Castan Centre for Human Rights Law
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Submission to the Senate Legal and Constitutional Affairs Committee

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

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The Castan Centre for Human Rights Law welcomes the opportunity to make a submission in relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 ('the Bill). The Castan Centre's mission includes the promotion and protection of human rights. It is from this perspective that we make this submission.

This submission sets out the following concerns about the Bill:

1. The Bill's amendments to the *Maritime Powers Act 2103* (Cth) ('the MPA') would permit arbitrary detention of asylum seekers and others.

2. The Bill would change the relationship between (*i*) the *Migration Act* 1958 *(Cth)* ('the MA') and the MPA and (*ii*) Australia's international obligations, including the *Refugees Convention*.

We will address these issues in turn:

1 DETENTION UNDER THE *MARITIME POWERS ACT 2013*

The MPA is an unusual piece of legislation because it confers power upon officers of the Australian government to intercept and detain foreigners outside Australian territory. To our knowledge, there is no equivalent domestic statute in the world which authorises detention of foreign persons in the contiguous zone and on high seas in the way that the MPA does.

Pursuant to the *UN Convention on the Law of the Sea* ('UNCLOS'), at international law Australia (like other countries) lacks jurisdiction on the high seas.[1] Nor does it enjoy jurisdiction in the *contiguous zone*, although it does enjoy limited international rights to exercise control in the contiguous zone so as to prevent infringement of certain of its domestic laws.[2]

[1] Article 87(1) of UNCLOS states that the High Seas shall not be subjected to the sovereignty of any state: 'The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas … comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation.' See also Article 89: 'No State may validly purport to subject any part of the high seas to its sovereignty' and Article 92(1): 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'. The Permanent Court of International Justice (PCIJ) also stated in the *Lotus* case that 'vessels on the high seas are subject to no authority except that of the State whose flag they fly': *France v Turkey* (1927) PCIJ (Series A) No 10 (the *SS Lotus* case).

[2] As many leading academic commentators have noted, the contiguous zone is "juridically part of the high seas" as established by customary international law and as codified in Article 1 of the Geneva Convention on the High Seas 1958. See A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 330. Article 33(1) of UNCLOS confers limited rights upon coastal states to 'exercise control' within the contiguous zone: 'In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'

International law is not, per se, part of Australian domestic law. And, under the *Constitution*, the Australian Parliament has the power to confer power upon officers of the Australian government that can be exercised outside Australia.[3] Nevertheless, there is good reason for Australian law that confers such powers to do so in ways that confirm to the requirements of international law. This is recognised in the MPA as it currently stands. For instance, section 7 states that 'In accordance with international law, the exercise of powers is limited in places outside Australia.' And this limitation can be seen, for instance, in the wording of section 41(1)(c), which draws upon the language of UNCLOS to state limits upon the use of powers in relation to foreign vessels in Australia's contiguous zone.

The Bill's extensions to the power to take and detain would extend these powers in a manner at odds with Australia's entitlements and obligations under international law. They are also constitutionally suspect.

Items 11, 12 and 19 of Schedule 1 of the Bill would expand the existing power under section 69 to take a vessel to a place within or outside of Australia. The amended section 69 would allow the intended destination to be changed at any time, even after arrival (s69(3)). Proposed sections 69A would permit a vessel to be detained during any period 'reasonably required' to *decide* the place to which a vessel is to be taken, or to decide whether to change that destination (s69A(1)(a)); and would permit a vessel to be detained during any period reasonably required for the Minister to *consider* exercising powers that would arise under proposed sections 75D, 75F or 75H (s69A(1)(b)). The proposed new power under section 75D would permit the Minister to suspend the requirement that the exercise of power in the contiguous zone be consistent with international law as stated by UNCLOS.

The net effect of these changes is that the MPA, as amended, would permit Australian official to take command of foreign vessels and maintain that control for a period that is, for practical purposes, indefinite, either holding them while decisions are made about where to take them, or taking them from place to place as changes in intended destination are made without limit.

This is contrary to international legal norms of freedom of navigation, and goes well beyond the exercise of control in the contiguous zone contemplated by UNCLOS.

Items 15 and 18 of Schedule 1 of the Bill would similarly amend the existing power under section 72 to detain persons on detained vessels and to take them to a place within or outside of Australia. Section 72 would be amended to allow for the intended destination to be changed, even after arrival. Proposed section 72A(1) and (2) is parallel to proposed section 69A(1) and (2), except that the period of permissible detention would also include 'any period reasonably required to make and effect arrangements relating to the release of the person' (s72A(1)(d)).

[3] For instance, section 51 (ix) ('aliens'), (xxix) ('external affairs'), xxxix ('matters incidental to the execution of any power vested by this Constitution' in the executive, which may include certain powers to act extraterritorially conferred by section 61).

These amendments raise the prospect of individuals being detained – either on their own boat or upon an Australian boat onto which they have been taken (pursuant to existing section 72(5)) – and then taken to a place, where time is spent determining whether or not they can be disembarked, and a change then being made to the intended destination, and the whole process being repeated, without practical limits upon the permissible time of detention. This prospect is particularly concerning in relation to asylum seekers, who might be taken elsewhere in the region by boat without there being an agreement in place with the destination country. This could lead to long periods of detention at sea, as there is no guarantee that a third country will take asylum seekers that it may well regard as Australia's responsibility.

The duration of detention that would be permitted under these amendments goes well beyond what is necessary and permitted at international law to exercise control in the contiguous zone. Its open-ended nature means that is clearly at odds with the international legal prohibition on arbitrary detention.[4] It is contrary to international practice in relation to the interception of asylum seeker vessels (eg in Europe) which has generally been carried out pursuant to a written agreement between countries.[5] We also note that Article 8(7) of the *Protocol against the Smuggling of Migrants* requires that the 'appropriate measures' a state may take upon finding evidence of the smuggling of migrants must be taken 'in accordance with relevant domestic and international law'.[6] Article 19 of the Protocol also stresses that nothing in the Protocol affects the application of the *Refugees Convention*.

The open-ended nature of the detention that would be permitted, pursuant to these amendments, also renders it constitutionally suspect. In the well-known case of *Chu Kheng Lim v Minister for Immigration*,[7] the High Court observed that the powers of Australian governments to detain people, and the powers of the Commonwealth Parliament to enact legislation providing for detention, are subject to significant limits derived from fundamental features of Australian (and prior British) constitutional history and practice. The High Court has recently reiterated this observation,[8] and in particular has reiterated the point that

> the provisions of the [Migration] Act which … authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered.[9]

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4 *International Covenant on Civil and Political Rights*, article 9.
5 See eg Agreements between Italy and Libya, referred to in UNHCR Submission to the European Court of Human Rights in *Hirsi v Italy*, 2012, p. 2.
6 Protocol Against The Smuggling Of Migrants By Land, Sea And Air, 2000, https://www.unodc.org/documents/middleeastandnorthafrica//smuggling-migrants/SoM_Protocol_English.pdf.
7 (1992) 176 CLR 1.
8 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 [25]–[26].
9 Ibid at [26].

The High Court went on to observe that

> the authority to detain the plaintiff is an incident of the power of the Executive to remove the plaintiff or to permit him to enter and remain in Australia, and the plaintiff's detention is limited to what is reasonably capable of being seen as necessary to effect those purposes. The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind.[10]

It is true that the MA, which was the subject-matter of this litigation, contains an express requirement that removal be effects 'as soon as reasonably practicable'.[11] But that requirement is not to be seen as an 'optional extra' which could be dispensed with while leaving the regime of immigration detention intact. As the High Court put it,

> The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the Executive, it must serve the purposes of the [Migration] Act and 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. These criteria, against which the lawfulness of detention is to be judged, are set at the start of the detention.[12]

That is, the presence of an express statutory requirement to make a decision about the status and future of a detained alien *as soon as reasonably practicable* is one crucial element in the overall statutory scheme that ensures that detention under the legislation is genuinely incidental to a constitutionally valid purpose.

When this well-established reasoning is applied to the MPA, it follows that provisions of the MPA which permit detention of foreigners in order to prevent them from entering Australia must not go beyond *what is reasonably capable of being seen as necessary for the purpose of ensuring exclusion from Australia,* and must be stated in such a way that *the duration of such detention, and thus its lawfulness, must be capable of being determined at any time and from time to time, by reference to these criteria which are set at the start of the detention*. The amendments would not satisfy these

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10 Ibid at [34].
11 *Migration Act 1958* (Cth) s198.
12 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 [29] (footnote omitted).

requirements, permitting an essentially open-ended discretion as to how long a person is to be detained, and where a person is to be taken. Detention that is open-ended in this way would seem to lose touch with its constitutionally-permitted basis, of excluding foreigners from Australia, instead amounting to an open-ended power to keep foreigners detained on Australian vessels at sea. As we have said, the constitutionality of these amendments is therefore doubtful.

There are additional features of the drafting of the amendments which reinforce these concerns (and which stand in contrast to those features of the MA which underpin its constitutionality, such as the express requirement to carry out the purpose of the detention *as soon as is reasonably practicable*). For instance, detaining persons while *decisions* are made, while *arrangements* are made and while *consideration* is given to the making of various administrative determinations does not seem sufficiently connected to the *exclusion* of persons or vessels from Australia; rather, it seems to make the *taking* of foreigners to other places an end in itself. This reinforces concerns about the constitutional validity of a statute purporting to authorise such detention.

Furthermore, in circumstances in which there is no prior agreement or informal arrangement in place with a destination country, the time taken to make and put into effect an agreement could potentially take several months. During this time, foreigners – particularly asylum seekers, who may have no other country willing to receive them – would be held at sea in a vessel, on which the conditions which may be cramped and/or injurious. In the case of *Re Woolley; Ex parte Applicants M276/2003*,[13] Gummow J stated that

> [I]t may be that, if it could be demonstrated that a federal law authorised or mandated detention of those individuals seeking their release from what in their case were harsh, inhumane and degrading conditions, this would indicate that the purpose of that detention went beyond the range of purposes that are permissible, consistently with Ch III.[14]

In the same case, Kirby J stated that

> I accept that in some cases of proved harsh conditions (unsanitary, violent, inhumane or unhealthy), or inordinately prolonged duration, the conversion of conduct from a classification as 'detention' to classification as 'punishment' might be upheld. In such a case, questions would arise as to whether the deprivation of liberty described in the evidence answered to the conditions authorised by the Act. Alternatively, the question would be presented as to whether, because the detention had become punitive, it could any longer be sustained in constitutional terms on the basis of administrative, as distinct from judicial, authority.[15]

[13] 2004) 225 CLR 1.
[14] Ibid at [167].
[15] Ibid at [189].

These considerations of treatment would go to the legality of a particular individual's detention, rather than the constitutionality of the statute.[16] Nevertheless, it is a serious flaw in the proposed amendments that they appear to open the door to the possibility of, even to invite, purported exercises of a power to detain in circumstances where, for constitutional reasons to do with the limits upon executive power arising from Chapter III of the *Constitution*,[17] its exercise would not be lawful.

Item 19 of Schedule 1 would introduce into the MPA a new section 75C, which would permit the taking of a vessel or a person to a place irrespective of the international obligations or domestic law of that (or any another) country. This appears to primarily contemplate the taking of possible asylum seekers to other countries without regard to whether or not that other country has legal obligations of non-refoulement.

The same section would also permit the *place* to which a vessel or detained person is taken to include the high seas (s75C(1)(a)(i)) or another vessel (s75C(1)(a)(iii)). This seems to contemplate the transfer of foreigners, including asylum seekers, to other vessels rather than to a place of genuine safety.

Item 19 of Schedule 1 would also introduce, via new section 75A, a 'no invalidity' clause in relation to failures of those exercising powers to have proper regard to the international and/or domestic laws of other countries. The precise scope and effect of a 'no invalidity' clause will always be a matter of statutory construction. However, the finding that a decision was not invalid (eg because that validity was underpinned by the operation of a 'no invalidity' clause) will not therefore insulate it against consequences of unlawfulness.[18] In the context of detention pursuant to the MPA, if that detention is unlawful because not for a constitutionally permissible purpose then the no-invalidity clause, even if it meant that the decision was not void *ab initio*, would not prevent the issue of *habeas corpus* to free foreigners from wrongful detention.[19]

We therefore urge that all the amendments to the MPA that we have discussed above be opposed.

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16 Ibid at [167] (per Gummow J).

17 Ibid at [149] (per Gummow J).

18 See, eg, the discussion in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 (per McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

19 In *Project Blue Sky*, in discussing a decision that was unlawful but nevertheless valid, the majority of the High Court said

> That being so, a person with sufficient interest is entitled to sue for a declaration that the [executive agency] has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.

The same reasoning would apply to unlawful detention decisions made pursuant to the MPA, even if the no invalidity clause were to be introduced into the statute.

2 AUSTRALIA'S INTERNATIONAL OBLIGATIONS UNDER THE *MARITIME POWERS ACT 2013* AND THE *MIGRATION ACT 1958*

2.1 The *Maritime Powers Act 2013*

As noted above, **Item 19 of Schedule 1** would also introduce a new section 75A into the MPA. This would incude a 'no invalidity' clause in relation to failures of those exercising powers under the act to have proper regard to Australia's international obligations. It is not entirely clear what the effect of this 'no invalidity' clause would be, because most of the decisions that might be made under the MPA do not impose obligations on others, nor generate a factum on which another decision might turn.[20] Hence, in most cases it seems that there would be no practical difference between a decision that was unlawful but valid and one that was invalid and hence void *ab initio*.

Exceptions would be administrative determinations made pursuant to proposed sections 75D, 75F and 75H. But these are precisely decisions in which it is highly desirable that regard be had to Australia's international obligations, including obligations under UNCLOS and obligations owed to asylum seekers under the Refugees Convention.

Hence these elements of the proposed 'no invalidity' clause should also be opposed.

2.2 The *Migration Act 1958* – deletion of references to the 1951 Refugees Convention

Part 2 of Schedule 5 of the Bill seeks to remove all references to the Refugees Convention from the MA. In particular, amendments to section 36(2)(a) would delete reference to the Convention from the definition of a refugee.

Australia is a party to the Refugees Convention and bound by its obligations. Therefore, deletion of reference to the Convention in the Act is contrary to the spirit of that treaty. Such deletion is also contrary to State practice internationally, including New Zealand, the UK and elsewhere in Europe. In those countries, domestic legislation and regional refugee documents *expressly refer* to the Refugees Convention. Two examples are:

- Section 129(1) of the New Zealand *Immigration Act 2009* provides that 'A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugees Convention';[21]

[20] Contrast the income tax assessment that was the subject of the litigation in *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

[21] *Immigration Act 2009* (NZ).

- The UK *Immigration Rules* state that 'All asylum applications will be determined by the Secretary of State in accordance with the Geneva [Refugee] Convention.[22]

This deletion from the MA of references to the Refugees Convention should be opposed.

2.3 The *Migration Act 1958* – changes to the conception of refugee status

Item7 of Schedule 5 of the Bill would introduce a range of new provisions defining what it is to be a refugee for the purposes of the MA.

Proposed new section 5J(1) attempts to define the existence of a 'well-founded fear of persecution' and states that this will be satisfied only if, amongst other things, the 'real chance of persecution relates to *all areas* of the receiving country'.[23]

This proposal means that if there is an area within the applicant's country in which they do not face a well-founded fear of persecution, they will be expected to go there. Such a requirement is a well-established refugee principle called 'relocation' or 'internal protection alternative'. However, all other leading signatories to the 1951 Refugees Convention (the UK, Canada, the USA, New Zealand, Germany and France) use a *reasonableness* test. For instance, the EU Qualification Directive 2011 states that Member States may determine that an applicant is not in need of refugee protection if he or she can access protection in a part of the country of origin, but it must be shown that 'he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there'.[24] UK law sets out similar requirements.[25]

The 'reasonableness' criterion for relocation is to ensure that the living conditions in the 'safe' internal area will not be so bad that the refugee will be forced to return to the 'unsafe' part of their country (therefore preventing refoulement). In contrast, Proposed section 5J(1)(c) contains no such protection. The omission of any reasonableness test for relocation is contrary to all other major signatories to the Refugees Convention in the industrialised world and opens Australia to breach of the non-refoulement principle.

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[22] *Immigration Rules* (UK) para 328. See also Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (13 December 2011) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>) ('EU Qualification Directive 2011'), which sets out an EU-wide codification of the Refugees Convention.

[23] Emphasis added.

[24] EU Qualification Directive 2011, article 8.

[25] Paragraph 339O of the UK Immigration Rules states that it must be 'reasonable to expect them to stay' in the relocation region.

We do not support the enactment of section 5J, as it would be rendered necessary only by the deletion of reference to the Refugees Convention. If, however, section 5J is to be enacted, then it should be amended from its current form to include reasonableness criterion of the sort discussed above.

Proposed new section 5J(2)(b) would provide that non-state actors can provide protection for the purposes of refugee law. Non-state actors include groups such as clans and militias (see eg in Chad and Somalia) and multinational forces. We urge that this amendment to the MA be opposed. Although refugees frequently come from fragile States where some groups are acting *like* States in that they may control part of the territory, and provide security to a community, the suggestion that non-state entities can provide protection is problematic for the following reasons:[26]

- Non-state actors are not accountable under international law.[27]
- Non-state actors normally only exercise authority in a State on a temporary or transitional basis and have a limited ability to enforce the rule of law.[28] This is particularly so in relation to groups such as militias and clans which may have control over part of a country. Protection based on exercise of territorial power, is by its nature, fluid and changeable and open to challenge by rival groups and militias within that state.
- Non-state bodies usually operate as 'protectors' when the State has failed or there is ongoing civil war within a country. In such situations, the hold of power that a non-state actor may have will be tenuous. There is also evidence that protection by clans (in for instance Chad and Somalia) is selective – it is only provided to other members of the clan.[29] Such local territorial control is not of the same nature as the widespread political, economic and legal power exercised by a functioning state.
- The legislative treatment of non-state actors as the functional equivalent of state actors is at odds with the legislative attitude being taken to non-state actors in other contexts, such as Australian anti-terrorism law.

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[26] See also M. O'Sullivan, 'Acting the part: can non-state entities provide protection under international refugee law? (2012) 24(1) *International Journal of Refugee Law* 85-110; http://ijrl.oxfordjournals.org/content/24/1/85.abstract.

[27] See 'Memorandum by GS Goodwin-Gill, Professor of International Refugee Law, University of Oxford, and A. Hurwitz, Refugee Studies Centre, University of Oxford', UK House of Lords Select Committee on the European Union, *Defining Refugee Status and Those in need of International Protection*, H.L. Paper 156, Session 2001-02, 28th Report, para 12.

[28] See 'UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009)551, 21 October 2009, at 5, available at <www.unhcr.org/4c5037f99.pdf>.

[29] Swedish Migration Board, Government and Clan system in Somalia: Report from Fact Finding Mission to Nairobi, Kenya, and Mogadishu, Hargeisa and Boosaaso in Somalia in June 2012, 5 March 2013, Section 5.1.2.

If this amendment is nevertheless to proceed, it should itself be amended to ensure that the MA sets a high threshold for this and require that the protection be durable in nature. An example of this is Article 7 of the EU Qualification Directive 2011. It provides:

> (1) Protection against persecution or serious harm can only be provided by:
>
> (a) the State; or
>
> (b) parties or organisations, including international organisations, *controlling the State* or a *substantial part* of the territory of the State;
>
> provided they are willing and *able* to offer protection in accordance with paragraph 2.
>
> (2) Protection against persecution or serious harm *must be effective and of a non-temporary nature*. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an *effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm*, and when the applicant has *access* to such protection.[30]

Proposed new section 5J(3) would deny refugee status to an asylum seeker who is able to take 'reasonable steps to modify his or her behaviour' (other than certain precluded modifications) so as to avoid persecution.

The principle that asylum seekers should not be expected to 'act discreetly' or otherwise avoid persecution by changing their behaviour was set out in the High Court decision of *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*.[31] The factual scenario in *S395* involved the suppression of a fundamental, immutable characteristic of a person (sexual identity) in a context where the expression of such identity was liable to criminal prosecution. Since then the principle has been understood to include behaviour which is not directly expressive of a Refugees Convention attribute. Thus a recent decision of the Full Federal Court rejected the contention that a truck driver from Afghanistan was not in need of protection because he could be expected to change his occupation where that gave rise to an imputed political opinion from the Taliban.[32]

We therefore submit that the exceptions in proposed section 5J(3) are drafted too narrowly. It refers only to behaviours which 'conflict with a characteristic that is fundamental to the person's identity or conscience' or 'conceal an innate or immutable characteristic of the person'. If sectin 5J(3) is to be enacted at all, at a minimum the exceptions should be redrafted so as to refer more broadly to

[30] Emphasis added.
[31] 216 CLR 473.
[32] *Minister for Immigration and Border Protection v SZSCA* [2013] FCAFC 155.

behaviour or actions which are expressive of a protected Convention attribute: race, religion, nationality, political opinion or membership of a particular social group.[33]

2.4 The *Migration Act 1958* – deportation in violation of non-refoulement obligations

Item 2 of Schedule 5 of the Bill would introduce a new section 197C that would make the existence of non-refoulement obligations irrelevant to a removal decision under section 198 of the MA. This amendment should be opposed. Upholding Australia's non-refoulement obligations must remain a fundamental requirement of Australian migration law and migration policy. These obligations are not arbitrary imposts that get in the way of an expeditious removal policy. They are obligations that Australia has, properly, taken upon itself by agreeing to honour the claims of asylum seekers under the Refugees Convention (and Protocol), in order to reduce the amount of human suffering in the world.

[33] For a more detailed presentation of this argument, see M O'Sullivan, 'Minister for Immigration and Border Protection v SZSCA: Should Asylum Seekers Modify Their Conduct to Avoid Persecution?' (2014) 36(3) *Sydney Law Review* 541 (available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509274>).