Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL 2014

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing 200 organisations and more than 900 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*. As noted in the Explanatory Memorandum accompanying the Bill, this legislation "fundamentally changes Australia's approach to managing asylum seekers". In RCOA's view, this change would be for the worse. The measures outlined in this Bill would profoundly undermine basic principles of refugee protection, reduce transparency and accountability and cause significant harm to people seeking protection, including through dramatically heightening the risk of *refoulement*. RCOA strongly recommends that the Bill not be passed.

1. Schedule 1 – Maritime powers

1.1. RCOA is deeply troubled by the proposed amendments to the *Maritime Powers Act* set out in Schedule 1. The amendments aim to give the Minister for Immigration extraordinary powers to detain people at sea (both within Australian waters and on the high 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.

1.2. It is clear that the proposed changes in Schedule 1 are a direct response and attempt to give authorisation to actions similar to those undertaken by the Australian Government in June and July 2014 with respect to two boats of Sri Lankan asylum seekers. These actions included the transfer of one of the boats and its occupants to the Sri Lankan navy and the attempted transfer of the other boat and its people to India.

1.3. These amendments seek to empower the Minister to detain and transfer people on the high seas even though the Australian Government does not have these powers under the law of the sea nor under the various conventions, covenants and international instruments of human rights. On the high seas or within the Exclusive Economic Zone or the contiguous zone, vessels are governed by the principle of freedom of the seas. Only the flag state can intercept and exert jurisdiction on vessels in these zones, except where the vessel is engaged in piracy, the slave trade or is stateless.[1] As such, interception and detention of vessels in these zones is a violation of the United Nations Convention on the Law of the Sea (UNCLOS). As set out, these amendments would give Australia unbridled power to detain and transfer people on the high seas without consideration of non-*refoulement* obligations or in breach of its obligations under

[1] UNCLOS art 110(1). Furthermore, a stateless vessel only allows for the right to visit, and this right does not extend to a right to tow a boat to another part of the sea. See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 271.

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the law of the sea. Furthermore, the Minister would have the power to detain people and transfer them to another country without the consent of the other country and without an assessment of whether the people being transferred have protection claims against that country.

1.4. RCOA is particularly troubled by amendments which create the risk of people facing arbitrary and prolonged detention without any scrutiny by Parliament or the courts. Given that the Australian Government would not confirm publicly that it had detained and held 157 asylum seekers in June 2014 until the commencement of a High Court case, RCOA is worried that people will face prolonged detention or even be *refouled* without public knowledge. Additionally, as Professor Ben Saul points out, such detention may constitute incommunicado military detention – also described as enforced disappearance – something which is prohibited under the Rome Statute of the International Criminal Court.[2]

1.5. The Bill's Explanatory Memorandum notes the limitations of Australia's extraterritorial jurisdiction in relation to interceptions and interdictions at sea, noting also the relevant international law, particularly that under UNCLOS. The Government, however, claims that there is ambiguity in the exercise of powers under the *Maritime Powers Act* in relation to these international laws and that amendments are required to reflect "the intention that the interpretation and application of [international] obligations is, in this context, a matter for the executive government, noting that the executive government is accountable to the international community for its compliance with those obligations."[3] Leaving decisions about how to comply with Australia's international obligations, including the obligation of non-*refoulement*, only to the Executive, with no external scrutiny, heightens the risk that Australia will violate these obligations. The non-*refoulement* obligation in particular must not be limited: compliance must include a series of safeguards that would not be achievable through executive interpretation of international obligations. Furthermore, as UNCLOS art 2(3) provides, the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." As such, "international law has unquestioned primacy in the zone, trumping not only the coastal state's domestic law but its sovereignty also."[4] In fact, the Parliamentary Joint Committee on Human Rights found that the amendments in Schedule 1 were not compatible with Australia's human rights obligations (see Section 3.11). Indeed, as Professor Guy Goodwin-Gill and Professor Jane McAdam point out, "domestic attempts such as these to regulate access to territory cannot, however, circumvent States' obligations under international law."[5]

1.6. The amendments would also ensure that decisions included within the powers of the Act would not be judicially reviewable or subject to review under the *Administrative Decisions (Judicial Review) Act* 1977, so the scrutiny of the courts would not be an obstacle to the Minister exercising his extraordinary powers. Certain determinations would also not be subject to publication under the *Legislative Instruments Act 2003* and would, therefore, not be made public or face scrutiny by Parliament. Again, the Executive and particularly the Minister for Immigration would have significant powers without being held to account by Parliament, the courts or the public.

1.7. It is clear to RCOA that the objective of the proposed amendments is to prevent legal challenges such as the current challenge in the High Court on behalf of 157 asylum seekers detained by the Australian authorities on board the Ocean Protector vessel in June 2014 (CPCF v Minister for Immigration and Border Protection & Anor [2014] HCATrans 227). The amendments, therefore, promote additional constraints on the already limited ability of the courts to evaluate Australia's treatment of refugees and asylum seekers with reference to its international obligations in relation to operations at sea. The amendments would permit Australia to undertake operations without scrutiny as to whether they were consistent with its international

[2] Saul, Ben, 'Australia Has Probably Broken the Law, but It Will Get Away Scot-Free', *Crikey*, July 2014, available at http://www.crikey.com.au/2014/07/04/australia-has-probably-broken-the-law-but-it-will-get-away-scot-free
[3] Explanatory Memorandum, p. 17.
[4] Pallis, M (2002), "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes", 14 *International Journal of Refugee Law* 329, 343.
[5] Goodwin-Gill, G and McAdam, J (2007), *The Refugee in International Law*, Oxford University Press, 3rd ed, 270.

obligations. The Bill also proposes to eliminate Australia's obligation to consider the national laws of other countries in relation to these operations at sea.

1.8. RCOA is also concerned that the changes to the *Immigration (Guardianship of Children) Act 1946* and its relationship to the *Maritime Powers Act* may result in the Government absolving itself of all obligations towards unaccompanied children on vessels that it intercepted and over which it had effective control. The proposed amendments could mean that, while maintaining effective control of a vessel and detaining and transferring people, the Minister would not have guardianship obligations or need to consider the best interests of unaccompanied children under Australia's effective control.

1.9. Despite the Government's assertion to the contrary, it has been well established under international law that a state's jurisdiction extends to wherever the state exercises effective control.[6] As such, as long as asylum seekers are under the effective control of Australian officials, they are under Australia's jurisdiction. The Government cannot absolve itself from its responsibilities to asylum seekers, including responsibilities under the Refugee Convention and other international human rights laws. As UNHCR has recently pointed out, "Where people are intercepted on the high seas and put on board a vessel of the intercepting State, the intercepting State is exercising de jure as well as de facto jurisdiction and is subject to the obligation of non-refoulement."[7]

1.10. RCOA notes that Australia cannot escape its obligations under the Refugee Convention by simply refusing to process an asylum seeker's claim for protection. A person is considered a refugee with rights under international law from the moment they meet the definition (e.g. the moment they leave their country), not from the moment they are assessed.[8] As Professor James Hathaway and Associate Professor Michelle Foster point out:

> *Refugee status determination does not make a person a refugee. Rather, positive assessment by a state party simply confirms the status already held by a person who meets the requirements of the refugee definition.*[9]

This point is reiterated by the UNHCR's *Handbook,* which states that:

> *A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*[10]

1.11. This distinction is vital due to the various levels of rights owed to refugees under the Refugee Convention in relation to state control and jurisdiction. Importantly in relation to this Bill, a number of rights, including the right of non-*refoulement,* attach "as soon as a refugee comes under a state's jurisdiction, in the sense of being under its control or authority".[11] As such, there are numerous obligations which states have in regards to refugees seeking asylum in their territories or under their jurisdiction.[12]

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[6] Lauterpacht, E. & Bethlehem, D (2003), "The Scope and Content of the Principle of Non-Refoulement: Opinion" in Erika Feller, Volker Türk and Frances Nicholson (eds), Refugee protection in international law: UNHCR's global consultations on international protection, Cambridge University Press, 110.

[7] United Nations High Commissioner for Refugees, "Seeking Leave to Intervene As Amicus Curiae", Submission in CPCF v. Minister for Immigration and Border Protection & Anor [2014] HCA Case S169/2014, [15].

[8] Hathaway, J. & Foster, M. (2014), *The Law of Refugee Status*, Cambridge University Press, Second edition, 25.

[9] Ibid.

[10] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' [28] <http://www.unhcr.org/3d58e13b4.pdf>.

[11] Hathaway & Foster, *The Law of Refugee Status*, above n 101, 26.

[12] See Hathaway & Foster, above n, 26. These rights include protection against discrimination, respect for personal status, property rights, access to courts, rationing, primary education, administrative assistance, equality in fiscal charges, protection against *refoulement* and to be considered for naturalisation.

1.12. The amendments to the *Maritime Powers Act 2013* in Schedule 1 are an affront to Australia's values and raise serious constitutional concerns, as the Minister would be given extraordinary powers to detain and transfer people without Parliamentary or judicial oversight. The Bill goes as far as to say that "the laws of justice to not apply to the exercise of powers" in the *Maritime Powers Act*. The Bill's Explanatory Memorandum goes on to say that the "original intention of the *Maritime Powers Act* was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives." The explanation that it is "impracticable" to provide natural justice in a maritime environment is inadequate and unjustified.

RECOMMENDATION 1: The Refugee Council of Australia recommends that the amendments in Schedule 1 not be passed.

2. Schedule 2 – Temporary protection

2.1. RCOA is dismayed that this Bill reintroduces temporary protection as the only available option to people in need of Australia's protection but deemed to have entered by a mode and date that does not permit them permanent protection.

2.2. There is considerable evidence that Temporary Protection Visas (TPVs) are:

2.2.1. Discriminatory and hinder refugees' ability to settle well: TPVs do not allow refugees to access the full range of services necessary for their successful settlement in Australia. Limited entitlements for and access to essential services (e.g. accommodation, food, household goods, finances, language training, employment and healthcare) prevent refugees from actively participating in the Australian community and increase the likelihood of them becoming stuck in a cycle of dependence.[13]

2.2.2. The cause of uncertainty and tension: temporary status promotes feelings of uncertainty and insecurity and tensions within communities. The constant threat associated with the re-evaluation of refugee status makes settlement intrinsically difficult for TPV holders. TPV restrictions also compound psychological strains of past trauma: restrictions to healthcare, English training, accommodation and family reunion cause additional psychiatric issues that multiply the effects of prior suffering.[14]

2.2.3. Damaging to families: the denial of family reunion and travel rights is punitive and causes negative psychological effects**.** TPV holders have expressed concerns that restrictions on travel and family reunion are particularly designed as punishment. Studies have shown this distress was a leading cause of psychological problems among TPV holders.[15]

2.3. A 2006 study by mental health experts found that refugees on TPVs experienced higher levels of anxiety, depression and post-traumatic stress disorder than refugees on permanent Protection visas, even though both groups of refugees had experienced similar levels of past trauma and persecution in their home countries.[16]

2.4. In fact, the 2006 Senate Inquiry into the Administration and Operation of the *Migration Act 1958* found that there was "little real evidence of [the TPV's] deterrent value…and there is no doubt that its operation has had a considerable cost in terms of human suffering". That Senate

[13] Barnes, D. (July 2003), And A Life Devoid Of Meaning: Living on a Temporary Protection Visa in Western Sydney, Western Sydney Regional Organisation of Councils, Sydney; Leach, M. & Mansouri, F. (2004). Lives in Limbo: Voices of Refugees Under Temporary Protection, UNSW Press, Sydney.

[14] Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006), 'A comparison of the mental health of refugees with temporary versus permanent protection visas', Medical Journal of Australia, vol. 185, no. 7, pp. 357-361, available at https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas

[15] The Centre for Peace and Conflict Studies (CPACS) (2003), 'Go Away: Punished Not Protected: Temporary Protection Visa Holders' Powerlessness, Federal Politicians' Indifference', University of Sydney, Sydney.; Leach, M. & Mansouri, F. (2004); Mann, R. (2001); Mansouri, F. & Bagdas, M. (2002); Nayano Taylor-Neumann, L.V. (2011).

[16] Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006). 'A comparison of the mental health of refugees with temporary versus permanent protection visas', Medical Journal of Australia, vol. 185, no. 7, pp. 357-361, available at https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas

Committee went on to recommend that "all TPV-holders be given the opportunity to apply for permanent protection after a specified period."

2.5. The Government's claim that TPVs will act as "an effective deterrent" against arrival by boat of asylum seekers is not supported by events after the policy's introduction in October 1999. In the two years following this (1 November 1999 to 31 October 2001), 10,217 asylum seekers entered Australia by boat, a five-fold increase on the number (1,953) of people who arrived in the two years prior.[17] There was also an almost ten-fold increase in the number of boat journeys made by women and children after the introduction of TPVs, as separated families attempted to reunite because husbands and fathers on TPVs could not apply for family reunion with their wives and children.

2.6. RCOA also notes that, as TPVs would be issued only to people already in Australia and all future arrivals are to be sent to offshore processing centres in Nauru and Papua New Guinea never to be settled in Australia, the Government cannot claim TPVs as a possible deterrent for future arrivals. Not only is this policy needlessly punitive, it will be counter-productive and ultimately against Australia's national interest. It makes no sense to treat people who are likely to become long-term residents of Australia in such a punitive manner.

2.7. In addition to being harmful to refugees and ineffective as a deterrent to irregular travel, TPVs are also administratively inefficient and burdensome. The TPV will require visa-holders to re-apply every three years and have a full re-assessment of their protection claims. Given the number of people in the legacy caseload and the admission from Government that it will take years to process the claims, the Department of Immigration and Border Protection will likely not get through the initial assessments of those in the legacy caseload before the first TPV re-assessments will be triggered. The TPV system requires all TPV-holders to have their protection claims reassessed, even if there has been no substantial change in conditions in their country of origin. As a result, time and resources will be wasted reassessing claims even when it is clear from the outset that the person is in need of ongoing protection.

2.8. This need for a re-assessment after an individualised refugee determination also potentially violates article 1C of the Refugee Convention by requiring a new protection application to be made each time a TPV expires, rather than the onus falling on the Government to explain that there has been a fundamental change to the circumstances in the country of origin that removes the risk of persecution for the individual concerned.

2.9. This Bill also introduces the Safe Haven Enterprise Visa (SHEV), a new form of (temporary) Protection visa. The SHEV has similar conditions to the TPV, with the major differences being that SHEVs are valid for up to five years if a refugee undertakes to work in a designated regional location. The details of where a designated regional location is not set out in the legislation and will be subject to both regulations and opt-in agreements with state and local areas. While the SHEV offers the possibility of permanency via another type of visa, RCOA is concerned that the regulations and detail of this visa have yet to be determined. RCOA is also concerned that the Minister for Immigration has made public comments forecasting that it will be difficult for SHEV-holders to "clear the hurdles" to be able to apply for another visa while in Australia and that the SHEV will present only a "very limited opportunity" for a pathway to permanency.

2.10. RCOA notes that, under Section 46AA (2)(a)(b), the legislation stipulates that a valid application for a SHEV cannot not 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 or introduce the regulations will rest with the Minister.

[17] See the Senate Budget Estimates Hearing from 21-22 May 2012.

2.11. RCOA is also troubled by the condition to prohibit a pathway to permanency for people on TPVs. The effect of the condition 8503 on the TPV means that a refugee is not permitted to apply for any other substantive visa and will create a never-ending loop of uncertainty. Given the plethora of evidence demonstrating the deleterious effects of ongoing uncertainty, the elimination of this condition and the options for a pathway to permanency would be a reasonable and appropriate approach.

2.12. In addition to the temporary nature of the visa, the lack of re-entry rights (and therefore, travel rights) on the visa and the lack of family reunion options are some of the more harmful aspects of the TPV and SHEV. Refugees that wish to depart Australia and visit family in countries of asylum (e.g. Malaysia) will lose their TPV and will not be able to re-enter Australia. Flexibility for a refugee on a TPV or SHEV to travel in and out of Australia without the threat of losing protection would mitigate some of the harm that damages people while on TPVs.

2.13. The allowance of family reunion, particularly for immediate family members like parents, spouses and children, would permit refugees to act and attempt to rescue family members trapped in desperate and dangerous circumstances overseas.

2.14. In relation to the conditions and residency requirements of the SHEV, RCOA believes that there is an opportunity to expand the options for where people live and the employment that they undertake. Given the growing labour shortages in certain industries (e.g. hospitality and aged care), there is a unique opportunity for the SHEV to include not only regional geographic locations but also to be expanded to include designated industries. The inclusion of designated industries for the provision of a SHEV would mean that both metropolitan and regional areas with labour shortages in key industries would be options for refugees eager to work and contribute. Refugees would also have access to the communities and support structures that are already in place in many metropolitan areas. The cost of developing support services in regional locations where there has been minimal refugee settlement would be lessened through the expansion of designated locations.

RECOMMENDATION 2: The Refugee Council of Australia recommends that the amendments in Schedule 2 in relation to re-introducing Temporary Protection Visas and introducing the Safe Haven Enterprise Visas not be passed.

RECOMMENDATION 3: If TPVs were to commence, the Refugee Council of Australia recommends that condition 8503 not be included in the conditions of the visa to enable TPV-holders to make an application for a permanent Protection visa.

RECOMMENDATION 4: If TPVs and SHEVs were to commence, the Refugee Council of Australia recommends that re-entry rights be included in the visa conditions so as to permit the visa-holders to exit and re-enter Australia without forfeiting the visa.

RECOMMENDATION 5: If TPVs and SHEVs were to commence, the Refugee Council of Australia recommends that family reunion options be made available for visa-holders.

RECOMMENDATION 6: If SHEVs were to commence, the Refugee Council of Australia recommends that, in addition to designated regional areas, designated industries with significant labour shortfalls be included for SHEV-holders to seek employment in both metropolitan and regional locations. RCOA recommends that the Department of Immigration conduct stakeholder consultations with relevant industry bodies and communities to inform the designations.

3. Schedule 4 – Fast track assessment process

3.1. RCOA agrees with the statement in the Explanatory Memorandum that "the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community – eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives". We have repeatedly urged both the previous and current Governments to end prolonged delays in the processing of refugee claims and ensure that all asylum seekers, regardless of their mode of arrival, have access to a fair and efficient process for determining their status.

3.2. The pursuit of efficiency, however, should not come at the expense of fairness and accuracy in decision-making, particularly where decisions could be the difference between life and death. We are therefore troubled by the proposed introduction of an Independent Assessment Authority (IAA) to act as a substitute for the Refugee Review Tribunal (RRT) for some asylum seekers.

3.3. The proposed structure and functions of the IAA do not, in RCOA's view, provide an adequate framework for ensuring accuracy and procedural fairness in decision-making. The overriding objective of the IAA, as stated in the Bill, is to provide "a mechanism of limited review that is efficient and quick". By contrast, the objective of the RRT under the *Migration Act* is to provide a "mechanism of review that is fair, just, economical, informal and quick". The RRT is also required to "act according to substantial justice and the merits of the case" – a requirement which does not apply to the IAA. The mixed objectives of the RRT require its decision-makers to strike a balance between efficiency, fairness and accuracy, while the IAA's objective essentially requires the prioritisation of speed above all other concerns.

3.4. RCOA is particularly troubled by the limited capacity of asylum seekers to participate in the IAA review process. Unlike the RRT, asylum seekers cannot apply to the IAA in their own right: cases must be referred to the IAA by the Minister. In most circumstances, the IAA will make assessments based solely on the information provided to it by the Secretary of the Department at the time that a case is referred. The applicant will not be permitted to participate in the process and cannot provide new information to support their claims except at the discretion of the IAA and within certain restrictions. The applicant will thus be effectively locked out of the review process unless the IAA decision-maker elects otherwise. Not only is this procedurally unfair, it also creates a conflict of interest, in that the Department will effectively control the evidence by which the accuracy of its own decision-making will be reviewed.

3.5. The effective exclusion of the applicant from the review process also heightens the risk of assessments being made on the basis of evidence that is inaccurate, out-dated or incomplete. As noted in the Explanatory Memorandum, "the power for the IAA to get, request or accept any new information is completely discretionary under all circumstances". Even if clear, compelling and credible evidence is available attesting that the applicant has a well-founded fear of persecution in their home country, the IAA will be under no obligation to consider it. It is difficult to see how this discretionary system can possibly ensure accurate decision-making and act as an effect safeguard against *refoulement*.

3.6. Even if the IAA does permit the applicant to provide new information, however, additional restrictions apply which further limit the types of information that the IAA can consider. There must be "exceptional circumstances" which warrant the consideration of new information and the applicant must demonstrate that the information could not have been presented at the primary stage of decision-making. There is no definition of "exceptional circumstances". In RCOA's view, these restrictions are out of step with the realities of refugees' experiences. The fast track assessment model proposed in this Bill appears to be based on a broad assumption that the provision of new evidence at a later stage of decision-making is likely to indicate that a person's claims are not credible. In reality, it is not always realistic or reasonable to expect that people fleeing persecution will be able to provide all information and evidence relevant to their claims in the first instance and many would have entirely legitimate reasons for providing additional evidence at a later stage.

3.7. It often takes time for asylum seekers to develop trust in decision-makers to the point that they feel comfortable divulging their stories. For example, survivors of sexual violence and other forms of torture and trauma often find it difficult and distressing to recount their experiences, particularly to complete strangers. Similarly, those who have experienced stigmatisation (such as survivors of sexual violence or people fleeing persecution based on their sexual orientation or gender identity) may not initially reveal the full extent of their experiences due to feelings of shame or fear. People who have been persecuted by their own governments may also be fearful of revealing their stories to government authorities in another country. In these cases, the provision of new information at a later stage in the process is unlikely to indicate a lack of credibility; in fact, it would be a consequence of persecution they have suffered.

3.8. In other cases, asylum seekers may face challenges in navigating the visa application process. For instance, people who are experiencing mental health issues which affect memory and concentration (as is common amongst survivors of torture and trauma) may struggle to articulate their claims coherently and consistently. Lack of understanding of Australia's immigration processes and systems may also make it more difficult for asylum seekers to present complete and relevant claims, particularly if they have additional vulnerabilities (as is the case for unaccompanied minors, for example) or if they are further disadvantaged by factors such as limited financial resources and support networks, lack of English language skills and low levels of education. This is a particularly significant issue given that most of the people who will be subject to the new fast track assessment process will no longer have access to government-funded legal advice and application assistance and thus may receive no assistance at all to navigate the visa application process.

3.9. The examples outlined above are common experiences of people seeking protection from persecution. In most cases, however, people in these circumstances would not be permitted to present new information to the IAA. Even if the IAA was satisfied that exceptional circumstances existed which justified the consideration of new information, many people in these circumstances would still be prevented from doing so on the basis that this information could have been provided at the primary stage of decision-making. In essence, the fast track assessment process outlined in this Bill could result in people being denied refugee status not because their cases did not have merit but because they were frightened, ashamed, mentally unwell or had difficulties navigating the visa application process.

3.10. RCOA is also deeply concerned that certain applicants would be ineligible for any form of merits review. Access to an independent and credible system of merits review is, in RCOA's view, both a basic standard of procedural fairness and a critical safeguard against *refoulement*. Denying access to merits review would both undermine the fairness of the refugee status determination system and heighten the risk of asylum seekers being returned to danger.

3.11. RCOA notes that in its consideration of this Bill, the Joint Parliamentary Committee on Human Rights noted that:

> *The obligation of non-refoulement is considered in international law as* jus cogens*, which means that it is a fundamental or peremptory norm of international law which applies to all nations, and which can never be limited. Accordingly, compliance with the obligation of non-*refoulement *requires that sufficient safeguards are in place to ensure a person is not removed in contravention of this obligation. …The provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.*[18]

3.12. The Committee advised that it considered the proposed amendments under several Schedules of this Bill incompatible with Australia's obligations under the ICCPR and the CAT.

[18] See the *Fourteenth Report of the 44th Parliament*, Parliamentary Joint Committee on Human Rights, tabled 28 October 2014, available at http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2014/14_44/14th%20report%20FINAL.pdf

3.13. Furthermore, the exclusion criteria outlined in the Bill are likely to capture some individuals who *do* have credible claims. For example, the fact that a person has made an application for refugee status which was previously refused in Australia or elsewhere is not necessarily an accurate indicator of their current protection needs. The emergence of new information, changes in personal circumstances or deteriorating conditions in an asylum seeker's home country could render previous decisions irrelevant. Additionally, given that the quality of refugee status determination can vary widely from country to country, the fact that a person has been denied refugee status in another country is not necessarily an accurate reflection of their protection needs. This includes status determination processes managed by UNHCR: in some countries, these processes do not conform to UNHCR's own guidelines for determining refugee status due to resource constraints or restrictions imposed by host governments. In RCOA's view, it would be both unwise and unjust to deny access to merits review based on assessments made in other jurisdictions which may not be of a comparable standard to assessments made in Australia.

3.14. We also note with concern that the exclusion criteria rely not on an objective test but on the "opinion of the Minister". Essentially, these criteria would allow an asylum seeker to be denied access to merits review based solely on the Minister's personal opinion, regardless of what evidence actually existed to suggest that they fall into one of the exclusion categories.

3.15. Additionally, RCOA is troubled by suggestions in the Explanatory Memorandum that legislative instruments may be introduced to alter the application of fast track measures. While we acknowledge that these instruments could be used to exempt some individuals from fast track measures, RCOA believes that this practice is likely to create uncertainty and unpredictability in the assessment process and does not provide an adequate substitute for a statutory entitlement to merits review.

3.16. In summary, RCOA is of the view that the IAA does not present an adequate substitute for the RRT. We believe that the introduction of this parallel system of merits review would create a much higher risk of inaccuracy in decision-making and thereby increase the danger of asylum seekers being erroneously returned to situations where they could be subject to persecution or other forms of serious harm. It is RCOA's position that all claims for refugee status should be assessed on their individual merits without prejudice. Quality refugee status determination systems should be able to easily make the necessary distinctions between credible and unfounded claims without placing lives in danger.

3.17. The proposed changes to create the fast track system, coupled with the burden of proof changes and identity requirements and restrictions outlined in the *Migration Amendment (Protection and Other Measures) Bill* 2014, amass to reshape Australia's refugee status determination system as a series of obstacles for refugees to overcome rather than a reliable and just system for determining if someone requires Australia's protection. The changes outlined in both Bills seem to be designed to make it more difficult for people to succeed in the having their claims positively assessed.

RECOMMENDATION 7: The Refugee Council of Australia recommends that the amendment in Schedule 4 removing access to the Refugee Review Tribunal not be passed.

RECOMMENDATION 8: The Refugee Council of Australia recommends that the amendments in Schedule 4 to create the Immigration Assessment Authority not be passed.

RECOMMENDATION 9: The Refugee Council of Australia recommends that funded migration advice be available to all asylum seekers in the "legacy caseload" so as to facilitate informed and quality applications.

4. Schedule 5 – Non-*refoulement* obligations

4.1. RCOA is alarmed by the proposed changes to Section 198 of the *Migration Act* which would permit non-citizens to be removed from Australia irrespective of whether Australia has non-*refoulement* obligations towards them.[19] While the Government has stated that it does not intend to remove non-citizens from Australia in breach of our non-*refoulement* obligations, RCOA finds it difficult to see how this can be assured in practice.

4.2. RCOA rejects the contention put forward in the Explanatory Memorandum that the removal powers set out in Section 198 should be "separate from, unrelated and completely independent of, any provisions in the *Migration Act* which might be interpreted as implementing Australia's non-*refoulement* obligations". As Australia's non-*refoulement* obligations are only ever engaged in the context of potential removal, we believe that this is fundamentally illogical. Arguing that removal and non-*refoulement* should be treated as "separate" and "unrelated" concerns would be akin to arguing that best interests considerations for children are "unrelated" to child protection.

4.3. The changes outlined in the Bill would not only *permit* the removal of non-citizens in violation of our non-*refoulement* obligations but would in fact *require* this to occur in some circumstances, as officers would have a duty to remove a person covered by Section 198 even if Australia had non-*refoulement* obligations towards that person. Furthermore, the alternative safeguards against *refoulement* outlined in the Explanatory Memorandum – the Protection Visa application process and Ministerial intervention – are simply not adequate in RCOA's view. Firstly, Section 198 can apply in circumstances where the individual concerned has not applied for a visa, so the visa application process and the consideration of non-*refoulement* obligations does not apply. Secondly, RCOA and others have long argued that the discretionary, non-compellable and non-reviewable Ministerial intervention process – under which the Minister is under no obligation to even consider intervening in a particular case, regardless of how compelling the person's protection claims may be – does not on its own provide an adequate safeguard against *refoulement*.[20] A process by which the Minister would be made aware of non-*refoulement* obligations – by referral from the RRT under Section 417 – is not available to fast track applicants, as they are not permitted access to the RRT.

4.4. RCOA is concerned that the inadequacies in the fast track process coupled with the lack of migration advice and support for applicants will mean that non-*refoulement* obligations will not be sufficiently considered under the new Refugee Status Determination system. Therefore, the need for consideration of non-*refoulement* obligations before removal is critical to ensure that people are not returned by Australia to places of danger where they face significant harm.

4.5. RCOA is also very concerned about the potential impacts of these amendments on refugees who have been denied visas on security or character grounds. As these individuals have a well-founded fear of persecution but are not eligible to be granted a visa, Australia's non-*refoulement* obligations play a critical role in ensuring that they are not returned to danger. Should these obligations no longer be considered when effecting removals under Section 198, there is a risk that these individuals could be removed despite their need for protection having been affirmed by the Australian Government.

4.6. RCOA is also troubled by the Government's myriad attempts to repeal or weaken Australia's complementary protection provisions in the *Migration Act* – and subsequent non-refoulement obligations – through the amendments proposed in this Bill, in the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* and in the *Migration Amendment (Protection and Other Measures) Bill 2014.* These attempts would reintroduce a

[19] Our non-*refoulement* obligations means that Australia must not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

[20] See RCOA's submission to the Senate Committee on the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013* at http://www.refugeecouncil.org.au/r/sub/1401-CP.pdf

flawed system that undermines protection for people at risk of egregious human rights violations and risks Australia breaching its international obligations.

4.7. While RCOA welcomes the Australian Government's stated commitment to upholding its non-*refoulement* obligations, we do not believe that simple assurances are sufficient to ensure that this occurs in practice. Non-*refoulement* obligations are expressly designed to protect people from some of the most egregious of human rights violations, such as deprivation of life, persecution, torture and other serious forms of harm. It is therefore imperative that consideration of these obligations remains central to decisions regarding removal.

RECOMMENDATION 10: The Refugee Council of Australia recommends that the amendments related to the removal power in Schedule 5 not be passed.

5. Schedule 5 – Reinterpretation of Refugee Convention obligations

5.1. RCOA opposes provisions in the Bill which remove references to the Refugee Convention from the *Migration Act* and reinterpret these obligations to create a new statutory framework for assessing refugee claims. In RCOA's view, this approach to implementing our international obligations is fundamentally at odds with the purpose of international law. The Refugee Convention (and other international treaties) do not merely provide general guidance but are intended to operate as consistent legal standards across all states parties. While it may be acceptable to build upon or expand the application of treaties in a manner which furthers the enjoyment of human rights, it is not acceptable for states to entirely reinterpret treaties in the manner of this Bill. While some of reinterpretations in the Bill are broadly consistent with Australia's obligations under the Refugee Convention, several are out of step with both the letter of the Convention itself and long-standing consensus on the appropriate interpretation of its provisions.

5.2. The Parliamentary Joint Committee on Human Rights was scathing of the Government's plan in the Bill to remove "the relevant international human rights norms from a role in defining the legal framework and standards within which Australia meets its international human rights obligations". The Committee was of the view that by "severing the connection between Australia's international obligations and [how] its domestic law engages, it is likely to significantly limit a number of human rights protected by international law".[21]

5.3. The Bill seeks to place a greater onus on asylum seekers to explore options for finding safety within their home country before seeking protection elsewhere. The definition of "well-founded fear of persecution" in the Bill requires that the risk of persecution apply across all areas of the person's home country. As noted in the Explanatory Memorandum, the implication of this amendment is that asylum seekers will not be eligible for protection in Australia if they can safely and legally relocate to a "safe part" of their home country upon return.

5.4. The Refugee Convention imposes no such requirements on refugees. As noted by UNHCR, the Convention "does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin" and "does not require threatened individuals to exhaust all options within their own country first before seeking asylum".[22] In fact, the Refugee Convention does not make any explicit reference to internal relocation and there is no consistent approach internationally regarding the application of this concept.

5.5. The Explanatory Memorandum also notes that options for internal relocation need not be considered "reasonable", that is, asylum seekers must explore options for relocation even if doing so would result in financial hardship. The Memorandum asserts that such considerations are "irrelevant" to the assessment of protection claims. RCOA rejects this argument. If a person experiences hardship as a result of efforts to avoid persecution, this hardship is essentially a

[21] See the *Fourteenth Report of the 44th Parliament*, Parliamentary Joint Committee on Human Rights, tabled 28 October 2014, available at www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2014/14_44/14th%20report%20FINAL.pdf
[22] See the UNHCR's Guidelines on International Protection, available at http://www.unhcr.org/3f28d5cd4.html

corollary of persecution. A person cannot be said to enjoy freedom from persecution if they must endure ongoing and significant hardship in order to avoid persecution. Indeed, UNHCR's guidelines on internal relocation emphasise that the requirement to relocate must be reasonable, that is, the person must be able to "lead a relatively normal life without facing undue hardship". In the absence of clear international legal standards regarding internal relocation within the context of refugee status determination, RCOA is of the view that Australia should be guided by the recommendations of UNHCR.

5.6. The Memorandum's explanation that such considerations are "irrelevant" directly contradicts the examples of what constitutes serious harm in the consideration of a well-founded fear of persecution, including but not limited to "significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; and denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."[23] This contradiction within the Bill is disturbing and signals the inappropriateness of the internal relocation provision.

5.7. RCOA also has concerns about provisions of the Bill which seek to codify the concept of "effective State protection". We believe these provisions are likely to obscure rather than elucidate the circumstances under which a person is likely to have a well-founded fear of persecution. The mere existence of "appropriate criminal law, a reasonably effective police force and an impartial judicial system" is not necessarily an accurate indicator of the risk of persecution to an individual asylum seeker. Status determination should not focus simply on assessing whether such institutions exist but on whether they have the capacity to provide effective protection in a particular case. For example, a police force may be "reasonably effective" in the majority of cases but may fail to provide effective protection from certain crimes (such as rape or domestic violence), to certain individuals (such as women or people who are same-sex attracted or members of a minority religious or ethnic group) or in certain circumstances (such as in a conflict situation).

5.8. In the same provision, the Bill seeks to equate protection measures provided by non-state actors with those provided by states. While non-state actors may be able to provide important forms of protection in some circumstances, they cannot possibly command the same level of protection capacity as a state. Non-state actors cannot, for example, confer legal status, grant visas, provide permission to access government services or prevent removal against the wishes of a state. In addition, while they are expected to adhere to certain principles of international law, non-state actors are not bound by international treaties (and their associated accountability and oversight mechanisms) in the same manner as states. RCOA is therefore of the view that protection provided by non-state actors should not be considered equivalent to state protection.

5.9. The introduction of new provisions regarding the modification of behaviour to avoid persecution also raises some concerns. We acknowledge that the Bill does include exemptions from this requirement in certain cases. However, while the Explanatory Memorandum provides examples of situations in which a person would be exempt from modifying their behaviour to avoid persecution, it provides no examples of situations in which a person *would* be expected to modify their behaviour. It is not clear, for instance, whether expressions of an individual's personality would be considered as "fundamental" to their identity and conscience as expressions of their political or religious beliefs. There is a risk that these provisions could result in the denial of refugee status to individuals who are at significant risk of harm or face undue restrictions on their liberty which, if based on other grounds, would entitle them to refugee status.

5.10. Potential gaps also exist within the Bill's definition of "social group". The definition in the Bill is broadly consistent with UNHCR's guidelines[24] on this concept. We note, however, that focusing solely on characteristics which are innate or immutable or which are fundamental to identity or conscience may exclude some social groups which are at risk of persecution. UNHCR's

[23] Section 5J paras 5d,e,f, p. 94 of the Bill.
[24] Available at http://www.unhcr.org/3d58de2da.html

guidelines provide the following example: "If it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart". As such, we believe there needs to be greater flexibility in the definition of "social group" to ensure that it is able to encompass the broad range of social groups at risk of persecution.

RECOMMENDATION 11: The Refugee Council of Australia recommends that the amendments in relation to Australia's codification of its interpretation of who is a refugee not be passed. As an alternative, RCOA recommends that the Government commence the processing of claims under the current Refugee Status Determination System and make available permanent Protection Visas to people found to be owed protection.

6. Schedule 6 – Children of asylum seekers who arrived by boat

6.1. In Schedule 6, the Government seeks to classify children born to asylum seekers who arrived by sea without a prior visa – defined as "unauthorised maritime arrivals" or "transitory person" for the purposes of the Act – as having the same classification as their parents. This amendment responds to the babies born in Australia to people seeking protection – including babies born in Australian hospitals after their mothers were transferred from the Offshore Processing Centre in Nauru – and would currently apply to at least 100 children.

6.2. The intent of the amendment is to ensure that the children do not have a pathway to a permanent Protection visa or citizenship even if they have Australian birth certificates.

6.3. RCOA is particularly disturbed by the assessment in the Statement of Compatibility with Human Rights that in relation to every child having the "right to acquire a nationality" (as written in Article 24 of the ICCPR), that a "stateless child's status as an ['unauthorised maritime arrival'] does not alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country".

6.4. RCOA is dumbfounded as to this claim that classification as an "unauthorised maritime arrival" would not alter a child's eligibility for citizenship under Australian or Nauruan laws (the only current designated Regional Processing Country that children are being transferred to). Nauru has not offered more than a five-year visa for people found to be owed protection and settled in the country. In Australia, this very Bill seeks to minimise any options for people who arrive without a prior visa the opportunity to apply for permanent residency, which is the pre-requisite for citizenship in Australia.

6.5. At a time when there are increased global efforts to prevent, reduce and resolve statelessness,[25] Australia is making laws that would contribute to statelessness.

RECOMMENDATION 12: The Refugee Council of Australia recommends that the amendments in Schedule 6 in relation to children born to asylum seekers not be passed.

7. Schedule 7 – Statutory limit on permanent Protection Visas

7.1. RCOA opposes the introduction of a statutory limit on the number of permanent Protection Visas which can be issued within a particular financial year and the introduction of Ministerial powers to suspend processing of asylum claims after this limit is reached. Protection Visa grants should be guided, first and foremost, by the protection needs of individual applicants. These needs

[25] See the UNHCR's most recent

(and, consequently, Protection Visa grants) will inevitably vary from year to year due changing conditions in countries of refugee origin across the world. Seeking to limit access to protection in Australia regardless of the level of need at a particular time is, in RCOA's view, fundamentally at odds with Australia's obligations under the Refugee Convention.

7.2. RCOA is greatly concerned that allowing the Minister to suspend processing of applications for refugee status could result in asylum seekers being forced to remain in limbo for extended periods. Past experience in Australia has demonstrated that suspensions of processing can have devastating consequences for the health and wellbeing of asylum seekers. The uncertainty caused by these suspensions has a deleterious impact on mental health and hampers recovery from pre-arrival experiences of torture and trauma. Delays in processing can also result in asylum seekers spending prolonged periods in indefinite detention or in the community under very difficult conditions, with further negative impacts on health and wellbeing.

7.3. Delays in processing not only have serious negative consequences for asylum seekers but also work against Australia's national interests. Forcing individuals who will eventually become permanent residents (and, indeed, citizens) of Australia to endure an artificially prolonged assessment process is likely to have significant long-term costs for Australia. Past experience has shown that refugees who have experienced prolonged periods of uncertainty (especially when coupled with indefinite detention or financial hardship) often require more intensive support to settle successfully and find it more difficult to recover from their experiences, rebuild their lives and contribute to Australia.

7.4. RCOA also notes that the introduction of a statutory limit and accompanying suspension powers conflicts with statements made elsewhere in the Explanatory Memorandum regarding the desirability of determining cases as quickly as possible. If the Government accepts this to be true, to the point that it is deemed necessary to introduce a fast track assessment process, it makes little sense to introduce provisions which will actively *prevent* cases from being resolved efficiently.

7.5. RCOA also has reservations regarding the removal of the 90-day timeframe for deciding Protection Visa applications. While we agree that the nature of refugee status determination is such that some cases will take longer to process than others, we believe that the current 90-day timeframe sets an important benchmark which helps to ensure that claims are processed efficiently and without undue delay. The removal of this benchmark would create greater potential for prolonged delays in processing, with the associated negative impacts described above.

RECOMMENDATION 13: The Refugee Council of Australia recommends that the amendments in Schedule 7 in relation to both the protection visa cap and the removal of the 90-day timeframe Protection Visa decision not be passed.

8. Lack of justification for proposed changes

8.1. One of RCOA's overriding concerns about this Bill is the lack of evidence provided by the Government illustrating why this legislation is needed or how the amendments proposed in the Bill would achieve their stated objectives. For example, the Government has provided no evidence to demonstrate that:

- The reintroduction of temporary protection would act as a deterrent.
- Australia's current refugee status determination system is inefficient or open to abuse by people with unmeritorious claims.
- Asylum seekers who arrive without visas are likely to have unmeritorious claims thus their cases should be processed in a different manner to asylum seekers who arrive with valid visas.
- Limiting access to merits review would enhance the integrity of the refugee status determination process.

- Non-*refoulement* obligations present a barrier to the removal of people who are not in need of Australia's protection.
- Placing a statutory limit on permanent Protection Visas would reduce the number of asylum applications received by Australia.

8.2. Given the serious negative consequences which could stem from this legislation, RCOA believes that it is incumbent upon the Government to provide further evidence of the necessity of these changes and the efficacy of the measures proposed. If such evidence is not provided or cannot be produced, RCOA can see no justification for introducing such sweeping changes to Australia's migration legislation or implementing measures which carry such high risks.

RECOMMENDATION 14: The Refugee Council of Australia recommends that, without further evidence and adequate justification of the proposed changes, the Committee recommend that the Bill not be passed.