6, the committee recommends that the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.

3.75 The committee is cognisant of the fact that the Bill contains a number of extraordinary provisions that the government believes are necessary to deal with the asylum legacy caseload. Because of the extensive powers granted by these provisions, the committee considers that it would be appropriate for the measures contained within the Bill to be reviewed by the Government after they have been in operation for three years so that the Parliament can satisfy itself that they are operating as intended.

Recommendation 2

3.76 The committee recommends that, if the Bill is enacted, the Government should review its operation three years after it passes into law.

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117 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 4.

Recommendation 3

3.77 The committee recommends that, subject to the above recommendations, the Bill be passed.

Senator the Hon Ian Macdonald

Chair