The Senate

Legal and Constitutional Affairs Legislation Committee

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]

November 2014

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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.

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.

Recommendation 3

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

Chapter 1
Introduction

The referral

1.1 On 25 September 2014, the Minister for Immigration and Border Protection introduced the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) into the House of Representatives.[1] On the same day and on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) 'for inquiry and report by 27 November 2014'.[2]

The 'asylum legacy caseload'

1.2 As the Bills Digest explains, the 'asylum legacy caseload' refers to 'asylum seekers who arrived unauthorised by boat between August 2012 and December 2013 and who have not been transferred to offshore processing centres on Nauru or Manus Island in Papua New Guinea'.[3] The Bills Digest recalls that:

> In response to a significant rise in the number of unauthorised boat arrivals in 2012, an Expert Panel on Asylum Seekers was tasked by the Gillard Government to report back on policy options available 'to prevent asylum seekers risking their lives on dangerous boat journeys to Australia'. After the Panel's report was released in August 2012, the then Government announced that some, but not all, of a suite of recommendations made by the Panel would be implemented, including the reinstatement of offshore processing for selected asylum seekers and the introduction of a 'no advantage' principle which would apply to all asylum seekers who had arrived by boat. What the 'no advantage' principle meant in practice was only ever explained in very general terms as a means to ensure that 'irregular migrants gain no benefit by choosing to circumvent regular migration mechanisms'.
>
> As more boats continued to arrive and the number of 'no advantage' asylum seekers waiting for their claims to be processed began to rise, pressure on the capacities of the onshore detention network and offshore processing centres to absorb the new arrivals increased. On 21 November 2012, the then Minister for Immigration and Citizenship, Chris Bowen, stated that 'given the number of people who had arrived by boat since 13 August 2012, it would not be possible to transfer them all to Nauru or Manus Island in the immediate future'. Instead, under the 'no advantage' principle, many would be released from detention into the community on bridging visas without work rights (BVEs) while they waited an outcome on their asylum claims.

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1 House of Representatives, *Votes and Proceedings*, No. 69—25 September 2014, P. 856.

2 *Journals of the Senate*, No. 56—25 September 2014, pp. 1506-1507.

3 Bills Digest, p. 3.

> Those found to be refugees would not be issued with permanent protection visas 'until such time that they would have been resettled in Australia after being processed in our region'.[4]

1.3 The 'asylum legacy caseload', therefore, consists of those asylum seekers who arrived by boat *after* the then-Government adopted the 'no advantage' principle in August 2012 but *before* December 2013, since which time all asylum seekers who have arrived by boat have been 'turned back' or sent to offshore processing under Operation Sovereign Borders.[5] The government estimates that there are currently 30,000 people in the 'asylum legacy caseload', most of whom are not in detention.[6]

Overview of the Bill

1.4 The Explanatory Memorandum explains that the Bill 'fundamentally changes Australia's approach to managing asylum seekers', and summarises those fundamental changes as including:

- reinforcing the Government's powers and support for our officers conducting maritime operations to stop people smuggling ventures at sea, clarifying and strengthening Australia's maritime enforcement framework to provide greater clarity to the ongoing conduct of border security and maritime enforcement operations;
- introducing temporary protection for those who engage Australia's *non-refoulement* obligations and who arrived in Australia illegally;
- introducing more rapid processing and streamlined review arrangements, creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently;
- deterring the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia;
- supporting a more timely removal from Australia of those who do not engage Australia's protection obligations; and
- codifying in the Migration Act Australia's interpretation of its protection obligations under the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (the Refugees Convention).[7]

4 Bills Digest, p. 3. References omitted.

5 Bills Digest, p. 3.

6 Bills Digest, p. 4; Mr Morrison, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10546.

7 Explanatory Memorandum, p. 2.

1.5 In his second reading speech, the Minister for Immigration and Border Protection explained that:

> These measures are a necessary extension and consolidation of the government's successful border protection policies and are part of a broad package of measures which will tackle the management of the backlog of illegal maritime arrivals…and bring important enhancements to the integrity of Australia's protection regime.
>
> The government is committed to Australia's national security and economic prosperity in its efforts to combat the illegal and dangerous practice of people-smuggling. These changes will further strengthen the government's ability to manage illegal arrivals and strengthen public confidence in Australia's protection and migration programs.[8]

1.6 The Bill would—if passed—amend:

- the *Administrative Decisions (Judicial Review Act) 1977*;
- the *Immigration (Guardianship of Children) Act 1946*;
- the *Maritime Powers Act 2013*;
- the *Migration Act 1958*; and
- the Migration Regulations 1994.

1.7 Each of the elements to the Bill will be explored in the next chapter.

1.8 The Explanatory Memorandum describes the financial impact of the Bill as 'medium'.[9] It further notes that '[a]ny costs will be met from within existing resources of the Department of Immigration and Border Protection'.[10]

Other parliamentary inquiries

1.9 The Senate Standing Committee for the Scrutiny of Bills examined the Bill in *Alert Digest No. 14 of 2014*. It noted 27 concerns that fall within its terms of reference.[11]

1.10 The Parliamentary Joint Committee on Human Rights examined the Bill in its *Fourteenth Report of the 44th Parliament*. It considered that two elements of the Bill are not compatible with human rights and raised concerns about eleven other elements.[12]

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8 Mr Morrison, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, pp. 10545-10546.

9 Explanatory Memorandum, p. 13.

10 Explanatory Memorandum, p. 13.

11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 14 of 2014*, 29 October 2014, pp. 20-47.

12 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, October 2014, pp. 70-92.

Conduct of the inquiry

1.11 The committee advertised the inquiry on its website (www.aph.gov.au/senate_legcon) and wrote to a number of stakeholders inviting submissions. The committee set a deadline for submissions of 31 October 2014.

1.12 The committee received more than 5,500 submissions. Due to the volume of submissions, the committee decided not to publish certain campaign letters. The remaining submissions were published on the committee's website. A list of published submissions is at Appendix 1.

1.13 A public hearing was held on 14 November 2014. A list of witnesses who appeared is at Appendix 2. The *Hansard* transcript of the committee's hearing can be accessed on the committee's website.

Acknowledgment

1.14 The committee acknowledges those who participated in the inquiry and thanks them for their assistance. The committee is particularly grateful to witnesses who appeared at the public hearing at relatively short notice.

Note on references

1.15 References in the report to the committee *Hansard* are to the proof committee *Hansard*. Page numbers between the proof committee *Hansard* and the official *Hansard* may differ.

Structure of the report

1.16 This report has been divided into three chapters. Chapter 2 summarises the key changes brought about by the Act and Chapter 3 canvasses the submissions received and contains the committee's recommendations.

Chapter 2

Key provisions of the Bill

2.1 This Chapter sets out—in summary form—the key amendments sought to be brought about by the Bill.

Schedule 1: Maritime powers

2.2 Schedule 1 would—if passed—amend the *Maritime Powers Act* to: (a) broaden maritime enforcement powers; and (b) limit the review and challenge of the exercise of such powers.

2.3 First, Schedule 1 would broaden the maritime powers used to intercept and return vessels carrying asylum seekers by:

- allowing authorities to take a detained vessel and the people on it to any place in the world[1] and to provide that:
  - the destination does not need to be another country;
  - the destination may be 'just outside a country' and may be a vessel;
  - the destination can change repeatedly during the period of detention;
  - it is irrelevant 'whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it)'; and
  - 'the international obligations or domestic law of any other country' are also irrelevant;[2]
- extending the period of time for which a vessel and the people on it may be detained;[3]
- extending the powers that authorities have to detain, restrain or move people on detained vessels;[4]
- allowing the Minister to expand the scope of the *Maritime Powers Act* by extending the powers that may be exercised over foreign vessels on the high seas by way of determination that is exempt from publication and that is not reviewable under the *Administrative Decisions (Judicial Review) Act*;[5]

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1 The Bill, Schedule 1, Items 11 & 15.

2 The Bill, Schedule 1, Item 19 (proposed section 75C).

3 The Bill, Schedule 1, Items 12 & 18.

4 The Bill, Schedule 1, Items 15 & 17.

5 The Bill, Schedule 1, Items 19 (proposed section 75D) & 31.

- allowing the Minister to give written directions relating to the exercise of certain maritime powers, including directions that require powers to be exercised in specified circumstances in a specified way. Such directions would likewise be exempt from publication and not reviewable under the *Administrative Decisions (Judicial Review) Act*;[6] and
- providing that certain other maritime laws, including those aimed at promoting the safety of life at sea, do not apply to vessels detained under the *Maritime Powers Act* or to specified vessels that are being used under the *Maritime Powers Act* to detain people.[7]

2.4 Secondly, Schedule 1 would limit the extent to which actions under the *Maritime Powers Act* could be reviewed and challenged, including by preventing the use of maritime powers in certain circumstances from being invalidated on the grounds that they violate international law, the domestic law of another country or the rules of natural justice.[8]

2.5 Schedule 1 would also:

- amend the *Immigration (Guardianship of Children) Act* to provide that the Minister does not have guardianship obligations to children when they are taken to a place outside Australia under the *Maritime Powers Act*, and to provide that the Minister's obligations as the guardian of certain non-citizen children do not limit the Minister's exercise of powers under the *Maritime Powers Act*;[9]
- amend the *Migration Act* to provide that persons on vessels that are taken to another country under the *Maritime Powers Act* may not make valid visa applications or institute legal proceedings against the Commonwealth;[10] and
- amend the *Migration Act* to classify persons brought to Australia as a result of the exercise of maritime powers as 'unauthorised maritime arrivals', thereby rendering them subject to offshore processing and preventing them from making a valid visa application in Australia or from instituting legal proceedings against the Commonwealth.[11]

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6 The Bill, Schedule 1, Items 19 (proposed section 75F) & 31.

7 The Bill, Schedule 1, Item 19 (proposed section 75H).

8 The Bill, Schedule 1, Items 6 (proposed sections 22A & 22B) & 19 (proposed sections 75A & 75B).

9 The Bill, Schedule 1, Items 32-35.

10 The Bill, Schedule 1, Item 36.

11 The Bill, Schedule 1, Item 37.

2.6 In his second reading speech, the Minister explained these changes as follows:

> The amendments to the Maritime Powers Act strengthen Australia's maritime enforcement framework and the ongoing conduct of border security and maritime enforcement operations. Enforced turn backs are a critical component of the governments [sic] suite of border protection measures that have been so successful to date in stopping the boats. These measures affirm and strengthen the government's ability to continue the success of our maritime operations. This will help ensure that the tap stays off, that it will never return and that we will never go back to the cost, chaos and tragedy that was present under the previous government and was created under the arrangements put in place by that government.
>
> The amendments in schedule 1 of this bill reinforce the government's powers and support for our officers conducting maritime operations to stop people-smuggling ventures at sea. They provide additional clarity and consistency in the powers to detain and move vessels and persons. They further clarify the relationship between the Maritime Powers Act and other laws and clearly state that ministers can give directions in respect of the exercise of maritime powers. Finally, as was parliament's original intent, the amendments support our Navy and Customs personnel to continue to do their difficult jobs efficiently, effectively and safely on the water.[12]

Schedules 2 & 3: Visas

2.7 Schedule 2 would—if passed—amend the *Migration Act* and the Migration Regulations to make provision for the reintroduction of temporary protection visas, including by:

- providing for three classes of protection visa, namely permanent protection visas, temporary protection visas and safe haven enterprise visas;[13]
- amending the criteria for permanent protection visas so that they will no longer be available to, *inter alia*, unauthorised maritime arrivals, people who did not hold a visa on their last entry into Australia and people who have ever held another specified humanitarian visa;[14]
- establishing temporary protection visas, which will last for up to three years[15] and the criteria for which will include that:
  - temporary protection visas will only be available to people in Australia who have previously held a temporary protection visa or who are unable to apply for a permanent protection visa because they are an unauthorised maritime arrival, did not hold a visa on

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

13 The Bill, Schedule 2, Items 5 & 16.

14 The Bill, Schedule 2, Item 29.

15 The Bill, Schedule 2, Item 31.

their last entry into Australia or have previously held another specified humanitarian visa;[16]

- the holder of a temporary protection visa will not be entitled to be granted any visa other than specified temporary visas;[17]

- allowing for the establishment of safe haven enterprise visas (but not actually establishing them or detailing their key features);[18] and
- establishing a mechanism whereby persons who have already validly applied for a permanent protection visa will be deemed to have applied for a temporary protection visa.[19]

2.8 Schedule 3 would—if passed—amend the *Migration Act* and the Migration Regulations to provide that:

- although the regulations may prescribe criteria for a specified class of visa, there is no requirement for them to do so;[20] and
- if the regulations do not prescribe criteria for a specified class of visa, a valid application for that class of visa cannot be made.[21]

2.9 Because the Bill does not specify criteria for the safe haven enterprise visa, the effect of Schedule 3 is that no valid application for such a visa would be able to be made until the criteria for this class of visa are inserted into the Migration Regulations.

2.10 In his second reading speech, the Minister explained these changes as follows:

> It has been a clear policy of this government to ensure that those who flagrantly disregard our laws and arrive illegally in Australia are not rewarded with a permanent protection visa. The reintroduction of temporary protection visas…in schedule 2 of this bill is fundamental to the government's key objectives to process the current backlog of [illegal maritime arrival] protection claims. The government is not resiling from providing protection but, rather, is providing temporary protection to those [illegal maritime arrivals] who are found to engage Australia's protection obligations. [Temporary protection visas] will be granted for a maximum of three years and will provide access to Medicare, social security benefits and work rights, as occurred under the Howard government. [Temporary protection visas] will provide refugees with stability and a chance to get on with their lives while at the same time guaranteeing that people smugglers

16 The Bill, Schedule 2, Item 30.

17 The Bill, Schedule 2, Item 31.

18 The Bill, Schedule 2, Item 16.

19 The Bill, Schedule 2, Items 20 & 38.

20 The Bill, Schedule 3, Item 1.

21 The Bill, Schedule 3, Item 7.

do not have a 'permanent protection visa product' to sell to those who are thinking of travelling illegally to Australia.[22]

Schedule 4: Fast track assessments

2.11 Schedule 4 would—if passed—amend the *Migration Act* to create a new 'fast track review process' for reviewing refused applications for protection visas. The proposed régime has the following key features:

- *fast track applicants* would be unauthorised maritime arrivals who: (a) entered Australia on or after 13 August 2012; (b) have been given written permission by the Minister to apply for a protection visa; and (c) have made a valid application for a protection visa. The Minister would be able to specify further classes of 'fast track applicant' by non-disallowable legislative instrument;[23]
- a *fast track decision* would be a decision to refuse an application for a protection visa made by a fast track applicant except on security and character grounds.[24] Fast track decisions would not be reviewable by the Migration Review Tribunal or the Refugee Review Tribunal;[25]
- *excluded fast track review applicants* would be fast track applicants who, in the opinion of the Minister:
  - make 'a manifestly unfounded claim for protection';[26]
  - present a 'bogus document' in support of their application without reasonable explanation;[27]
  - is considered to have effective protection in a country other than Australia; and
  - fall into such classes of person as are specified by the Minister by non-disallowable legislative instrument;[28]

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

23 The Bill, Schedule 4, Item 1; *Legislative Instruments Act 2003*, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.

24 The Bill, Schedule 4, Item 1

25 The Bill, Schedule 4, Items 16 & 17.

26 The phrase 'manifestly unfounded claim' is not defined.

27 Section 97 provides the following definition of 'bogus document' which only applies to Subdivision C of Division 3 of Part 2 of the *Migration Act* and, therefore, does not apply to the definition of 'excluded fast track review applicant':

> "***bogus document***", in relation to a person, means a document that the Minister reasonably suspects is a document that:
>
> (a) purports to have been, but was not, issued in respect of the person; or
>
> (b) is counterfeit or has been altered by a person who does not have authority to do so; or
>
> (c) was obtained because of a false or misleading statement, whether or not made knowingly.

- if an excluded fast track review applicant was refused a protection visa, they would not have access to any form of merits review;
- the fast track review process would apply to fast track decisions to refuse a protection visa to a fast track applicant (except for excluded fast track review applicants).[29] Such decisions would not be able to be reviewed by the Migration Review Tribunal or the Refugee Review Tribunal. Furthermore, the Minister would be empowered to issue a conclusive certificate—which would exclude all forms of review—on the grounds that that it would be contrary to the national interest for the decision to be changed, or for the decision to be reviewed;[30]
- the fast track review process would be conducted by the Immigration Assessment Authority, which would be established within the Refugee Review Tribunal and which would be mandated 'to pursue the objective of providing a mechanism of limited review that is efficient and quick';[31] and
- the fact track review process would have the following key features:
  - aside from the matters specifically provided for in the legislative scheme, the review would not be subject to the rules of natural justice;[32]
  - reviews would be conducted 'on the papers' by the Authority considering the material provided to it by the Secretary of the Department of Immigration.[33] Except in 'exceptional circumstances', the Authority would not be able to accept or request further information, nor would it be able to interview the applicant;[34]
  - the Authority would be able to affirm the decision to refuse the application, or to remit it for reconsideration, but would not be able to vary the decision or set it aside and substitute a new decision;[35] and

28 The Bill, Schedule 4, Items 1 & 2; *Legislative Instruments Act 2003*, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.

29 The Bill, Schedule 4, Item 21 (proposed section 473CA).

30 The Bill, Schedule 4, Item 21 (proposed section 473BD).

31 The Bill, Schedule 4, Item 21 (proposed section 473FA).

32 The Bill, Schedule 4, Item 21 (proposed section 473DA).

33 The Bill, Schedule 4, Item 21 (proposed section 473DB).

34 The Bill, Schedule 4, Item 21 (proposed sections 473DB-DD).

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

- decisions that have been or might be subject to fast track review are excluded from the jurisdiction of the Federal Circuit Court.[36]

2.12 The Minister explained these amendments as follows in his second reading speech:

> The government is of the view that a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia's protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government's capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system. A new approach is warranted in the Australian context. The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority…These measures are specifically aimed at addressing the backlog of [illegal maritime arrivals]—some 30,000—and will ensure their cases progress towards timely immigration outcomes, either positive or negative.
>
> …
>
> This new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the department. This behaviour has on numerous occasions led to considerable delay while new claims are explored.
>
> These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.
>
> Effective tools must be available to ensure that those who do not engage our protection obligations can be removed from Australia. Prompt removal of failed asylum seekers from Australia supports the integrity of our protection program and reduces the likelihood of applicants frustrating and delaying removal plans.[37]

Schedule 5: Australia's obligations under international law

2.13 'Non-refoulement' is a principle of public international law that prohibits States from returning people to territories where they would face persecution, torture or other serious human rights violations. The obligation is contained in numerous human rights treaties, including the Refugees Convention, the International Covenant

36 The Bill, Schedule 4, Item 22.

37 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, pp. 10547, 10548.

on Civil and Political Rights and the Convention against Torture. It is also a principle of customary international law.[38]

2.14 Schedule 5 would—if passed—make two key amendments to the *Migration Act*. First, it would explicitly provide that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens under section 198.[39] As the Minister explained in his second reading speech:

> This change is in response to a series of court decisions which have found that the Migration Act as a whole is designed to address Australia's non-refoulement obligations, which has had the effect of limiting the availability of the removal powers. Asylum seekers will not be removed in breach of any non-refoulement obligations identified in any earlier processes. The government is not seeking to avoid these obligations and will not avoid these obligations, rather it seeks to be able to effect removals in a timely manner once the assessment of the applicant's protection claims has been concluded.[40]

2.15 Secondly, Schedule 5 would remove references to the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* from the *Migration Act* and replace them with references to a new statutory definition of 'refugee'.[41]

2.16 In his second reading speech, the Minister explained these amendments as follows:

> The new statutory framework will enable parliament to legislate its understanding of these obligations within certain sections of the Migration Act without referring directly to the refugees convention and therefore not being subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the refugees convention well beyond what was ever intended by this country or this parliament. This parliament should decide what our obligations are under these conventions—not those who seek to direct us otherwise from places outside this country. The new framework clearly sets out the criteria to be satisfied in order to meet the new statutory definition of a 'refugee' and the circumstances required for a person to be found to have a 'well-founded fear of persecution', including where they could take reasonable steps to modify their behaviour to avoid the persecution.
>
> Let me be clear, the government is not changing the risk threshold required for assessing whether a person has a well-founded fear of persecution.

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38 See Sir Elihu Lauterpacht QC & Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in E Feller, V Turk & F Nicholson (Eds), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press, 2003), pp. 87-177.

39 The Bill, Schedule 5, Item 2.

40 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, pp. 10548-10549.

41 The Bill, Schedule 5, Items 4-17.

> Under the new framework, refugee claims will continue to be assessed against the 'real chance' test, which has been the test adopted by successive governments, in line with the High Court's decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62.
>
> The bill also clarifies the interpretation of various protection related concepts such as:
>
> - the standard of effective state and non-state protection;
> - the test for assessing whether a person can relocate to another area of the receiving country; and
> - the definition of 'membership of a particular social group'.
>
> The new framework will also clarify those grounds which exclude a person from meeting the definition of a refugee or which, upon a person satisfying the definition of a refugee, render them ineligible for the grant of a protection visa.[42]

Schedule 6: Newborn babies

2.17 At present, a child born in Australia's migration zone who is not an Australian citizen (or an excluded maritime arrival) and who does not have a current visa is deemed to be an 'unauthorised maritime arrival', despite the fact that he or she did not arrive in Australia by boat and regardless of whether his or her parents arrived by boat.[43] He or she is unable to apply for a visa and must be taken 'as soon as reasonably practicable' to a regional processing country.

2.18 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. Non-citizen children of 'transitory persons' are to be transitory persons themselves; non-citizen children of 'unauthorised maritime arrivals' are to be likewise classified.

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42 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10549.

43 This is because:

(a) by section 10 of the *Migration Act*, a non-citizen child born in Australia is deemed to have entered Australia at the time of birth:

(b) by subsection 5AA(2), a person who enters Australia otherwise than by air is deemed to have 'entered Australia by sea';

(c) by section 14, a non-citizen in Australia without a valid visa is an 'unlawful non-citizen'; and

(d) by subsection 5AA(1), an unlawful non-citizen who entered Australia by sea is an 'unauthorised maritime arrival'.

This analysis is supported by the recent decision of the Federal Circuit Court of Australia in *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348.

2.19 These changes were explained as follows by the Minister in his second reading speech:

> The amendments contained in schedule 6 reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival'…in the Migration Act. This will ensure that, consistent with their parents, these children are subject to offshore processing and are unable to apply for a visa while they remain in Australia, unless I have personally intervened to allow a visa application.
>
> The government will also extend the definition of a [unauthorised maritime arrival] to the children of [illegal maritime arrivals] born in a regional processing country. This amendment supports the government's intention that [illegal maritime arrival] families in regional processing countries should be treated consistently and that children born to an [illegal maritime arrival] ought not be treated separately from their family in the protection assessment process.
>
> Amendments will also be made to the Migration Act to ensure provisions relating to 'transitory persons' operate consistently.[44]

Schedule 7: Caseload management

2.20 Schedule 7 would—if passed—amend the *Migration Act* to:

- remove the 90-day period within which decisions on protection visa applications must be made by the Minister and the Refugee Review Tribunal;[45]
- empower the Minister to impose suspensions and caps on visa processing (including protection visa processing) by non-disallowable legislative instrument;[46] and
- 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.[47]

2.21 The Minister explained in his second reading speech that:

> From time to time, successive governments have found it necessary to cap certain classes of either the migration or the humanitarian visa programs in order to ensure that government annual targets are not exceeded. This is a vital program management tool, particularly when exceeding targets may resolve [sic] in budget overspends. As a result of a recent High Court judgement regarding my use of the cap for the onshore component of the

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44 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10549.

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

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

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

humanitarian program, it has been necessary to make minor amendments to the Migration Act. The amendments in schedule 7 of the bill will put it beyond doubt that I may cap classes of the migration or humanitarian program when necessary.

Schedule 7 will also repeal the 90-day limit for deciding protection visa applications at both the primary and review stages of processing. The associated reporting requirements will also be repealed, as they consume time and resources without adding value to the overall government objectives.[48]

48 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 25 September 2014, p. 10550.

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

Dissenting Report of the Australian Labor Party

Introduction

1.1 Labor Senators have grave concerns about elements of this Bill and cannot support it in its current form.

1.2 In particular, Labor is concerned about:

(a) Schedule 1, which seeks to provide legal authority for the Government's policy of turning back asylum seeker boats on the high seas;

(b) The provisions in Schedule 2 which seek to reintroduce the failed Temporary Protection Visa;

(c) The Government's failure to honour its commitment to the Palmer United Party to create the Safe Haven Enterprise Visa, which was to provide a pathway to permanent residency;

(d) Schedule 4, which will deprive asylum seekers of the opportunity to have their applications for protection reviewed fairly;

(e) Schedule 5, which attempts to displace Australia's international obligations under the Refugee Convention and replace them with a codified version of the Government's preferred interpretation of those obligations; and

(f) The provisions in Schedule 7 which will abolish the requirement to decide protection visa applications within 90 days and to report on compliance with that requirement.

Amendments to Maritime Powers

1.3 The Government has argued that Schedule 1 of the Bill provides legal authority for its turn backs policy.

1.4 The Australian Labor Party maintains its longstanding concern about the secretive 'on water' operations carried out by the Government in relation to turning back asylum seeker vessels. The Government refuses to tell the Australian people precisely what is involved in turn backs. We have even witnessed the absurd situation on occasions where the Immigration Minister refuses to admit that a boat has been intercepted despite widespread reporting that this is the case.

1.5 Moreover, we maintain our concerns about the safety at sea of Australian Customs and Navy personnel involved in conducting these operations. In 2011 Admiral Ray Griggs stated before Senate Estimates that 'there are obviously risks involved in this process'. We are yet to hear an explanation from the Australian Government about what, if anything, has changed to now make these operations safe. The Australian Government should not lightly place our service personnel in harm's way.

1.6 The Australian Labor Party is also concerned that the Government's turn backs policy is harming Australia's vital relationship with Indonesia. We have seen turn backs result in incursions into Indonesian territorial waters on more than 6 occasions. The new Indonesian President, His Excellency Joko Widodo, has issued a stern warning to the Australian Prime Minister about his failure to respect Indonesian sovereignty.

1.7 That said, Schedule 1 is less about legislating for turn backs than it is about seeking to undermine a specific case before the High Court, namely *CPCF v Minister for Immigration and Border Protection* (CPCF case)). Schedule 1 seeks to address each of the points which have been raised in the CPCF Case.

1.8 Labor Senators believe that a pre-emptive strike on an existing High Court case is an inappropriate basis for legislative action. Indeed it is important that the High Court be allowed to do its job and apply the rule of law.

1.9 The High Court should be allowed to determine the legality of the Government's turn backs policy as implemented on the basis of existing law. If the turn backs policy is shown to be totally lawful that is important for public confidence in the Government and its actions. Equally if aspects of the turn backs policy are found to be unlawful it is important that this be a transparent part of the public record.

1.10 In the latter event the Government might then come to the Parliament and seek legislative remedial action in respect of those areas which might be found to be unlawful. The Parliament can then consider its position in light of this legal verdict.

1.11 However, the current scatter gun approach in Schedule 1, put before the Parliament on the assumption of a negative court ruling, but without the Parliament having the benefit of considering such a ruling, is deeply inappropriate.

1.12 Accordingly the Labor Senators oppose Schedule 1.

Temporary Protection Visa

1.13 Labor Senators oppose the provisions in Schedule 2 of the Bill which seek to reinstate the failed TPV. The Australian Labor Party has a well-established policy against TPVs.

1.14 Temporary Protection Visas suspend asylum seekers in a prolonged state of uncertainty that leads to fear, anxiety, financial hardship and an inability to move forward in building a new life in safety for themselves and their families in Australia and prevent them contributing to the community.

1.15 When the Parliament rejected Immigration Minister Scott Morrison's policy of bringing back Temporary Protection Visas in December of last year, Scott Morrison, in an act of petulance, stopped processing people. Labor believes the correct Government response should be to start processing people without delay and managing its detention facilities in a safe, humane and dignified manner.

1.16 Any claim that TPVs serve as a deterrent to people seeking to risk their life and come to Australia by sea is patently wrong. Australia was taken off the table with the Regional Resettlement Arrangement introduced by Labor in July of last year. This issue has absolutely nothing to do with any person that may seek to come here by

boat. It relates to people already in detention that arrived before 19 July last year. For that group of people, Labor believes we need to have a sensible policy that sees them processed, and if they are found to be genuine refugees then they should be allowed to settle in Australia. During the use of TPVs by the Howard Government more than 90 per cent of refugees initially granted TPVs under the Howard Government were eventually granted permanent protection because their situation in their country of origin had not changed. This underscores that the vast bulk of those seeking protection will not have their situation change.

Safe Haven Enterprise Visa

1.17 The Australian Labor Party has offered in-principle support for the Safe Haven Enterprise Visa (SHEV) and we are disappointed that the Government has failed to deliver the SHEV through this Bill.

1.18 The commitment to deliver the SHEV was a key component of Mr Morrison's agreement with the Leader of the Palmer United Party, Mr Clive Palmer, to support the reintroduction of TPVs.

1.19 The Minister for Immigration has repeatedly claimed that this Bill would give life to a new visa to be known as a Safe Haven Enterprise Visa. For example:

(a) In his letter to Mr Palmer of 24 September 2014, the Minister claimed –

> A new Safe Haven Enterprise Visa ***will be introduced*** which will be open to applications by those who have been processed under the legacy caseload, and are found to be refugees. (Emphasis added.)

(b) In a statement to the House of Representatives on 25 September 2014 the Minister contended –

> Consistent with this Government's principles of rewarding enterprise and its belief in a strong regional Australia, the Safe Haven Enterprise Visa ***will be created***. (Emphasis added.)

(c) In a media release of 25 September 2014 the Minister asserted –

> A further temporary visa, a Safe Haven Enterprise Visa (SHEV)—where holders work in a designated self-nominated regional area to encourage filling of job vacancies—***will be introduced*** as an alternative to a TPV. (Emphasis added.)

1.20 Unfortunately Mr Morrison has failed to deliver on this commitment. The text of the Bill reveals that the Minister has misled Mr Palmer, the Parliament and the Australian people.

1.21 The Bill does not in fact give legal effect to Safe Haven Enterprise Visas (SHEVs) as a new visa class. The most that the Division of the Bill called 'Safe Haven Enterprise Visas' does is to introduce a new subsection 35A(3) into the *Migration Act 1958*, which provides as follows:

(3A) There is a class of temporary visas to be known as safe haven enterprise visas.[1]

1.22 It provides no further details, let alone the criteria for the visa or the conditions that apply to it.

1.23 All it does is to name the class of visa that the Minister *may bring into effect in the future* by promulgating an appropriate regulation. 'Naming' the Safe Haven Enterprise Visa in the Bill has *no substantive legal effect*. The SHEV provisions which currently appear in the Bill are nothing more than legislative window dressing.

1.24 Extensive provisions are included in the legislation to make clear that, despite the SHEV being named in the Bill, no such substantive visa is actually brought into effect and nobody can apply to obtain a SHEV until and unless the Minister issues regulations to bring the SHEV to life.[2] There is nothing to compel the Minister to ever promulgate such regulations; accordingly the SHEV might never actually come into existence. This is because:

(a) despite being 'named' in the Bill, the Minister *is not required* to issue a regulation to prescribe criteria to give substantive effect to the Safe Haven Enterprise Visa;[3] and

(b) unless and until regulations are issued to prescribe criteria for the making of a valid application for a Safe Haven Enterprise Visa and for the granting of the Safe Haven Enterprise Visa, non-citizens *cannot make an application for a Safe Haven Enterprise Visa*.[4]

1.25 Further, the Government has failed to undertake the detailed policy development necessary to make the SHEV a reality. As the evidence given by the Department during the course of the public hearing made clear, the work that must be done to develop these criteria and conditions has not advanced much beyond the brief description of the SHEV contained in the Minister's media release and his remarks at the related press conference. The Department has 'attended a meeting' of public servants and conducted 'first consultations' with States and Territories, but these have been conducted only on the basis of the limited information that the Minister has made public.[5] There appears still to be high levels of doubt about many aspects of this visa, including:

- what pathway there will be to other visas (an issue that is discussed in more detail below);

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1 All other provisions in the Bill concerning safe haven enterprise visas are consequential to this proposed subsection.

2 Namely Schedule 3.

3 The Bill, Schedule 2, Item 15; Explanatory Memorandum, p. 51.

4 The Bill, Schedule 3, Item 7; Explanatory Memorandum, pp 52, 53.

5 Ms Karen Visser, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, *Committee Hansard*, 14 November 2014, p. 55.

- what 'regional Australia' means; and
- what social services will disqualify a holder of a SHEV from applying for other visas.[6]

1.26 In relation to the last point for example, the Department was unable to tell the committee whether receipt of family benefits—including by women with newborn children—would prevent them from applying for further visas to stay in Australia. This was because the Minister was yet to give that detail of information to the Department.[7]

1.27 Motivated by the paucity of publicly-available information about the criteria and conditions that will relate to the SHEV, the committee asked the Department to provide (on notice) 'more information about precisely what the government is looking at putting into the regulations'.[8] In response, the committee was provided with a fact sheet that provides no more information than was already publicly available.[9]

1.28 This confirms Labor's suspicions that nobody really knows, at this stage, what the SHEV will look like, if it comes into existence at all.

1.29 It is curious that the Government is progressing the policy development to support the SHEV at such an unusually slow pace. It could be inferred that the Government does not genuinely intend to create the SHEV, despite its commitment to Mr Palmer, and that once it has secured the votes necessary to reinstate the TPV it will quietly abandon its promise to create the SHEV.

1.30 The Parliament and the Australian people should not have to wait until April 2015, which is the earliest date the Government says it will produce the necessary regulations, to discover whether the Government will break its promise to Mr Palmer.

1.31 Even if the Government does introduce the SHEV, two of the known aspects of it are very concerning; namely that very few people will get them and that it will be very difficult for those people to establish themselves in the community.

1.32 Labor supports, in principle, the idea of SHEVs. Labor agrees with Mr Palmer that, if properly established, SHEVs would be 'a win for refugees', who would be able to 'protect themselves and work towards establishing themselves in an Australian community', and 'a win for regional Australia, which will benefit from the additional work resources in communities where there is a labour shortage, thereby increasing the viability of these areas'.[10]

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

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

8 Senator the Hon Jacinta Collins, *Committee Hansard*, 14 November 2014, p. 57.

9 Department of Immigration and Border Protection, answer to questions on notice, 14 November 2014 (received 19 November 2014).

10 Mr Clive Palmer MP, Member for Fairfax, 'A solution to save Australia billions of dollars and place refugees into productive employment', Media release, 26 September 2014.

1.33 Labor is very concerned, however, about the public statements that Mr Morrison has made that suggest that:

(a) only a very small number of people will be granted SHEVs; and

(b) it will be nearly impossible for those who are granted SHEVs to gain access to other visas and thereby remain in Australia.

1.34 In relation to the first point: when a journalist suggested to Mr Morrison that it was possible that 'a very small number' of people would be granted SHEVs and would satisfy the conditions that would enable them to apply for other visas, Mr Morrison replied:

> It's very possible.[11]

1.35 In relation to the second point, Mr Morrison said that

> …these benchmarks [that will need to be met before people on safe haven enterprise visas can apply for other visas] are very high. Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it…There is an opportunity here but I think it is a very limited opportunity and we will see how it works out. But at the end of the day, no-one is getting a permanent protection visa.[12]

1.36 If Mr Morrison only grants a SHEVs to 'a very small number' of refugees, and if Mr Morrison sets 'a very high bar' for those refugees to be able to stay in Australia, the safe haven enterprise visa will not create the 'win, win situation' envisaged by Mr Palmer and supported by the Australian Labor Party. The SHEV will not be the 'stepping stone for refugees to make a positive contribution to Australian society' that Mr Palmer agreed to.[13]

1.37 What is more likely is that—if it ever comes into existence—the SHEV will be a TPV in all but name because it will not provide a realistic pathway to permanency.

Limiting appeal rights in the refugee assessment process

1.38 The Australian Labor Party opposes Schedule 4 of the Bill, which seeks to deprive asylum seekers the opportunity to have their applications for protection assessed fairly and replace it with a bureaucratic agency subject to the direction of the Executive Government.

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11 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', Transcript of press conference, 26 September 2014.

12 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', Transcript of press conference, 26 September 2014.

13 Mr Clive Palmer MP, Member for Fairfax, 'A solution to save Australia billions of dollars and place refugees into productive employment', Media release, 26 September 2014.

1.39 Schedule 4 seeks to remove access to the Refugee Review Tribunal (RRT) for certain asylum seekers who the Government have given the Orwellian name 'Fast Track Applicants'. In lieu of the RRT, asylum seekers who have their application for protection denied will be directed to a new 'Immigration Assessment Authority' (IAA).

1.40 The IAA will conduct only a limited merits review of the decision to deny the application for protection 'on the papers', which fails to meet the basic standards of justice. Unsuccessful asylum seekers will not have an opportunity to appear before the IAA to argue their case; the review will be conducted by a bureaucrat in a closed office. Asylum seekers will not even have the opportunity to make written submissions. Asylum seekers will not have an opportunity to be notified of adverse findings about them or respond to those findings. They will be denied the right to legal representation. There are no prescribed grounds for the review conducted by the IAA; it is entirely at the discretion of the reviewer.

1.41 Furthermore, the IAA lacks the institutional independence from the Executive Government which is a touchstone of fair and credible merits review. IAA reviewers will not be employed by an independent statutory authority such as the RRT or the Administrative Appeals Tribunal. Rather, IAA reviewers will be regular public servants employed under the *Public Service Act 1999*. In addition, in performing reviews they will be required to comply with Practice Directions and Guidelines imposed by their superiors.

1.42 The proposed IAA is a pale imitation of the RRT which falls drastically short of the basic principles of fairness. Asylum seekers will not be afforded natural justice. The basic principles of fair and reasonable administrative decision-making will be abandoned. The open and transparent review process offered by the RRT will be replaced with a team of bureaucrats sitting in a closed office in the dark corners of a Government building. The institutional independence of the RRT will be substituted for a new bureaucratic agency obliged to act at the behest of the Executive Government.

1.43 Even more concerning is the fact that the Bill seeks to give the Government the unfettered and unreviewable power to use non-disallowable legislative instruments to subject *any person* to this atrocious system and, what is more, to exclude *any person* from it and leave them without any form of merits review whatsoever. This flies in the face of the time-honoured traditions of the rule of law.

1.44 The IAA is a truly Orwellian proposal. It amounts to a 'trust us, we're the Government' approach to justice. The rights and obligations of asylum seekers should not be at the mercy of the Executive Government. Rather, asylum seekers ought to be afforded a fair, independent, transparent and credible forum for merits review. Accordingly, Labor Senators oppose Schedule 4 of the Bill.

Displacing Australia's obligations under the Refugee Convention

1.45 The Australian Labor Party opposes the provisions in Schedule 5 which seeks to displace Australia's obligations under the Refugee Convention and replace them

with a codified version of the Abbott Government's subjective interpretation of those obligations.

1.46 This is an alarming proposal. The Refugee Convention provides a well-established framework for determining whether an asylum seeker is entitled to protection, consistent with international law. It is unnecessary to displace our international obligations with a codified version of the Government's subjective interpretation of what those obligations ought to be.

1.47 It is also strongly undesirable. The Abbott Government cannot be trusted to draft a Code which would faithfully implement Australia's obligations under the Refugee Convention. The majority report outlines *seven* ways in which submitters to this inquiry believe that the proposed definition violates the Refugee Convention. Even if the Government acted in good faith, there is a significant risk that the attempted codification would inadvertently omit elements of the Refugee Convention or fail to accurately transfer them from the Convention to the Code.

1.48 Even if the Abbott Government could be trusted to faithfully produce a codification of the Refugee Convention, it is doubtful that the attempt to displace our international obligations would be effective. Australia has an English common law legal system. It is an inherent component of the common law system that courts in one jurisdiction will apply precedents from courts in other jurisdictions when interpreting legislation. This comity is a great strength of the common law.

1.49 Accordingly, it is doubtful that Australian courts would cease to consider international precedents when interpreting the codification proposed by the Government in Schedule 5 of the Bill. The codification proposal is accordingly both an undesirable and futile exercise.

1.50 The dangers inherent in attempting to replace the Refugee Convention with the Abbott Government's preferred interpretation of the Convention obligations are demonstrated by the concerning 'modification' principle proposed by the Government.

1.51 Proposed section 5J(3) of the Bill will provide that an asylum seeker is not entitled to protection if they could 'modify' their behaviour so as to avoid persecution. The Opposition is concerned that the 'modification' principle could operate inhumanely.

1.52 For example:

(a) Should a person who has fled his or her country of origin after being charged with apostasy for converting to Christianity be expected to renounce his or her new religion, conceal it or cease to practise his or her new faith?

(b) Should an activist such as Nobel Peace Prize winner Malala Yousafzai, who fights against the Taliban for the right of girls to obtain an education 'modify her behaviour' and accept oppression on the basis of her gender?

(c) Should a person of a particular race, ethnicity or nationality conceal this characteristic and feign belonging to the dominant race, ethnicity or nationality in the area which they reside, so as to avoid persecution?

(d) Should LGBTI refugees adopt a heterosexual identity or conceal their true sexual orientation or gender identity? Note that some commentators continue to claim that homosexuality can be 'cured' and that it is not an innate, immutably personal characteristic?

1.53 The reasonableness of expecting a person to 'modify' his or her behaviour to avoid persecution in any particular circumstances is ambiguous. The Bill fails to expressly rule out expecting a person to 'modify' their behaviour to avoid persecution in the above circumstances. Labor Senators find this to be absolutely unacceptable.

Power to cap visas

1.54 Schedule 7 of the Bill addresses the decision in *Plaintiff S297/2013 v MIBP* [2014] HCA 24 to make clear that the Minister has the power to place a cap on the number of protection visas granted in a programme year.

1.55 The ability for the Minister to cap the number of visas issued within any visa category is an important mechanism in managing Australia's migration system. This applies equally to the management of protection visas.

1.56 However, the Abbott Government's attempt to prevent, by capping, almost the entirety of the last group of 6000 asylum seekers, for whom the bar was lifted under the former Labor Government, from being granted a protection visa was not about managing the business of the system but rather about preventing Permanent Protection Visas from ever being granted. This was an abuse of process which was struck down by the High Court.

1.57 The Australian Labor Party will not allow the provisions of Schedule 7 to allow the Government to undermine the High Court and prevent the relevant cohort of asylum seekers from pursuing their application for a Permanent Protection Visa.

90 day rule

1.58 Schedule 7 seeks to abolish the requirement to decide protection visa applications within 90 days and to report on the meeting of that requirement.

1.59 Reporting on the 90 day rule has been an important accountability measure in ensuring that the Government operates in a timely way in assessing protection applications.

1.60 At the end of Labor's period in office about half of all protection applications were decided within 90 days. However, the most recent report (1 March 2014–30 June 2014) indicated only 14 per cent of cases were now being determined within the 90 day period.

1.61 The Abbott Government is obsessed with secrecy. Labor Senators will not countenance the Government's efforts to further reduce transparency and accountability. We oppose any attempt to water down the 90-day rule.

Conclusion

1.62 The Australian Labor Party has serious concerns about elements of the proposed Bill. The Bill seeks to undermine a single High Court case, namely the CPCF Case. It seeks to resurrect the failed TPV, but fails to deliver on its promise to the Palmer United Party to establish the SHEV. The Bill is designed to deprive asylum seekers of the opportunity to have their applications for protection fairly reviewed, by replacing the RRT which a bureaucratic agency which fails to meet the basic standards of justice. It attempts to displace Australia's obligations under the Refugee Convention, and replace it with a flawed codification of the Abbott Government's preferred interpretation of those obligations. The Bill also makes questionable changes to the Minister's power to cap visas, and seeks to further entrench a culture of secrecy within Australia's migration framework by abolishing the 90 day rule. In these circumstances, Labor Senators cannot support the Bill in its current form.

Senator Jacinta Collins
Deputy Chair

Dissenting Report: The Australian Greens

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Introduction

1.1 The Senate inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 heard from thousands of human rights lawyers, refugee advocates, academics, and community members, all of whom rejected the amendments proposed in the Bill.

1.2 Despite the overwhelming evidence from experts and the community, who have said that this Bill should not proceed, the majority report has recommended that the Bill be passed. This committee has arrogantly rejected the evidence of thousands of Australians and has chosen to favour politics and punishment over protection and the rule of law.

1.3 This Bill is by far one of the most regressive pieces of legislation this Parliament has seen when it comes to the treatment of asylum seekers and refugees. There is no doubt that this Bill is an attempt by the government to dramatically reduce the number of refugees Australia takes each year and to legitimise their actions at sea when intercepting and turning back asylum seeker boats.

1.4 This Bill seeks to legalise the Government's actions at sea, limit Parliamentary and judicial oversight, disregard Australia's international and human rights obligations, reintroduce Temporary Protection Visas for boat arrivals, introduce a new temporary visa called the Special Humanitarian Enterprise Visa, introduce rapid processing with the sole aim of reducing the number of people Australia finds to be in need of protection, remove the Refugee Convention from the statute books, and deem babies born to asylum seekers parents as 'Unauthorised Maritime Arrivals'.

1.5 The Bill is an attack on Australia's generous heart and will result in Australia wrongly refusing protection to genuine refugees and returning them to persecution or significant harm.

1.6 The Australian Greens agree with the majority of submitters that this Bill is a radical deviation from Australia's longstanding commitment to international and human rights law. If passed this Bill will seriously endanger the lives of thousands of asylum seekers. The Australian Greens strongly recommend that this Bill be rejected by the Senate.

Amending the Maritime Powers Act

1.7 The amendments proposed in Schedule 1 of the Bill seek to give the Minister for Immigration and Border Protection unprecedented power over operations at sea and limit Parliamentary and judicial oversight. The amendments would give the Minister of the day the power to detain asylum seekers at sea for an unlimited timeframe, send them to other countries against their will and the will of the

destination country. The Parliament would have no say in these actions nor would the judiciary. The amendments proposed would circumvent the courts by making such powers and decisions immune from legal challenge.

1.8 Whilst the Government has continued to tout that their actions at sea are consistent with international law, attempts to amend the law in this way suggest otherwise. This is quite clearly a power grab by the Minister for Immigration and Border Protection and an attempt to place the Government above both the Parliament and the judiciary.

1.9 The amendments proposed will mean that the Australian Government would not need to comply with, or even consider, international law when exercising maritime powers.[1] In practice, this means that any operation at sea that is inconsistent with Australia's international obligations, fails to consider Australia's international obligations or fails to consider international law or the domestic laws of another country cannot be invalidated.

1.10 There is no doubt that these changes come in direct response to a case currently before the High Court[2] which is challenging the extent of the Government's maritime enforcement powers under the Maritime Powers Act and its power to intercept and detain asylum seekers and then take them to a place outside Australia. Essentially these amendments would nullify this challenge and any future challenges to the Government's operations at sea. Any attempt to decrease independent oversight or Parliamentary scrutiny is extremely concerning in light of the continuing secrecy surrounding Operation Sovereign Borders and the Government's actions at sea.

1.11 The Bill also removes any requirement for maritime powers to be exercised in accordance with the rules of natural justice. These amendments will effectively enable the Government to detain and transfer people without considering their individual circumstances or giving them a fair hearing.[3] Australia has an obligation under the Refugee Convention not to return people to a place where they will face persecution or suffer serious harm; these amendments will compromise Australia's ability to uphold these obligations and individuals will not be given the opportunity to receive a fair and thorough assessment of their protection claims.

1.12 As argued by the Refugee and Immigration Legal Centre:

> Australian officials, who intercept, detain and/or transport people at sea have 'effective control' over those persons as a matter of jurisdiction under international law. Australia's duty not to refoule persons to serious harm is engaged at that point. Australian officials who fail to investigate whether the persons they detain at sea are seeking asylum, fail to hear claims, and who remove persons to their home country or to third countries, which may

1 Human Rights Law Centre, *Submission 166*, p. 3.

2 *CPCF v. Minister for Immigration and Border Protection & Anor*.

3 Human Rights Law Centre, *Submission 166*, p. 4.

> return those people to their home country, will be responsible for direct or indirect refoulement to persecution or other human rights abuses.[4]

1.13 Further to this, under these amendments the Minister's powers are extended to enable him or her to give directions about the detention and movement of vessels and people provided that it is in the 'national interest'. This is an unprecedented power that will have devastating consequences for asylum seekers and refugees and will result in Australia breaching its non-refoulement obligations by sending people back to persecution or serious harm.

1.14 In addition to the overwhelming opposition to these amendments which was raised by witnesses and submitters to the inquiry, the Parliamentary Joint Committee on Human Rights has stated that the amendments outlined in schedule 1 breach a number of human rights obligations and will allow Australia to undertake actions at sea that are inconsistent with Australia's international obligations.

Temporary Protection Visas and Safe Haven Enterprise Visas

1.15 Schedule 2 of the Bill seeks to reintroduce Temporary Protection Visas (TPVs) and create a new visa named the Safe Haven Enterprise Visa (SHEV). These two visas classes will be the only visas that will be available to asylum seekers who have arrived in Australia by boat and are found to be in genuine need of protection. The legislation will be applied retrospectively to all individuals who have applied for Permanent Protection Visas.

1.16 The Government continues to promote TPVs as an effective deterrent against boat arrivals; however, evidence suggests that this is not the case. In 1999 following the introduction of TPVs by the Howard Government the number of boat arrivals grew ten-fold, including a significant increase in the number of women and children making the perilous journey to Australia by boat, as TPVs denied family reunification. The Government cannot continue to argue that the reintroduction of TPVs will act as a deterrent as they will only apply to those who are currently in Australia.

1.17 TPV holders will live in a constant state of limbo as they will face the very real prospect that their visas will not be reissued after 3 years. Hanging over their head will be the constant fear of being returned to the danger they once fled. As was the case previously, TPV holders will be unable to sponsor family members, will be precluded from re-entering Australia should they need to travel and will be barred from applying for any other visa in Australia. History has shown that those who were previously granted TPVs suffered from high levels of anxiety, depression, post-traumatic stress disorder and other psychiatric illness.[5] As stated by Amnesty International in their evidence, 'TPVs, far from offering the protection refugees have been found to require, in fact create prolonged uncertainty, separation, frustration, fear and mental ill-health'.[6]

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4 Refugee and Immigration Legal Centre, *Submission 165*, p. 24.

5 Uniting Justice Australia, *Submission 124*, p. 4.

6 Amnesty International Australia, *Submission 170*, p. 4.

1.18 In addition to the reintroduction of TPVs this legislation creates a new visa, the Safe Haven Enterprise Visa (SHEV). Whilst the legislation clearly amends the Migration Act to include TPVs, it does not do the same for the SHEV. The Bill names the visa type but fails to detail the criteria and conditions. Regulations will be required to establish the SHEV, however the Minister cannot be compelled to designate the regulation.

1.19 As detailed by the Minister for Immigration and Border Protection in correspondence with the Palmer United Party, the SHEV will be a valid visa for five years and like the TPV will not include the right to family reunion or the right to re-enter Australia. SHEV holders will be required to work in regional areas, after having worked in regional Australia for three and half years without accessing welfare and if they meet the eligibility criteria they may be able to apply for other onshore visa types, such as skilled or family visas.

1.20 As argued by the Refugee and Immigration Legal Centre:

> …the criteria will be unattainable for the overwhelming majority and for these the prospect of a permanent visa through the proposed SHEV scheme will be merely illusory.[7]

1.21 The Minister himself has admitted that it will be extremely difficult for SHEV holders to obtain permanency in Australia and that there is an extremely high bar to pass. It is evident that the pathway to permanency will be long and hard for genuine refugees.

1.22 The introduction of this visa subclass is being viewed by many as necessary in order to 'deal' with the 30,000 asylum seekers currently living in the community. It is important to note that the Department of Immigration and Border Protection have stated that it will take three years to process the backlog.[8] Those who are currently in the community have already been waiting years for their claims to be processed, the reintroduction of temporary visa will not 'fix' the backlog, instead it will condemn thousands of refugees to a life of uncertainty.

Rapid processing of asylum claims

1.23 Schedule 4 of the Bill creates a rapid assessment process for asylum seekers who have arrived in Australia by irregular means. Whilst enforcing strict timeframes and requirements these amendments also deny persons the right to appeal the decision.

1.24 It is clear that the amendments proposed are about the Government trying to make it as hard as possible for a person to be found to be a refugee and in turn be eligible for any type of permanent visa in Australia. Under these changes Australia will make incorrect determinations and will risk sending people back to danger and serious harm, breaching Australia's non-refoulement obligations.

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7 Refugee and Immigration Legal Centre, *Submission 165*, p. 20.

8 Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2014, p. 78.

1.25 Under these amendments asylum seekers will have their applications assessed initially by the Department of Immigration and Border Protection. If they are unsuccessful in their application only some will be eligible for an expedited and limited review process through the newly established Immigration Assessment Authority (IAA), an authority of the Department of Immigration and Border Protection. All applicants will be precluded from applying to the Refugee Review Tribunal (RRT).

1.26 As per the amendments the IAA will have limited review powers, will have no obligation to ever interview applicants or consider any new information should it arise unless 'exceptional circumstances' exist.

1.27 Further to this, not all asylum seekers will get access to this limited review. The amendments proposed in this Bill seeks to exclude people who may have provided false documentation, who may already have been denied refugee status by the UNHCR in another country, have 'manifestly unfounded claims', or if they fall within a class of persons the Minister for Immigration and Border Protection prescribes. These amendments are unjust, fail to recognise the realities of seeking asylum and hand unprecedented power to the Minister to determine the future of vulnerable asylum seekers.

1.28 Further to this, it is important to note that those who are found under this process not to be owed protection will become unlawful citizens leaving open the possibility of people being returned to detention. The effects of this amendment will be that a larger number of asylum seekers will be denied protection and therefore be mandatorily detained or returned to danger.

1.29 Australia has an obligation to protect people fleeing human rights abuses and to uphold the standards of procedural fairness. If due process fails, there is an increased likelihood that people will be wrongly refused protection and removed to the very real prospect of persecution or serious harm in their country of origin. Under these amendments, Australia will risk breaching its obligations under the Refugee Convention, most namely the principle of non-refoulement.

Removing references to the Refugee Convention

1.30 The amendments outlined in Schedule 5 of the Bill removes most references to the Refugee Convention from the Migration Act and replaces it with the Government's own interpretation of Australia's protection obligations. The amendment goes so far as to redefine what it means to be a refugee. The changes will also make it possible for the Government to remove asylum seekers without considering the risk of refoulement.

1.31 The proposed amendments are in contradiction with Australia's obligations under international and human rights law and will result in the very real risk of Australia returning genuine refugees to danger.

1.32 The Refugee Convention remains at the cornerstone of international refugee protection. The government is arrogantly attempting to impose its own interpretation of what has been an internationally understood treaty. As stated by the Human Rights

Law Centre, the Convention 'cannot be unilaterally redefined by Australia more than 60 years after it was signed'.[9]

1.33 Further to this, the amendments outlined in this schedule also seek to remove Australia's obligation to consider refoulement when removing a person from the country. This amendment is regressive and completely flies in the face of Australia's commitment to international law. As argued by the Refugee and Immigration Legal Centre, these amendments are:

> …entirely inappropriate and would further limit Australia's capacity to comply with its international obligations, and consequently increasing the risk of it breaching those obligations.[10]

1.34 There are a number of concerning aspects regarding the government's redefinition of the Refugee Convention. Currently, under Australian and International law, a person is not eligible for protection if he or she can safely access another location and it is 'reasonable' for him or her to move there. This Bill seeks to remove the reasonableness criteria and instead introduce a blanket clause stating that an individual must show that there is a real chance of persecution in all areas of their country, regardless of the practicalities of moving and living there. The UNHCR stated in its submission that decision makers are required to assess whether internal relocation 'is a reasonable consideration, both subjectively and objectively, given the circumstances of the asylum seeker'.[11] Protection should not be contingent on the persecuted trying to avoid their persecutors.

1.35 When determining a person's refugee status these amendments will deny a person protection if the government believes that if they change their behaviour they will no longer be in fear of persecution or serious harm. As stated by the Asylum Seeker Resource Centre in their evidence:

> This is an affront to the rule of law, supports actions of oppressive regimes and undermines the purpose of the Refugee Convention. It is not and should not be question for an Australian decision maker to consider what aspects of a person's belief should be modified to suit the extremist group's ideology.[12]

1.36 Protection should not be contingent on the persecuted having to modify their own behaviour so as not to agitate their persecutors.

1.37 Further to this, the Bill proposes to change and codify the test of defining a particular social group. The Bill seeks to add an additional requirement which states that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member's identity or conscience, the person

9 Human Rights Law Centre, *Submission 166*, p. 10.

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

11 United Nations High Commissioner for Refugees, *Submission 138*, p. 5.

12 Asylum Seeker Resource Centre, *Submission 131*, p. 19.

should not be forced to renounce it.[13] As noted previously, protection should not be contingent on the persecuted having to modify their behaviour to avoid persecution.

1.38 The amendments proposed to this schedule are an affront to international law and Australia's long and proud history of offering protection to those in need.

New born babies

1.39 With retrospective effect, the Bill would also classify babies born in Australia to asylum seeker parents as 'Unauthorised Maritime Arrivals (UMAs)'. These children were born in Australian hospitals, yet the Bill seeks to classify them as if they arrived by boat.

1.40 Should this Bill pass it will significantly impact a current case before the Federal Court of Australia, in which Maurice Blackburn Lawyers are representing a baby named Ferouz, who was born in Brisbane's Mater Hospital, holds a Queensland birth certificate and is eligible to apply for Australian citizenship.[14] These amendments represent another attempt by the government to overrule court proceedings and circumvent the law.

1.41 The consequences of such changes will be devastating for these Australian born babies as the amendments will leave them liable to transfer offshore, subject to arbitrary and indefinite detention, and effectively deemed stateless.

1.42 As was raised by ChilOut in their submission to the inquiry, this amendment, which will result in the indefinite detention of children, is at odd with the concluding observations of the UN Committee on the Rights of the Child, where it was stated that children should only be held in detention as a last resort and for the shortest possible period of time.[15]

1.43 Putting aside the absurdity of the claim that babies born in Australian hospitals in fact arrived by boat, these amendments seriously compromise Australia's obligations under the Convention on the Rights of the Child and Article 24 of the International Covenant on Civil and Political Rights (the right to acquire nationality).

1.44 These amendments would effectively render these children stateless due to their inability to acquire nationality and would result in Australian born babies being subject to offshore indefinite detention.

Statutory limit on Permanent Protection Visas

1.45 The amendments outlined in schedule 7 introduce a statutory limit on the number of Permanent Protection Visas which can be issued within a particular financial year and removes the 90 day processing requirement for the Department and the RRT and related Parliamentary reporting requirements.

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13 Asylum Seeker Resource Centre, *Submission 131*, p. 22.

14 Maurice Blackburn Lawyers, *Submission 43*, p. 1.

15 ChilOut, *Submission 96*, p. 2.

1.46 These amendments come in response to the decisions of the High Court in *Plaintiff S297 of 2013* and *Plaintiff M150 of 2013* and to ensure that 'the onshore component of the Humanitarian Programme is appropriately managed'.[16]

1.47 Australia is obliged to provide protection to those who arrive in Australia and are found to be in genuine need of protection. A cap on protection visa applications for people who have been found to be genuine refugees abrogates this important responsibility and places Australia at considerable risk of inflicting harm on people by leaving them languishing for long periods of time should the cap be reached.

1.48 As stated by the Refugee Council of Australia, 'Protection Visa grants should be guided, first and foremost, by the protection needs of individual applicants'.[17]

Conclusion

1.49 This Bill is by far one of the most regressive pieces of legislation this Parliament has seen when it comes to the treatment of asylum seekers and refugees. There is no doubt that this Bill is an attempt by the government to reduce the number of refugees Australia takes each year.

1.50 The Government's arrogant approach to those seeking protection in Australia is an attack on the nation's generous heart and proud history of resettlement of the world's most vulnerable.

1.51 The committee heard unprecedented evidence from experts around the country stating that this Bill should not be passed. The Australian Greens agree and strongly recommend that the Bill be rejected by the Senate.

Recommendations

1.52 Recommendation 1: The Australian Greens recommend that the Bill be rejected by the Senate.

1.53 Recommendation 2: The Australian Greens recommend that the Government reinstate legal funding for IAAAS for all protection visa applicants and make migration assistance available to all those considered part of the 'legacy caseload'.

1.54 Recommendation 3: The Australian Greens recommend that Australia's humanitarian intake be increased immediately to a minimum of 20,000 places per annum.

1.55 Recommendation 4: The Australian Greens recommend that the Government immediately begin processing claims under the current Refugee Status Determination System and make available Permanent Protection Visas to people found to be owed protection.

1.56 Recommendation 5: The Australian Greens recommend that the Government pass the Australian Greens' Guardian for Unaccompanied Children

16 Refugee Immigration and Legal Centre, *Submission 165*, p. 20.

17 Refugee Council of Australia, *Submission 136*, p. 13.

Bill 2014 to ensure that unaccompanied minors have a truly independent guardian acting in their best interest.

Senator Sarah Hanson-Young
Australian Greens

Appendix 1

Public submissions

1	Ms Robyn Hansen
2	Otto and Jenny Wichert
3	Ms Leonie Stubbs
4	Ms Colleen Considine
5	Mr Tony Guttmann
6	Ms Joanne Merrick
7	Ms Ieta D'Costa
8	Ms Heather Stevens
9	Ms Sally Green
10	Ms Heather Inglis
11	Mr Walter and Mrs Patricia Phillips
12	Ms Andrea Pink
13	Ms Catriona Macleod
14	Ms Angela Weekes
15	Ms Dianne Francois
16	Ms Emma Corcoran
17	Mr Nathaniel and Mrs Elizabeth Taylor
18	Mr Peter Flanagan
19	Mr Daniel Berg
20	Ms Louise Segrave
21	Ms Julie Kraak
22	Ms Carolyn Elliott
23	Ms Kerrie Mel
24	Ms Nerine Mills
25	MS Jo Steinle
26	Ms Priya Shaw
27	New South Wales Bar Association
28	Ms Jan Govett
29	Refugee Advocacy Network

30 Ms Pamela Jones
31 Ms Louise D'Arcy
32 Dr Alfred L.C. van Amelsvoort
33 Dr Christine Hampshire
34 Ms Jennifer Wills
35 Ms Sophie Chisholm
36 Dr Pat Horan
37 Ms Ania Tomaszewska
38 Coalition for Asylum Seekers Refugees and Detainees (CARAD)
39 Ms Rosemary McKenry
40 Australia-Tamil Solidarity
41 Mrs Elaine Gorman
42 Name Withheld
43 Maurice Blackburn lawyers
44 Migration Institute of Australia
45 Queenscliff Rural Australians for Refugees
46 Mx Patricia Asch
47 Mr John Stear
48 Dr Jim Russell
49 Anna Sande
50 Professor Helen Ware
51 Dr Hank De
52 Roger GRAF
53 Dr Gordon Menzies
54 Lynn Benn
55 Confidential
56 Dr Dr Jemma
57 Mr Richard Barry
58 Ms Kaely Kreger
59 Mr Craig McIntosh
60 Sophie Rudolph
61 Fiona So
62 Barbara Finch
63 Miss Zoe Emily

64 Associate Professor Mary Anne Kenny
65 Dr Malcolm Dunning
66 Joy Mettam
67 Name Withheld
68 Ms Pamela Jacobs
69 Ms Jane Hodge
70 Ms Gillian Wells
71 Ms Ida Sulkunen
72 Mr Oliver Coleman
73 Ms Lindsay McCabe
74 Ms Zarny Tran
75 Mr Andrew Witham
76 Mr Simon Corden
77 Ms Marilyn Shepherd
78 Ms Helen Kvelde
79 Mr Colin Smith
80 Australian Churches Refugee Taskforce
81 Dr Niko Leka, Hunter Asylum Seeker Awareness (HASA)
82 Mr Joshua Mason
83 Ms Leanne Tully
84 Mr David Bath
85 Brotherhood of St Laurence
86 Ms Phillippa Bricher
87 Ms Trish Cameron
88 Ms Cathy Preston-Thomas and Dr Mitchell Smith
89 Mr Brad Ferguson
90 Ms Suzanne Stallard
91 Dr David Ness
92 Ms Genevieve Caffery
93 Ms Yvonne Bartels
94 Mr Shane Nichols
95 Mr Mike McCausland
96 ChilOut - Children out of Immigration detention

97 Ms Kate Gillespie, The Victorian Association for the Teaching of English Inc.
98 Ms Elly Freer
99 Ms Clare Conway
100 Mr Peter Cruice
101 Ms Heidi Gill
102 Mr Christopher Walsh
103 Ms Fernida Hunter
104 Ms Kay Doecke
105 Mr Brenton Doecke
106 Mr A Neal
107 Mr Brendan Kirkpatrick
108 Ms Barbara Guthrie
109 Ms Nicky Chapman
110 Mr Michael Leahy
111 Ms Virginia Woodger
112 Mr Bill Gerogiannis
113 Dr Millie Rooney
114 Mr Paul Dennis
115 Institute of International Law and Humanities - Melbourne Law School
116 Mr Brian Farrelly
117 Ms Gina Haebich
118 Ms Annette Jacobsen
119 Ms Bella Illesca
120 Ms Susan Longmore OAM
121 Ms Catherine Greenhill
122 Mr Daniel Payne
123 Ms Rebecca Short
124 UnitingJustice Australia
125 Institute of Sisters of Mercy of Australia and Papua New Guinea
126 Name Withheld
127 Name Withheld
128 Ms Kim Wormald
129 Law Council of Australia

130 Ms Margaret Phillips
131 Asylum Seeker Resource Centre
132 Refugee and Immigration Legal Service
133 HIV/AIDS Legal Centre
134 Refugee Advice and Casework Service
135 Children's Rights International
136 Refugee Council of Australia
137 Castan Centre for Human Rights Law
138 United Nations High Commissioner for Refugees
139 Ms Rachel Birthisel
140 Ms Camilla Tafra
141 Ms Elaine Pullum
142 Ms Francine Cade
143 Ms Therese McEvoy
144 Ms Annie O'Connell
145 Name Withheld
146 Mr Brendan McCarthy
147 Ms Ellen O'Gallagher
148 Name Withheld
149 Name Withheld
150 Mrs Samone Blandthorn
151 Mr Mitchell Reese
152 Ms Karen Thurgood
153 Mr Evan Kirk
154 Confidential
155 Ms Elizabeth Chandler
156 Ms Pauline Crawford
157 Ms Rose Whitau, The Australian National University
158 Ms Trine Vik
159 Mrs Frances Tafra
160 Ms Sue Doyle
161 Mr Phil McMillan
162 Anna Lashko
163 Australian Human Rights Commission

164 Australian Red Cross

165 Refugee and Immigration Legal Centre

166 Human Rights Law Centre

167 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW

168 Migration Law Program, Australian National University

169 Compassion and Justice for Refugees

170 Amnesty International

171 Department of Immigration and Border Protection

172 Ms Kathryn Rose

173 Mrs Tania Breed

174 Name Withheld

175 Dr Jeff Siegel

176 Australian Psychological Society

177 Human Rights Committee of the Law Society of NSW

178 NSW Council for Civil Liberties

179 Brisbane Refugee and Asylum Seeker Support Network (BRASS)

180 Bar Association of Queensland

181 Canberra Refugee Action Committee (RAC)

182 Heather and Paul Cooney

183 Australian Lawyers for Human Rights

184 Combined Refugee Action Group

185 Dominica Dorning AO RFD QC

186 Mr Geoff Allshorn

187 Mr Fraser Powrie

188 Ms Bea Leoncini

189 Ms Susannah Gregan

190 Ms Katrina Sedgwick

191 Darwin Asylum Seeker Support Advocacy Network

192 The NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors

193 Marina Brizar, Clare Jackson, Melinda Jackson & Besmellah Rezaee

194 Refugee and Immigration Legal Service

195 Mr Nicholas Carey

196 Central Victorian Refugee Support Network
197 Australian Churches Refugee Taskforce
198 Dr Keren Cox-Witton
199 Ms Nicola Fortune
200 Ms Maeve Kennedy
201 Associate Professor Alexander Reilly
202 Pastor David Busch
203 Ms Claudia Caton
204 Name Withheld
205 Ms Heidi Gill
206 Mr Ivan Ajduk
207 Name Withheld
208 Mr David Mac Phail
209 Ms Maureen Mac Phail
210 Federation of Ethnic Communities' Councils of Australia
211 Georgina Gurney
212 Ms Jane Hodge
213 Ms Michelle Swenson
214 Ms Heather Marr
215 Pauline Brown
216 CASE for Refugees
217 Mrs Sally Thompson
218 Campus Refugee Rights Club
219 Name Withheld
220 Fitzroy Learning Network Inc
221 Mrs Shona Salver
222 Prof Philomena Murray
223 Dr Anne Pedersen
224 Jesuit Social Services
225 Ms Adrienne Buffini & Mr Gerard Hughes
226 Mr Ross Ollquist
227 Public Law and Policy Research Unit
228 Danieka Montague
229 Ms Ana Lamaro

230 Ms Maureen Kingshott
231 Gaby Banens
232 Dr Laura Fisher
233 Mr Ben Beccari
234 Conference of Leaders of Religious Institutes in NSW
235 Mr Sean McManus
236 Ms Sherry Howlett
237 Baptistcare
238 Dr Graeme Swincer
239 Ms Heather Thompson
240 Ms Petrina Turner
241 Ms Maura Murnane
242 Ms Helen Marron
243 Humanist Society of Victoria

Appendix 2

Public hearings and witnesses

Friday 14 November 2014—Canberra

CAMPBELL, Ms Leonie, Director, Criminal Law and Human Rights Division, Law Council of Australia

FORD, Ms Carina, Steering Group, Migration Law Committee, Law Council of Australia

KNACKSTREDT, Ms Nicola, Policy Lawyer, Criminal Law and Human Rights Division, Law Council of Australia

PRINCE, Mr Shane, Member, Law Council of Australia

CLEMENT, Mr Noel, Head, Australian Services, Australian Red Cross

DE VRIES, Ms Elisabeth, National Manager, Migration Support Programs, Australian Red Cross

HANSON, Mr Greg, Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

MANNE, Mr David Thomas, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre

CHAN, Ms Angela, National President, Migration Institute of Australia

TEBBEY, Mr Nicholas, Member, Migration Institute of Australia

DE KRETSER, Mr Hugh, Executive Director, Human Rights Law Centre

RYAN, Mr Rhys, Secondee Lawyer, Human Rights Law Centre

FOSTER, Associate Professor Michelle, Director, International Refugee Law Research Program, University of Melbourne

O'SULLIVAN, Dr Maria Josephine, Associate, Castan Centre for Human Rights Law, Monash University

EMERTON, Dr Patrick, Associate, Castan Centre for Human Rights Law, Monash University

HOANG, Mr Khanh, Associate Lecturer, Migration Law Program, ANU College of Law, Australian National University

ZAGOR, Mr Matthew, Senior Lecturer, Migration Law Program, ANU College of Law, Australian National University

POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia

COSGRIFF, Mr Scott, Senior Solicitor, Refugee Advice and Casework Service

MOJTAHEDI, Mr Ali, Solicitor, Refugee Advice and Casework Service

THOM, Dr Graham, Refugee Coordinator, Amnesty International

REGESTER, Mr Jack Michael, Advocacy Officer, UNICEF Australia

LARKINS, Ms Alison, Acting Deputy Secretary, Policy Group, Department of Immigration and Border Protection

PARKER, Ms Vicki, General Counsel, Legal Division, Department of Immigration and Border Protection

VISSER, Ms Karen, Director, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection

VARGHESE, Mr Jacob, Principal, Maurice Blackburn

WATT, Mr Murray, Senior Associate, Maurice Blackburn

Appendix 3

Tabled documents, answers to questions on notice and additional information

Additional information

1. Information provided by the Department of Immigration and Border Protection - fact sheet on TPVs and SHEVs (received 19 November 2014)

Answers to questions on notice

1 Migration Institute of Australia - answers to questions taken on notice (received 18 November 2014)

2 Department of Immigration and Border Protection - answers to questions taken on notice (received 19 November 2014)

3 Law Council of Australia - answers to questions taken on notice (received 19 November 2014

4 Refugee & Immigration Legal Centre - answers to questions taken on notice (received 21 November 2014)