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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE; ON THE MIGRATION AMENDMENT (PROTECTION AND OTHER MEASURES) BILL 2014.

ANU COLLEGE OF LAW- MIGRATION LAW PROGRAM

INTRODUCTION

The ANU Migration Law Program, within the Legal Workshop of the ANU College of Law specialises in developing and providing programs to equip people with the necessary knowledge, skills and qualifications to register as Migration Agents. Legal Workshop also provides Continual Professional Development opportunities for Registered Migration Agents.

The Migration Law Program has also been engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

OVERVIEW

- 1 We are concerned about a number of the proposed amendments that, in our view, would very likely result in Australia breaching its *non-refoulement* obligations under the international law. Our submission touches on the proposed amendments that would:
 - increase the threshold for determining complementary protection claims from 'real chance' to 'more likely than not';
 - allow refusal of a protection visa on the basis that an applicant has not provided identity documents;

- provide that the Refugee Review Tribunal (RRT) must draw an adverse credibility inference if an applicant presents new evidence or claim unless accompanied by 'reasonable grounds';
- provide that the RRT members must follow a 'guidance decision' unless a decision is distinguishable; and
- prevent family reunification for members of the family unit; of a person who has been granted a protection visa; unless the application was made before the protection visa was granted.

RAISING THE THRESHOLD FOR COMPLEMENTARY PROTECTION TO 'MORE LIKELY THAN NOT'

2 In considering the Bill, we submit that there should be an overriding imperative to consider whether the proposed changes would allow the Australian Government to better discharge its *non-refoulement* obligations under the Convention Against Torture (CAT) and the International Covenant in Civil and Political Rights (ICCPR) than under the status quo. We note that both international instruments contain, expressed or implied, *non-refoulement* clauses. These clauses represent absolute, non-derogable obligations.¹

3 Article 3 of the Convention Against Torture provides that:

*No state party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*²

4 Similarly, Articles 6 and 7 together impose implied *non-refoulement* obligations:

Every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

*No one shall be subjected to torture, cruel, or inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*³

5 While it is matter of some controversy, we would also submit that an argument could be made that *non-refoulement* obligations represent customary international law, binding on states irrespective of whether they are a party to CAT or the ICCPR.⁴

¹ The Department of Immigration and Border Protection has previously stated that: 'Australia accepts that the position under international law is that Australia's non-refoulement obligations under the CAT and the ICCPR are absolute and cannot be derogated from': Department of Immigration and Border Protection, *Submission No 3 to Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* (Cth), 3.

² *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 / [1989] ATS 21 (entered into force, 26 Jun 1987) art 3.

³ International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force, 26 March 1976) art 7. See also, Human Rights Committee, General Comment No 31 [80] expressing the view that Art 2 of the ICCPR provides an obligation on states not to remove a person where there are substantial grounds for believing there is real risk of irreparable harm, such as that contemplated in arts 6 and 7.

⁴ Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003).

- 6 If it is accepted that the overriding obligation is one of *non-refoulement*, then there can be no rational reason to subject persons claiming refugee status and complementary protection—who share the same characteristics of undertaking ‘international movement to avoid the risk or furtherance of serious human rights violations’⁵—to different tests. This view is shared by a number of commentators.⁶
- 7 Our concerns are encapsulated by the comments of the UK Asylum and Immigration Tribunal in *Kajac* in relation to the relationship between the Refugee Convention and the CAT:

*Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual’s human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would, if Mr. Tam is right, be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.*⁷

- 8 Similar sentiments have been expressed in Canada, where Member Kagedan of the Refugee Protection Division of the Immigration and Refugee Board said:

*The reputation of the justice system is at stake where two people from the same country, fearing the same harm, and equally having no state protection, get different decisions on protection, just because the harm feared by one is on account of his political opinion and the harm faced by another is on account of having helped convict a prominent mobster.*⁸

- 9 We agree with the above analysis and stress that having different tests for Convention Refugees and complementary protection is likely to result in confusion and inconsistent decision-making, and thus increase the likelihood of refoulement. If the Government’s view is that the current test for complementary protection is ‘complicated, convoluted and difficult for decision-makers to apply,’⁹ then we consider that this should strengthen, rather than detract from, the need to apply the same ‘real chance’ test which is well understood by decision makers and is consistent with Australian and international jurisprudence.¹⁰

⁵ Jason M Pobjoy, ‘Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection’ (2010) 34 *Melbourne University Law Review* 181, 214.

⁶ See eg, Jane McAdam, ‘Australian Complementary Protection: A Step-By-Step Approach’ (2011) 33 *Sydney Law Review* 686; Pobjoy, above n 5.

⁷ *Kacaj v Secretary of State for the Home Department* [2001] INLR 354, [10].

⁸ See *Re Y.A.T.*, [2004] R.P.D.D. No. 10.

⁹ Scott Morrison MP, ‘*Second reading speech: Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013*’, 1521.

¹⁰ Professor Jane McAdam has previously argued that the current test is ‘far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalizing an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonization is being sought’: Jane McAdam, above n 6.

- 10 While we do not offer a conclusive view on the matter, we further draw to the Committee's attention the arguments made by Dr Pobjoy, that having different tests *may* constitute discrimination in breach of Article 27 of the ICCPR.¹¹

CONTRARY TO UN COMMITTEE VIEWS AND PRACTICE IN EUROPE

- 11 Our view is further strengthened by the jurisprudence of the UN's Committee Against Torture. Numerous decisions of the Committee have affirmed a position that 'substantial grounds' in Art 3 of the CAT means 'foreseeable, real and personal risk' of torture.¹² The Committee has been of the view that the risk of harm need not be 'highly probable' or 'highly likely to occur', but it has to go beyond mere theory or suspicion or a mere possibility of torture.¹³

- 12 In the European Union, complementary protection is referred to as 'subsidiary protection'. Article 2(e) of the EU Qualification Directive provides that a claim to subsidiary protection is made out where:

*Substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a **real risk** of serious harm as defined in Article 15.*¹⁴

- 13 In the UK, the Asylum and Immigration Tribunal has interpreted the 'substantial grounds test' in Article 2(e) to be the same as the 'well-founded fear' test under the Refugee Convention.¹⁵

- 14 We note that even in countries where the 'more likely than not' test has been adopted, its principle has been called into question. For example, s 97 of Canada's *Immigration and Refugee Protection Act* (IPRA Act) provides for a complementary protection if the decision-maker believes that 'substantial grounds' of torture within the meaning of Art 1 of the CAT exist.¹⁶ The Federal Court of Appeal has held in *Suresh* and *Ahani*, that the test for complementary protection is whether 'on the balance of probabilities' there is a 'serious risk' of torture.¹⁷

¹¹ See Pobjoy, above n 5. He argues that Article 26 of the ICCPR offers an independent and autonomous guarantee of non-discrimination. In his view, 'the fact that one group is at risk of fundamental disenfranchisement, and the other is at risk of the perpetuation or furtherance of a serious human right', is not a sufficient basis to justify preferential treatment for the former'.

¹² See eg *EA v Switzerland*, *Communication No 28/1995*, UN Doc CAT/C/19/D/28/1995 (10 November 1997), [11.5]; *X, Y and Z v Sweden*, *Communication No 61/1996*, UN Doc CAT/C/20/D/61/1996 (6 May 1998), [11.4]; *ALN v Switzerland*, *Communication No 90/1997*.

¹³ *EA v Switzerland*, *Communication No 28/1995*, UN Doc CAT/C/19/D/28/1995 (10 November 1997), [11.3].

¹⁴ European Union Council Directive 2004/83/EC art 2(e).

¹⁵ *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958, 994 (Lord Keith), 996 (Lord Bridge and Lord Templeman), 997 (Lord Griffiths), 1000 (Lord Goff).

¹⁶ *Immigration and Refugee Protection Act 2001* ((Can)) s 97(1)(a).

¹⁷ *Suresh v. Canada (Minister for Citizenship and Immigration)*, [2000] F.C.J. No. 228 (FCA). The court held that the test was somewhere in between 'highly probable' or 'theory of suspicion' and considered that, had the language of the CAT been cast in terms of 'could', 'might' or 'may', then the test might be of a lower threshold. Similar findings were made in *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 2, January 11, 2002.

- 15 However, the Immigration Refugee Board's Legal Services notes 'that the meaning of "serious risk" referred to in *Suresh* does not appear to be significantly different from "serious possibility" or "reasonable chance"'.¹⁸ In its view:

*The preferred position of Legal Services is that all three grounds of protection should be decided using the same standard of proof, namely the Adjei test, "reasonable chance or serious possibility". Hence, the question to be determined in respect of allegations of a danger of torture can be formulated as follows: Is there a reasonable chance or a serious possibility that the person would be tortured should he or she be removed to the country of reference? The test is premised on the prospective nature of the risk, and that same prospective element is present in all three protection grounds.*¹⁹

REQUIREMENT TO PRODUCE IDENTITY DOCUMENTS

- 16 The Bill proposes amendment to s 91W and s 91WA to introduce new two new grounds for refusal of a protection visa. Under s 91W, a protection visa can be refused if a person refuses or fails to comply with a request to provide proof of identity, nationality or citizenship, and does not provide a reasonable explanation for doing so. Under s 91WA, a protection visa can be refused if a person provides a bogus document for the purposes of establishing identity, or have caused their identity documents to be destroyed or disposed of, whether by their own actions or those of another. These refusal powers do not apply where the applicant provides the evidence, or has taken reasonable steps to do so. Currently, the provisions provide that failure to produce documents can lead an unfavourable inference to be drawn in relation to the applicant's nationality.
- 17 We agree that establishing an applicant's nationality is an important part of the refugee status determination process, since an assessment of well-founded fear under the Convention has to be done in relation to a person's 'country of his nationality' or 'country of his formal habitual residence'. It is clear then that a decision-maker needs to identify the country of nationality, or in the case of a stateless person, country of habitual residence.
- 18 We note that a finding as a person's nationality is a finding of fact for the decision maker, having regard to all the circumstances. While evidence of a passport or other identity documents makes such findings about nationality easier, it is also open to the decision maker to determine a claim based on the applicant's own assertions as to his nationality, an assessment of credibility or other factors such as the applicant's language and local knowledge and other relevant matters.²⁰ The RRT's *Guide to Refugee Law* suggests that it would be open to the Tribunal to make a finding based on the applicant's own assertions as to his nationality.²¹

¹⁸ Immigration and Refugee Board, *Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Danger of Torture*, 4.6 (Standard of Proof – Believed on Substantial Grounds to Exist).

¹⁹ *Ibid.* See also *Adjei v Canada (Minister for Employment and Immigration)*, [1989] 2. F.C. 680.

²⁰ For example, the Department's Procedures Advice Manual 3 provides that: 'However, some applicants arrive without any form of documentation or with fraudulent documents. Hence their real nationality might be difficult to determine. In such circumstances, a decision maker may need to consider other aspects of the applicant's claims and other available information. Local knowledge may be used to establish the appropriate country of reference, and decision makers may give weight to linguistic analysis. The amount of weight given is a matter for a decision maker'.

²¹ Refugee Review Tribunal, *Guide to Refugee Law* ch 3 (Country of Reference).

- 19 We suggest that the current measures adequately deal with situations where a person is unable or unwilling to present identity documents. We stress that the issue of proving nationality, of itself, should not be a ground on which to refuse a protection visa. Such an approach recognises that an applicant may not always be able to produce identity documents. For example, a person who is fleeing persecution based on adverse political opinion may draw themselves to the attention of their government if they apply for a passport. The Refugee Convention itself recognises that there are instances where people fleeing persecution are not able to obtain identity documents and imposes obligations upon states not to punish refugees based on their mode of arrival.²²
- 20 In our view, the amendments proposed to these sections increases the risk of *refoulement*. They risk undermining a robust assessment as to whether a person has a well-founded fear of persecution under the Convention or under complementary protection, and instead place the inability to conclusively determine nationality at the front of the refusal decision.
- 21 We also note that in relation to circumstances where a person presents a bogus document, the *Migration Act* also has existing measures to deal with this problem, including the power to cancel a visa on the basis of fraudulent documents being supplied.²³
- 22 The explanatory memorandum suggests that a person whose application is refused under these provisions would still be subject to a *non-refoulement* assessment and could still be granted a visa if the Minister exercises his or her non-compellable powers under the *Migration Act*.
- 23 We do not think that this provides an adequate safeguard against *non-refoulement* given the non-compellable, non-reviewable, and non-delegable nature of the power and the inability to challenge such a decision.²⁴

PRESENTING NEW CLAIMS OR EVIDENCE BEFORE THE RRT

- 24 The Bill proposes to insert a new s 423 of the Migration Act. The effect of the provision is to 'require the RRT to draw an inference unfavourable to the credibility of new claims or evidence provided to the RRT, where the applicant does not have a reasonable explanation to justify why claims were not raised or the evidence was not presented before the primary decision was made on their protection visa application'.²⁵
- 25 The explanatory memorandum states that 'the measure does not prevent the later presentation of new claims and supporting evidence. Rather, it specifies that they must be accompanied by a reasonable explanation in order to be assessed as credible'.²⁶ However, the explanatory memorandum does not provide any guidance on what might be a 'reasonable' excuse for not having provided evidence to the primary decision maker. The provision gives the decision maker considerable power to essentially draw adverse inferences of credibility *based on the timing* of when evidence is presented. In our view, this is not an adequate manner in which to consider credibility issues.

²² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entry into force 22 April 1954) art 31.

²³ *Migration Act 1958* (Cth) s 109.

²⁴ *Ibid* s 417.

²⁵ Explanatory Memorandum, Migration Amendment (Protection and Other Measures Bill) 2014 (Cth), Attachment A, 4.

²⁶ *Ibid*, 5.

- 26 We would suggest that, in practice, there are very few instances where the new information presented was not coupled with a reasonable explanation.
- 27 Current provisions already provide for a robust approach to credibility assessment when new information or claims are presented. That is, RRT members are to have regard to the evidence or new claim that is presented and make the credibility assessment, having regard to the totality of the applicant's claims and situation.
- 28 While we concede that the timing of evidence presented should be a factor in determining credibility, any new claims and evidence need to be properly assessed. This is especially true of new evidence that would appear to be corroborative of the applicant's claims. We would be very concerned if evidence that corroborates an applicant's claims were considered not to be credible, solely on the basis that it should have, or could have, been presented earlier.
- 29 The proposed amendment may be based on assumptions that are not borne out in practice, including that applicants would know in advance what documents or evidence is necessary to support a protection claim and that all evidence would be available to the applicants at the time of application.
- 30 A failure to disclose earlier claims or evidence would be particularly common in relation to family violence or gendered-violence claims. Applicants may be reluctant to disclose evidence due to the traumatic nature of such claims and a fear and mistrust of authorities. The MRT/RRT Guidelines on Credibility recognises this and provides guidance accordingly:

*Traumatic experiences including torture may impact upon a number of aspects of an applicant's case **including the timeliness of an application**, compliance with immigration laws, or the consistency of statements since arrival in Australia. They may also impact adversely on an applicant's capacity in providing testimony of such events.*

*A person may forget dates, locations, distances, events and personal experiences due to lapse of time or other reasons. **A person may not reveal the whole of his or her story because of feelings of shame, for fear of endangering relatives or friends or because of mistrust of persons in positions of authority.***

...

*There may be good reasons why new information or claims are presented by applicants at a later stage in the application process. These reasons may **include stress, anxiety, inadequate immigration advice and uncertainty about the relevance of certain information to an applicant's claims.***²⁷

- 31 This was the experience of several of the academic staff at ANU when they worked with refugees who were in Australia from Kosovo and Afghanistan. The ability for women to articulate crimes of rape and/or sexual violence they and their young daughters had experienced was premised on a relationship of trust and proven by medical investigations that needed to take place over time.
- 32 In our view, the RRT Credibility Guidelines already provide guidance for a robust credibility assessment that takes into account all the evidence and claims presented by an applicant, irrespective of whether that

²⁷ Migration and Refugee Review Tribunal, *Guidance on the Assessment of Credibility*.

evidence has, or has not, been earlier presented. We think this is a proper approach to credibility assessment, with the overarching emphasis that:

*Evidence is assessed in its entirety, not just in isolated parts. The tribunal assesses evidence by weighing up its **probative value and relevance to an applicant's claims**. There is no requirement in law that evidence must be independently corroborated before it can be accepted by the Tribunal.*²⁸

- 33 The proposed provisions might also lead to some intended consequences. For example, it may encourage applicants to delay making an initial application for a protection visa, waiting to collect all the evidence available to the decision maker to avoid an adverse credibility finding, should their claim not be successful. However, the delay itself in making an application may result in an adverse credibility finding against the applicant.²⁹ Conversely, it may unwittingly encourage applicants to submit false documents or evidence to support their claims for fear that later evidence may not be accepted.
- 34 While we understand the importance to the RRT of achieving quick outcomes, we submit that expediency should not be pursued at the expense of affording applicants with proper procedural fairness and access to justice. In our view, there is an obvious risk that the provision may be used to draw an adverse credibility inference based on when the evidence was presented, rather than on its merits in the context of the applicant's claim for protection.
- 35 We also query why review applicants should not be treated the same before the RRT as they are before the Minister. The proposed provision appears at odds with under s 55 of the *Migration Act*. That section provides that an applicant 'may give the minister any additional relevant information and the Minister *must have regard* to that information in making the decision'.³⁰ We see no reason why the Tribunal, conducting a *de novo* review standing in the Minister's shoes, should not be under the same obligation and applicants be afforded with the same rights to have all claims and evidence properly considered.

REQUIRING THE RRT TO FOLLOW 'PERSUASIVE DECISIONS' UNLESS A DECISION IS CLEARLY DISTINGUISHABLE

- 36 The Bill proposes a new s 420B(1) of the *Migration Act* to provide that the Principal Member may, in writing, direct that a 'guidance decision' be complied with, unless the RRT is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision'.³¹ The measure is aimed at 'promoting consistency in decision-making between different members of the RRT' in relation to common facts. Failure to follow a 'guidance decision' would not render a RRT decision invalid.
- 37 We query whether this provision would unnecessarily fetter the freedom and independence of individual members of the RRT to conduct an independent and fair assessment of the case. We note that the

²⁸ *Ibid.*

²⁹ For example, because it suggests that the applicant does not have a genuine well founded fear, or that the applicant has waited to engage in conduct that might strengthen their claim for protection. The RRT Credibility Guidelines provide that 'delay in making an application may be taken into account when assessing the genuineness or extent of an applicant's subjective fear of persecution'.

³⁰ *Migration Act 1958* (Cth) s 55.

³¹ Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) 48.

Tribunal's objective is to provide for a mechanism of review that is 'fair, just, economical, informal and quick'.³² Further, the Tribunal is 'not bound technicalities, legal forms or rules of evidence and must act according to the substantial natural justice and merits of the case'.³³ We stress again the importance of ensuring that the merits of the case not be trumped by expediency.

POLICY OR LEGISLATION?

- 38 Consideration could be given as to whether achieving more consistent decision making at the RRT could be done through policy guidance, as is done in Canada (discussed below). This appears to us to be a better method at encouraging consistent decision-making, without unnecessary restrictions on a Member's ability to decide each case on its merits.
- 39 The Explanatory Memorandum is silent as to what circumstances might trigger the issuance of 'guidance decision' by the Principal Member of the RRT. If the provision is to be inserted, we suggest that, at the minimum, the Act or Regulations should provide clarity around: the circumstances when a 'guidance decision' can be handed down; the policy reasons for the issuance of a 'guidance decision'; and provide for mechanisms for repeal or removal of 'guidance decisions'. The approach taken by Canada's Immigration and Refugee Board (IRB), may be instructive in this regard.

PERSUASIVE DECISIONS AND JURISPRUDENTIAL NOTES IN CANADA

- 40 In Canada, a division head of the IRB can identify a 'persuasive decision', which members are encouraged, but not obliged, to follow in the interest of consistency and effective decision-making.³⁴ The identification of a 'persuasive decision' is done under policy, and can be revoked and replaced over time as the situation changes. A member does not have to provide any reasons for not following a persuasive decision.³⁵
- 41 In contrast, the Chairperson of the IRB has the legislative power to issue guidelines and to provide 'jurisprudential guides' to assist members in carrying out their duties.³⁶ The power can only be exercised after consultation with the Deputy Chairperson and the Director General of the Immigration Division. The policy note contains an adjudication strategy, which suggests jurisprudential notes are aimed at 'identifying small number of cases that merit the division's particular attention because they have the potential to shape the Board's jurisprudence'. As such, the policy provides that the jurisprudential guides should only be used to:
- address an issue of importance to the Board;
 - address an emerging issue;

³² *Migration Act 1958* (Cth) s 420(1).

³³ *Ibid* s 420(2).

³⁴ Immigration and Refugee Board of Canada, *Persuasive Decisions* (16 December 2010) <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/persuas/Pages/index.aspx>>.

³⁵ Immigration and Refugee Board of Canada, *Policy Note on Persuasive Decisions* (19 May 2009) <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/notes/Pages/NotePersuas2009.aspx>>.

³⁶ *Immigration and Refugee Protection Act 2001* ((Can)) s 159(h).

- resolve ambiguity in the law; or
- resolve inconsistency in decision-making.³⁷

42 A decision that is identified as a jurisprudential guide must be well written, provide clear and detailed analysis and consider all the relevant issues of the case, and contain persuasive reasoning.

43 Members of the IRB are expected to follow the reasoning of a decision identified as a jurisprudential guide where the facts underlying the decision are sufficiently close. A member must explain his or her reasoning for not adopting reasoning set out in a jurisprudential guide.³⁸

REMOVAL OF GROUNDS FOR A PROTECTION VISA ON THE BASIS OF BEING A MEMBER OF A FAMILY UNIT

44 The Bill proposes a new s 91WB which is intended to clarify that a person cannot be granted a visa on the basis of being a member of a family unit of a protection visa applicant unless they apply before the protection visa has been granted to the protection visa applicant. The explanatory memorandum acknowledges that while families may be separated—such as children who are unaccompanied minors who are granted protection—they can still apply for family reunification under the Humanitarian Program.

45 We do not support the removal of this pathway for family reunification. Family reunification derives from a fundamental principle of international law that ‘family is the natural and fundamental group of society and is entitled to protection by society and the state’.³⁹ We note that there are benefits to both the individual and to society of an expansive family reunification policy, including that:

- families help to enhance the integration prospects of refugees, including through employment;
- vulnerable groups such as women and children are in need of familial support, especially where assistance programs are limited; and
- families reduce the reliance of refugees on welfare systems.

46 It appears that the intention of the government is to facilitate family reunification through the Humanitarian Program or the Family Migration Program.

47 In relation to the Humanitarian Program, we note that there long processing times (up to five years for children to be reunited with parents) and there are additional ‘compelling reasons’ that must be met by onshore authorised arrivals or those arriving by boat prior to 13 August 2012.⁴⁰ It must be noted that split family applicants are still required to pay for their travel to Australia. The process often results in refugees in Australia waiting until they are in full employment before they apply for family reunion resulting in longer delays.

³⁷ Canada, *Persuasive Decisions*, above n 22.

³⁸ Immigration and Refugee Board of Canada, *Policy on the Use of Jurisprudential Guides* (10 October 2008) <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolJurisGuide.aspx>>.

³⁹ See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) art 16; *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force, 26 March 1976) arts 17, 23(1); *Convention on the Rights of the Child*, UNTS 1755 (entered into force 2 September 1990) art 10.

⁴⁰ See eg, *Migration Regulations 1994* (Cth) sch 2 cl 202.222 in relation to the Global Special Humanitarian Visa (Subclass 202).

- 48 The reality of the current state of this program means that any further reliance on this program as a means to facilitate family reunion will result in families being separated for long periods of time. It is difficult to see how, in the case of an unaccompanied minor, this would be his or her 'best interest', or how the program facilitates family reunion in an 'expeditious manner' in accordance with art 10 of the Convention on the Rights of the Child.
- 49 Pursuing family reunification through the Family Migration Program may prove to be too costly for refugees due to relatively high Visa Application Charges and the cost of airfares. Furthermore migration under a humanitarian program takes into account issues that these visa categories cannot accommodate smoothly such as documentation that is not available to refugees or people in flight or at risk (evidence of residence, birth certificates, and even a permanent address). We are also concerned that other potential options under the Family Migration Program are now reduced, following the recent repeal of the Parent visa (subclass 103), Aged Parent visa (subclass 804), Aged Dependent Relative visa (subclasses 114 and 838), Remaining Relative visa (subclasses 115 and 835) and Carer visa (subclasses 116 and 836).⁴¹ In light of this, the proposed measures to remove family reunification appear to us to be particularly harsh.

CONCLUSION

In our view, the raft of proposed amendments in this Bill risk increasing the likelihood of violating Australia's *non-refoulement* obligations under international human rights treaties. This fundamental obligation not to return people to potential persecution, torture or death is the bedrock, foundation stone human rights principle that must not be weakened or put at risk. Accordingly, we recommend the Senate not pass the Bill.

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⁴¹ See *Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014* (Cth).