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Canberra ACT 0200 Australia

Senate Standing Committee on Legal and Constitutional Affairs

Via email: legcon.sen@aph.gov.au

Submission to the Maritime and Migration Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)

Introduction

The ANU Migration Law Program, within the Legal Workshop of the ANU College of Law, specialises in developing and providing programs to further develop expertise in Australian migration law. These include the Graduate Certificate in Australian Migration Law and Practice, which provides people with the necessary knowledge, skills and qualifications to register as Migration Agents, and the Masters of Law in Migration Law.

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.

We thank the Committee for the opportunity to put in a submission to the Inquiry. Our submission has also benefited from input from Professor Pene Matthew (Dean of Griffith Law School). We thank her for her invaluable input and contribution to our submission.

Our submission focuses on Schedules 2-7 of the Bill. We oppose the measures proposed in the strongest possible terms. If the Bill is passed, it will seriously diminish the rights of refugees and asylum seekers in Australia. The Bill seeks to undermine due process, hinder the ability for the judiciary to play a role in the development of international law, and give the Minister considerable powers to determine when and how Australia will meet its obligations under the Refugee Convention. This comes at a time when states around the world should be engaging in solidarity and burden sharing to deal with refugee problems. It would set a dangerous and worrying precedent with far reaching consequences.

We urge the Committee to carefully consider the ramifications of the proposed measures and in particular, to consider whether there is sufficient justification for the suite of proposals. In our view, there is not.

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Schedule 2 – Protection Visa and Other Measures

1 Schedule 2 makes a number of significant changes to Australia's protection visa regime. However, we direct our comments in this part of the submission to the:

- proposed reinstatement of temporary protection visas (TPV);[1] and
- introduction of a new temporary protection visa known as a Safe Haven Enterprise Visa (SHEV).[2]

Temporary Protection Visas

2 The Bill seeks to reinstate the temporary protection visa regime to ensure that unauthorised maritime arrivals, those who arrive by air without a visa, or who already hold a TPV will not be granted a permanent protection visa.[3]

3 It is envisaged that the TPV will share many of the characteristics of its predecessors. The visa will last for 3 years, after which time a person must apply for another TPV. The statement of compatibility with human rights notes that TPV holders will be able to access Medicare and the Australian health system.[4] TPV holders are also granted the right to work.[5] However, TPV holders are not entitled to leave and re-enter Australia and are also not entitled to family reunion.

4 We oppose the reinstatement of TPVs on the basis that rolling temporary protection visas are inconsistent with the object and purpose of the *Refugee Convention*. The conditions imposed on the TPV may also give rise to breaches under other international human rights instruments.

Rolling temporary protection visas

5 There is nothing in the *Refugee Convention* that requires protection offered by a State to be of a permanent nature. However, temporary protection is widely recognised as an *exceptional measure* to be applied only where it is impracticable to conduct individual refugee status determinations, or where protection is granted

a class of persons broader than *Refugee Convention*, for example, those fleeing generalized violence or other emergencies.[6]

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[1] Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload)
[2] Ibid item 13–18.
[3] Explanatory Memorandum, ibid 6.
[4] Statement of Compatibility with Human Rights, ibid 16.
[5] Ibid 17.
[6] Executive Committee of the High Commissioner's Programme, 'Note on International Protection, UN Doc. A/AC.96/830' [47].

6 While it is envisaged that temporary protection may be suitable in range of circumstances, it is the practice of most states to offer permanent protection to a person who is recognised as a refugee. By contrast, the proposed TPV is intended to ensure that the person to whom Australia owes protection obligations can never granted a permanent protection visa, due to their mode of arrival. In our view, this constitutes a breach of the right to non-discrimination under the ICCPR.[7] It also constitutes a breach of Article 31 of the *Refugee Convention*, since it could be argued that TPVs holders are being penalised for their mode of arrival by way of being offered a visa with diminished social entitlements.

7 We also argue that temporary protection visas are inconsistent with the purpose of the *Refugee Convention* to provide protection that is worthy of the name for refugees. In this respect, the Convention envisages that, once found to be a refugee, the cessation of refugee status should only occur where, for example, the conditions in the country of origin have changed such that the reasons for the person becoming a refugee have ceased.[8] What the Convention does not envisage is a 'potential loss of status triggered by the expiration of domestic visa arrangements'.[9]

8 In addition, we note that Article 34 of the *Refugee Convention* requires states to 'as far as possible facilitate the assimilation and naturalization of refugees'.[10] We fail to see how rolling temporary protection visas can be consistent with this obligation. Rather, they place refugees in a state of permanent limbo with no pathway or ability to achieve a permanent and durable solution.[11]

9 There exists ample evidence that the uncertainty of the TPV regime and the limited rights afforded to visa holders have a deleterious effect on the mental wellbeing of refugees.[12] For example, a British Journal of Psychiatry study found that:

- Certainty of residency to persons recognised as refugees seems to be essential for recovery from trauma-related psychiatric symptoms.
- Families and social groups that are not kept together or reunited maybe at greater risk of prolonged mental disorder.[13]

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[7] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.
[8] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 1C.
[9] UNHCR, 'UNHCR Concerned about Confirmation of TPV System by High Court'.
[10] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 34.
[11] C.f. James Hathway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 989.
[12] Zachary Steel et al, 'Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees' [2006] *British Journal of Psychiatry* 58; Zachary Steel and Derrick Silove, 'The Mental Health Implications of Detaining Asylum Seekers' (2001) 175 *Medical Journal of Australia* 569.

Ban on family reunion for TPV holders

10 The most concerning aspect of the TPV is the ban on family reunification. TPV holders will not be able to sponsor their families to Australia, and cannot leave Australia to visit their families and then return to Australia. The explanatory memorandum recognizes that the policy may result in people being 'separated from their families for some years', but that the measures are proportionate and reasonable to 'maintain the integrity of the migration system and the national interest'.[14]

11 We disagree. In our view, the ban on family reunification may give rise to a breach of Articles 17(1) and 23 of the International Covenant on Civil and Political Rights (ICCPR).[15] These provide that family is a fundamental unit of society that should be protected, and that no one should be subjected to arbitrary or unlawful interference with his family. We also point to Articles 10(1) of the Convention on the Rights of the Child (CRoC), which requires states to facilitate family reunification in a 'positive, humane and expeditious manner'. This is consistent with the primary obligation to ensure the best interest of the child is primary consideration in Article 3(1) of the CRoC.

12 In our view, it is disingenuous to say that a person can voluntarily choose to return home if they wish to be with their family. Given that a person who engages Australia's protection obligations has a well-founded fear of persecution in their home country, we say that the only place where refugees may enjoy family unity is within the country of refuge. Similarly, it is also disingenuous to say that because people choose to travel to Australia without their family, Australia has not caused the separation and therefore, is not interfering with the family within the meaning of Article 17 of the ICCPR. This ignores the stark realities of forced migration, where people may be forced to leave their countries quickly to avoid persecution and may be separated from their families for reasons beyond their control.

13 We also note that the ban on family reunion could have the unintended consequence of more people risking their lives on the high seas. That is, people may be encouraged to take dangerous boat trips to Australia, simply because the ban on family reunion for the TPV holders means that there is no other alternative to be reunited with their family.

14 In our view, there is no justification legally, politically or even morally for what is clearly a deliberately harsh policy. It will cause serious psychological trauma to people who have already experienced trauma in their home country. The policy is

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[13] See Zachary Steel et al, above n 12.

[14] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 12.

[15] *International Covenant on Economic, Social and Cultural Rights*, Opened for Signature 16 December 1966, 993 UNTS 3 (entered into Force 3 January 1976).

clearly punitive against people who are found to be refugees. It is likely to cause severe hardship and suffering for an already damaged group of people for years to come. What is worse is that these seriously harmful effects are deliberately intended.

Safe Haven Enterprise Visas (SHEV)

15 The Bill also provides a framework for the introduction of the Safe Haven Enterprise Visas (SHEV). The Bill does not provide any details about the criteria for the grant of the visa, which will be provided for later in the Regulations.

16 However, the Minister has indicated that the SHEV can be granted as an alternative to a TPV for those who are found to be genuine refugees. It is envisaged that a person granted a SHEV will be required to live in and work in 'designated region' and are encouraged to fill job vacancies in these areas.[16] States and territories, regions and employers will be able to nominate themselves to participate in this program.[17] The SHEV will last for 5 years and holders will need to work continuously for the period of three and a half years without accessing income support, before being eligible to apply for other onshore permanent visas, such as a family or skilled visa. However, they will not be able to apply for a permanent protection visa. Similar to the TPV, holders of SHEV will not have access to family reunion or travel and re-entry into Australia.

17 In our view, the SHEV does not provide a durable solution for refugees. The requirement to work three and half years without income support is particularly onerous. In addition, we query how likely it is that SHEV holders would be eligible for permanent skill or family visas. These visas require applicants to obtain a high level of English, have their skills recognised by professional bodies and often require a high visa application fees. The Minister himself acknowledges that obtaining permanent residency is a 'very limited opportunity and 'a very high bar to clear'.[18]

18 If SHEV holders cannot apply for a permanent visa, their only option is to apply for a further TPV or SHEV, effectively leaving them in a state of permanent limbo. This is an undesirable outcome.

19 Ironically, the visa that SHEV holders would most likely meet the criterion for – a permanent protection visa – is not available. We submit that there should be clearer

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[16] Second Reading Speech (Scott Morrison, Minister for Immigration and Border Protection) Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth).
[17] Ibid.
[18] Scott Morrison (Minister for Immigration and Border Protection), 'Transcript of Press Conference: Reintroducing TPVs to Resolve Labor's Asylum Legacy Caseload' op cited.

assurance of a pathway to permanent residence, ideally, in the form of a permanent protection visa.

Schedule 4 – Fast Track Assessment Process

Overview

20 The proposed amendments in Schedule 4 insert a new Part 7AA into the *Migration Act* to provide for a limited form of merits review of primary decisions to refuse to grant a protection visa to a defined group of applicants, namely unauthorised maritime arrivals (UMAs), that entered Australia on or after 13 August 2012 for whom the Minister has lifted the bar preventing the UMA from making a valid visa application under subsection 46A(1) and who has subsequently made a valid application for a protection visa in Australia.[19] These applicants form the 'asylum legacy caseload' referred to in the Bill, and comprise approximately 30,000 asylum seekers living in the community on a bridging visa or being held in onshore immigration detention facilities or under community detention arrangements.[20]

21 Applicants who form part of the 'asylum legacy caseload', are termed 'fast track applicants'[21] and will be subject to the fast track assessment process established by the new Part 7AA.

22 The primary decision ('fast track decision') for 'fast track applicants' will be made by the Department of Immigration and Border Protection (DIBP) in accordance with an as yet unspecified fast track assessment process. The Explanatory Memorandum to the Bill states that primary decision-making "will be conducted under existing provisions of the Migration Act [and] will be supported by a code of procedure with shorter time frames which will be prescribed in the Migration Regulations."[22]

23 Merits review of negative DIBP decisions ('fast track reviewable decisions')[23] will be conducted by a newly created Immigration Assessment Authority (IAA) to be established within the existing Refugee Review Tribunal (RRT).[24]

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[19] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 19.

[20] Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary' (31 August 2014).

[21] Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) s 5(1) sch4 pt 1 Item 1.

[22] Explanatory Memorandum, ibid 8.

[23] See proposed s 473BB.

[24] See proposed s 473JA.

24 Certain applicants, termed 'excluded fast track review applicants',[25] will not have access to merits review by the IAA.[26] These applicants will include those who can access protection elsewhere or who make a manifestly unfounded claim for protection or who without reasonable explanation use a bogus document to support their application.[27] These 'excluded fast track review applicants' will have access only to an internal Departmental review of the primary decision.

25 Under the proposed amendments, the Minister will have the power to expand the class of persons that will be excluded from accessing merits review (excluded fast track applicants) and will also be able to expand the class of persons that will be subject to the fast track process. Both will be by way of a non-disallowable legislative instrument.[28]

26 This part of the submission is limited to a consideration of the proposed amendments to introduce the fast track assessment review process established by Part 7AA, specifically the creation of the IAA and its limited merits review function, and the power conferred on the Principal Member of the RRT to issue guidance decisions.

Summary of Submission

27 We oppose the proposed amendments on the basis that they are discriminatory, punitive, unnecessary, undesirable and dangerous.

28 The proposed amendments are discriminatory, punitive and contrary to Australia's international obligations as they identify and subject to inferior assessment processes a group of asylum seekers based on their mode of arrival and date of entry into Australia.[29] The failure of the proposed amendments to provide an independent, effective and impartial review of claims to protection by 'fast track

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[25] Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) s 5(1) sch 4 pt 1 Item 2.

[26] Explanatory Memorandum, ibid 107.

[27] Ibid s 5(1) sch 4 pt 1 Item 2.

[28] Ibid ss 5(1AA) and (1AB) sch 4 pt 1 Item 2.

[29] Contrary to Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights (ICCPR), and Articles 2 and 31 of the Refugee Convention. The Statement of Compatibility with Human Rights states that whereas the proposed measures "may be said to engage Articles 2(1) and 26 [of the ICCPR] by facilitating different review rights for certain fast track applicants, they are both reasonable and proportionate to achieving their aim … of limiting access to de novo merits review as provided by the Refugee Review Tribunal to those asylum seekers who seek Australia's protection through lawful channels.": 23.

applicants' is incompatible with Australia's obligations under the ICCPR and CAT.[30]

29 The proposed amendments are unnecessary as there is an existing and established merits review tribunal (the RRT), which can conduct reviews of negative primary DIBP decisions for applicants who are part of the 'asylum legacy caseload'.

30 The proposed amendments are undesirable for the reason that they provide for an inferior system of merits review undertaken by a non-independent decision-making body (the IAA) for 'fast track applicants' and remove entirely access to merits review for a group of 'excluded fast track review applicants'. The diminution and/or removal of merits review processes proposed by the amendments increases the risk of inaccurate decision-making in relation to the protection claims of 'asylum legacy caseload' applicants, and thereby increases the potential for the *refoulement* of refugees to a place of persecution.

31 The danger of *refoulement* of refugees to a place of persecution as a consequence of the amendments is heightened by the fact that the process to be undertaken by DIBP officers for the primary assessment of the protection claims of 'fast track applicants' is as yet unspecified.[31] When DIBP officers conducted streamlined refugee assessment processes on Christmas Island in 2010-11 and 2011-12, the overturn rate on review by Independent Merits Reviewers was as high as 90%.[32]

32 Finally, the potential in the proposed amendments for the expansion by the Minister of the class of persons who will be excluded entirely from accessing merits review ('excluded fast track review applicants') or subject to the fast track process ('fast track applicants') is both concerning and dangerous, especially in the absence of effective parliamentary scrutiny.[33] In addition, the power conferred on the Minister to issue a conclusive certificate to prevent review of fast track decisions because it would be contrary to the 'national interest' to change the primary refusal decision[34] has the potential to remove access to merits review for individuals or groups of applicants at the whim of the Minister. Both these mechanisms rely excessively on executive discretion in the hands of the Minister

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[30] Contrary to *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for Signature 10 December 1984, 1465 UNTS 85 (entered into Force 26 June 1987) art 3(1); *International Covenant on Economic, Social and Cultural Rights*, Opened for Signature 16 December 1966, 993 UNTS 3 (entered into Force 3 January 1976) art 6(1) and 7; *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 31.

[31] Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) ss 5(1AA) and (1AB) sch 4 pt 1 Item 2.

[32] See overturn rates of IMA assessments conducted during 2010 to 2012 *Report of the Expert Panel on Asylum Seekers* table 14, 98.

[33] Proposed s 5(1AA).

[34] Proposed s 473BD.

in determining matters of fundamental administrative justice, and are incompatible with the constitutional doctrine of responsible government.

Recommendation: That Schedule 4 of the Bill not be enacted.

Fast Track Procedures

33 'Fast track' or 'accelerated' procedures are commonly adopted as part of the refugee status determination process in other jurisdictions and are invariably controversial. They are almost always limited to categories of persons thought to be at no serious risk of persecution, such as individuals from 'safe countries of origin' in the European regime.

34 In the United Kingdom there are two types of accelerated procedures. First, where the claim is certified by the Home Office to be 'clearly unfounded', there is no provision for an in-country appeal. These are termed 'non-suspensive appeal' cases (NSA). The majority of cases certified in this manner are of applicants from a deemed safe country of origin, although individual cases can also be certified as clearly unfounded.[35]

35 The second accelerated procedure is a detained fast track procedure (DFT) where the United Kingdom Border Authority considers that the claim is capable of being decided quickly. The DFT process is conducted while the applicant is in detention.

36 The two procedures (NSA and DFT) are in theory quite different in that the former implies that the applicant's claim has no merit, whereas the latter is based on an assumption that the matter can be determined quickly. However informally the DFT also operates on the basis that the claims are 'unfounded'.[36]

37 The Statement of Compatibility with Human Rights for the proposed Bill cites the UNHCR's policy on manifestly unfounded applications for asylum and notes that it supports accelerated procedures for these types of claims where procedural

[35] In 2013 about 10% of claims were certified 'clearly unfounded'. Albania, India and Nigeria were the most common countries of origin, accounting for 76% of applicants whose claims were certified unfounded. Countries are treated as safe if they are designated as such in binding orders made under section 94 of the Nationality Immigration and Asylum Act 2002 (UK): Asylum Information Database http://www.asylumineurope.org

[36] Ibid.

safeguards are afforded to applicants subjected to the accelerated processes.[37] The Statement of Compatibility states that it is the Government's position that "there are sufficient procedural safeguards in place for ensuring all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent assessment process …".[38]

38 The United Kingdom courts have considered 'fast track' procedures on several occasions against both non-discrimination norms and common law principles of unfairness. In *R (Refugee Legal Centre) v SSHD*,[39] Lord Sedley observed:

> The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. *But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency*; and whether it has done so is a question of law for the courts … we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in *Thirukumar* [1989] Imm AR 402,414, *asylum decisions are of such moment that only the highest standards of fairness will suffice*; and as Lord Woolf CJ stressed in *R v Home Secretary, ex parte Fayed* [1998] 1 WLR 763, 777, *administrative convenience cannot justify unfairness*. In other words, there has to be in asylum procedures, as in many other procedures, *an irreducible minimum of due process*.[40]

39 More recently, the High Court of Justice found that elements of the UK's fast track detention process carried an 'unacceptably high risk of unfairness'.[41]

40 The proposed amendments in Schedule 4 appear to be loosely modelled on fast track or accelerated procedures in overseas jurisdictions. As discussed below, our primary objection to the amendments is that they amount to a considerable reduction in the scope of merits review of negative primary DIBP decisions available to fast track applicants and significantly diminish the content of the procedural fairness obligation owed to these applicants.

41 We oppose the proposed measures for reason that, as Lord Sedley has observed, protection decision are of such importance that only the highest standards of fairness are sufficient, and these measures improperly sacrifice fairness on the altar of speed and convenience.

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[37] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 22.

[38] Ibid.

[39] *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481.

[40] Ibid [8], emphasis added.

[41] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) (09 July 2014).

Discriminatory and Punitive Measures

42 Article 31 of the Refugee Convention recognises the realities of refugee flight by prohibiting the imposition of penalties on refugees for not complying with domestic requirements for legal entry where they can show 'good cause.'[42] As Lord Bingham noted in *R v Asfaw*, the provision implements one of the three broad humanitarian aims of the Convention and should not be narrowly construed.[43] Consistent with this approach, an overly formal or restrictive approach to interpreting the term 'penalties' is inappropriate. States cannot circumvent the fundamental protection, which Article 31 is intended to provide by narrowly limiting the term to the criminal sphere. This is consistent with the approach of the UN Human Rights Committee to the term 'penalty' as it appears in article 15 ICCPR, and 'offences' in Article 14.[44]

43 Schedule 4's removal of fundamental procedural rights and protections when determining refugee status, targeted at a specific category of refugees identified exclusively by reference to their mode of arrival, amounts to a penalty in both its purpose and effect, and thereby falls foul of Australia's obligations under Article 31 of the Refugee Convention. This argument is heightened by the cumulative nature of the restriction of rights imposed on unauthorised maritime arrivals in other areas of Australian migration law, not least their susceptibility to removal and offshore processing.

Non-Refoulement Obligations

44 Australia has non-refoulement obligations under the Refugee Convention, the International Convention on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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[42] Article 31(1) provides that: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

[43] *R v Asfaw* [2008] UKHL 31. His Honour also confirmed the widely accepted principle that the term 'coming directly' does not refer to countries through which a refugee transited.

[44] See discussion in Guy Goodwin-Gill, 'Refugee Protection in International Law: UNHCR's Global Consultations on International Protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 195.

Punishment (CAT) for asylum-seekers who are found not to be refugees.[45] The provision of 'independent, effective and impartial' review of non-refoulement decisions including merits review is integral to complying with *non-refoulement* obligations.[46]

45 The Statement of Compatibility with Human Rights correctly notes that "the Refugee Convention does not prescribe procedures to be adopted by States in the processing of protection claims [and] the UNHCR recognises that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of non-refoulement …"[47]

46 However, as noted by the Parliamentary Joint Committee on Human Rights (PJCHR), "while there is scope for Australia to determine its own process for refugee status determination, those processes must be compliant with Australia's obligations of non-refoulement to avoid placing Australia in breach of its international human rights obligations."[49]

47 A recent decision of the Inter-American Court of Human Rights lays down important guidance concerning due process in asylum proceedings. The Court drew not only on the inter-American human rights instruments and jurisprudence, but the Refugee Convention and various authoritative documents from UNHCR and its executive committee. Essential due process elements according to the Court are:

- 'necessary facilities' for submission of the claim for asylum (this includes an interpreter and may include legal representation);
- objective consideration of the claim by a 'competent and clearly identified authority', including a personal interview;
- 'duly and expressly founded' decisions;
- respect for the principles of privacy and confidentiality;

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[45] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 31; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for Signature 10 December 1984, 1465 UNTS 85 (entered into Force 26 June 1987) art 3(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1) and 7; and Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.

[46] Parliamentary Joint Committee on Human Rights, 'Fourteenth Report of the 44th Parliament' (October 2014) 75 citing International Covenant on Civil and Political Rights, article 2.

[47] Statement of Compatibility on Human Rights, Attachent A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 22.

[49] Parliamentary Joint Committee on Human Rights, above n 46, 87.

- an appeal and a reasonable period to, and information on how to appeal; and
- suspensive effect of any appeal.[51]

48 The Court stated that even in cases of 'accelerated procedures' to 'decide requests that are "manifestly unfounded and abusive" … the minimum guarantees of a hearing, and determination of the unfounded or abusive nature of the request by the competent authority, and the possibility of a review of the negative decision should be respected before expulsion.'[52]

49 We endorse the comments of the PJCHR that "independent, effective and impartial review of claims to protection against non-refoulement is a fundamental aspect of [Australia's] obligations."[53] As the PJCHR notes, the proposed fast track process established by the Bill appears to be directed at ensuring that the assessment and review processes for 'fast track applicants' be "as brief as possible" and that while "administratively efficient processes are generally desirable, it is unclear whether the proposed fast track process will ensure that genuine claims for protection are identified and, in the case of the fast-track review process, that is capable of ensuring that the true and correct decision is arrived at".[54]

50 We further endorse the observations of the PJCHR that "compliance with the obligation of *non-refoulement* requires that sufficient procedural and substantive safeguards are in place to ensure a person is not removed in contravention of this obligation, given the irreversible nature of the harm that may result."[55]

51 As detailed below in the following paragraphs, the absence of sufficient procedural and substantive safeguards in the proposed amendments which establish and confer a limited merits review function on the IAA in relation to negative primary decisions for 'fast track applicants' creates a significant risk that refugees will be returned to persecution and therefore Australia will have failed to satisfy its *non-refoulement* obligations.

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[51] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Judgment of November 25, 2013 [159].
[52] Ibid [172].
[53] Parliamentary Joint Committee on Human Rights, above n 46, 87.
[54] Ibid.
[55] Ibid.

Exclusion of Merits Review for 'Excluded Fast Track Review Applicants'

52 Under the proposed amendments, 'excluded fast track review applicants' will not have access to any form of external merits review of the primary decision.[56]

53 As noted by the PJCHR, "the provision of 'independent, effective and impartial' merits review of non-refoulement decisions is integral to complying with the non-refoulement obligations under the ICCPR and CAT."[57]

54 We strongly endorse the view of the PJHCR that "an internal departmental review system, by its nature, lacks the requisite degree of independence required under international human rights law to provide a sufficient safeguard."[58]

55 Accordingly, we oppose the proposed amendments which seek to exclude decisions made in relation to 'excluded fast track review applicants' as the absence of independent scrutiny of these decisions creates a high risk that inaccurate primary decisions will not be identified and that wrongful refoulement of refugees will thereby occur.

Independent Assessment Authority

56 Proposed Division 8 provides for the establishment of the Immigration Assessment Authority (IAA) within the existing Refugee Review Tribunal (RRT).[59] The IAA consists of the Principal Member of the RRT, Senior Reviewers and other Reviewers who exercise the powers and functions of the IAA.[60] The Principal Member is responsible for the overall operation and administration of the IAA and may issue directions and determine policies for this purpose.[61] The Senior Reviewer manages the IAA subject to the directions of and policies determined by the Principal Member.[62] The Senior Reviewer is appointed by the Principal Member, who must consult the Minister before making the appointment.[63] The Reviewers and Senior

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[56] Ibid.

[57] Parliamentary Joint Committee on Human Rights, above n 46, 88.

[58] The PJCHR concluded that the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's non-refoulement obligations: Ibid.

[59] Proposed s 473JA(1).

[60] Proposed s 473JA(2),(3).

[61] Proposed s 473JB(1).

[62] Proposed s 473JB(2).

[63] Proposed s 473JC. Note that proposed section 473BA provides that Reviewers are appointed by the Minister.

Reviewer are engaged under the *Public Service Act 1999*.[64] The Reviewers are appointed by the Minister.[65]

57 The establishment of the IAA within the existing structure of the RRT and overseen by the Principal Member of the RRT will mark a significant change to the existing operation of the RRT. The RRT was established in 1993 as an independent statutory tribunal which, together with its sister tribunal, the Migration Review Tribunal (MRT), is empowered under the *Migration Act 1958* to conduct independent merits review of primary DIBP decisions to refuse to grant an applicant a protection or migration visa.

58 The *Migration Act* provides that the Principal Member, Deputy Principal Member and Members of the MRT and RRT are appointed by the Governor-General, on the advice of Cabinet, for a fixed term of up to five years.[66] Members are not bound by Departmental Policy in making their decisions however, like Departmental officers; they are bound by Directions issued by the Minister under s.499 of the Act.

59 While there are no mandatory qualifications for the appointment of MRT or RRT Members, persons appointed by the Governor-General under the *Migration Act* as Members have typically worked in a relevant profession or have had extensive experience at senior levels in the private or public sectors. The remuneration of Members is determined by the Remuneration Tribunal,[67] and Members are not subject to removal from office other than in limited circumstances.[68]

60 The proposed amendments similarly do not mandate any qualifications for appointment as a Senior Reviewer or Reviewer of the IAA. However, unlike appointments to the MRT-RRT that are made by the Governor-General for a fixed term, appointments to the IAA will be public servants employed or seconded to undertake the work of the IAA. Unlike Members of the MRT-RRT, IAA Reviewers will not be independent statutory officers.[69]

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[64] Proposed s 473JE(1). The Senior Reviewer must be an SES employee: section 473JC(1).

[65] Proposed s 473BA.

[66] *Migration Act 1958* (Cth): s 398 (MRT) and s 461 (RRT). The most recent round of appointments in June 2014 were for a term of three years. Members are cross-appointed to both the MRT and RRT. Sections 396 (MRT) and 459 (RRT) provides for appointment of Members by the Governor-General.

[67] *Migration Act 1958* (Cth) s 399 (MRT) and s 462 (RRT).

[68] Ibid s 403 (MRT) and s 468 (RRT).

[69] The Statement of Compatibility with Human Rights states that "[t]he establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary assessment process.": Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 27.

61 If enacted, these amendments will effectively create a new non-independent division (IAA) within the existing MRT-RRT. The Senior Reviewer and Reviewers of the IAA will be non-statutory officers (public servants) undertaking a merits review function similar to, albeit considerably more limited than (discussed below), that exercised by the independent statutory officers (Members) of the MRT-RRT.

62 We are opposed to the proposed amendments that seek to establish the IAA within the existing organisational structure of the MRT-RRT. This hybrid structure, with RRT Members and IAA Reviewers undertaking similar merits review functions but only the former being independent statutory appointments and thereby not subject to influence by the Minister or DIBP in making decisions for individual applicants, creates a situation whereby decisions made for 'fast track applicants' will not be those of an independent and impartial tribunal. There is a considerable risk that the decisions of the non-independent IAA will be little more than a rubber stamp of the primary DIBP decision, a risk that is heightened by the inferior processes and reduced procedural fairness obligations of the IAA (discussed below) as compared to those of the RRT.

63 There is no reason why the review of primary 'fast track' decisions of applicants who form part of the 'asylum legacy caseload' cannot and should not be undertaken by the RRT. There are currently 135 MRT-RRT Members[70] located throughout Australia who could be constituted these 'fast track' review cases by the Principal Member and prioritised ahead of other on-shore protection cases.[71] This would ensure that reviews of 'fast track' decisions are finalised efficiently and expeditiously in accordance with Government policy, and without sacrificing the procedural fairness safeguards guaranteed by the RRT's statutory processes and procedures (discussed further below).

IAA is not an Impartial and Independent Tribunal

64 The Executive Committee of the UNHCR has stated that processes for determining refugee status should satisfy minimum requirements including, where an asylum-seeker has been found not to engage Australia's protection obligations, the ability of the asylum seeker to seek a reconsideration of the decision to the same or a

[70] Senate Legal and Constitutional Affairs Committee, Estimates, *Hansard*, 20 October 2014, 16.

[71] Prioritisation of the 'fast track' caseload could also be effected by way of a Ministerial Direction under section 499 of the *Migration Act*.

different authority and either to an administrative or judicial body.[72] The right to appeal is confirmed by the Inter-American Court's decision in Pacheco Tineo.[73]

65 Article 14(1) of the ICCPR requires that in the determination of an individual's "rights and obligations in a suit at law" they "shall be entitled to a fair and pubic hearing by a competent, independent and impartial tribunal established by law."[74]

66 The Statement of Compatibility with Human Rights states that it is the Government's view "that it is consistent with its international obligations to implement a mode of merits review that is efficient, cost effective and ensures a reconsideration of a fast track review applicant's circumstances."[75]

67 In our view, the proposed measures that establish the non-independent IAA with a limited merits review function and which is prohibited from conducting a hearing with 'fast track review applicants' are incompatible with the requirements of Article 14(1) ICCPR.

68 The Statement of Compatibility with Human Rights states that the "establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary decision process." Contrary to this, for the reasons stated above, it is our view that the IAA cannot be said to be an independent body as IAA Reviewers are public servants appointed by the Minister for Immigration and Border Protection and the Senior Reviewer is appointed by the Principal Member RRT only after consultation with the Minister.

Limited Merits Review and Procedural Fairness Obligations

69 Whereas the *Migration Act* provides for a right to merits review by the RRT following a negative primary protection decision by DIBP,[76] a 'fast track' applicant[77] who receives a negative primary decision cannot make an application for review directly to the IAA. The proposed amendments provide that the

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[72] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 26.

[73] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Judgment of November 25, 2013.

[74] The Statement of Compatibility with Human Rights notes that Article 14(1) "may not be directly applicable to immigration proceedings."

[75] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 26.

[76] See which together provide that a valid application for review made to the RRT *must* be reviewed by the RRT.

[77] Other than an 'excluded fast track review applicant' who cannot access IAA review.

Minister must "as soon as reasonably practicable after the decision is made" refer a 'fast track reviewable decision' to the IAA.[78] Once referred to the IAA, a fast track reviewable decision must be reviewed by the IAA, which has the power to affirm the decision or remit it for reconsideration to the primary decision-maker.[79]

70 The denial to 'fast track' applicants of what is effectively the right to apply for review to the RRT of a negative primary protection decision is a significant departure from the existing statutory scheme. Whereas this obviates the need for an applicant to complete application forms and pay an application fee, it removes from the applicant's control the decision as to whether their case is to be reviewed. Furthermore, there is no provision in the proposed amendments to require a fast track applicant to be notified that the primary decision has been referred by the Minister to the IAA.

71 While the RRT is required under section 420 of the *Migration Act* to provide a review that is 'fair, just, economical, informal and quick', the review provided by the IAA need only be 'efficient and quick'.[80] The removal of 'fair' and 'just' as stated objectives of the review process for fast track decisions is indicative of the fact that merits review of these decisions by the non-independent IAA is, and is intended to be, an inferior form of merits review to that provided by the RRT under existing provisions of the Act.

72 Proposed Division 3 of the Act purports to be an exhaustive statement of the natural justice hearing rule as it applies to reviews conducted by the IAA.[81] It provides that nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the primary decision-maker,[82] and the applicant has no right to comment on the material before the IAA.[83] These provisions, together with the absence of a requirement to invite a 'fast track' applicant to a hearing of the IAA (discussed below), have the potential for an applicant to not only have no right to be heard in relation to the review, but to be completely unaware that their case is being reviewed by the IAA.[84]

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[78] Proposed s 473CA.

[79] Proposed s 473CC.

[80] Proposed s 473FA.

[81] Proposed s 473DA(1). *Migration Act 1958* (Cth) s 423 sets out the exhaustive statement of the natural justice hearing rule in relation to the RRT.

[82] Proposed s 473DA(2).

[83] Unless the new information is adverse information in which case the applicant is to be invited to comment on the information: see proposed section 473DE.

[84] Proposed s 473EB provides that the IAA must notify the applicant of its decision.

73 Whereas section 425 of the Act requires the RRT to hold a hearing, the proposed amendments provide that the IAA must not conduct a hearing with or otherwise interview the applicant[85] except in exceptional circumstances.[86] IAA review decisions will therefore be made 'on the papers' and with reference only to the information that was available to the primary decision-maker.[87]

74 This does not accord with the essential due process elements noted by the Inter-American Court in the Pacheco Tineo decision[88] and is a marked departure from the processes mandated for the RRT by the Act. It will allow the IAA to make decisions without reference to the applicant, and without consideration being given to new evidence or updated country of origin information or any other relevant material the applicant, or a witness, may wish to draw to the attention of the Reviewer. The RRT by contrast must not make a decision adverse to the applicant without inviting them to a hearing at which they can give evidence and present arguments relating to the issues arising in relation to the decision under review.[89]

75 The IAA has the discretion to obtain new information, however a Reviewer is under no obligation to do so.[90] The proposed amendments make clear that the IAA must not consider new information unless there are exceptional circumstances and the information could not have been provided to the primary decision-maker.[91] The threshold for 'exceptional circumstances' is intended to high, and "should only be recognised if a fast track review applicant's circumstances may now cause them to engage Australia's protection obligations."[92]

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[85] Termed a 'referred applicant' – see proposed s 473BB.

[86] Proposed s 473DB obliges a Reviewer to review a fast track reviewable decision referred to it without accepting or requesting new information and without interviewing the referred applicant. The IAA may obtain documents and information that was not before the primary decision-maker if it considers it relevant but it does not have a duty to obtain, request or accept any new information. The IAA may invite a person to provide new information in writing or at an interview: see proposed s 473DC.

[87] Proposed s 473DD provides that the IAA must not consider new information unless there are exceptional circumstances and the information could not have been provided to the Minister before the primary decision was made.

[88] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Judgment of November 25, 2013.

[89] *Migration Act 1958* (Cth) s 425.

[90] Proposed s 473DC.

[91] Proposed s 473DD.

[92] Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 24. This lists three broad categories of events that have arisen in a fast track review applicant's case after the primary decision has been made.

76 Whereas the IAA is not obliged to request or consider any new information a 'fast track' applicant may wish to present as part of the review process, the IAA is required to disclose new information considered by the Reviewer which would be the reason or part of the reason for affirming the primary decision.[93] However such information is limited to information specifically in relation to the applicant and does not include general country of origin information.[94]

77 These proposed amendments significantly diminish the existing statutory procedural fairness obligations applicable to RRT reviews and remove entirely a fast track review applicant's opportunity to correct factual errors or incorrect assumptions in the primary decision in the course of the review process.

78 A 'fast track review applicant' will be provided with a 'written statement of decision' by the IAA that will set out the decision and the reasons for decision.[95] There is no requirement that the IAA (unlike the RRT)[96] set out any findings of fact or to refer to the evidence on which the findings were based. This is in contrast to the requirement that the statement containing the primary fast track decision provided by DIBP to the IAA must not only give reasons for the decision but also set out the findings of fact of the primary decision maker and refer to the evidence on which those findings were based.[97] This is inconsistent with the essential due process elements noted by the Inter-American Court in the Pacheco Tineo decision that any decision be 'duly and expressly founded'.[98]

79 The merits review function of the IAA is vastly inferior to that of the RRT under the existing provisions of the Act. As a consequence there is considerable potential for inaccurate decision-making by the IAA in relation to reviews of adverse decisions affecting 'fast track applicants' by virtue in particular of the IAA's inability to accept or request new or updated information. The limited merits review function of the IAA exacerbates the high risk of inaccurate decision-making and thereby heightens the potential for refugees to be *refouled* to danger.

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[93] Proposed s 473DE. See also proposed s 473DF. See also *Migration Act 1958* (Cth) 424A which imposes this obligation on the RRT.

[94] Proposed s 473DE(3).

[95] Proposed s 473EA.

[96] *Migration Act 1958* (Cth) s 430.

[97] Proposed s 473CB.

[98] *Case of the Pacheco Tineo Family v Plurinational State of Bolivia*, Judgment of November 25, 2013.

Challenges to IAA decisions

80 All 'fast track' applicants (including excluded fast track review applicants) will have access to judicial review. However in the case of 'excluded fast track review applicants', applications for judicial review may only be made to the High Court as the Federal Circuit Court does not have jurisdiction over primary decisions.[99]

81 Despite the availability of judicial review for fast track review applicants to the Federal Circuit Court in relation to a negative IAA decision, the absence of a requirement for the IAA to outline any findings of fact or to refer to the evidence on which the findings were based will make it difficult for the Court to identify jurisdictional error in IAA decisions.

82 Furthermore, the limited procedural fairness obligations imposed on the IAA towards fast track review applicants by the proposed measures will significantly limit the grounds on which an applicant might make a successful application for judicial review. For example, there would be no denial of procedural fairness in circumstances where a Reviewer failed to consider new information or claims, whether sought and obtained by the Reviewer[100] or received from an applicant without request.[101]

83 Unlike decisions of the RRT,[102] there is no provision for the Minister to substitute a decision of the IAA with a decision that is more favourable to the applicant on public interest grounds.

Guidance Decisions

84 Proposed section 473FC empowers the Principal Member of the RRT to direct that a decision of the RRT or the IAA (a 'guidance decision') be followed by the IAA in reaching a decision on a fast track review. These 'guidance decisions' must be followed by the IAA unless the facts or circumstances are clearly different from the facts or circumstances of the guidance decision.[103] Non-compliance with a guidance decision does not render the IAA's decision invalid.[104]

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[99] *Migration Act 1958* (Cth) s 476.

[100] Under proposed s 473DC.

[101] See discussion in NSW Bar Association submission to the Inquiry – Submission 27.

[102] The non-compellable Ministerial intervention power in s 417 of the *Migration Act 1958* (Cth).

[103] Proposed s 473FC.

[104] Proposed s 473FC(3).

85 This provision mirrors proposed section 353B and section 420B in the Migration Amendment (Protection and Other Measures) Bill 2014 which empowers the Principal Member of the Migration Review Tribunal and Refugee Review Tribunal respectively to identify a 'guidance decision' of the Tribunal.

86 The Explanatory Memorandum notes that the purpose of empowering the Principal Member to identify guidance decisions is "to promote consistency in decision-making between different reviewers of the Authority in relation to common issues and/or the same or similar facts or circumstances."[105]

87 These provisions appear to be broadly based on similar powers conferred by legislation on the Chairperson of the Canadian IRB to issue Guidelines and Jurisprudential Guides, and the provisions that empower the President of the Upper Tribunal (Asylum and Immigration Chamber) in the United Kingdom to issue directions requiring specified decisions to be treated as Country Guidance.[106]

88 However, in contrast to the detailed procedures that exist in Canada and the United Kingdom, the provisions in this Bill provide very limited information about critical aspects of the proposed system of identifying a guidance decision. For example, there is no detail in the Bill as to the following matters:

- whether a guidance decision is to be a newly made decision or whether an existing decision can be designated a guidance decision?
- if it is to be a new decision, the process for making the guidance decision, for example, is the process in any way different from the making of a standard RRT or IAA decision?
- how will the specific review to be the subject of the guidance decision be selected?
- will the applicant be notified of the intention for the review to form the basis of a guidance decision and will they be asked to provide their consent?
- will the Minister or Department of Immigration and Border Protection be consulted in selecting cases suitable for a guidance decision?
- will the Department appear before the RRT or make written submissions or arguments in relation to the relevant issues?

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[105] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) [978]. See also Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014 (Cth) [334].

[106] The Statement of Compatibility with Human Rights refers to the practices in the United Kingdom and Canada: Statement of Compatibility with Human Rights, Attachment A to Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 27.

- who will be chosen to conduct the review that will form the basis for the guidance decision, for example, will it be the Principal Member RRT, a Senior Member or Senior Reviewer or an experienced RRT Member or IAA Reviewer?
- will the RRT call expert witnesses to provide the most current and reliable country of origin information as evidence?
- if the guidance decision is to be an existing decision of the RRT, what will be the criteria for the selection of the decision?
- how long will the guidance decision remain in effect?
- if a RRT Member or IAA Reviewer does not follow a guidance decision what are the consequences?
- must a RRT Member or IAA Reviewer explain in his or her reasoning why he or she is not following the guidance decision?

89 We are opposed to the proposed provision to confer on the Principal Member of the RRT the power to identify guidance decisions which must be followed by the IAA for reason that, as drafted, it does not ensure that Reviewers will not be required to apply relevant guidance without due regard to the individual merits and justice of the case.

90 We submit that the proposed provision in relation to guidance decisions should not be enacted in its current form.

Conclusive Certificates

91 The amendments include a provision which provides for the Minister to issue a conclusive certificate preventing IAA review of a fast track decision because it would be contrary to the 'national interest' to change the primary refusal decision.[107]

92 We oppose this measure as it will have the effect not only of denying to a fast track applicant the opportunity to access limited merits review by the IAA, but also it deprives them of effective judicial review of the Minister's decision to issue the conclusive certificate as the 'national interest' test is so broad and subjective.

Expansion of Categories of Applicant Subject to Fast Track Procedures

93 There is provision made for the Minister to make other groups of applicants subject to the fast track assessment process in the future, and also to allow the Minister to specify a person or class of persons as 'excluded fast track review

[107] Proposed s 473BD.

applicant(s)'.[108] The expansion of those subject to fast track procedures will be able to be effected by way of a non-disallowable legislative instrument.[109]

94 The Explanatory Memorandum states that the purpose of the amendment is to provide the Minister with the ability and flexibility to include other cohorts of individuals within the scope of the fast track provisions.[110] The example is given of specifying unauthorised air arrivals as subject to the fast track procedures.[111]

95 We oppose this provision as it gives the Minister unfettered power to expand the categories of protection visa applicants who will be subject to the fast track procedures. If this provision were to be enacted, the Minister would have unrestricted power to extend the fast track procedures to all on-shore protection visa applicants thereby effectively removing their access to the full merits review of negative DIBP decisions currently provided by the RRT. In other words, it would establish the IAA as the Trojan Horse to facilitate the demise of the RRT.

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[108] Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) item 2.

[109] See item 26 of the table at subsection 44(2) of the *Legislative Instruments Act 2003* (Cth), cited in Parliamentary Library *Bills Digest* No.40, 2014-15, 16.

[110] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) [752].

[111] Explanatory Memorandum, ibid [754].

Schedule 5 – Clarifying Australia's International Obligations

Overview

96 Schedule 5 proposes significant changes to the *Migration Act*. The purpose is to create a 'new, independent and self-contained statutory framework' setting out Australia's interpretation of the Refugee Convention.[112] The stated intention is to ensure that the Australian parliament defines Australia's international obligation 'without referring directly to the Refugees Convention' to ensure that Australia is 'not subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the refugees convention well beyond what was ever intended by this country or this parliament'.[113]

97 The Government is seeking to achieve this purpose by:

- inserting a provision that allows the power to remove a non-citizen from Australia to be exercised irrespective of *non-refoulement* obligations;
- removing certain references to the Refugee Convention from the Migration Act; and
- inserting a new framework that codifies the Government's interpretation of a number of aspects of the Refugee Convention.

98 We oppose these amendments on the basis that they are inherently at odds with the principles underlying international law and the *Refugee Convention*, and are based upon inaccurate assertions about the subjection of Australian courts to 'foreign courts'.

99 Australian courts have played a crucial role in developing the jurisprudence on the interpretation of the *Refugee Convention* and similarly, have been able to draw on jurisprudence from other countries. Transnational judicial dialog is important in ensuring consistent and principled development of international refugee law. This Bill essentially seeks to isolate Australian jurisprudence from the international legal order to the detriment of both asylum seekers and the international community. In this context, we note that, contrary to the Minister's repeated assertions otherwise, Australian courts are not 'subject to the interpretations of foreign courts or judicial bodies' in their interpretation of international law.

[112] Explanatory Memorandum, ibid 10.
[113] Second Reading Speech (Scott Morrison MP), ibid op cited.

Moreover, there are no 'international courts dictating to Australia what our obligations are' in international refugee law.[114]

100 In a dualist system - such as Australia's - international obligations are not part of domestic legislation unless they are specifically incorporated. However, this does not mean that there is no relationship between the two systems. Nor does it mean that domestic legislation should be used to abrogate binding international obligations. As a party to the Refugee Convention and other international human rights instruments, Australia remains bound by its international obligations.

101 We are particularly concerned about the Government's attempt to codify its interpretation of the *Refugee Convention*. The Bill provides no principled basis or reasoning for the Government's preferred interpretation in relation to various aspects of the *Refugee Convention*. In some areas, the government's interpretation is inconsistent with international refugee law.

102 We urge the Committee to consider whether such codification is necessary and on what grounds. In light of the government's insistence that the role of interpreting Australia's international treaty obligations be transferred in its entirety from the judicial to the parliamentary arm of government, without further judicial oversight, it is incumbent upon the Committee to ensure that the legislature undertakes this onerous task by reference to the rules of treaty interpretation and contemporary understandings of the Refugee Convention as an evolving human rights instrument.

References to the *Refugee Convention* should be retained in the *Migration Act 1958* (Cth)

Recommendation: That references to the UN Convention Relating to the Status of Refugees be retained in the *Migration Act 1958* (Cth)

103 As a starting point, we examine fundamental principles relating to treaty interpretation set out in the Vienna Convention on the Law of Treaties (VCLT).[115] In particular, Article 31(1) of the VCLT states that treaties are to be interpreted 'in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*'.[116]

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[114] Scott Morrison (Minister for Immigration and Border Protection) 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', Friday, 26 September 2014, Press conference, Canberra. op cited.
[115] Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into Force 27 January 1980).
[116] Ibid art 31(1) (emphasis added).

104 The object and purpose of the Refugee Convention can be ascertained, in part, from Preamble of the Convention, which affirms the Convention as a human rights instrument.[117] The Preamble to the Convention's 1967 Protocol expressly stipulates that states shall ensure that 'equal status should be enjoyed by all refugees'.[118] More recently, the Declaration of States Parties issued at the Ministerial Meeting of States Parties in 2001 to mark the 50th Anniversary of the Convention can be relied upon as affirming the object the purpose of the Convention. In that Declaration, states parties – including Australia – reaffirmed the 'enduring importance' of the Convention and that all persons within its scope are entitled to 'rights, including human rights, and minimum standards of treatment'. It also stressed 'respect by States for their protection responsibilities towards refugees is strengthened by *international solidarity involving all members of the international community*'.[119]

105 Ensuring equal rights for refugees and giving effect to international solidarity should require states to work together, towards a uniform understanding of the obligations under the Refugee Convention. As Lord Steyn of the House of Lords noted in the seminal case of *Adan*:

> The Refugee Convention must be given an independent meaning … without taking colour from distinctive features of the legal system of any individual contracting state. **In principle, there can only be one true interpretation of a treaty** …
>
> In practice, it is left to national courts, faced with a material disagreement on an issue of interpretation to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty.[120]

106 It is therefore important that the Australian judiciary can be part of, and draw upon, international jurisprudence in the interpretation of the *Refugee Convention*. A similar attitude and approach must be taken by the legislature when codifying the definition and Australia's obligations.

107 It is difficult to see how isolating Australia from the international legal order can amount to 'good faith' implementation of the *Refugee Convention*. In our view, removing references to the *Refugee Convention* from the *Migration Act*, and providing expressly for the Convention obligations to be an irrelevant consideration in the exercise of a Ministerial discretion - at a time when States are

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[117] Preamble *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) [1], [2], [3].
[118] Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
[119] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees: Ministerial Meeting of States Parties, Geneva, Switzerland 12-13 December 2001. UN Doc HCR/MMSP/2001/09 Dec. 13. 2001.
[120] Adan (UKHL, 2000), 516-17 (Lord Steyn).

seeking to consolidate and build on principles to burden sharing to deal with protracted refugee situations around the world – undermines the purpose and objective of the Refugee Convention. It will establish Australia as an international outlier willing only to take an interpretation of the *Refugee Convention* that suits it politically. This would set a worrying and dangerous precedent.

108 This action would be contrary to Article 27 of the VCLT, which provides that a state party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty. Far from dictated to by foreign courts, this Bill is seeking to undercut the international obligations that Australia has signed up to.

109 We urge the Committee to consider the advantages to retaining references to the Refugees Convention in the *Migration Act*, including that it:

- allows Australian courts to continue to contribute towards international jurisprudence on the interpretation of the *Refugee Convention*;
- sets an example to other countries in the region that Australia is serious about regional cooperation and burden sharing, and takes seriously its international obligations; and
- properly ensures that Australia can give proper effect to its international obligations.

Removing a person from Australia irrespective of whether *non-refoulement* obligations are owed

Recommendation: That s 197C(1) be removed from the Bill to ensure that *non-refoulement* obligations must be considered prior to removal of a non-citizen.

110 The new s 197C(1) provides that for the purposes of s 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen. The stated intention is to ensure that an officer 'is not bound to consider whether or not a person engages Australia's *non-refoulement* obligations before removing that person'.[121]

111 The amendments are also intended to circumvent a number of High Court decisions that have interpreted the *Migration Act*, as a whole, is to be read as

[121] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 165.

facilitating Australia's compliance with international obligations.[122] In particular, it is an attempt to circumvent the Full Federal Court's finding in *SZRQB* that Minister could not remove the applicant from Australia without their claims being assessed under the CAT and ICCPR and, that the Minister is satisfied that the applicant was not a person to whom Australia owes protection obligations.[123]

Non-refoulement principle

112 The principle of *non-refoulement* is the cornerstone of international refugee law and is embedded in customary international law.[124] The principle thus binds all States, irrespective of whether they are a party to the Refugee Convention. *Non-refoulement* is also a non-derogable obligation under both the Convention Against Torture and the International Covenant on Civil and Political Rights.[125]

113 As a matter of international law, Australia cannot simply 'legislate away' its international obligations. In our view, the language of the proposed s 197C(1) is an attempt to do just that. It facilitates the breach of *non-refoulement*, as it is designed to provide an express power to remove *irrespective* of *non-refoulement* obligations.

114 The explanatory memorandum claims that s 197C(1) does not breach Australia's *non-refoulement* obligations, because such obligations will have been assessed prior to removal. Reliance is placed on the consideration of the person's application for a protection visa or when the Minister exercises his personal powers under ss 46A, 195A or 417 of the *Migration Act*.[126] These powers provide respectively, that:

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[122] See *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; *Plaintiff M61/2010E v Commonwealth of Australia Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319; *Minister for Immigration and Citizenship v SZQRB* (2013) 269 ALR 525.

[123] *Minister for Immigration and Citizenship v SZQRB* (2013) 269 ALR 525, (Lander and Gordon JJ at [246]—[268]).

[124] 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).

[125] International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force, 26 March 1976) art 7; *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. 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.

[126] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) [1142].

- The Minister *may* determine that an unauthorized maritime arrival may make a valid visa application, that may enable *non-refoulement* obligations to be considered as part of the visa application process;[127]
- The Minister has a *non-compellable* power to grant a person who is in detention a visa under s 195A where the Minister thinks it is in the public interest. The Minister may grant the visa to ensure that a person is not removed in breach of Australia's *non-refoulement* obligations
- The Minister has a power to substitute a decision more favourable than that of the Refugee Review Tribunal (RRT), if it is in the public interest to do so. The power is *non-delegable and non-compellable*.[128]

115 In our view, these mechanisms are not appropriate to ensure that Australia's *non-refoulement* obligations will be met. Each of these powers are discretionary, non delegable and non-compellable.[129] The Minister is not bound to exercise them and does not have to give reasons for not exercising the powers. Even where the Minister chooses to exercise his powers, the Minister is not bound to provide reasons for a negative decision.[130]

116 If officers are not required to consider whether or not the Minister has exercised any of these powers – and the Minister is under no obligation to exercise them in the first place – the system has no safeguards to ensure *refoulement* does not occur.

117 Moreover, it is disingenuous for the government to claim that new provision will merely restore the pre-*M70/2011* understanding that s 198 allowed for removal of non-citizens without regard to their protection claims because 'international obligations [had] already been considered during separate processes prior to removal.'[131] In that case, the government proposed to rely upon s 198 in a situation where Australia's protection obligations under the Refugee Convention had *not* been considered in order to send maritime arrivals to a country which was not a party to the Refugee Convention, which had no domestic refugee law, and had a notoriously poor human rights record in its treatment of refugee claimants.

118 In this respect, we urge the Committee to consider closely the facts and reasoning of the courts in those cases, which the government wishes legislatively to by-pass, especially *Plaintiff M70/2011* and *SZQRB*.

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[127] *Migration Act 1958 (Cth)* s46A.
[128] Ibid s 417.
[129] See eg, Ibid s 417(7) which provides that: 'The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances'.
[130] When a positive decision is made under s 417, the Minister is required to table before Parliament and set out the reasons why the decision is in the public interest: Ibid s 417(4)(a)-(c).
[131] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) [1136].

119 In relation to the refugee status determination process, we have argued above that the proposed amendments in Schedule 3 of the Bill may also facilitate breaches of *non-refoulement*. The proposed 'fast-tracking' of cases and limited review rights to the Independent Appeals Authority (IAA) lack procedural safeguards that are integral to a fair and robust refugee status determination. In our view, they also do not provide adequate safeguards against *non-refoulement.*

Replacing the Refugee Convention with the Government's own interpretation

120 In addition to removing references to the Convention, Schedule 5 also seeks to codify the Government's interpretation of a number concepts relating to the definition of a refugee under Convention. These include:

- Changing the test for well-founded fear as it applies to internal relocation and requiring a person to modify their behaviour to avoid persecution;
- Proposing a definition of a 'particular social group' that is narrow and may limit certain groups from protection; and
- Expanding the concept of state protection to encompass non-state actors

121 As we have argued above, interpretation of any aspects of the Convention should be grounded in, and be consistent with, the object and purpose of the Convention. In our view, the Bill does not provide any principled basis or explanation for the Government's interpretation of these aspects of the *Refugee Convention*. In our view, the new framework will result in a narrowing of protection and ultimately, heighten the risk of *refoulement*.

Internal relocation and removal of reasonableness test

122 The Bill seeks to insert s 5J(1) into the Act to provide that a person has a 'well-founded fear' of persecution if:

a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
c) the real chance of persecution applies to *all areas of the receiving country*.

123 The explanatory memorandum argues that s 5J(1)(c) is intended to codify the 'internal relocation' principle 'which provides that the fear of persecution is not well-founded in respect of the receiving country if it only relates to some parts of

the country'.[132] In our view, this is somewhat misleading. It actually seeks to alter the definition of a refugee under the Convention, which only requires that an applicant be outside of his country and has a well-founded fear of return.[133] The Convention itself does not require that persecution need be feared all over the country.[134]

124 The proposed amendment is also intended to remove any concept of 'reasonableness' in assessing whether relocation is possible. The Explanatory Memorandum argues that, in interpreting reasonableness, 'Australian case law has broadened the scope of the principle to take into account the practical realities of relocation' such as 'potential diminishment in quality of life or financial hardship'. The explanatory memorandum espouses the government's view that these are factors that should not be considered in an assessment of well-founded fear. The intention of s 5J(1)(c) is that internal relocation not be read down by any notion of 'reasonableness'.

125 It is intended that decision-makers will continue to consider whether the applicant can safely and legally access the area.

Problems with the proposed test

126 We see two immediate problems with the proposed test in s 5J(1)(c).

127 First, the language of the provision creates a danger that decision-makers will require an applicant to prove that the fear of persecution extends to all parts of his country of origin, including every town, city and village. This is an unreasonable burden. It would require access detailed and up-to-date country of origin information that is out of the reach of most applicants. UNHCR has labelled such a test 'an impossible burden and one which is patently at odds with the refugee definition'.[135]

128 UNHCR's Guidelines on Internal Relocation makes it clear that the burden of proof should rests with the party who asserts it. On this basis, UNHCR argues that 'the decision-maker bears the burden of proof in establishing that an analysis of relocation is relevant to the particular case'. Similarly, the Michigan Guidelines provide that:

> To ensure that assessment of the viability of an "internal protection alternative" meets the standards set by international refugee law, it is important that the putative asylum

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[132] Explanatory Memorandum ibid [1181].
[133] *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS 189 (entered into Force 22 April 1954) art 1A(2).
[134] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status' (Geneva, re-edited 1992 1979).
[135] UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' (April 2001).

> state clearly discloses to the asylum-seeker that internal protection is under consideration, as well as the information upon which it relies to advance this contention.[136]

129 Secondly, the proposed provision could be used to argue that a person should 'hide out in an isolated region of the country, like a cave in the mountains or in a desert or a jungle, if those are the only areas of internal safety available'.[137] This is at odds with the purpose of the *Refugee Convention*, especially when considered in light of the range of rights referred to therein, and the wider international human rights law framework within which the Convention sits. As it stands, the provision would potentially result in the most narrow of interpretations of the internal relocation principle, without even the relatively low safeguard of the 'unduly harsh' test employed by the UK Courts referred to below.[138]

130 Further, while the explanatory memorandum states that decision makers will continue to consider whether a person 'can safely and legally access the area', there is no guarantee that this will be applied in practice. Indeed, the proposed wording of the legislation does not require the decision-maker to make a finding in relation to safe access.

131 On the above basis alone, we do not support s 5J(1)(c) and we suggest that it be removed from the Bill.

132 We agree with the proposition that the concept of 'reasonableness' has problems in practice. However, we suggest that if the Government wants to retain the concept of 'internal relocation', this is better framed within the context of considering whether an applicant is 'willing or unable' to access the protection of his country. That is, a move away from 'reasonableness' towards asking whether the state can provide, and the person can properly access, protection of the kind envisaged by the Convention in another area of the country, is a more principled interpretation of the Convention. We discuss this further below.

The principle of internal relocation

133 The principle of internal relocation is not a stand-alone provision of refugee law, nor is it a test independent from the refugee status determination process. According to UNHCR, the principle of internal relocation arises 'as part of the refugee status determination process'.[139] It draws on the principle that international protection is 'surrogate' protection, to be relied on only where a person could not

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[136] Michigan Guidelines on the International Protection of Refugees (1999).
[137] *Thirunavukkarasu v Canada (Citizenship and Immigration)* [2011] IRB 93599 (2011).
[138] *Januzi v SSHD* [2006] 2 AC 426; AH (Sudan) [2008] 1 AC 678.
[139] United Nations High Commissioner for Refugees, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention And/or 1967 Protocol Relating to the Status of Refugees' (2003).

access protection from within his or her own state.[140] As Black CJ argued in *Randhawa v MILGEA*:

> If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.[141]

134 In short, the principle provides that in determining a person's refugee status, a decision maker must consider whether an applicant could relocate to another part of the country where there is no real risk of persecution. However, there is some debate as to where the principle is located within the refugee definition itself. Article 1A(2) of the Convention provides that a refugee is a person who:

> owing to *well-founded fear* of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is *unwilling to avail himself* of the protection of that country ..

135 The prevailing view in most jurisdictions is that relocation be considered in the context of 'well-founded fear' assessment. This position has been endorsed in Australia in a number of High Court decisions, although primarily as a result of the Court's idiosyncratic understanding of the word 'protection' in the definition. In *SZATV*, the High Court held that:

> [I]f a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason.[142]

136 In practice, Australian decision-makers first consider whether a person's well-founded fear is localized to an area of the country, before considering whether relocation is possible. Under existing case law, a finding that relocation also requires an assessment of whether it would be reasonable 'in all the circumstances' having regard to the particular circumstances of the applicant.

137 The concept of reasonableness has been adopted in Europe, the UK and Canada. For example, in the UK the Courts have interpreted reasonableness as amounting

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[140] *Canada (Attorney-General) v Ward* (1993) 2 SCR 689, 709. The Court built on points made by Hathaway including his comment that, 'A person cannot be said to be at risk of persecution if she can access effective protection in some part of her state of origin. Because refugee law is intended to meet the needs of only those who have no alternative to seeking international protection, primary recourse should always be to one's own state'. See James Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 133.

[141] (1994) 52 FCR 437 at 441.

[142] *Januzi v SSHD* [2006] 2 AC 426 at 440, cited with approval in *SZATV v MIAC* (2007) 233 CLR 18 at [19].

to a consideration of whether it is 'unduly harsh' to expect an applicant to relocate. This is consistent with UNHCR's Guidelines, which suggests that a decision-maker should ask:

> Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there'.[143]

138 Refugee law academics have noted that the concept of reasonableness has given rise to 'extensive discussion and to a range of not always consistent applications'.[144] Professors James Hathaway and Michelle Foster argue that questions of whether it is 'unduly harsh' or ' whether the 'claimant live a relatively normal life' are subjective questions that can take on a life of their own and detract from the fundamental question of protection under the Convention.[145]

139 We agree with Hathaway and Foster that relocation is better framed within the context of considering whether a person is unwilling to avail himself of the protection of that country. Rather than asking whether it is 'reasonable' for a person to relocate, they prefer an assessment of whether the person can access 'affirmative protection' under the Convention. This requires asking whether:

a) there is access to in the proposed site of internal relocation, the kind of rights and entitlements that encompass the notion of 'protection' under the Convention;[146] and
b) whether the applicant would have access on a non-discriminatory basis to those rights and entitlements.

140 The advantage with this interpretation is that it avoids the question of reasonableness, and is grounded in an assessment of whether there is a true failure of state protection. Moreover, it adopts a more coherent and principled approach to locating the internal location (or protection) doctrine in the definition, promoting greater certainty and consistency in decision-making by linking the test to those limited rights available under the Convention.

141 We refer the Committee to a decision of the New Zealand Refugee Status Appeals Authority No 76044. In that decision, the Authority considers both approaches, and provides a comprehensive and persuasive analysis as to why the textual

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[143] United Nations High Commissioner for Refugees, above n 139, 3. Ibid.
[144] Jane McAdam and Guy Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, 2007) 124.
[145] James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed) 352. They argue that the reasonableness test be read liberally, it can lead to a decision-maker to read into the Refugee Convention 'qualifications, limitations, and exceptions that are not there'.
[146] See Ibid 356. The authors refer to the Refugee Convention as providing for rights of a restorative nature, including 'rights that relate to income generation', freedom of movement and ability to access health care and other social services. It is these rights that should set the benchmark in determining whether there is protection at the site of internal relocation.

location of internal relocation is better placed not in the well-founded fear element, but the protection element.[147]

Recommendation: Section 5J(1)(c) be removed from the test as to whether a person has a well founded fear of persecution

Relocation should only be required where the putative refugee can access meaningful protection of his or her human rights in line with the Refugee Convention's guarantees for refugees

Effective protection should not extend to protection from non-state actors

142 The proposed s 5J(2) provides that a person does not have a well-founded fear of persecution if either or both of the following are available to the person in the receiving country:

- an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant police; and
- adequate and effective protection measures provided by a source other than the relevant state.

143 The amendments claim to be a codification case law on effective protection. In *MIMIA v S152/2003* the joint judgment held that the effective state protection under the Refugee Convention requires the state 'to take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system.'.[148] In *Siaw v MIMIA* it was reasoned that it makes no difference whether protection is provided by government or by non-state actors (including mercenaries).[149] The proposed provisions are to be read consistently with these two cases.

[147] Refugee Status Appeals Authority, *Refugee Appeal No. 76044* (Roger Haines QC and B Dingle, 11 September 2008)
[148] *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, [26] (Gleeson CJ, Hayne and Heydon JJ).
[149] *Siaw v Minister for Immigration & Multicultural Affairs* [2001] FCA 953 (2001) 7. (Sundberg J).

Level of state protection

144 The attempt to codify a test arising out of *S152/2003* is in our opinion misguided and dangerous. The reasoning of the various judges is nuanced and, in many respects, remains contentious, emphasising form over substance, and potentially leading the decision-maker away from the obligation to undertake an individualised assessment of the real chance of persecution. In our opinion, the attempt to reduce and codify the complex issue of state protection in a simplified rule in the way reflected in the first provision will result at best in unnecessary litigation and confusion, at worst in a perfunctory rejection of credible claims based on general country information depicting the existence in a country of basic criminal justice apparatus. The likelihood of the latter occurring – and Australia breaching its obligations under the Refugee Convention as a result – is significantly increased by the proposed amendments.

145 In our opinion, the only test that is applicable as a matter of principle is the requirement that a decision-maker consider whether there is a real chance that a person will suffer serious harm and a real chance that the state will be unwilling or unable to provide protection. As Professors Hathaway and Foster note in *The Law of Refugee Status*, '[t]he ultimate question is not … whether the home state has complied with any particular standard of *conduct*, but whether the *result* of even the best intentions and most diligent efforts is to "reduce the risk of claimed harm blow the well-founded fear threshold".'[150]

146 In this context, we are of the view that a necessary, but insufficient, element of state protection is an 'appropriate criminal law system, a reasonably effective police force and an impartial judicial system'. As stated by Justice McHugh '[i]f there is a real chance that the asylum seeker will be persecuted for a Convention reason, the fear of persecution is well-founded irrespective of whether law enforcement systems do or do not operate within the State.'[151]

147 As a matter of both practice and principle, it is imperative that a decision-maker considers all the circumstances of the case, which, as Driver FM pointed out in *SZQUB v MIAC*, may run counter to circumstances appearing from country information.[152] Indeed, this is the direction which the Australian courts have taken generally since *S152/2003*. Some of the tests developed in the jurisprudence are

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[150] James Hathaway and Michelle Foster, above n 145 citing US Department of Homeland Security, "Asylum Officer Basic Training, *Female Asylum Applicants and Gender-Related Claims* (Mar. 12, 2009), 25.

[151] *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1, [78]. See also, James Hathaway and Michelle Foster, above n 145, 318.

[152] [2012] FMCA 74 (8 February 2012) at [11] (upheld on appeal).

summarised in the advice to Tribunal members which appears in the *RRT Guide to Refugee Law*:[153]

> Each case turns on its own facts; and the Tribunal should ensure it addresses the particular circumstances of the applicant and the particular harm faced when considering the question of state protection. Even if the general evidence points to a reasonably effective police force and a reasonably impartial system of justice, particular attention may need to be given to whether it meets the required standards in the circumstances where protection sought was not provided or was not effective, or whether the claimed persecution is by 'rogue' state officials, or where an applicant is in a particularly vulnerable position.

148 Again, this important development in the jurisprudence not reflected in the provision as drafted.

Protection should relate only to state protection

149 It is not controversial in refugee law a person has a well-founded fear of persecution arising from conduct of non-state actors. However, this does not mean that converse should also be true. That is, non-state actors can also provide for 'protection' – in the Convention sense.

150 As noted above, a fundamental reason for this is that international refugee law is premised on the concept of surrogate *international* protection, 'to serve as a back-up to the protection *one expects from the State* of which an individual is a national'. [154] Article 1A(2) of the Convention refers to a person's *country of nationality*. The word 'country' in this context refers to a state and the concept of 'nationality' refers to a relationship or bond between a person and the state. Taken together, there is a strong inference that the protection provided must be from the state.

151 Therefore, the effectiveness of state protection is relevant in considering whether there is a real risk of 'being persecuted', and also to whether a person could receive protection in other areas of the country.

152 In our view, a principled interpretation of the Convention leaves no room for holding that effective protection can be provided by a non-state actor such as a tribe, faction, armed militia or mercenary force. Such an interpretation is at odds with the underlying object and purpose to the Convention to provide surrogate *national* protection to an individual.

153 There are other principled reasons why protection should not emanate from non-state actors. Individuals and organisations are not signatories to the Convention, and are not subject to international obligations or little, if any, accountability under international law. This concern has been raised by UNHCR and a number of

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[153] Refugee Review Tribunal, *Guide to Refugee Law, 'State Protection'* (December 2013) [8-11].
[154] See *Ward v Canada* (Attorney-General) [1993] 2 SCR 689 (Can. SC Jun 30, 1993) at 709.

academics.[155] Further, non-state actors are unlikely to exercise authority on a state beyond a temporary or limited basis and have limited ability to enforce the rule of law.[156]

154 Further, we think that the test would be very difficult for decision makers to apply in practice. The Bill does not spell out exactly what would constitute 'effective protection measures' provided by a source other than the state. For example, does the notion of effective protection in this instance require permanent rather than temporary protection from the harm feared? Does it require that the non-state actor be able to provide protection of the kind that can normally be given by the state? By what standards can be reference a protection measure as 'effective'?

155 In our view, the test is highly subjective and does not provide a robust framework to ensure that a person who has a well-founded fear of persecution would not be *refouled*.

Recommendation: That s 5J be amended to make clear that a) any state protection must take the fear of persecution below the evidentiary threshold of a real chance and b) effective protection cannot be provided other than by the state.

Narrowing of 'particular social group'

156 The Bill seeks to insert a new s 5L to 'clarify and limit' the definition of a particular social group (PSG), and is intended 'to provide additional legislative guidance to decision makers'. The proposed new definition is intended to 'reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups which are broader than the government's understanding of the term'.

157 The new s 5L provides that a person is a member of a particular social group if:

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[155] See UNHCR, 'Annotated Comments on the EC Council Directive 2004/83/EC of 29 Apr 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted' (OJ L 304/12 of 30.9.2004), 28 Jan 2005, 17; Jane McAdam, 'The Qualification Directive: An Overview' in K Zwaan (ed), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007), 1.

[156] See, eg, UNHCR, 'Annotated Comments on the EC Council Directive 2004/83/EC of 29 Apr 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted' (OJ L 304/12 of 30.9.2004), 28 Jan 2005, 17.

- a characteristic is shared by each member of the group; and
- either:
    - the characteristic is an innate or immutable characteristic; or
    - the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it; ***and***
    - the person shares, or is perceived as sharing, the characteristic; and
    - the characteristic distinguishes the group from society.

158 The amendment is essentially an amalgamation of two different approaches to the interpretation of 'particular social group' in the international jurisprudence – the *ejusdem generis* approach and the '*social perception'* approach. As we explain below, the amalgamation of the two tests has been adopted by a number of other jurisdictions. However, we query whether such an approach is principled and consistent with the purpose of the Convention. In addition, we are concerned that in practice, the new test will lead to protection gaps for certain groups such as women, homosexuals, and persons with a disability.

Ejusdem generis and the 'social perception' approaches

159 It has been said that PSG is the 'Convention Ground with the least clarity'.[157] This has given rise to jurisprudential and academic debate about what the appropriate limit of the PSG ground should be. On the one hand, it should not represent a 'catch-all' provision.[158] Similarly, it should not be so artificially limited to exclude from protection groups that the Convention ought to protect.

160 There are two dominant schools of thought on this issue – the *ejusdem generis* and the 'social perception' approaches.

161 *Ejusdem generis* is a principle of statutory interpretation, which can be applied to resolve ambiguity or uncertainty in the law. It provides that the meanings of general words are to be derived from the context in which they appear. The US Board of Immigration Appeals in *Acosta* suggested that since each of the other Convention grounds describe 'an immutable characteristic' that the applicant cannot change or ought not to be required to chance, PSG should be understood as:

> to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be shared past experience such as a former military leadership or land ownership.[159]

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[157] UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees' 1.
[158] *Applicant A v Minister for Immigration and Ethnic Affairs* 190 CLR 225 [94] (McHugh J).
[159] *Acosta* (USBIA, 1985), 23.

162 This approach has been adopted in Canada, where the Supreme Court in *Ward* applied the *ejusdem generis* approach to find 'non-discrimination' as the genus that ties PSG to the other convention grounds.[160] As Lord Hope observed in *Shah*:

> If one is looking for a genus in order to apply the ejusdem generis rule of construction to the phrase 'particular social group', it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against'.[161]

163 Professors James Hathaway and Michelle Foster prefer this principled approach in which grounds PSG in the underlying non-discrimination purposes of the Refugee Convention. In their view, such an approach is preferred on the basis that 'it promotes consistency and objectivity in refugee status decision-making'.[162]

164 As the Bill notes, the proposed s 5L is intended to codify the 'social perception' approach taken by the High Court of Australia in *Applicant S.*[163] The social perception test requires satisfaction of three factors:

> First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.[164]

Problems with amalgamation of the two tests

165 It can be seen that the proposed amendment is an amalgamation of the two tests, essentially requiring an applicant to satisfy *both* the *ejusdem generis* and social perception test. In our view, this approach cannot be justified as a matter of treaty interpretation, will unnecessarily limit the width of a PSG, and will lead to protection gaps for certain groups, including those claiming on gender and sexuality-related grounds.

166 In 2002, UNHCR noted these two divergent approaches and recommended that they be 'reconciled', in the sense that an applicant could be considered a member of a PSG if *either* test is met:

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[165]

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[160] *Canada (Attorney-General) v Ward* (1993) 2 SCR 689.
[161] Shah (UKHL, 1999), 656 (Lord Hope).
[162] James Hathaway and Michelle Foster, above n 145, 423.
[163] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, [36] per Gleeson CJ, Gummow and Kirby JJ.
[164] Ibid [36].
[165] UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention And/or Its 1967 Protocol Relating to the Status of Refugees', above n 157.

167 As Hathaway and Foster point out, UNHCR's alternative approach has been widely misapplied in the EU as a cumulative test, with the unintended consequence that social groups defined by gender, sexuality, and family have not been afforded protection because there was insufficient evidence to find that they have a distinct 'identity in society'.[166]

168 Similarly, the US Board of Immigration Appeals in 2006 relied on UNHCR's guidelines to introduce a requirement that PSG requires an assessment of the extent to which members of a society perceive those with the characteristics as members of a particular social group. Courts now require that the applicant show that a PSG has 'social visibility' or 'social distinction', and this has been used to reject gender and family related claims.[167]

169 Hathaway and Foster have pointed out that 'the notion that both tests must be met is impossible to justify by reference to the rules of treaty interpretation'. We agree. As these scholars note, the cumulative test adopted by the EU has been widely critiqued including by judicial figures such as Lord Bingham who regarded it as 'propound[ing] a test more stringent than is warranted by international authority.'

170 We agree with Hathaway and Foster that a fundamental problem with the social perception approach is that it would lead to inconsistent and unprincipled decision making. For example, it is not clear whether an applicant needs to establish, *subjectively* that the group is perceived as a separate group within society, or on some other, objective criterion. If it is objective, then in whose eyes do we apply the test from? As the 9th Circuit Court of Appeals in the US has stated:

> We have not specified the relevant community for this analysis (Petitioner's social circle? Petitioner's native country as a whole? The United States? The Global community)? Nor have we specified whether 'social visibility' requires that the immutable characteristic particular to the group be readily identifiable to a stranger on the street', or must simply be recognizable in some general sense to the community at large. [168]

171 We therefore suggest that the Bill be amended to remove the social perception test.

172 However, if the Committee is not minded to make this recommendation, we would suggest that the Committee consider adopting UNHCR's approach that a person can meet *either* the *ejusdem generis* test or the social perception test. While this is not our preferred position, it would be a more practical and principled approached

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[166] See James Hathaway and Michelle Foster, above n 51, 431 noting cases in Germany which have held that 'homosexuality here is not identity defining enough' or that 'a family is not as clearly distinguishable from the rest of society with their own group perceived identity'.

[167] See Ibid. referring to See Re AT, (2007) 24 I & N Dec. 296 (USBIA, Sept 27 2007), 303 where the Board of Immigration Appeals rejected a gender based claim on the basis that the relevant group lacked the requisite 'social visibility'.

[168] *Henriquez-Rivas v Holder* (2011) 449 Fed appx. 626 (USCA 9th cir sept 7 2011), 630.

than the one proposed in the Bill and one that would better ensure that a range of particular social groups is protected, consistent with the object of the Convention.

Recommendation: That s 5L be amended to remove the social perception test.

Schedule 6 – Unauthorised maritime arrivals and transitory persons: newborn children

Introduction

173 Schedule 6 proposes amendments that will impact children of asylum seekers. These include:

- Clarifying, with retrospective effect, that the definitions of unauthorized maritime arrivals (UMAs) and 'transitory persons' also include any child of such persons born in detention or in a regional processing country; and
- Inserting a new provision that requires the removal of such children from Australia as soon as 'reasonably practicable' after the temporary purpose for which they were bought to Australia has ceased (such as giving birth).

174 The effect of the amendments will be that such children will be prevented from applying for protection visas, as they will now fall under the definition of a UMA.[169] They will also be liable for offshore processing where this is the case for their parents. The Government's position argues that the amendments are necessary to ensure:

> as far as is possible, that all members of a family are treated in the same way and will limit the possibility of separation of the ***child*** and ***parent*** due only to the operation of the Migration Act.[170]

175 The amendments would confirm the government's interpretation of the current provisions, a position endorsed by the Federal Circuit Court in Plaintiff B9/2014, handed down on 15 October 2014.[171] The government claims that these amendments are consistent with Australia's obligations under Articles 17 and 23 ICCPR and Article 3 of the Convention on the Rights of Child, since they will reduce the 'number of scenarios where family separation might arise'. This is said to be consistent with policy and practice: 'family units will not be separated by Australia, and consideration will be given to family unity and the best interest of the child on a case-by-case basis'. [172]

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[169] See *Migration Act 1958* (Cth) s 46A: A person who is an unauthorized maritime arrival cannot make a valid application for the protection visa, unless the Minister exercises his discretion to allow an application to be made.

[170] Explanatory Memorandum Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) [1363] and [1365].

[171] *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348.

[172] Explanatory Memorandum Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth).

176 While we agree that the principle of family unity is important, we also note that the CRoC and the ICCPR provide for bundle of rights that accrue to the child. Giving effect to the right to family unity should not, in our view, come at the cost of breaching numerous other rights under these international instruments.

177 We are also concerned about the effect of the proposed amendments on Australia's ability to meets its obligations under the *1961 Convention on the Reduction of Statelessness* (the Statelessness Convention).[173]

The proposed changes will result in more children in detention

178 The proposed changes will mean that children born in Australia to UMAs or transitory persons will continue to be subject to offshore processing and detention. This gives rise to a number of potential breaches under the CRC and the ICCPR, including:

- Article 3(2) of the CRoC – that the best interest of the child shall be a primary consideration;
- Article 22 of the CRoC – that refugee and asylum-seeker children should be given appropriate protection and humanitarian assistance;
- Article 24 of the CRoC – the right to the highest attainable standard of health;
- Article 28 of the CRoC – the right to education;
- Article 37 of the CRoC – the right not to be subjected to torture or other cruel inhuman, or degrading punishment and no arbitrary deprivation of liberty;
- Article 7 of the ICCPR – freedom from torture, cruel, inhuman, or degrading treatment or punishment
- Article 9 – Freedom from arbitrary detention; and
- Article 10(1) – If deprived of their liberty, the right to be treated with humanity and respect for the inherent dignity of the human person.

179 We share similar concerns with other academics, human rights bodies and civil society about the impact of children in detention. In particular, we share concern of others about whether processing on Nauru or Christmas Island is adequate to ensure a child's right to health, wellbeing and mental development. We refer the Committee to reports of the Australian Human Rights Commission and the Parliamentary Joint Committee on Human Rights, in relation to the detrimental impact of detention on children,[174] as well as reports by UNHCR, who noted in their report last year that:[175]

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[173] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entry into force 13 December 1975).

[174] See, Parliamentary Joint Committee on Human Rights, 'Examination of the Migration (Regional Processing) Package of Legislation' (2013 2012). See submissions to the Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*

> Overall, the harsh and unsuitable environment at the closed RPC is particularly inappropriate for the care and support of child asylum-seekers. UNHCR is also concerned that children do not have access to adequate educational and recreational facilities.

180 In light of the overall shortcomings in the arrangements, highlighted in this and earlier reports, UNHCR is of the view that no child, whether an unaccompanied child or within a family group, should be transferred from Australia to Nauru.

181 In our view, rather than consolidate the current inadequate state of affairs and allow children to be subjected to offshore detention, we consider that the government could give effect to the principle of family unity in other ways that ensure the best interest of the child. For example, we have argued in our submission to the Guardian for Unaccompanied Children Bill 2014 (Cth), that unaccompanied minors should not be removed from Australia unless the Guardian is satisfied that removal would be in conflict with the best interest of the child.

182 Similarly, given the detrimental effects of offshore detention on children, the *Migration Act* could be amended to provide that the Minister has the discretion to allow the newborn child and the parents to remain in Australia. This facilitates the principle of family unity, and at the same time, ensures that the rights of the child are protected.

Effect on stateless children

183 The Bill also states that the proposed amendments do, in respect of a stateless child 'alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country'.

184 Under s 21(8) *Australian Citizenship Act 2007* (Cth), a child of stateless asylum seekers and refugees in Australia can apply for conferral of citizenship to become an Australian citizen. In order to be eligible, the Minister must be satisfied that the person was born in Australia, is not a national or citizen of any country, has never been a national or citizen of any country, and is not entitled to acquire the nationality or citizenship of a foreign country.[176] The provision gives effect to Australia's obligations under the *Statelessness Convention* to grant nationality to individuals who would otherwise be stateless. The right to nationality is also contained in Articles 24(3) of the ICCPR and Article 7(1) of the CRoC.

<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014-0>.

[175] *UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013*, available at: http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf

[176] *Australian Citizenship Act 2007* (Cth) s 21(8).

185 However, the Minister cannot confer citizenship under s 21(8) unless he is satisfied as to the identity of the person.[177]

186 We share the concerns highlighted by Professors Jane McAdam and Michelle Foster in their submission to the Migration Amendment (Protecting Babies in Australia) Bill 2014 (Cth), about the lack of transparency surrounding the process of birth registration for children in detention and those who are transferred to offshore processing centres.[178] In that sense, we are further concerned that the obligation to remove a child 'as soon as reasonably practicable', may not allow for children to remain in Australia as long as is necessary to ensure that proper birth registration occurs. If children are not afforded proper birth registration, this will have a flow-on effect in terms of heightened risks of statelessness and also being able to apply for citizenship in Australia and elsewhere.

[177] Ibid s 24(3): The Minister must not approve the person becoming an Australian Citizen unless the Minister is satisfied of the identity of the person.

[178] See, Professor Jane McAdam, Associate Professor Michelle Foster and Davina Wadley, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth)*.

Schedule 7 - Statutory 'cap' on protection visas

187 Schedule 7 seeks to amend the *Migration Act 1958* (Cth) to:

- Allow the Minister to place a statutory limit on the number of protection visas that can be granted in a financial year;
- Remove existing requirements that protection visa applications be decided by the Department and the RRT (on remittal from the courts), within 90 days and to also remove associated reporting requirements.

188 We oppose these amendments on the basis that it would result in the Minister having the power to prolong the visa decision-making process and set a cap (at an arbitrary number) that would result in unnecessary and protracted detention of asylum seekers. We do not believe that this amounts to a 'good faith' giving of effect to Australia's obligations under the *Refugee Convention*.

189 We submit that the 90-day rule not be repealed. In our view, the Bill does not provide sufficient justification for the repeal of such an important provision. We argue that the provision strikes an appropriate balance between ensuring that protection claims are properly assessed and, at the same time, ensuring that claims are heard in expeditious manner. The reporting requirements in relation to the 90-day rule also provide for accountability and transparency and should also be retained.

Recommendation:

- **Sections 91Y and 440A of the *Migration Act 1958* (Cth) not be repealed**
- **Sections 84 and 85 of the *Migration Act* should not be amended to include allow a statutory 'cap' to be placed on protection visas**

Statutory cap on protection visas

190 The Bill seeks to amend s 85 of *Migration Act* to ensure that the Minister can place a 'cap' on the grant of protection visas for each financial year. If only the cap is in place, then processing of protection visas may still occur, but no protection visas can be granted until the cap is lifted. However, the Bill also seeks to amend s 84 of the Act to allow the Minister to suspend the processing of protection visas. If both the cap and the suspension on processing are in place at the same time, this will result in considerable delay in the processing of asylum applications.

191 The proposed amendments are intended to address the High Court's decision in *Plaintiff S297 of 2013 and Plaintiff M150* of 2013, which held that the Minister's capping power under s85 was conflicted with the requirement under s65A to make a decision on a protection visa application within 90 days.[179] The court resolved this conflict by holding that protection visas are not subject to the capping powers.

192 In effect, the proposed amendments will give the Minister considerable discretion in determining how long a person spends in detention, despite the fact that they may be persons to whom Australia owes international obligations. This may give rise to a breach of Article 9 of the ICCPR. It may also give rise to a breach of Article 31 of the *Refugee Convention*, as the restriction on a person's liberty goes beyond what is required to regularised their status, since the person has already been found to be a refugee. As French CJ observed in *Plaintiff M150*:

> For an unlawful non-citizen in detention awaiting determination of a valid application for a protection visa, the application of ss 85 and 86, read with s 91, would have the consequence that the date of decision could be indefinitely deferred by the imposition of successive caps, thus prolonging the period that that applicant would remain in detention absent a request for removal or, as in the present case, the exercise of a non-compellable ministerial discretion to grant a visa pursuant to s 195A(2) of the Migration Act.[180]

193 We agree with the above reasoning that there are good reasons why the statutory capping powers should not apply to protection visas. That is, they are inherently at odds with the purpose of protection visas in giving effect to Australia's international obligations under the *Refugees Convention*. Other visa categories in the migration program, such as student or visitor visas, do not give rise to the same international obligations.

194 Further, the proposed legislation virtually invites litigation on behalf of those being detained who are subject to caps on the basis of the *Lim* principle, most recently reaffirmed by a unanimous bench in *Plaintiff S4-2014*.[182] The Court in that case noted that executive detention must be for a legitimate purpose, and that 'its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes'.[183] There is a likelihood that detention that results from putting processing of a claim on hold will fall foul of this test as no longer being 'reasonably capable of being seen as necessary to effect' the purpose of 'receiving, investigating and determining an application for a visa.'[184] Without such an implied constitutional limitation, what we will have is the type of detention frowned upon in *M61*, again by a unanimous

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[179] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 225.
[180] *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 225, [31] per French CJ.
[182] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* 312 ALR 537.
[183] Ibid [29].
[184] Ibid [26].

court: 'it is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.'[185]

195 The Committee will be well aware of the effects of prolonged detention on the health and wellbeing of asylum seekers. We do not wish to repeat them here, other than to reiterate our concerns that these amendments may result in prolonged and unnecessary detention of asylum seekers and refugees.

196 The explanatory memorandum concedes that these proposed changes may result in prolonged detention of asylum seeker in breach of the Article 9 of the ICCPR. However, it suggests that the Minister can release a person from detention on a bridging visa until the cap is lifted.[186] In our view, this is an inadequate mechanism to give effect to Australia's international obligations, since the power to release a person from detention under s 195A(2) is a non-compellable power.[187] There is no guarantee that the Minister will exercise this power.

197 Further, it is well documented that asylum seekers who are released into the community on a Bridging Visa E are subject to a number of conditions that restrict their ability to enjoy basic human rights.[188] For example, a BVE can be granted without any work conditions, and a person on a bridging visa is not entitled to Centrelink benefits or government housing.[189] Research has shown that restrictions on the right to work may lead to mental and physical health problems and family breakdowns.[190]

198 While the Department provides some financial and other support for initial period of transition from detention to the community, such support is only provided for six weeks.[191] We therefore submit that, without other reform measures to ensure that those living in the community on BVEs can access basic rights, exercise of the Minister's power to release a person from detention provides an insufficient guarantee of asylum seeker's basic human rights.

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[185] *Plaintiff M61/2010E v Commonwealth of Australia Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319, [64].

[186] Statement of Compatibility with Human Rights, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 32.

[187] Explanatory Memorandum, Statement of Compatibility with Human Rights, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth).

[188] See eg, Australian Human Rights Commission, 'Tell Me About: Bridging Visas for Asylum Seekers' (2013).

[189] See *Migration Regulations 1994* (Cth) sch2

[190] Network of Asylum Seeker Agencies Victoria, 'Seeking Safety, Not Charity: A Report in Support of Work-Rights for Asylum-Seekers Living in the Community on Bridging Visa E' (2005) 27–35.

[191] Department of Immigration and Border Protection, *Fact Sheet 64 - Community Assistance Support Programme* <http://www.immi.gov.au/media/fact-sheets/64community-assistance.htm>.

Repeal of the 90 day-rule and associated reporting requirements

199 Under the current legislative framework, Minister must make an initial assessment of a person's protection visa application within 90 days starting from the day on which the valid visa was made.[192] Similarly, the RRT is to make a decision within 90 days on a protection visa case that is remitted to it from the Courts. Under s 91Y, the Minister is obligated to table before Parliament periodic reports in relation to compliance with s 65A, including providing reasons why decisions were not made within the 90 day period.[193]

200 These provisions were inserted into the Act in 2005 to ensure greater transparency and efficiency in the finalisation of protection visa applications. The provisions also play an important role in ensuring that asylum seekers are not subject to prolonged detention. As the High Court explained in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*:

> When s 65A was inserted (together with s 91Y) in 2005, its purpose was identified as being to reflect the policy "that decisions on protection visa applications should be made in a timely and efficient manner so as to provide greater transparency and certainty for protection visa applicants". "Timeliness in the decision-making process will be enhanced by [s 65A]", it was explained, "as the Minister will be required to make all decisions within a set time frame". By so requiring the making of a timely decision, the section limits the potential for prolongation of detention of an unlawful non-citizen who has made a valid application for a protection visa during the decision-making process.[194]

201 The Bill suggests that the 90-day rule should now be repealed because it is no longer an effective mechanism to achieve a flexible, fair and timely resolution of protection visa applications. Instead, the Government prefers to rely on Ministerial directions in relation to processing to achieve 'a more effective and responsive approach to different caseloads, without generating resource-intensive reporting'.[195]

202 However, the Bill does not provide any principled reasoning as to why the 90-day rule should be repealed. While it suggests that the rule is no longer 'effective', there is little evidence to suggest that the time limit itself is the cause of the problem. Rather, we suggest that changes in Government policy in the last few years have made it harder for the 90-day rule to be met in practice. For example,

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[192] *Migration Act 1958* (Cth) s 65A.
[193] Ibid s 91Y(6). Section 440A provides that the Principal Member of the RRT must give periodic reports to the Minister on whether the RRT has met the 90 day requirement. The reports must be tabled in parliament.
[194] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209, [60] per Crennan, Bell, Gageler and Keane JJ.
[195] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (Cth) 13.

the Department's 2013-2014 Annual Report acknowledges the detrimental impact of government changes.[196]

203 We submit that the underlying rationale for ss 91Y and 440A still exists and that the provision should not be repealed. The removal of the 90-day rule and associated reporting requirements would - in addition to the proposed capping power - would allow the Minister to effectively delay the visa decision-making process and subject asylum seekers to prolonged detention without any public scrutiny. We submit that such an outcome is not in the public interest in ensuring an efficient and transparent protection visa process.

[196] Department of Immigration and Border Protection, 'Annual Report 2013-14' (2014).