

# Migration And Maritime Powers Legislation Amendment (Resolving The Asylum Legacy Caseload) Bill 2014 (detailed)

## Migration and Maritime Powers Legislation Amendment Bill

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

The Senate

Legal and Constitutional Affairs  
Legislation Committee

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

November 2014

□ Commonwealth of Australia 2014

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## Recommendations

## Recommendation 1

3.74 In relation to the amendments contained in Schedule 6, the committee recommends that the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.

## Recommendation 2

3.76 The committee recommends that, if the Bill is enacted, the Government should review its operation three years after it passes into law.

## Recommendation 3

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

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Chapter 1  
Introduction

## The referral

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

## The 'asylum legacy caseload'

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

In response to a significant rise in the number of unauthorised boat arrivals in 2012, an Expert Panel on Asylum Seekers was tasked by the Gillard Government to report back on policy options available 'to prevent asylum seekers risking their lives on dangerous boat journeys to Australia'. After the Panel's report was released in August 2012, the then Government announced that some, but not all, of a suite of recommendations made by the Panel would be implemented, including the reinstatement of offshore processing for selected asylum seekers and the introduction of a 'no advantage' principle which would apply to all asylum seekers who had arrived by boat. What the 'no advantage' principle meant in practice was only ever explained in very general terms as a means to ensure that 'irregular migrants gain no benefit by choosing to circumvent regular migration mechanisms'.

As more boats continued to arrive and the number of 'no advantage' asylum seekers waiting for their claims to be processed began to rise, pressure on the capacities of the onshore detention network and offshore processing centres to absorb the new arrivals increased. On 21 November 2012, the then Minister for Immigration and Citizenship, Chris Bowen, stated that 'given the number of people who had arrived by boat since 13 August 2012, it would not be possible to transfer them all to Nauru or Manus Island in the

immediate future'. Instead, under the 'no advantage' principle, many would be released from detention into the community on bridging visas without work rights (BVES) while they waited an outcome on their asylum claims.

1 House of Representatives, Votes and Proceedings, No. 69–25 September 2014, p. 856.  
 2 Journals of the Senate, No. 56–25 September 2014, pp. 1506–1507.  
 3 Bills Digest, p. 3.  
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Those found to be refugees would not be issued with permanent protection visas 'until such time that they would have been resettled in Australia after being processed in our region'.<sup>4</sup>

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

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

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

4 Bills Digest, p. 3. References omitted.

5 Bills Digest, p. 3.

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

7 Explanatory Memorandum, p. 2.

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

These measures are a necessary extension and consolidation of the government's successful border protection policies and are part of a broad package of measures which will tackle the management of the backlog of illegal maritime arrivals...and bring important enhancements to the integrity of Australia's protection regime.

The government is committed to Australia's national security and economic prosperity in its efforts to combat the illegal and dangerous practice of people-smuggling. These changes will further strengthen the government's ability to manage illegal arrivals and strengthen public confidence in Australia's protection and migration programs.<sup>8</sup>

1.6 The Bill would-if passed-amend:

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

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

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

Other parliamentary inquiries

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

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

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

9 Explanatory Memorandum, p. 13.

10 Explanatory Memorandum, p. 13.

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

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

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#### Conduct of the inquiry

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

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

1.13 A public hearing was held on 14 November 2014. A list of witnesses who

appeared is at Appendix 2. The Hansard transcript of the committee's hearing can be accessed on the committee's website.

#### Acknowledgment

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

#### Note on references

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

#### Structure of the report

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

#### Chapter 2

##### Key provisions of the Bill

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

##### Schedule 1: Maritime powers

2.2 Schedule 1 would—if passed—amend the Maritime Powers Act to:

(a) broaden maritime enforcement powers; and (b) limit the review and challenge of the exercise of such powers.

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

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

<sup>1</sup> The Bill, Schedule 1, Items 11 & 15.

<sup>2</sup> The Bill, Schedule 1, Item 19 (proposed section 75C).

<sup>3</sup> The Bill, Schedule 1, Items 12 & 18.

<sup>4</sup> The Bill, Schedule 1, Items 15 & 17.

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

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

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

2.5 Schedule 1 would also:

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

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

<sup>7</sup> The Bill, Schedule 1, Item 19 (proposed section 75H).

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

<sup>9</sup> The Bill, Schedule 1, Items 32-35.

<sup>10</sup> The Bill, Schedule 1, Item 36.

<sup>11</sup> The Bill, Schedule 1, Item 37.

- 2.6 In his second reading speech, the Minister explained these changes as follows: The amendments to the Maritime Powers Act strengthen Australia's maritime enforcement framework and the ongoing conduct of border security and maritime enforcement operations. Enforced turn backs are a critical component of the government's [sic] suite of border protection measures that have been so successful to date in stopping the boats. These measures affirm and strengthen the government's ability to continue the success of our maritime operations. This will help ensure that the tap stays

off, that it will never return and that we will never go back to the cost, chaos and tragedy that was present under the previous government and was created under the arrangements put in place by that government. The amendments in schedule 1 of this bill reinforce the government's powers and support for our officers conducting maritime operations to stop people-smuggling ventures at sea. They provide additional clarity and consistency in the powers to detain and move vessels and persons. They further clarify the relationship between the Maritime Powers Act and other laws and clearly state that ministers can give directions in respect of the exercise of maritime powers. Finally, as was parliament's original intent, the amendments support our Navy and Customs personnel to continue to do their difficult jobs efficiently, effectively and safely on the water.<sup>12</sup>

## Schedules 2 & 3: Visas

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

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

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

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

14 The Bill, Schedule 2, Item 29.

15 The Bill, Schedule 2, Item 31.

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- their last entry into Australia or have previously held another specified humanitarian visa;16
- the holder of a temporary protection visa will not be entitled to be granted any visa other than specified temporary visas;17
- allowing for the establishment of safe haven enterprise visas (but not actually establishing them or detailing their key features);18 and
- establishing a mechanism whereby persons who have already validly applied for a permanent protection visa will be deemed to have applied for a temporary protection visa.19

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

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

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

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

16 The Bill, Schedule 2, Item 30.

17 The Bill, Schedule 2, Item 31.

18 The Bill, Schedule 2, Item 16.  
19 The Bill, Schedule 2, Item 20.

19 The Bill, Schedule 2, Items 20 & 38.  
20 The Bill, Schedule 3, Item 1.

20 The Bill, Schedule 3, Item 1.  
21 The Bill, Schedule 3, Item 2.

21 The Bill, Schedule 3, Item 7.

do not have a 'permanent protection visa product' to sell to those who are thinking of travelling illegally to Australia.<sup>22</sup>

#### Schedule 4: Fast track assessments

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

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

- fall into such classes of person as are specified by the Minister by non-disallowable legislative instrument;<sup>28</sup>

- 22 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, House of Representatives Hansard, 25 September 2014, p. 10546.
- 23 The Bill, Schedule 4, Item 1; Legislative Instruments Act 2003, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.
- 24 The Bill, Schedule 4, Item 1
- 25 The Bill, Schedule 4, Items 16 & 17.
- 26 The phrase 'manifestly unfounded claim' is not defined.
- 27 Section 97 provides the following definition of 'bogus document' which only applies to Subdivision C of Division 3 of Part 2 of the Migration Act and, therefore, does not apply to the definition of 'excluded fast track review applicant':  
 "bogus document", in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
  - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
  - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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

- 28 The Bill, Schedule 4, Items 1 & 2; Legislative Instruments Act 2003, subsection 44(2) (Item 26); Explanatory Memorandum, p. 114.
- 29 The Bill, Schedule 4, Item 21 (proposed section 473CA).
- 30 The Bill, Schedule 4, Item 21 (proposed section 473BD).
- 31 The Bill, Schedule 4, Item 21 (proposed section 473FA).
- 32 The Bill, Schedule 4, Item 21 (proposed section 473DA).
- 33 The Bill, Schedule 4, Item 21 (proposed section 473DB).
- 34 The Bill, Schedule 4, Item 21 (proposed sections 473DB-DD).
- 35 The Bill, Schedule 4, Item 21 (proposed section 473CC).

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

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

The government is of the view that a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia's protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government's capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system. A new approach is warranted in the Australian context. The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority...These measures are specifically aimed at addressing the backlog of [illegal maritime arrivals]—some 30,000—and will ensure their cases progress towards timely immigration outcomes, either positive or negative.

This new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the department. This behaviour has on numerous occasions led to considerable delay while new claims are explored.

These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.

Effective tools must be available to ensure that those who do not engage our protection obligations can be removed from Australia. Prompt removal of failed asylum seekers from Australia supports the integrity of our protection program and reduces the likelihood of applicants frustrating and delaying removal plans.<sup>37</sup>

#### Schedule 5: Australia's obligations under international law

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

36 The Bill, Schedule 4, Item 22.

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

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on Civil and Political Rights and the Convention against Torture. It is also a principle of customary international law.<sup>38</sup>

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

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

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

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

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

Let me be clear, the government is not changing the risk threshold required for assessing whether a person has a well-founded fear of persecution.

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

39 The Bill, Schedule 5, Item 2.

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

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

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Under the new framework, refugee claims will continue to be assessed against the 'real chance' test, which has been the test adopted by successive governments, in line with the High Court's decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62.

The bill also clarifies the interpretation of various protection related concepts such as:

- the standard of effective state and non-state protection;
- the test for assessing whether a person can relocate to another area of the receiving country; and
- the definition of 'membership of a particular social group'.

The new framework will also clarify those grounds which exclude a person from meeting the definition of a refugee or which, upon a person satisfying the definition of a refugee, render them ineligible for the grant of a protection visa.<sup>42</sup>

#### Schedule 6: Newborn babies

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

2.18 Schedule 6 would-if passed-amend the Migration Act to seek to ensure that unlawful non-citizen children have the same status and are subject to the same removal power as their parents. Non-citizen children of 'transitory persons' are to be transitory persons themselves; non-citizen children of 'unauthorised maritime arrivals' are to be likewise classified.

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

43 This is because:

- (a) by section 10 of the Migration Act, a non-citizen child born in Australia is deemed to have entered Australia at the time of birth;
- (b) by subsection 5AA(2), a person who enters Australia otherwise than by air is deemed to have 'entered Australia by sea';
- (c) by section 14, a non-citizen in Australia without a valid visa is an 'unlawful non-citizen'; and
- (d) by subsection 5AA(1), an unlawful non-citizen who entered Australia by sea is an 'unauthorised maritime arrival'.

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

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

The amendments contained in schedule 6 reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival'...in the Migration Act. This will ensure that, consistent with their parents, these children are subject to offshore processing and are unable to apply for a visa while they remain in Australia, unless I have personally

intervened to allow a visa application.

The government will also extend the definition of a [unauthorised maritime arrival] to the children of [illegal maritime arrivals] born in a regional processing country. This amendment supports the government's intention that [illegal maritime arrival] families in regional processing countries should be treated consistently and that children born to an [illegal maritime arrival] ought not be treated separately from their family in the protection assessment process.

Amendments will also be made to the Migration Act to ensure provisions relating to 'transitory persons' operate consistently.<sup>44</sup>

**Schedule 7: Caseload management**

2.20

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

- remove the 90-day period within which decisions on protection visa applications must be made by the Minister and the Refugee Review Tribunal;<sup>45</sup>
- empower the Minister to impose suspensions and caps on visa processing (including protection visa processing) by non-disallowable legislative instrument;<sup>46</sup> and
- remove provisions that require the Minister to report specified information about applications for protection visas and decisions made concerning such applications to Parliament on a regular basis.<sup>47</sup>

2.21

The Minister explained in his second reading speech that:

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

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

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

46 The Bill, Schedule 7, Items 5–10.

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

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

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

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

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**Chapter 3**  
**Key Issues**

**Schedule 1: Amendments relating to maritime powers**

3.1 Submitters to the inquiry expressed concerns regarding the provisions set out in Schedule 1.1 These concerns were not limited to particular provisions and were aimed at the collective effect passing the amendments would have on operations carried out on the high seas.

3.2 As noted by the Refugee Council of Australia:

...these amendments aim to give the Minister for Immigration extraordinary powers to detain people at sea (both within Australian water and on the high seas) and to transfer them to any country or even a vessel of another country that the Minister chooses, without scrutiny from either Parliament or the Courts.<sup>2</sup>

3.3 As with other Schedules to the Bill, submitters expressed concerns regarding the Government's decision to clarify the scope of its obligations under international law.<sup>3</sup> The Human Rights Law Centre argued that the provisions aimed at broadening maritime enforcement powers may lead to the Government choosing not to comply with international law.<sup>4</sup>

3.4 The Law Council of Australia (LCA) shared these concerns and noted that these provisions 'increase the likelihood that the exercise of powers under the Maritime Powers Act will violate Australia's obligation to respect the sovereignty of other states'.<sup>5</sup> The LCA also questioned whether the new powers allowing for the removal and detention of a vessel or aircraft either inside or outside the migration zone were contrary to human rights law and amounted to arbitrary detention.<sup>6</sup>

3.5 Of most concern to some submitters was the proposed removal of procedural fairness guarantees and the limitations on the court's ability to invalidate executive

1 Human Rights Law Centre, Submission 166, pp 2–6; Castan Centre for Human Rights Law, Submission 137, pp 2–9; Amnesty International, Submission 170, pp 2–3; Law Council of Australia, Submission 129, pp 12–19; Australian Red Cross, Submission 164, p. 19 and Refugee and Immigration Legal Centre, Submission 165, pp 24–25.

2 Refugee Council of Australia, Submission 136, p. 1.

3 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp 4–5; Refugee Advice and Casework Service, Submission 134, pp 5–7; Refugee and Immigration Legal Centre, Submission 165, pp 24–25 and Law Council of Australia, Submission 129, p. 15.

4 Human Rights Law Centre, Submission 166, pp 2–3.

5 Law Council of Australia, Submission 129, p. 15.

6 Law Council of Australia, Submission 129, p. 16.

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actions.<sup>7</sup> The Refugee and Casework Service (RACS) argued that the lack of judicial oversight and Parliamentary scrutiny was particularly concerning:

Irrespective of any view of the relevance of international law obligations, RACS believes that the Committee should exercise extreme caution in relation to legislation that proposes to allow the prolonged detention of any person in the absence of Parliamentary or judicial oversight.<sup>8</sup>

3.6 The department addressed the majority of these concerns in its submission to the inquiry.<sup>9</sup> In addressing the concerns raised regarding the extension of the

Minister's power, the department stated that:

These amendments do not seek to create new powers beyond what is already available to maritime officers- instead, they clarify the intended operation of those powers and their relationship with other law. Limited new powers are provided to the Minister personally to ensure that the executive has appropriate oversight of matters significant to Australia's sovereignty, national security and overarching national interests.<sup>10</sup>

3.7 The department also clarified what matters would constitute national interest:

..the term "national interest" has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Only the Executive arm is appropriately and adequately placed to make assessments about what is often a complex range of diverse considerations<sup>11</sup>

3.8 The department also provided justification with regards to proposed sections 22A and 75A which provide that a failure to consider international obligations will not invalidate the exercise of certain powers under the Maritime Powers Act:

Parliament did not legislate to make international obligations a relevant consideration, as a matter of domestic law, for the exercise of maritime powers. These amendments put this beyond doubt. The Government remains committed to Australia's international obligations, including non-refoulement obligations and the obligations arising under the United Nations Convention on the Law of the Sea. New sections 22A and 75A do not absolve Australia of its obligation to comply with international law, and the Government does not resile from responsibility for actions taken under

<sup>7</sup> Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp 6-7; Refugee Advice and Casework Service, Submission 134, p. 7. and Law Council of Australia, Submission 129, p. 16.

<sup>8</sup> Refugee Advice and Casework Service, Submission 134, p. 7.

<sup>9</sup> Department of Immigration and Border Protection, Submission 171.

<sup>10</sup> Department of Immigration and Border Protection, Submission 171, p. 5.

<sup>11</sup> Department of Immigration and Border Protection, Submission 171, p. 6.

19

the Maritime Powers Act. However, it is the Government's position that it is the Executive Government which is best placed to decide how to comply with these obligations, particularly in light of the full range of considerations surrounding operational activities at sea.<sup>12</sup>

3.9 At the public hearing, departmental officials reiterated that the introduction of these provisions does not mean that the Government will not comply with international law:

The government's compliance with our international obligations is of course made up of various factors, some of which is provided for in the legislation, some is provided for in policy and some is provided for in practice. Whilst these provisions are dealing with the manner in which we deal with asylum seekers, you need to look at the total practice of the government in meeting its international obligations. It is quite clear in the explanatory memorandum—it is stated on several occasions—that the government has no intention of breaching its international obligations, in particular the non-refoulement obligation.<sup>13</sup>

3.10 In its submission, the department clarified that none of these provisions would result in vessels being left at sea or people put in dangerous situations:

New subsections 69(2) and (3) and new section 75C have attracted criticism as apparently allowing the "abandonment" of a vessel on the high seas, and allowing the trespass into other countries' territorial sea. This is incorrect. These amendments are intended to make it clear that a destination need not be in a country (which, when read with the definition of 'country' in section 5, includes that country's territorial sea or, where relevant, archipelagic waters). The Government's policy relating to Suspected Illegal Entry Vessels is to remove them to a place outside Australia's contiguous zone where it is safe to do so. The professional mariners of the Royal Australian Navy and the Marine Unit of the Australian Customs and Border Protection Service view the safety of life at sea as their highest duty as mariners. An extraordinary amount of work goes into ensuring that operations take place in safety, and not a single life has been lost at sea as a result.<sup>14</sup>

Schedules 2 and 3: Introduction of new types of visas and changes to visa applications

3.11 Both schedules 2 and 3 of the Bill make changes to Australia's current visa regime. Submitters were most concerned with the provisions in Schedule 2 which

<sup>12</sup> Department of Immigration and Border Protection, Submission 171, pp 5-6.

<sup>13</sup> Ms Vicki Parker, General Counsel, Department of Immigration and Border Protection, Committee Hansard, 14 November 2014, p. 61.

<sup>14</sup> Department of Immigration and Border Protection, Submission 171, pp 6-7.

20 allow for the re-introduction of Temporary Protection Visas (TPVs) and the introduction of Safe Haven Enterprise Visas (SHEVs).<sup>15</sup>

3.12 A number of witnesses at the public hearing argued that TPVs were not a suitable long-term solution for refugees.<sup>16</sup> Mr Khanh Hoang, from the ANU College of Law, argued that TPVs are discriminatory and are inconsistent with the broad objectives of the refugee convention:

Temporary protection is usually provided by states to address situations that do not squarely fall within the convention or where people are fleeing from generalised violence or other emergency situations. It is the practice of most states to grant permanent protection to those who are found to be convention refugees.

By contrast, the TPV effectively discriminates against people who come by boat and who have been found to be refugees by ensuring that they will never be granted a permanent protection visa. If we want to talk about certainty for people then we say that the temporary protection visa and the safe haven enterprise visa do the exact opposite of providing certainty.<sup>17</sup>

3.13 The Refugee Council of Australia argued that there is no justification for introducing TPVs on the basis of deterrence and that it will lead to numerous families being separated:

Families who are known by the government to be experiencing the impacts of persecution will be separated indefinitely. The family member in Australia will be trapped: having to decide whether to remain safely here,

away from the place where it is accepted that they will face persecution, while other family members are highly unsafe, or to return at great risk to themselves.<sup>18</sup>

3.14 While acknowledging the need to process the vast number of asylum claims that have yet to be assessed, the Law Council also noted that TPVs are inconsistent with its own asylum seeker policy:

If TPVs are to be reintroduced, to be consistent with international obligations, the Law Council would support them as only constituting a

15 Human Rights Law Centre, Submission 166, pp 15-16; Refugee Council of Australia, Submission 136, pp 4-6; Migration Law Program, Australian National University, Submission 168, pp 6-7; Refugee Advice and Casework Service, Submission 134, pp 8-16; Amnesty International, Submission 170, pp 3-5; Law Council of Australia, Submission 129, pp 19-25; Australian Red Cross, Submission 164, pp 6-11 and Refugee and Immigration Legal Centre, Submission 165, pp 17-20.

16 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp 8-9; Refugee Advice and Casework Service, Submission 134, p. 9; Amnesty International, Submission 170, p. 4 and Australian Human Rights Commission, Submission 163, pp 34-35,

17 Mr Khanh Hoang, Associate Lecturer, Migration Law Program, ANU College of Law, Committee Hansard, 14 November 2014, p. 37.

18 Mr Paul Power, Chief Executive Officer, Refugee Council of Australia, Committee Hansard, 14 November 2014, p. 44.

21

form of 'bridging visa' while people await the determination of their claim. However, they should not be supported as the final outcome once an individual has been found to engage in protection obligations.<sup>19</sup>

3.15 Submitters also were opposed to the introduction of SHEVs.<sup>20</sup> The ANU College of Law argued that the SHEV does not provide a durable solution for refugees:

The requirement to work three and half years without income support is particularly onerous. In addition, we query how likely it is that SHEV holders would be eligible for permanent skill[ed] or family visas. These visas require applicants to obtain a high level of English, have their skills recognised by professional bodies and often require high visa application fees.<sup>21</sup>

3.16 The Refugee Council of Australia expressed concerns that the eligibility criteria for SHEVs is to be specified by way of delegated legislation:

...under Section 46AA(2)(a)(b), the legislation stipulates that a valid application for a SHEV cannot be made without the Government first prescribing criteria by regulation. The amendments in the Bill do not specify a timeframe for the introduction of this regulation. As the legislation does not require the Minister to introduce the regulations necessary to bring the SHEV into existence, the legislation does not guarantee that TPV-holders will have access to SHEVs, as the decision about when or whether to introduce the regulations will rest with the Minister.<sup>22</sup>

3.17 In its submission, the department stated that 'TPVs strike an appropriate and effective balance between the provision of safety from persecution and the removal of an incentive for illegal arrivals'.<sup>23</sup> The Department argued that it is this element of discouragement that makes it necessary for the granting of temporary as opposed to permanent protection visas.<sup>24</sup>

3.18 The department also highlighted that asylum seekers would not be returned to their home country under any circumstances while they continued to engage Australia's protection obligations.<sup>25</sup>

19 Law Council of Australia, Submission 129, p. 20.

20 Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp 8-9; Australian Human Rights Commission, Submission 163, p. 42; Human Rights Law Centre, Submission 166, pp 15-16 and Refugee Council of Australia, Submission 136, pp 4-6;

21 Migration Law Program, Australian National University, Submission 168, pp 6-7,

22 Refugee Council of Australia, Submission 136, p. 5.

23 Department of Immigration and Border Protection, Submission 171, p. 7.

24 Department of Immigration and Border Protection, Submission 171, p. 7.

25 Department of Immigration and Border Protection, Submission 171, p. 7.

22

3.19 In his second reading speech, the Minister provided clarification on eligibility criteria for SHEVs:

IMAs granted a SHEV will be required to confine themselves to designated regions (either a State or Territory government, local government, or employer can request to be designated), identified through a national self-nomination process. The visa will be valid for five years, and like the TPV will not include family reunion or the right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies and will have access to the same support arrangement as a TPV holder.<sup>26</sup>

3.20 The department noted that 'the SHEV will come into effect in April 2015 following necessary amendments to the Migration Regulations 1994'.<sup>27</sup> At the public hearing, departmental officials noted that the Minister was still undertaking consultation with stakeholders in relation to SHEV visas:

...the requirements for the SHEV are the same as for a temporary protection visa, insofar as it is a protection visa and the person holding it needs to have been assessed to be a refugee. The complicated part of it is in the pathway to other visas, which is obviously what the intent of the visa is for. The complicated part of that is in articulating the definition of regional Australia... and also what accesses to social services count towards meeting the requirements for the visa or not. We need to come up with a very clear list of that.<sup>28</sup>

3.21 In response to questions from the committee regarding the operation of SHEVs, the department has provided a detailed fact sheet which has been published on the committee's website. The committee thanks the department for providing this fact sheet.

Schedule 4: Fast track assessments

3.22 As noted in Chapter 2, Schedule 4 would—if passed—insert a new 'fast track review process' for reviewing refused protection visa applications.

3.23 Submitters emphasised the importance of merits review in refugee status determination processes,<sup>29</sup> pointing to departmental statistics that show that, when it

- 26 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Second Reading Speech, House of Representatives Hansard, 25 September 2014, p. 10546.
- 27 Department of Immigration and Border Protection, Submission 171, p. 7.
- 28 Ms Karen Visser, Director, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection, Committee Hansard, 14 November 2014, p. 56.
- 29 Australian Human Rights Commission, Submission 163, p. 24; Refugee and Immigration Legal Centre, Submission 165, pp. 1, 2; Human Rights Law Centre, Submission 166, p. 13.

23

comes to applications for protection visas, up to 87% of first instance rejections are overturned on review.<sup>30</sup>

3.24 Submitters were concerned, however, that the fast track régime would 'truncate the refugee status determination process by removing safeguards that operate to ensure each claim is fairly and carefully assessed on its merits'.<sup>31</sup> This was said to create an 'inherent risk...that an applicant with legitimate claims will nevertheless fail and be returned' to an 'appreciable risk of serious human rights abuses such as targeted killings and torture'.<sup>32</sup> It was argued that this risk was heightened by the other fundamental changes made by the Bill,<sup>33</sup> other migration legislation currently before the Parliament,<sup>34</sup> the removal of all funding for the Immigration Advice and Application Assistance Scheme in respect of people who arrive in Australia without a valid visa, and the replacement of that scheme with 'a handful of short brochures'.<sup>35</sup> Reviews conducted by the Immigration Assessment Authority

3.25 Submitters were concerned that reviews conducted by the Authority would not be sufficiently robust because:

- applicants would be required to 'provide a complete statement of their claims for protection during their first engagement with an officer of the department',<sup>36</sup> but there are many legitimate reasons why applicants might not disclose all relevant information in their application. These could include:
  - a lack of knowledge of what information is relevant (particularly to the new definition of 'refugee' that the Bill seeks to insert into the Migration Act);

30 Law Council of Australia, Submission 129, p. 29; Refugee and Immigration Legal Centre, Submission 165, p. 2; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 10.

31 Law Council of Australia, Submission 129, pp. 25, 27; Refugee and Immigration Legal Centre, Submission 165, p. 1.

32 Law Council of Australia, Submission 129, pp. 11, 25; Australian Red Cross, Submission 164, pp. 11-12; Refugee and Immigration Legal Centre, Submission 165, p. 2.

33 Law Council of Australia, Submission 129, p. 4.

34 Law Council of Australia, Submission 129, p. 31; Amnesty International, Submission 170, p. 7. These submissions are referring to the Migration Amendment Legislation (Regaining Control of Australia's Protection Obligations) Bill 2014, which seeks to remove the statutory process for complementary protection assessment, and the Migration Amendment Legislation (Protection and Other Measures) Bill 2014, which seeks to increase the test for complementary protection claims to 'more likely than not', or greater than 50% chance of harm on return.

35 Law Council of Australia, Submission 129, p. 4; Australian Human Rights Commission, Submission 163, pp. 26-28; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 9.

36 Australian Human Rights Commission, Submission 163, pp. 18, 26; Australian Red Cross, Submission 164, p. 12.

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- a lack of access to documentation;
  - a lack of legal advice and understanding of the Australian legal system;
  - a lack of education, literacy and English language skills;
  - mental illness, including that brought on by torture or trauma; and
  - a lack of trust in government officials caused by persecution that they may have suffered at the hands of the government in their home country;<sup>37</sup>
  - the process excludes recognised procedural fairness guarantees, such as the right to be heard, to present and challenge evidence and conclusions, and to clarify misunderstandings;<sup>38</sup>
  - the process does not involve a hearing, which will make it very difficult for the Authority to evaluate the decision-maker's conclusions about the applicant's credibility;<sup>39</sup>
  - because the Authority is not able to receive further information (except in undefined 'exceptional circumstances'<sup>40</sup>), it risks missing crucial factual developments that bear on the applicant's claim for protection, including changes of circumstances in their home country;<sup>41</sup>
  - the Authority's objective would be to provide a review that is 'efficient and quick'.<sup>42</sup> It would not, unlike the Migration Review Tribunal and the Refugee Review Tribunal, be required to provide a review that is 'fair' and 'just'.<sup>43</sup> This was said to be 'sacrificing accuracy of decision making for speed';<sup>44</sup> and

37 Law Council of Australia, Submission 129, p. 30; Australian Human Rights Commission, Submission 163, pp. 25-26; Australian Red Cross, Submission 164, p. 12; Refugee and Immigration Legal Centre, Submission 165, p. 9.

38 Law Council of Australia, Submission 129, p. 28; Refugee and Immigration Legal Centre, Submission 165, p. 9.

39 Australian Human Rights Commission, Submission 163, p. 28; Refugee and Immigration Legal Centre, Submission 165, p. 9.

40 Refugee and Immigration Legal Centre, Submission 165, p. 7;

41 Law Council of Australia, Submission 129, p. 29; Australian Human Rights Commission, Submission 163, pp. 25-26; Refugee and Immigration Legal Centre, Submission 165, pp. 7-8.

42 The Bill, Schedule 4, Item 21 (proposed subsection 473FA(1)). Law Council of Australia, Submission 129, p. 28; Australian Human Rights Commission, Submission 163, p. 29; Australian Red Cross, Submission 164, p. 13; Refugee and Immigration Legal Centre, Submission 165, p. 7.

43 Migration Act 1958, sections 353 & 420.

44 Australian Human Rights Commission, Submission 163, p. 20; Human Rights Law Centre, Submission 166, p. 13.

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- if an application were remitted for reconsideration because the Authority found that the applicant was entitled to be granted a protection visa, the Minister would be under no obligation to grant one.<sup>45</sup>

3.26 In addition, the Australian Human Rights Commission expressed concern that there is no limit to the classes of person that could become subject to the fast track review process. The Minister would be able to expand the categories of applicant

subject to fast track review without Parliamentary oversight and could, by this process, ultimately replace the Refugee Review Tribunal entirely.<sup>46</sup>

3.27 The department responded to many of these concerns in its submission to the inquiry. It explained that the fast track régime

...has been designed to deter abuse of the review system through the late presentation of claims that could reasonably have been presented earlier, particularly where this is done in order to prolong failed asylum seekers' stay in Australia. It is consistent with the amendments in the Migration Amendment (Protection and Other Measures) Bill 2014 which clarify the responsibility of asylum seekers to specify the particulars of their claim, deliver the consistent message that it is extremely important to provide sufficient evidence and information to establish protection claims upfront, and will create an effective, efficient process.<sup>47</sup>

3.28 In relation to concerns that fast track reviews will not respect due process, the department submitted that:

- 'Fast track applicants will have the opportunity to articulate their claims in a full and confidential interview with a specially trained Onshore Protection decision-maker';<sup>48</sup> and
- 'Given the short period of time elapsing between a refused decision being referred by the department to the [Authority] and a review being completed (expected to take two weeks) and the resultant limited period in which an applicant's circumstances could change during that time, it is anticipated that the [Authority] will very rarely exercise its power to seek new information of its own volition while reviewing a case'.<sup>49</sup>

#### Applicants excluded from the process

3.29 Submitters also expressed concern about the range of people who would be excluded from the fast track process and would not have access to any kind of merits review. These concerns included:

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

46 Australian Human Rights Commission, Submission 163, p. 25.

47 Department of Immigration and Border Protection, Submission 171, p. 14.

48 Department of Immigration and Border Protection, Submission 171, p. 13.

49 Department of Immigration and Border Protection, Submission 171, pp. 13-14.

26

- that the Minister would be able to exclude people from the fast track process (and prevent them accessing any form of merits review) based merely on a suspicion;<sup>50</sup>
- in relation to people thought to have had protection refused in Australia or elsewhere, that they may still be a genuine refugee. There might, for example, have been a material change in circumstances between applications for protection or the prior refusal may have been in a country that does not observe the same assessment procedures and standards as Australia;<sup>51</sup>
- in relation to people who were thought to have made a 'manifestly unfounded claim', that this phrase is not defined and is 'capable of an infinite variety of arbitrary and subjective interpretations';<sup>52</sup> and
- in relation to people who are thought to have used a bogus document without reasonable explanation, that—although the Bill does recognise that asylum seekers may need to rely on bogus documents to flee persecution—'[i]t is unclear how the asylum seeker is in a position to judge the point in time at which the facilitation of safe passage has ended and the first opportunity to resile from a bogus document has arrived'.<sup>53</sup> Furthermore, 'first instance decision-makers often decide that documents are false or fraudulent without any evidence from experts'.<sup>54</sup>

3.30 Specific concerns were raised about the Minister's non-reviewable power to expand the class of people excluded from the fast track review process. The Australian Human Rights Commission noted that there is no limit to the people who could be excluded from any form of merits review and that 'the Minister could ultimately entirely prevent any recourse' to merits review.<sup>55</sup>

3.31 Similarly, in relation to the Minister's power to issue conclusive certificates to prevent decisions in individual cases from being reviewed, there were concerns that that this 'could potentially empower the Minister to prohibit merits review of all decisions refusing to grant a protection visa'.<sup>56</sup>

3.32 In relation to these concerns, the department noted that:

50 Law Council of Australia, Submission 129, pp. 27-28.

51 Law Council of Australia, Submission 129, p. 30; Refugee and Immigration Legal Centre, Submission 165, pp. 3-4.

52 Refugee and Immigration Legal Centre, Submission 165, p. 6.

53 Australian Human Rights Commission, Submission 163, p. 32.

54 Refugee and Immigration Legal Centre, Submission 165, pp. 6-7.

55 Australian Human Rights Commission, Submission 163, p. 31; Refugee and Immigration Legal Centre, Submission 165, p. 3.

56 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 10.

27

It is the Government's policy that if refused fast track applicants are found to have put forward claims that indicate they have previously been refused protection, already have protection available elsewhere or have unmeritorious claims, prompt resolution of their status should be a priority.<sup>57</sup>

3.33 The Department also submitted that:

Excluding these applicants from merits review will stop unmeritorious claims being considered by the [Authority] which could otherwise lead to delays in departure and an inefficient and costly use of resources. As the majority of [irregular maritime arrival] cases in the backlog relate to people from known refugee producing countries, the percentage of cases expected to fall under the definition of an excluded fast track review is small. The vast majority of refused cases are expected to be reviewed by the [Authority].

It is the Government's position that there are sufficient procedural safeguards in place for ensuring all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent assessment process while ensuring priority is given to identifying applications that present legitimate claims and in turn, asylum seekers who require Australia's protection.

The introduction of a different process for dealing with unmeritorious claims will not curtail a fast track applicant's ability to seek protection, nor

their ability to access judicial review. Rather, these measures will place further emphasis on the importance for all protection visa applicants to fully and truthfully articulate all of their protection claims at the earliest possible opportunity.<sup>58</sup>

3.34 Finally, many submitters expressed the view that the fast track review process would, in fact, slow down the assessment process because it would give rise to a backlog of judicial review applications in the High Court.<sup>59</sup> At the public hearing, representatives of the Law Council of Australia submitted that

...the proposed amendments—especially the removal or restriction of merits review—are likely to lead to more judicial review applications to the High Court. This will undoubtedly lead to further inefficiencies, thereby conflicting with the bill's stated intention and prolonging the process of determining Australia's protection obligations.<sup>60</sup>

57 Department of Immigration and Border Protection, Submission 171, p. 14.

58 Department of Immigration and Border Protection, Submission 171, p. 15.

59 Law Council of Australia, Submission 129, pp. 4, 30; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 10. The Bill excludes decisions that have been or might be subject to fast track review from the jurisdiction of the Federal Circuit Court: Schedule 4, Item 22.

60 Ms Carina Ford, Steering Group, Migration Law Committee, Law Council of Australia, Committee Hansard, 14 November 2014, p. 2.

28

3.35 Furthermore:

[A]t the moment, the courts show quite a degree of deference to the [Refugee Review Tribunal's] fact-finding processes because they have a set of reasons, they know there is a process that is undertaken—an interview—and there is at least a level of interaction.  
I suspect what you will find under this new process is that those comforts to the courts will no longer be there, so the courts may be more ready to intervene and grant judicial review, which will just start the whole process again.<sup>61</sup>

#### Schedule 5: Australia's obligations under international law

3.36 As noted in the previous chapter, Schedule 5 would—if passed—amend the Migration Act to explicitly provide that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens under section 198 and to replace references to the Refugees Convention with a new statutory definition of 'refugee'. Irrelevance of non-refoulement obligations to removal

3.37 In relation to the first proposed change, submitters expressed concern that it does not accord with Australia's non-refoulement obligations under the Convention.<sup>62</sup> They argued that it would increase the risk of people being returned to a real risk of harm, particularly in the case of asylum seekers who had been excluded from the fast track review process.<sup>63</sup>

3.38 The department submitted that the amendment did nothing more than re-establish the 'historical understanding' that the obligation to remove under section 198 was 'unconstrained by reference to Australia's international obligations'.<sup>64</sup>

Furthermore:

Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. For example, Australia's non-refoulement obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.<sup>65</sup>

3.39 Submitters disagreed that this was sufficient, arguing that:

- unauthorised maritime arrivals may only make a visa application if the Minister—in his or her discretion—allows one to be made;

61 Mr Shane Prince, Member, Law Council of Australia, Committee Hansard, 14 November 2014, p. 8.

62 Law Council of Australia, Submission 129, p. 35; Human Rights Law Centre, Submission 166, p. 1; Castan Centre for Human Rights Law, Submission 137, p. 12.

63 Law Council of Australia, Submission 129, p. 35; Australian Red Cross, Submission 164, p. 17.

64 Department of Immigration and Border Protection, Submission 171, pp. 15–16.

65 Explanatory Memorandum, p. 166.

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- other legislation before the Parliament proposes removing non-refoulement obligations under treaties other than the Refugees Convention from Australia's protection visa scheme;
- the fast track review régime will increase the risk that people are wrongly found not to be refugees; and
- the powers that the department points to are discretionary, non-compellable and non-reviewable. They do not need to be exercised fairly, or at all.<sup>66</sup>

3.40 Furthermore, some submitters pointed out that the obligation to remove in section 198 'requires removals to be carried out in a range of circumstances, including where people may not have applied for visas or had their protection needs considered through a visa process at all'.<sup>67</sup>

Statutory definition of 'refugee'

3.41 In relation to the codification of the definition of 'refugee', submitters expressed concern that this was inconsistent with Australia's obligations. This was because the creation of an 'independent and self-contained statutory refugee framework'<sup>68</sup> was said to be inconsistent with article 42 of the Convention (which prohibits Australia from departing from the definition of 'refugee' in article 1) and with the principles of treaty interpretation more generally.<sup>69</sup>

3.42 It was also suggested that the proposed definition is narrower than—and therefore inconsistent with—the definition in the Convention for a number of reasons.<sup>70</sup>

3.43 It was first argued that, although international law does recognise that a person may be refused protection if they are able to avoid persecution by relocating to another part of their home country, such 'internal relocation' must be reasonable. Whatever internal relocation is reasonable must be assessed on a case-by-case basis. By removing the reasonableness requirement and requiring applicants to show that their persecution extends to all areas of their home country, proposed

66 Australian Human Rights Commission, Submission 163, pp. 9–10; Human Rights Law Centre, Submission 166, pp. 9–10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 12.

- 67 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 12.
- 68 Department of Immigration and Border Protection, Submission 171, p. 17.
- 69 Australian Red Cross, Submission 164, p. 15; Human Rights Law Centre, Submission 166, p. 10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 14-15.
- 70 Australian Human Rights Commission, Submission 163, pp. 7, 12; Human Rights Law Centre, Submission 166, p. 10; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 15.

30 subsection 5J(1)(c) was said to be inconsistent with Australia's obligations and was said to risk forcing people to relocate to places where they have no family, ethnic, cultural or linguistic ties if they cannot meet what the UNHCR has described as an 'impossible burden'.<sup>71</sup>

3.44 Second, it was suggested that, although it is true that a person may be refused protection if there is effective state protection in their home country, proposed subsection 5J(2)(a) lowers the bar from the protection that would be available to the applicant to the protection that might be available and 'require[s] decision-makers to conclude that no person from a country with a functioning criminal justice system can ever have a well-founded fear of persecution'.<sup>72</sup>

3.45 Third, it was argued that there is no basis in the Convention for expanding the concept of effective protection to include that which is provided by non-state actors (such as warlords, peacekeepers or private security services), as proposed subsection 5J(2)(b) seeks to do.<sup>73</sup>

3.46 Fourth, there was said to be no requirement in proposed subsection 5J(2) that the protection (whether from the State or non-state actors) be 'stable effective or durable'.<sup>74</sup>

3.47 Fifth, it was argued that the prospect, enlivened by proposed subsection 5J(3), that a person could be refused protection on the basis that they could take reasonable steps to modify their behaviour and avoid persecution—including by acting discreetly—is not consistent with the existing Australian case law and the UNHCR's

- 71 Law Council of Australia, Submission 129, p. 36; Australian Human Rights Commission, Submission 163, pp. 12-13; Australian Red Cross, Submission 164, pp. 16-17; Refugee and Immigration Legal Centre, Submission 165, pp. 12-13; Human Rights Law Centre, Submission 166, pp. 10-11; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 15-16; Castan Centre for Human Rights Law, Submission 137, pp. 9-10.
- 72 Refugee and Immigration Legal Centre, Submission 165, pp. 13-14; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 16-18.
- 73 Australian Human Rights Commission, Submission 163, pp. 13-14; Refugee and Immigration Legal Centre, Submission 165, pp. 14-15; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 18-19; Castan Centre for Human Rights Law, Submission 137, p. 10.
- 74 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 19-20

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position that persons should not be 'expected or required to suppress their political or religious views or other protected characteristics to avoid persecution'.<sup>75</sup>

3.48 The sixth reason why the proposed definition of 'refugee' was said to be narrower than the definition in the Convention was that the definition of 'particular social group consisting of family' in proposed section 5K, which precludes family as a social group capable of being persecuted where the original family member was targeted for a non-Convention reason, has been criticised by the United States Court of Appeals as 'erecting artificial barriers to asylum eligibility'.<sup>76</sup>

3.49 Finally, the definition of 'particular social group other than family' in proposed section 5L was said to be narrower than is permitted in the Convention because it is limited to groups that have shared characteristics that are 'innate', 'immutable' or 'fundamental'. It could exclude, therefore, 'private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, members of a labour union or students', all of which are currently considered social groups the persecution of which can give rise to protection obligations.<sup>77</sup>

3.50 Submitters also opined that the detailed and extensive case law on the Convention's definition of 'refugee' has led to a relatively stable and certain understanding of the word.<sup>78</sup> They expressed concern that the new definition would 'almost certainly encourage litigation for further judicial clarification' of concepts such as 'fundamental', 'innate' and 'immutable'.<sup>79</sup>

3.51 In its submission, the department explained that '[i]t is intended that this framework not be subject to the interpretations of international law by the Courts, which may seek to expand the scope of the Convention or introduce interpretations that go beyond what Parliament intended'.<sup>80</sup> This is intended to create 'a clearer and more transparent framework for decision makers to use to make more accurate and consistent refugee assessments'.<sup>81</sup> Furthermore, the department submitted that:

- 75 Law Council of Australia, Submission 129, p. 38; Australian Human Rights Commission, Submission 163, pp. 14-15; Australian Red Cross, Submission 164, p. 16; Refugee and Immigration Legal Centre, Submission 165, pp. 16-17; Human Rights Law Centre, Submission 166, pp. 11-12; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, p. 20; Castan Centre for Human Rights Law, Submission 137, pp. 11-12.

- 76 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 20-21.

- 77 Australian Human Rights Commission, Submission 163, pp. 15-17; Refugee and Immigration Legal Centre, Submission 165, pp. 15-16; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 21-22.

- 78 Refugee and Immigration Legal Centre, Submission 165, p. 12.

- 79 Law Council of Australia, Submission 129, p. 38; Australian Human Rights Commission, Submission 163, p. 15.

- 80 Department of Immigration and Border Protection, Submission 171, p. 17.

- 81 Department of Immigration and Border Protection, Submission 171, p. 17.

32 Currently, the Migration Act only makes direct reference to an applicant being required to engage Australia's protection obligations under the Refugees Convention as a criterion for the grant of a Protection visa. How a person satisfies this criterion is set out in policy guidance and an extensive body of complex case law, which is not readily accessible to asylum

seekers or other interested parties. By creating a statutory refugee framework that sets out a clear, transparent set of criteria asylum seekers will be better able to identify the circumstances that are required in order for them to engage Australia's protection obligations. This will enhance an asylum seeker's ability to make and establish their claims for protection in line with the criteria set out in the Migration Act.<sup>82</sup>

3.52 In relation to some of the specifics of the definition of 'refugee' objected to by submitters, the department explained that:

- 'the internal relocation principle no longer encompasses a 'reasonableness' test which assesses whether it is reasonable for a person to relocate to another area of the receiving country' because 'Australian case law has broadened the scope of the 'reasonableness' test to take into account the practical realities of relocation such as diminishment in quality of life or potential hardship';<sup>83</sup>
- '[t]he breadth of [the current approach to social groups other than family] has led to long lists of increasingly elaborate potential particular social groups being drawn for the purposes of protection visa applications thereby making implementation of the term complex and difficult for decision makers to apply';<sup>84</sup> and
- in relation to requiring people to modify their behaviour, '[i]t is the Government's position that the purpose of the Refugees Convention does not extend to protecting conduct that might give rise to a false imputation of an opinion, belief, membership or origin unless either that conduct is an expression of a Convention related characteristic or it would not be reasonable for the person to modify their behaviour in the circumstances'.<sup>85</sup>

#### Schedule 6: Newborn babies

3.53 Schedule 6 would—if passed—amend the Migration Act to seek to ensure that unlawful non-citizen children have the same status and are subject to the same removal power as their parents.

82 Department of Immigration and Border Protection, Submission 171, p. 17.

83 Department of Immigration and Border Protection, Submission 171, p. 20.

84 Department of Immigration and Border Protection, Submission 171, p. 21.

85 Department of Immigration and Border Protection, Submission 171, p. 23.

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3.54 A number of submitters referred to the high-profile case of Ferouz.<sup>86</sup> As explained by the Law Council of Australia:

Ferouz's parents are stateless (Rohingyas from Myanmar) and were sent to Nauru, contrary to medical advice after a doctor examined his mother on Christmas Island and alerted the Department to her high risk pregnancy. Ferouz's mother was flown to the Australian mainland shortly after arriving in Nauru, and Ferouz was born in Brisbane. As such, he has an Australian birth certificate and has spent every day of his life in Australia.<sup>87</sup>

3.55 Maurice Blackburn, a law firm that currently 'acts for around 100 babies who were born in Australia' to parents who are [unauthorised maritime arrivals] and/or transitory persons' and who 'are currently held in detention on Christmas Island and on the Australian mainland',<sup>88</sup> explained that, if Schedule 6 is passed:

- (a) All 100 babies would be retrospectively deemed to be [unauthorised maritime arrivals], because their parents entered Australia by sea.
- (b) All 100 babies would therefore retrospectively lose their right to apply for a permanent Protection Visa.
- (c) All 100 babies "must" be taken to Nauru or Manus "as soon as reasonably practicable". Some may qualify for SHEVs or/TPVs under other amendments proposed in the Bill, but only if the Minister allows the babies and their parents to apply for protection here in Australia.
- (d) At least 16 of these 100 babies would be retrospectively deemed to be transitory persons, because their parents have previously been detained on Nauru and/or Manus.
- (e) At least these 16 babies would not be eligible for TPVs/SHEVs under other amendments proposed in the Bill, as their parents have been brought to the mainland from Nauru or Manus, and the Minister has said that he will not be allowing these babies and their families to apply for protection in Australia. If the amendments are passed, there is no way that these babies and their families could remain in Australia.
- (f) Around 31 of these 100 babies, who "must" be taken to Nauru or Manus, are eligible to apply for Australian citizenship...These babies "must" be taken to Nauru or Manus, unless they are granted Australian citizenship. Even if they are granted Australian citizenship, their families "must" be taken to Nauru or Manus as a result of the Ferouz amendments.<sup>89</sup>

3.56 Submitters expressed concern about the general policy stance taken by Schedule 6. In particular, they expressed views that:

86 Law Council of Australia, Submission 129, pp. 42-44; Australian Human Rights Commission, Submission 163, p 48; Maurice Blackburn, Submission 43.

87 Law Council of Australia, Submission 129, p. 42.

88 Maurice Blackburn, Submission 43, p. 4.

89 Maurice Blackburn, Submission 43, p. 4.

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babies born in Australia should not be taken to regional processing centres that are not equipped to deal with them. Doing so is not in their best interests and 'has significant impacts on the full physical emotional and cognitive development of children and young people, extending long into their post detention futures';<sup>90</sup>

Schedule 6 'creates other risks of family separation by deeming a baby born in Australia to be an 'unauthorised maritime arrival' if only one parent is an 'unauthorised maritime arrival"';<sup>91</sup> and

Schedule 6 penalises children for the decisions made by their parents.<sup>92</sup>

3.57 Concerns were also expressed about the fact that these provisions apply retrospectively to children who have already been born.<sup>93</sup>

3.58 The department explained in its submission that '[i]t has long been the case in Australian immigration law that newborn children are given the same visa status as their parents at birth'.<sup>94</sup> Furthermore:

In terms of both preventing asylum seeker families from applying for permanent visas and making them subject to offshore processing, it is important to maintain consistency of migration status within the family unit, where this is possible. Nomenclature is less important than the need for children to have a migration status that is consistent with that of their parents, where this is possible.

It has also been argued that, as newborn children did not make the decision to travel to Australia illegally, they should not be "punished" for this, and that classifying them as UMAS is not a deterrent to their arrival. These measures are not intended to punish or deter newborn children. Rather, they assist in maintaining family unity and in implementing a number of the Government's migration policies.<sup>95</sup>

3.59 The committee also expressed some concern about the retrospective application of these provisions. The department responded to these concerns in explaining why the provisions are necessary:

The rationale for giving these measures retrospective application is to clarify the government's existing position and the intention of the legislation, which is that children of unauthorised maritime arrivals (UMAs), born in Australia, are already included within the existing definition of UMA in the Migration Act.

- 90 Australian Red Cross, Submission 164, p. 18; Human Rights Law Centre, Submission 166, p. 7;  
 Maurice Blackburn, Submission 43, p. 4.  
 91 Australian Human Rights Commission, Submission 163, pp. 48, 50.  
 92 Australian Red Cross, Submission 164, p. 18.  
 93 Law Council of Australia, Submission 129, p. 39.  
 94 Department of Immigration and Border Protection, Submission 171, p. 24.  
 95 Department of Immigration and Border Protection, Submission 171, p. 25.

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Although the amendments operate retrospectively, they do so to explicitly capture those persons the legislation is already intended to capture. Upon commencement of the amendments, it will be clear that children born in Australia or in a Regional Processing Country (RPC) to at least one UMA parent are UMAS and have always been UMAS. It will remain the case, however, that if a child born in Australia has an Australian citizen or permanent resident parent the child will be an Australian citizen by birth. It is also necessary to ensure that all UMAS, regardless of the date of their arrival, have a migration status consistent with their children, as far as possible. This will mean that, if a UMA is to be removed from Australia, the UMA's removal will not be frustrated because a non-UMA child family member makes a valid application for a visa, solely for the purpose of frustrating this removal. Delivering consistency of migration status between a parent and a new born child is a long standing approach taken in many circumstances within the Migration legislation.

Any prior visa application made by children affected by these amendments will be taken to have been made invalidly, where the Minister did not expressly allow it. Ensuring that such applications will be taken to have been made invalidly upon the commencement of the amendments will also remove the incentive for applications to be lodged on behalf of the Australian-born children of UMAS prior to the commencement of the amendments.

If children of UMAS are able to make a valid application for a permanent protection visa, it renders ineffective the application bars in the Migration Act, central to achieving a variety of desired policy outcomes including regional processing. This will likely lead to a difference in treatment within the family unit if the application bar, preventing the relevant UMA parents from applying for a permanent protection visa, is not lifted. Alternatively, if the application bar is lifted to allow all other members within that family unit to apply for a permanent protection visa, the Government's policy position on UMAS would be contradicted to the detriment of current, successful, anti-people smuggling strategies.

Similarly, the retrospective application of the measures also clarifies that children of UMAS arriving on or after 13 August 2012 are subject to transfer to a RPC. This means the Government will not have to consider the risk of separating a newborn baby from their UMA parents who are subject to transfer, or alternatively the consequences of keeping the family unit together in Australia contrary to the Government's policy position that such UMAS will not be processed or resettled in Australia. The deterrent effect of that policy would be reduced if UMAS who have children in Australia were not able to be transferred for offshore processing.

The retrospective effect of the amendments will not however affect applications in respect of which the Minister has previously intervened to allow a valid application to be made. Accordingly, on-hand applications

- 36 that the Minister has already allowed to proceed can continue to be assessed.<sup>96</sup>
- Potential for statelessness
- 3.60 At present, a stateless child born in Australia is eligible for Australian citizenship.<sup>97</sup> The Explanatory Memorandum notes that it is not the government's intention to alter a child's eligibility for Australian citizenship.<sup>98</sup> Submitters expressed concern, however, that the obligation to take such a child to a regional processing country 'as soon as reasonably practicable' could infringe on the child's ability to apply for Australian citizenship.<sup>99</sup> Maurice Blackburn, referring to the Ferouz case, submitted that:

In addition to applying for a Protection Visa, Ferouz has applied for Australian citizenship. His application was made pursuant to section 21(8) of the Australian Citizenship Act 2007 (Cth), which states that a person is eligible to apply for Australian citizenship if they are:

- (a) born in Australia; and
- (b) are stateless, meaning they are not eligible for citizenship in another country.

"Ferouz satisfies the criteria set out above. He was born in Australia and he is stateless. This is because, as members of the Rohingya ethnic minority, the government of Myanmar denies their right to citizenship of that country. Little wonder the United Nations regards the Rohingya people as one of the most persecuted minorities in the world. In total, Maurice Blackburn acts for around 31 Rohingya babies who are similarly eligible to apply for Australian citizenship.

Ferouz submitted his citizenship application in December 2013. Ten months later, and despite several requests for action, the Department has still not advised the outcome. This is well outside the Department's normal service standards.

Despite being born in Brisbane, and being eligible to apply for Australian citizenship, Schedule 6 to the Bill – if passed – places Ferouz at risk of transfer to Nauru unless he is granted citizenship.

Even if Ferouz is granted Australian citizenship, his family "must" be taken to Nauru or Manus as a result of the Ferouz amendments.<sup>100</sup>

- 96 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, pp 6-7.  
 97 Australian Citizenship Act 2007, subsection 21(8).  
 98 Explanatory Memorandum, p. 31.  
 99 Australian Human Rights Commission, Submission 163, p. 52.  
 100 Maurice Blackburn, Submission 43, pp. 5-6.

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3.61 More generally, submitters also expressed concern that newborn children could be removed from Australia before their birth can be registered. 101 They explained that '[b]irth registration is an important tool for the prevention of statelessness because it establishes a legal record of where a child was born and who his or her parents are'.102 Removing children born in Australia before their birth can be registered could mean that they are at risk of statelessness.

3.62 In its submission, the department offered some clarification of the rights granted to stateless persons to apply for citizenship, and of the benefits of extending the definition of 'transitory person':

As with other children born overseas, if the child of a UMA is born in an RPC to an Australian citizen or permanent resident, that child will be eligible to apply for Australian citizenship by descent. As with other stateless children born in Australia, stateless UMAs born in Australia are entitled to apply for, Australian citizenship. For children born in Australia, an application for citizenship based on statelessness made on behalf of the child, being a UMA, will be assessed in the same way as all such applications.

The amendments will extend the definition of 'transitory person' to:

- children born to UMAs in an RPC; and
- children born in Australia to UMAs who have been transferred to Australia from an RPC.

Such children need to be included in the definition of 'transitory person' to enable them to be brought to Australia for a temporary purpose, such as to undergo specialist medical treatment or to accompany a parent brought to Australia for a similar purpose.<sup>103</sup>

#### Unlawful non-citizens born to air arrivals

3.63 Furthermore, the Australian Human Rights Commission argued that Schedule 6 'would not address the anomaly that babies born in Australia to unlawful non-citizens who arrived in Australia by air would be liable to be detained and then taken to a regional processing country'.104 This anomaly was explained as follows in the Commission's submission to this committee's inquiry into the Migration Amendment (Protecting Babies Born in Australia) Bill 2014:

This result [that a non-citizen child born in Australia is deemed to be an unauthorised maritime arrival] seems to apply regardless of how the baby's parents came to be in Australia. For example, it appears that if a woman arrives in Australia by air, overstays her visa and gives birth to a child who

- 101 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 24-25.  
 102 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 24.  
 103 Department of Immigration and Border Protection, Submission 171, p. 26.  
 104 Australian Human Rights Commission, Submission 163, pp. 48, 49-50.

38 is not a citizen of Australia, then the child will be deemed to have 'entered Australia by sea' and be liable to be detained and then taken to a regional processing country.<sup>105</sup>

3.64 The committee also raised concerns regarding the status of a child born in Australia where one parent has arrived by boat and the other parent is an Australian citizen. The department clarified that 'as with other children born in Australia, if the child of a UMA is born in Australia to an Australian citizen or permanent resident, that child will be an Australian citizen at birth'.<sup>106</sup> The department noted that this specific provision 'is contained within Section 12 of the Australian Citizenship Act 2007, which is unaffected by the Bill':

One of three conditions under new subsection 5AA(1A) provides that "the person [the child] is not an Australian citizen at the time of birth", ensuring that this is of paramount importance in consideration of the status of the child. This is further clarified in a note under that new subsection (note 4), which directly references section 12 of the Australian Citizenship Act 2007.

That section, in turn provides that when a person is an Australian Citizen at the time of their birth they are unaffected by this Bill.<sup>107</sup>

3.65 The department also advised the committee as why the Bill refers to 'one parent', as opposed to 'parents':

There are a number of scenarios in which a child may be born to a parent who is a UMA. The intended objectives of these amendments would not be achieved if they were limited to the children of two UMA parents. For example, if a pregnant UMA arrived in Australia and the father of the child did not travel to Australia, the child born in Australia would not be a UMA if the definition was limited to children with two UMA parents.<sup>108</sup>

#### Schedule 7: Caseload management

- 3.66 As noted in the previous chapter, Schedule 7 seeks to:
- remove the 90-day period within which decisions on protection visa applications must be made by the Minister and the Refugee Review Tribunal;<sup>109</sup>
  - empower the Minister to impose suspensions and caps on visa processing (including protection visa processing) by non-disallowable legislative instrument;<sup>110</sup> and

- 105 Australian Human Rights Commission, Submission 163, p. 47.  
 106 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 2.  
 107 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 2.  
 108 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 3.  
 109 The Bill, Schedule 7, Items 4 & 14.

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- remove provisions that require the Minister to report specified information about applications for protection visas and decisions made concerning such applications to Parliament on a regular basis.<sup>111</sup>

3.67 Submitters argued against the removal of the 90-day limit and reporting requirements, pointing to the fact that the Howard government introduced them on the basis that they would

...enable protection visa application processing to be more rigorously overseen at all stages of decision making to identify and minimise the impacts of any factors which could delay finalisation of applications.<sup>112</sup>

3.68 The department submitted that the 90-day period ...is an unnecessary regulatory burden that, while it may provide transparency at one level, duplicates standard protection reporting which is publicly available on the departmental website and provides clear and easily accessible information and advice on all aspects of protection visa processing.<sup>113</sup>

3.69 In relation to the suspension of processing and the capping of the number of protection visas that can be issued, submitters expressed concern that such measures 'may lead to prolonged detention as those who fall outside of the cap [or whose applications are not processed] will have to wait, either for Ministerial discretion to waive the waiting period, or for the cap to be lifted in the next calendar year'.<sup>114</sup> It was noted that 'previous governmental decisions freezing granting of protection visas has resulted in noticeable increases in self-harming behaviour and other mental and physical harm to those affected'.<sup>115</sup>

3.70 The department explained that these measures will assist with the appropriate management of the onshore component of the protection visa programme and will 'help to ensure that only the planned number of visas is granted in a given year and that there is not a budget overspend for the department or a range of other agencies with programmes and services associated with the Humanitarian programme'.<sup>116</sup>

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

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

112 Refugee and Immigration Legal Centre, Submission 165, p. 21, quoting Explanatory Memorandum, Migration and Ombudsman Legislation Amendment Bill 2005, para. 35.

113 Department of Immigration and Border Protection, Submission 171, p. 28.

114 Australian Red Cross, Submission 164, p. 19; Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission 167, pp. 26.

115 Refugee and Immigration Legal Centre, Submission 165, p. 21.

116 Department of Immigration and Border Protection, Submission 171, p. 28.

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#### Committee comment

3.71 The committee is grateful for the large number of thoughtful and detailed submissions that it received. It has considered the concerns that have been raised. The committee has also considered, however, the fact that the government has a clear mandate to give full effect to its border protection policies. So far, those policies have enjoyed a good measure of success in stopping the boats. One thing that they have been unable to achieve, however, is to clear the backlog of protection visa applications that have been made by the unauthorised maritime arrivals that arrived during the previous government's time in office. The department has estimated that it would take seven years to process these applications.<sup>117</sup> The government believes that legislative change is required to clear that backlog and the committee agrees. It is for that reason that the committee recommends that the Bill be passed.

3.72 The committee believes that there are, however, ways in which the Bill could be improved.

3.73 In relation to the provisions of Schedule 6 that would provide that the Australian-born children of unauthorised maritime arrivals are themselves unauthorised maritime arrivals, the committee has noted concerns about the unintended consequences that could result if the births of such children are not registered before they are removed from Australia. In the interests of ensuring that such children are not rendered stateless because they cannot prove where they were born and who their parents are, the committee recommends that—as a matter of administrative practice at least—the Department ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.

#### Recommendation 1

3.74 In relation to the amendments contained in Schedule 6, the committee recommends that the Department of Immigration and Border Protection ensures that the birth registration process is completed before any child born in Australia is removed to a regional processing country.

3.75 The committee is cognisant of the fact that the Bill contains a number of extraordinary provisions that the government believes are necessary to deal with the asylum legacy caseload. Because of the extensive powers granted by these provisions, the committee considers that it would be appropriate for the measures contained within the Bill to be reviewed by the Government after they have been in operation for three years so that the Parliament can satisfy itself that they are operating as intended.

#### Recommendation 2

3.76 The committee recommends that, if the Bill is enacted, the Government should review its operation three years after it passes into law.

117 Department of Immigration and Border Protection, answer to a question on notice, received 19 November 2014, p. 4.

#### Recommendation 3

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

Senator the Hon Ian Macdonald

Chair

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Dissenting Report of the Australian Labor Party

#### Introduction

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

1.2 In particular, Labor is concerned about:

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

- (b) The provisions in Schedule 2 which seek to reintroduce the failed Temporary Protection Visa;
- (c) The Government's failure to honour its commitment to the Palmer United Party to create the Safe Haven Enterprise Visa, which was to provide a pathway to permanent residency;
- (d) Schedule 4, which will deprive asylum seekers of the opportunity to have their applications for protection reviewed fairly;
- (e) Schedule 5, which attempts to displace Australia's international obligations under the Refugee Convention and replace them with a codified version of the Government's preferred interpretation of those obligations; and
- (f) The provisions in Schedule 7 which will abolish the requirement to decide protection visa applications within 90 days and to report on compliance with that requirement.

**Amendments to Maritime Powers**

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

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

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

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

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

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

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

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

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

1.12 Accordingly the Labor Senators oppose Schedule 1.

**Temporary Protection Visa**

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

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

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

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

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

**Safe Haven Enterprise Visa**

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

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

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

- (a) In his letter to Mr Palmer of 24 September 2014, the Minister claimed – A new Safe Haven Enterprise Visa will be introduced which will be open to applications by those who have been processed under the legacy caseload, and are found to be refugees. (Emphasis added.)
- (b) In a statement to the House of Representatives on 25 September 2014 the Minister contended – Consistent with this Government's principles of rewarding enterprise and its belief in a strong regional Australia, the Safe Haven Enterprise Visa will be created. (Emphasis added.)
- (c) In a media release of 25 September 2014 the Minister asserted – A further temporary visa, a Safe Haven Enterprise Visa (SHEV) – where holders work in a designated self-nominated regional area to encourage filling of job vacancies – will be introduced as an

alternative to a TPV. (Emphasis added.)

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

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

46 (3A) There is a class of temporary visas to be known as safe haven enterprise visas.<sup>1</sup>

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

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

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

- (a) despite being 'named' in the Bill, the Minister is not required to issue a regulation to prescribe criteria to give substantive effect to the Safe Haven Enterprise Visa;<sup>3</sup> and
- (b) unless and until regulations are issued to prescribe criteria for the making of a valid application for a Safe Haven Enterprise Visa and for the granting of the Safe Haven Enterprise Visa, non-citizens cannot make an application for a Safe Haven Enterprise Visa.<sup>4</sup>

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

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

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

2 Namely Schedule 3.

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

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

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

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- what 'regional Australia' means; and
- what social services will disqualify a holder of a SHEV from applying for other visas.<sup>6</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) only a very small number of people will be granted SHEVs; and
- (b) it will be nearly impossible for those who are granted SHEVs to gain access to other visas and thereby remain in Australia.

1.34 In relation to the first point: when a journalist suggested to Mr Morrison that it was possible that 'a very small number' of people would be granted SHEVs and would

satisfy the conditions that would enable them to apply for other visas, Mr Morrison replied:

It's very possible.<sup>11</sup>

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

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

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

Limiting appeal rights in the refugee assessment process

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

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

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

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

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

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

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

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

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

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

Displacing Australia's obligations under the Refugee Convention

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

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

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

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

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

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

1.50 The dangers inherent in attempting to replace the Refugee Convention with the Abbott Government's preferred interpretation of the Convention obligations are demonstrated by the concerning 'modification' principle proposed by the Government.  
 1.51 Proposed section 5J(3) of the Bill will provide that an asylum seeker is not entitled to protection if they could 'modify' their behaviour so as to avoid persecution. The Opposition is concerned that the 'modification' principle could operate inhumanely.

1.52 For example:

- (a) Should a person who has fled his or her country of origin after being charged with apostasy for converting to Christianity be expected to renounce his or her new religion, conceal it or cease to practise his or her new faith?
- (b) Should an activist such as Nobel Peace Prize winner Malala Yousafzai, who fights against the Taliban for the right of girls to obtain an education 'modify her behaviour' and accept oppression on the basis of her gender?
- (c) Should a person of a particular race, ethnicity or nationality conceal this characteristic and feign belonging to the dominant race, ethnicity or nationality in the area which they reside, so as to avoid persecution?
- (d) Should LGBTI refugees adopt a heterosexual identity or conceal their true sexual orientation or gender identity? Note that some commentators continue to claim that homosexuality can be 'cured' and that it is not an innate, immutably personal characteristic?

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

Power to cap visas

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

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

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

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

90 day rule

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

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

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

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

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#### Conclusion

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

Senator Jacinta Collins

Deputy Chair

Dissenting Report: The Australian Greens

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

#### Introduction

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

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

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

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

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

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

#### Amending the Maritime Powers Act

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

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

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

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

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

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

1.12 As argued by the Refugee and Immigration Legal Centre:

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

<sup>1</sup> Human Rights Law Centre, Submission 166, p. 3.

<sup>2</sup> CPCF v. Minister for Immigration and Border Protection & Anor.

<sup>3</sup> Human Rights Law Centre, Submission 166, p. 4.

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

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

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

#### Temporary Protection Visas and Safe Haven Enterprise Visas

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

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

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

<sup>4</sup> Refugee and Immigration Legal Centre, Submission 165, p. 24.

<sup>5</sup> Uniting Justice Australia, Submission 124, p. 4.

<sup>6</sup> Amnesty International Australia, Submission 170, p. 4.

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

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

1.20 As argued by the Refugee and Immigration Legal Centre:  
...the criteria will be unattainable for the overwhelming majority and for these the prospect of a permanent visa through the proposed SHEV scheme will be merely illusory.<sup>7</sup>

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

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

Rapid processing of asylum claims

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

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

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

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

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

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

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

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

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

Removing references to the Refugee Convention

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

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

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

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Law Centre, the Convention 'cannot be unilaterally redefined by Australia more than 60 years after it was signed'.<sup>9</sup>

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

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

1.34 There are a number of concerning aspects regarding the government's redefinition of the Refugee Convention. Currently, under Australian and International law, a person is not eligible for protection if he or she can safely access another location and it is 'reasonable' for him or her to move there. This Bill seeks to remove the reasonableness criteria and instead introduce a blanket clause stating that an individual must show that there is a real chance of persecution in all areas of their

country, regardless of the practicalities of moving and living there. The UNHCR stated in its submission that decision makers are required to assess whether internal relocation 'is a reasonable consideration, both subjectively and objectively, given the circumstances of the asylum seeker'.<sup>11</sup> Protection should not be contingent on the persecuted trying to avoid their persecutors.

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

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

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

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

<sup>9</sup> Human Rights Law Centre, Submission 166, p. 10.

<sup>10</sup> Refugee and Immigration Legal Centre, Submission 165, p. 12.

<sup>11</sup> United Nations High Commissioner for Refugees, Submission 138, p. 5.

<sup>12</sup> Asylum Seeker Resource Centre, Submission 131, p. 19.

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

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

#### New born babies

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

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

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

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

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

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

#### Statutory limit on Permanent Protection Visas

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

<sup>13</sup> Asylum Seeker Resource Centre, Submission 131, p. 22.

<sup>14</sup> Maurice Blackburn Lawyers, Submission 43, p. 1.

<sup>15</sup> ChilOut, Submission 96, p. 2.

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

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

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

#### Conclusion

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

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

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

#### Recommendations

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

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

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

1.55 Recommendation 4: The Australian Greens recommend that the

Government immediately begin processing claims under the current Refugee Status Determination System and make available Permanent Protection Visas to people found to be owed protection.

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

- 16 Refugee Immigration and Legal Centre, Submission 165, p. 20.  
 17 Refugee Council of Australia, Submission 136, p. 13.

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

Senator Sarah Hanson-Young  
 Australian Greens  
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## Appendix 1

## Public submissions

1 Ms Robyn Hansen  
 2 Otto and Jenny Wichert  
 3 Ms Leonie Stubbs  
 4 Ms Colleen Considine  
 5 Mr Tony Guttmann  
 6 Ms Joanne Merrick  
 7 Ms Ieta D'Costa  
 8 Ms Heather Stevens  
 9 Ms Sally Green  
 10 Ms Heather Inglis  
 11 Mr Walter and Mrs Patricia Phillips  
 12 Ms Andrea Pink  
 13 Ms Catriiona Macleod  
 14 Ms Angela Weekes  
 15 Ms Dianne Francois  
 16 Ms Emma Corcoran  
 17 Mr Nathaniel and Mrs Elizabeth Taylor  
 18 Mr Peter Flanagan  
 19 Mr Daniel Berg  
 20 Ms Louise Segrave  
 21 Ms Julie Kraak  
 22 Ms Carolyn Elliott  
 23 Ms Kerrie Mel  
 24 Ms Nerine Mills  
 25 Ms Jo Steinle  
 26 Ms Priya Shaw  
 27 New South Wales Bar Association  
 28 Ms Jan Govett  
 29 Refugee Advocacy Network  
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30 Ms Pamela Jones  
 31 Ms Louise D'Arcy  
 32 Dr Alfred L.C. van Amelsvoort  
 33 Dr Christine Hampshire  
 34 Ms Jennifer Wills  
 35 Ms Sophie Chisholm  
 36 Dr Pat Horan  
 37 Ms Ania Tomaszewska  
 38 Coalition for Asylum Seekers Refugees and Detainees (CARAD)  
 39 Ms Rosemary McKenry  
 40 Australia-Tamil Solidarity  
 41 Mrs Elaine Gorman  
 42 Name Withheld  
 43 Maurice Blackburn lawyers  
 44 Migration Institute of Australia  
 45 Queenscliff Rural Australians for Refugees  
 46 Mx Patricia Asch  
 47 Mr John Stear  
 48 Dr Jim Russell  
 49 Anna Sande  
 50 Professor Helen Ware  
 51 Dr Hank De  
 52 Roger GRAF  
 53 Dr Gordon Menzies  
 54 Lynn Benn  
 55 Confidential  
 56 Dr Dr Jemma  
 57 Mr Richard Barry  
 58 Ms Kaelly Kreger  
 59 Mr Craig McIntosh  
 60 Sophie Rudolph  
 61 Fiona So  
 62 Barbara Finch  
 63 Miss Zoe Emily

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64 Associate Professor Mary Anne Kenny  
 65 Dr Malcolm Dunning  
 66 Joy Mettam  
 67 Name Withheld  
 68 Ms Pamela Jacobs  
 69 Ms Jane Hodge  
 70 Ms Gillian Wells  
 71 Ms Ida Sulkuinen  
 72 Mr Oliver Coleman  
 73 Ms Lindsay McCabe  
 74 Ms Zarny Tran  
 75 Mr Andrew Witham  
 76 Mr Simon Corden  
 77 Ms Marilyn Shepherd

78 Ms Helen Kvelde  
 79 Mr Colin Smith  
 80 Australian Churches Refugee Taskforce  
 81 Dr Niko Leka, Hunter Asylum Seeker Awareness (HASA)  
 82 Mr Joshua Mason  
 83 Ms Leanne Tully  
 84 Mr David Bath  
 85 Brotherhood of St Laurence  
 86 Ms Phillipa Bricher  
 87 Ms Trish Cameron  
 88 Ms Cathy Preston-Thomas and Dr Mitchell Smith  
 89 Mr Brad Ferguson  
 90 Ms Suzanne Stallard  
 91 Dr David Ness  
 92 Ms Genevieve Caffery  
 93 Ms Yvonne Bartels  
 94 Mr Shane Nichols  
 95 Mr Mike McCausland  
 96 ChilOut - Children out of Immigration detention  
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97 Ms Kate Gillespie, The Victorian Association for the Teaching of English Inc.  
 98 Ms Elly Freer  
 99 Ms Clare Conway  
 100 Mr Peter Cruice  
 101 Ms Heidi Gill  
 102 Mr Christopher Walsh  
 103 Ms Fernida Hunter  
 104 Ms Kay Doecke  
 105 Mr Brenton Doecke  
 106 Mr A Neal  
 107 Mr Brendan Kirkpatrick  
 108 Ms Barbara Guthrie  
 109 Ms Nicky Chapman  
 110 Mr Michael Leahy  
 111 Ms Virginia Woodger  
 112 Mr Bill Gerogiannis  
 113 Dr Millie Rooney  
 114 Mr Paul Dennis  
 115 Institute of International Law and Humanities - Melbourne Law School  
 116 Mr Brian Farrelly  
 117 Ms Gina Haebich  
 118 Ms Annette Jacobsen  
 119 Ms Bella Illesca  
 120 Ms Susan Longmore OAM  
 121 Ms Catherine Greenhill  
 122 Mr Daniel Payne  
 123 Ms Rebecca Short  
 124 UnitingJustice Australia  
 125 Institute of Sisters of Mercy of Australia and Papua New Guinea  
 126 Name Withheld  
 127 Name Withheld  
 128 Ms Kim Wormald  
 129 Law Council of Australia

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130 Ms Margaret Phillips  
 131 Asylum Seeker Resource Centre  
 132 Refugee and Immigration Legal Service  
 133 HIV/AIDS Legal Centre  
 134 Refugee Advice and Casework Service  
 135 Children's Rights International  
 136 Refugee Council of Australia  
 137 Castan Centre for Human Rights Law  
 138 United Nations High Commissioner for Refugees  
 139 Ms Rachel Birthisell  
 140 Ms Camilla Tafra  
 141 Ms Elaine Pullum  
 142 Ms Francine Cade  
 143 Ms Therese McEvoy  
 144 Ms Annie O'Connell  
 145 Name Withheld  
 146 Mr Brendan McCarthy  
 147 Ms Ellen O'Gallagher  
 148 Name Withheld  
 149 Name Withheld  
 150 Mrs Samone Blandthorn  
 151 Mr Mitchell Reese  
 152 Ms Karen Thurgood  
 153 Mr Evan Kirk  
 154 Confidential  
 155 Ms Elizabeth Chandler  
 156 Ms Pauline Crawford  
 157 Ms Rose Whitau, The Australian National University  
 158 Ms Trine Vik  
 159 Mrs Frances Tafra  
 160 Ms Sue Doyle  
 161 Mr Phil McMillan  
 162 Anna Lashko  
 163 Australian Human Rights Commission  
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164 Australian Red Cross  
 165 Refugee and Immigration Legal Service  
 166 Human Rights Law Centre  
 167 Institute of International Law and Humanities, Melbourne Law School, and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW  
 168 Migration Law Program, Australian National University  
 169 Compassion and Justice for Refugees  
 170 Amnesty International  
 171 Department of Immigration and Border Protection  
 172 Ms Kathryn Rose

173 Mrs Tania Breed  
 174 Name Withheld  
 175 Dr Jeff Siegel  
 176 Australian Psychological Society  
 177 Human Rights Committee of the Law Society of NSW  
 178 NSW Council for Civil Liberties  
 179 Brisbane Refugee and Asylum Seeker Support Network (BRASS)  
 180 Bar Association of Queensland  
 181 Canberra Refugee Action Committee (RAC)  
 182 Heather and Paul Cooney  
 183 Australian Lawyers for Human Rights  
 184 Combined Refugee Action Group  
 185 Dominica Dornung AO RFD QC  
 186 Mr Geoff Allshorn  
 187 Mr Fraser Powrie  
 188 Ms Bea Leoncini  
 189 Ms Susannah Gregan  
 190 Ms Katrina Sedgwick  
 191 Darwin Asylum Seeker Support Advocacy Network  
 192 The NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors  
 193 Marina Brizar, Clare Jackson, Melinda Jackson & Besmellah Rezaee  
 194 Refugee and Immigration Legal Service  
 195 Mr Nicholas Carey

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196 Central Victorian Refugee Support Network  
 197 Australian Churches Refugee Taskforce  
 198 Dr Keren Cox-Witton  
 199 Ms Nicola Fortune  
 200 Ms Maeve Kennedy  
 201 Associate Professor Alexander Reilly  
 202 Pastor David Busch  
 203 Ms Claudia Caton  
 204 Name Withheld  
 205 Ms Heidi Gill  
 206 Mr Ivan Ajduk  
 207 Name Withheld  
 208 Mr David Mac Phail  
 209 Ms Maureen Mac Phail  
 210 Federation of Ethnic Communities' Councils of Australia  
 211 Georgina Gurney  
 212 Ms Jane Hodge  
 213 Ms Michelle Swenson  
 214 Ms Heather Marr  
 215 Pauline Brown  
 216 CASE for Refugees  
 217 Mrs Sally Thompson  
 218 Campus Refugee Rights Club  
 219 Name Withheld  
 220 Fitzroy Learning Network Inc  
 221 Mrs Shona Salver  
 222 Prof Philomena Murray  
 223 Dr Anne Pedersen  
 224 Jesuit Social Services  
 225 Ms Adrienne Buffini & Mr Gerard Hughes  
 226 Mr Ross Ollquist  
 227 Public Law and Policy Research Unit  
 228 Danieka Montague  
 229 Ms Ana Lamaro  
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230 Ms Maureen Kingshott  
 231 Gaby Banens  
 232 Dr Laura Fisher  
 233 Mr Ben Beccari  
 234 Conference of Leaders of Religious Institutes in NSW  
 235 Mr Sean McManus  
 236 Ms Sherry Howlett  
 237 Baptistcare  
 238 Dr Graeme Swincer  
 239 Ms Heather Thompson  
 240 Ms Petrina Turner  
 241 Ms Maura Murnane  
 242 Ms Helen Marron  
 243 Humanist Society of Victoria

## Appendix 2

## Public hearings and witnesses

Friday 14 November 2014-Canberra  
 CAMPBELL, Ms Leonie, Director, Criminal Law and Human Rights Division, Law Council of Australia  
 FORD, Ms Carina, Steering Group, Migration Law Committee, Law Council of Australia  
 KNACKSTREDT, Ms Nicola, Policy Lawyer, Criminal Law and Human Rights Division, Law Council of Australia  
 PRINCE, Mr Shane, Member, Law Council of Australia  
 CLEMENT, Mr Noel, Head, Australian Services, Australian Red Cross  
 DE VRIES, Ms Elisabeth, National Manager, Migration Support Programs, Australian Red Cross  
 HANSON, Mr Greg, Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre  
 MANNE, Mr David Thomas, Executive Director, Principal Solicitor and Registered Migration Agent, Refugee and Immigration Legal Centre  
 CHAN, Ms Angela, National President, Migration Institute of Australia  
 TEBBEY, Mr Nicholas, Member, Migration Institute of Australia  
 DE KRETSE, Mr Hugh, Executive Director, Human Rights Law Centre  
 RYAN, Mr Rhys, Secondee Lawyer, Human Rights Law Centre  
 FOSTER, Associate Professor Michelle, Director, International Refugee Law Research Program, University of Melbourne  
 O'SULLIVAN, Dr Maria Josephine, Associate, Castan Centre for Human Rights Law, Monash University  
 EMERTON, Dr Patrick, Associate, Castan Centre for Human Rights Law, Monash University  
 HOANG, Mr Khanh, Associate Lecturer, Migration Law Program, ANU College of

Law, Australian National University  
 ZAGOR, Mr Matthew, Senior Lecturer, Migration Law Program, ANU College of Law, Australian National University  
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 POWER, Mr Paul, Chief Executive Officer, Refugee Council of Australia  
 COSGRIFF, Mr Scott, Senior Solicitor, Refugee Advice and Casework Service  
 MOJTAHEDI, Mr Ali, Solicitor, Refugee Advice and Casework Service  
 THOM, Dr Graham, Refugee Coordinator, Amnesty International  
 REGESTER, Mr Jack Michael, Advocacy Officer, UNICEF Australia  
 LARKINS, Ms Alison, Acting Deputy Secretary, Policy Group, Department of Immigration and Border Protection  
 PARKER, Ms Vicki, General Counsel, Legal Division, Department of Immigration and Border Protection  
 VISSER, Ms Karen, Director, Protection and Humanitarian Policy Section, Department of Immigration and Border Protection  
 VARGHESE, Mr Jacob, Principal, Maurice Blackburn  
 WATT, Mr Murray, Senior Associate, Maurice Blackburn

## Appendix 3

Tabled documents, answers to questions on notice and additional information

## Additional information

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

## Answers to questions on notice

- 1 Migration Institute of Australia - answers to questions taken on notice (received 18 November 2014)
- 2 Department of Immigration and Border Protection - answers to questions taken on notice (received 19 November 2014)
- 3 Law Council of Australia - answers to questions taken on notice (received 19 November 2014)
- 4 Refugee & Immigration Legal Centre - answers to questions taken on notice (received 21 November 2014)

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 **UNHCR statement: Migration and Maritime Powers Legislation ...**

<http://unhcr.org.au/unhcr/images/2014%2009%2026%20-%20Statement%20-%20Migration%20and%20Maritime%20Power%20Legislation%20Amendment%20Bill.pdf>  
 December 11, 2014

... and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 UNHCR is reviewing the Migration and Maritime Powers Legislation ...

26 September 2014

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

## STATEMENT

UNHCR is reviewing the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 which raises a number of serious questions in relation to the interpretation of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (together 'the 1951 Convention').

UNHCR considers that any policy and legislation relating to the protection needs of asylum-seekers, refugees and stateless persons, must fully respect and comply with international refugee, statelessness and human rights obligations, and not unduly restrict these as some of the provisions appear to do. At a time when unprecedented numbers of people are compelled to flee persecution, serious human rights violations and armed conflict, a full and inclusive interpretation of established protection principles is essential for the integrity of the global system. The need for cooperation and responsibility sharing both regionally and globally is crucial.

Temporary protection is a group-based protection mechanism suited as a response to particularly complex circumstances, notably in contexts of mass displacement, where an individualized assessment of protection needs is not possible or practical. An approach that is punitive or deterrent in nature or prolongs uncertainty would be of concern.

Although UNHCR in general supports prioritised and accelerated procedures directed at improving the fairness and efficiency of asylum procedures, such procedures must provide appropriate procedural safeguards, both in law and practice. Overall, procedures must be fair and accurate in identifying protection needs.

A State party to the 1951 Convention, wherever it exercises jurisdiction, including outside its territory, is bound by its international obligations under the 1951 Convention, in particular the non-refoulement obligation to not return individuals to a country, either directly or indirectly, where their life or freedom would be at risk.

UNHCR looks forward to a constructive review of the draft legislation jointly with the Government of Australia and others interested in this important matter, the outcome of which will critically impact the lives and safety of many who seek asylum from persecution.

-ENDS-

## MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT ...

[http://www.refugeecouncil.org.au/r/pb/140926\\_LegacyCaseloadBrief.pdf](http://www.refugeecouncil.org.au/r/pb/140926_LegacyCaseloadBrief.pdf) December 11, 2014

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL ... on the Migration and Maritime Powers Legislation Amendment ...

26 September 2014 PRELIMINARY BRIEFING FOR RCOA MEMBERS

### MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT

#### (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL 2014

The Government has tabled new legislation called the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Given the size and complexity of this Bill (the Bill is 118 pages and the Explanatory Memorandum is 251 pages), the full impact of the changes proposed in this legislation will take some time to assess fully. In the interim, the Refugee Council of Australia (RCOA) has developed a preliminary list of the key aspects of the legislation and the Government's announcements.

If passed, this Bill would amend several pieces of legislation. It seeks to:

- Extend the Government's powers to stop asylum seeker boats at sea – The Bill would give the Minister responsible for the Maritime Powers Act greater power to direct the movement of vessels and people at sea, including the taking of a vessel or person to a place outside of Australia regardless of whether there is an agreement with the particular country.
- Restrict the courts' capacity to invalidate government actions at sea – The rules of natural justice would not apply to a range of powers in the Maritime Powers Act and a court would not be able to invalidate a government action at sea due to a failure to consider or comply with Australia's international obligations or the domestic law or international obligations of any other country.
- Make consideration of non-refoulement obligations irrelevant when removing a person – The Bill would clarify that the removal power is available even if an assessment of Australia's international obligations and consideration of the risk of refoulement has not occurred.
- Remove most references to the Refugee Convention in the Migration Act – The Bill would replace Refugee Convention definitions with the Government's interpretation of Australia's obligations. As part of this interpretation:
  - Options for internal relocation within the country of origin would have to be considered but consideration of this question would not encompass a "reasonableness" test..
  - Decision makers would be required to consider the extent to which a person could modify his or her behaviour in order to avoid persecution.
  - The definition of membership of a particular social group as grounds for a determining a well-founded fear of persecution would be restricted.
  - There would be an expanded interpretation of who can be excluded under the definition of "refugee".
  - Australia would designate a statutory formulation of its interpretation of what constitutes effective state or non-state protection in considering whether a person has a well-founded fear.
- Clarify the legal status of children born to asylum seekers in Australia and offshore processing countries – The legislation would ensure that children born to parents who arrived by sea after 13 August 2012 are subject to transfer to an offshore processing country like their parents, as the children would have the same designation under the Migration Act as their parents. Children of parents who arrived before 13 August 2012 are not subject to offshore processing arrangements. The measures would be applied retrospectively.

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Incorporated in ACT • ABN 87 956 673 083

- Create a fast track assessment process – People who arrived by sea on or after 13 August 2012 and seek asylum would be subject to a new fast track asylum process. There are provisions to expand the process to people who seek asylum after arriving by plane without a prior visa. People subject to fast track assessment would be expected to provide all claims and supporting evidence at the beginning of the process. The production of new material later in the process would be allowed only if there were compelling reasons. While the timeframes are not yet clear for fast track processing, it is clear that most asylum seekers would not have access to funded legal advice and support to put forward their claims.

- Limit independent merits review – Asylum applicants deemed to be making manifestly unfounded claims, to have been owed protection in another country, to have presented fraudulent documents or previously rejected by a refugee status determination body in another country would be excluded from independent merits review while others would receive limited review via the Immigration Assessment Authority. Those denied merits review would have access to judicial review.

- Create the Immigration Assessment Authority (IAA) – The IAA would conduct limited reviews for people who are not otherwise excluded. The IAA would sit within the Refugee Review Tribunal (RRT) and the Principal Member of the RRT would be responsible for the overall operation and administration of the IAA. The IAA's statutory objective would be to provide a mechanism of limited review that is "efficient and quick" unlike the RRT's objective to be "independent, fair, just, economical, informal and quick". Applicants would have no right to apply, as only the Minister can make referrals to the IAA. The IAA would be under no duty to accept or request new information or interview an applicant and would be allowed to consider new information only in exceptional circumstances. IAA reviews would be conducted primarily on the available application rather than through a personal interview or hearing.

- Allow the Minister to cap the number of Protection visas issued – The legislation would allow the Minister to place a statutory limit on the number of permanent Protection visas granted in a program year. Only asylum seekers who entered Australia on a valid visa would be eligible for permanent protection.

- Create new classes of Protection visas – The Temporary Protection Visa (TPV) and the Safe Haven Enterprise Visa (SHEV) would become the only Protection visas available to people found to be owed protection who arrived without a prior visa by sea or air, as well as for people those who arrived with a valid visa but were refused immigration clearance (including because they sought asylum on arrival). People on TPVs or SHEVs would not have the right to depart and re-enter Australia, access to family reunion or the option to apply for permanent protection. However, they would have access to work rights, employment services, Medicare and income support, torture and trauma counselling, translating and interpreting services, complex case support and access to education for school aged children and would be subject to mutual obligation arrangements.

- Under these arrangements, people found to be owed protection would be offered a TPV for up to three years. Each person granted a TPV would have the option of choosing to take up a SHEV, which would be valid for five years and would require the visa holder to work in a designated regional area without requiring income support for 3½ years of the visa period. However, accessing government assistance to study for a degree, diploma or trade certificate in a designated regional area would not be classified as accessing benefits and would be counted as being part of the 3½ years for which no support was received.

- Any SHEV holder completing 3½ years of work in a designated area without income support

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would be eligible to apply for any onshore visa (other than a permanent Protection Visa) if they meet the visa criteria.

- Facilitate the possible release of people in detention – Once the legislation is passed, asylum seekers detained on Christmas Island and on the Australian mainland who arrived between 19 July and 31 December 2013 may be eligible for release from detention and may be able to apply for a TPV or SHEV. People who arrived in the same period but have already been transferred to Nauru or to Manus Island would remain subject to the offshore processing arrangements and not allowed to apply for a TPV or SHEV. All future boat arrivals will be subject to offshore processing.

The above points reflect our best understanding of the legislation at this point. Feedback on this briefing would be welcome and should be addressed to Rebecca Eckard at [research@refugeecouncil.org.au](mailto:research@refugeecouncil.org.au)

## MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT ...

<http://refugeecouncil.org.au/r/sub/1410-Legacy-Caseload.pdf> December 11, 2014

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL ... RCOA submission on the Asylum Legacy Caseload Bill 2014 2 the law ...

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

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

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

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

1. Schedule 1 – Maritime powers
- 1.1. RCOA is deeply troubled by the proposed amendments to the Maritime Powers Act set out in Schedule 1. The amendments aim to give the Minister for Immigration extraordinary powers to detain people at sea (both within Australian waters and on the high seas) and to transfer them to any country or even a vessel of another country that the Minister chooses, without scrutiny from either Parliament or the courts.
- 1.2. It is clear that the proposed changes in Schedule 1 are a direct response and attempt to give authorisation to actions similar to those undertaken by the Australian Government in June and July 2014 with respect to two boats of Sri Lankan asylum seekers. These actions included the transfer of one of the boats and its occupants to the Sri Lankan navy and the attempted transfer of the other boat and its people to India.
- 1.3. These amendments seek to empower the Minister to detain and transfer people on the high seas even though the Australian Government does not have these powers under the law of the sea nor under the various conventions, covenants and international instruments of human rights. On the high seas or within the Exclusive Economic Zone or the contiguous zone, vessels are governed by the principle of freedom of the seas. Only the flag state can intercept and exert jurisdiction on vessels in these zones, except where the vessel is engaged in piracy, the slave trade or is stateless.<sup>1</sup> As such, interception and detention of vessels in these zones is a violation of the United Nations Convention on the Law of the Sea (UNCLOS). As set out, these amendments would give Australia unbridled power to detain and transfer people on the high seas without consideration of non-refoulement obligations or in breach of its obligations under

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

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

- 1.4. RCOA is particularly troubled by amendments which create the risk of people facing arbitrary and prolonged detention without any scrutiny by Parliament or the courts. Given that the Australian Government would not confirm publicly that it had detained and held 157 asylum seekers in June 2014 until the commencement of a High Court case, RCOA is worried that people will face prolonged detention or even be refouled without public knowledge. Additionally, as Professor Ben Saul points out, such detention may constitute incommunicado military detention – also described as enforced disappearance – something which is prohibited under the Rome Statute of the International Criminal Court.<sup>2</sup>
- 1.5. The Bill's Explanatory Memorandum notes the limitations of Australia's extraterritorial jurisdiction in relation to interceptions and interdictions at sea, noting also the relevant international law, particularly that under UNCLOS. The Government, however, claims that there is ambiguity in the exercise of powers under the Maritime Powers Act in relation to these international laws and that amendments are required to reflect "the intention that the interpretation and application of [international] obligations is, in this context, a matter for the

executive government, noting that the executive government is accountable to the international community for its compliance with those obligations.<sup>3</sup> Leaving decisions about how to comply with Australia's international obligations, including the obligation of non-refoulement, only to the Executive, with no external scrutiny, heightens the risk that Australia will violate these obligations. The non-refoulement obligation in particular must not be limited: compliance must include a series of safeguards that would not be achievable through executive interpretation of international obligations. Furthermore, as UNCLOS art 2(3) provides, the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." As such, "international law has unquestioned primacy in the zone, trumping not only the coastal state's domestic law but its sovereignty also."<sup>4</sup> In fact, the Parliamentary Joint Committee on Human Rights found that the amendments in Schedule 1 were not compatible with Australia's human rights obligations (see Section 3.11). Indeed, as Professor Guy Goodwin-Gill and Professor Jane McAdam point out, "domestic attempts such as these to regulate access to territory cannot, however, circumvent States' obligations under international law."<sup>5</sup>

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

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

<sup>2</sup> Saul, Ben, 'Australia Has Probably Broken the Law, but It Will Get Away Scot-Free', Crikey, July 2014, available at <http://www.crikey.com.au/2014/07/04/australia-has-probably-broken-the-law-but-it-will-get-away-scot-free>

<sup>3</sup> Explanatory Memorandum, p. 17.

<sup>4</sup> Pallis, M (2002), "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes", 14 International

Journal of Refugee Law 329, 343.

<sup>5</sup> Goodwin-Gill, G and McAdam, J (2007), The Refugee in International Law, Oxford University Press, 3rd ed, 270.

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

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

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

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

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

This point is reiterated by the UNHCR's Handbook, which states that:  
A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>10</sup>

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

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

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

<sup>8</sup> Hathaway, J. & Foster, M. (2014), The Law of Refugee Status, Cambridge University Press, Second edition, 25.

<sup>9</sup> Ibid.

<sup>10</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating

to

the Status of Refugees' [28] <<http://www.unhcr.org/3d58e13b4.pdf>>.

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

12 See Hathaway & Foster, above n, 26. These rights include protection against discrimination, respect for personal status, property rights, access

to courts, rationing, primary education, administrative assistance, equality in fiscal charges, protection against refoulement and to be considered for naturalisation.

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

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

#### 2. Schedule 2 – Temporary protection

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

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

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

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

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

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

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

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

14 Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006), 'A comparison of the mental health of refugees with

temporary versus permanent protection visas', Medical Journal of Australia, vol. 185, no. 7, pp. 357-361, available at <https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas>

15 The Centre for Peace and Conflict Studies (CPACS) (2003), 'Go Away: Punished Not Protected: Temporary Protection Visa Holders'

Powerlessness, Federal Politicians' Indifference', University of Sydney, Sydney.; Leach, M. & Mansouri, F. (2004); Mann, R. (2001); Mansouri, F. &

Bagdas, M. (2002); Nayano Taylor-Neumann, L.V. (2011).

16 Momartin, S., Steel, Z., Coello, M., Aroche, J., Silove, D.M. & Brooks, R. (October 2006). 'A comparison of the mental health of refugees with

temporary versus permanent protection visas', Medical Journal of Australia, vol. 185, no. 7, pp. 357-361, available at <https://www.mja.com.au/journal/2006/185/7/comparison-mental-health-refugees-temporary-versus-permanent-protection-visas>

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

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

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

2.7. In addition to being harmful to refugees and ineffective as a deterrent to irregular travel, TPVs are also administratively inefficient and burdensome. The TPV will require visa-holders to re-apply every three years and have a full re-assessment of their protection claims. Given the number of people in the legacy caseload and the admission from Government that it will take

years to process the claims, the Department of Immigration and Border Protection will likely not get through the initial assessments of those in the legacy caseload before the first TPV reassessments will be triggered. The TPV system requires all TPV-holders to have their protection claims reassessed, even if there has been no substantial change in conditions in their country of origin. As a result, time and resources will be wasted reassessing claims even when it is clear from the outset that the person is in need of ongoing protection.

- 2.8. This need for a re-assessment after an individualised refugee determination also potentially violates article 1C of the Refugee Convention by requiring a new protection application to be made each time a TPV expires, rather than the onus falling on the Government to explain that there has been a fundamental change to the circumstances in the country of origin that removes the risk of persecution for the individual concerned.
- 2.9. This Bill also introduces the Safe Haven Enterprise Visa (SHEV), a new form of (temporary) Protection visa. The SHEV has similar conditions to the TPV, with the major differences being that SHEVs are valid for up to five years if a refugee undertakes to work in a designated regional location. The details of where a designated regional location is not set out in the legislation and will be subject to both regulations and opt-in agreements with state and local areas. While the SHEV offers the possibility of permanency via another type of visa, RCOA is concerned that the regulations and detail of this visa have yet to be determined. RCOA is also concerned that the Minister for Immigration has made public comments forecasting that it will be difficult for SHEV-holders to "clear the hurdles" to be able to apply for another visa while in Australia and that the SHEV will present only a "very limited opportunity" for a pathway to permanency.
- 2.10. RCOA notes that, under Section 46AA (2)(a)(b), the legislation stipulates that a valid application for a SHEV cannot not be made without the Government first prescribing criteria by regulation. The amendments in the Bill do not specify a timeframe for the introduction of this regulation. As the legislation does not require the Minister to introduce the regulations necessary to bring the SHEV into existence, the legislation does not guarantee that TPV-holders will have access to SHEVs, as the decision about when or whether or introduce the regulations will rest with the Minister.

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

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- 2.11. RCOA is also troubled by the condition to prohibit a pathway to permanency for people on TPVs. The effect of the condition 8503 on the TPV means that a refugee is not permitted to apply for any other substantive visa and will create a never-ending loop of uncertainty. Given the plethora of evidence demonstrating the deleterious effects of ongoing uncertainty, the elimination of this condition and the options for a pathway to permanency would be a reasonable and appropriate approach.
- 2.12. In addition to the temporary nature of the visa, the lack of re-entry rights (and therefore, travel rights) on the visa and the lack of family reunion options are some of the more harmful aspects of the TPV and SHEV. Refugees that wish to depart Australia and visit family in countries of asylum (e.g. Malaysia) will lose their TPV and will not be able to re-enter Australia. Flexibility for a refugee on a TPV or SHEV to travel in and out of Australia without the threat of losing protection would mitigate some of the harm that damages people while on TPVs.
- 2.13. The allowance of family reunion, particularly for immediate family members like parents, spouses and children, would permit refugees to act and attempt to rescue family members trapped in desperate and dangerous circumstances overseas.
- 2.14. In relation to the conditions and residency requirements of the SHEV, RCOA believes that there is an opportunity to expand the options for where people live and the employment that they undertake. Given the growing labour shortages in certain industries (e.g. hospitality and aged care), there is a unique opportunity for the SHEV to include not only regional geographic locations but also to be expanded to include designated industries. The inclusion of designated industries for the provision of a SHEV would mean that both metropolitan and regional areas with labour shortages in key industries would be options for refugees eager to work and contribute. Refugees would also have access to the communities and support structures that are already in place in many metropolitan areas. The cost of developing support services in regional locations where there has been minimal refugee settlement would be lessened through the expansion of designated locations.
- RECOMMENDATION 2:** The Refugee Council of Australia recommends that the amendments in Schedule 2 in relation to re-introducing Temporary Protection Visas and introducing the Safe Haven Enterprise Visas not be passed.
- RECOMMENDATION 3:** If TPVs were to commence, the Refugee Council of Australia recommends that condition 8503 not be included in the conditions of the visa to enable TPV-holders to make an application for a permanent Protection visa.
- RECOMMENDATION 4:** If TPVs and SHEVs were to commence, the Refugee Council of Australia recommends that re-entry rights be included in the visa conditions so as to permit the visa-holders to exit and re-enter Australia without forfeiting the visa.
- RECOMMENDATION 5:** If TPVs and SHEVs were to commence, the Refugee Council of Australia recommends that family reunion options be made available for visa-holders.
- RECOMMENDATION 6:** If SHEVs were to commence, the Refugee Council of Australia recommends that, in addition to designated regional areas, designated industries with significant labour shortages be included for SHEV-holders to seek employment in both metropolitan and regional locations. RCOA recommends that the Department of Immigration conduct stakeholder consultations with relevant industry bodies and communities to inform the designations.

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3. Schedule 4 – Fast track assessment process
- 3.1. RCOA agrees with the statement in the Explanatory Memorandum that "the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community – eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives". We have repeatedly urged both the previous and current Governments to end prolonged delays in the processing of refugee claims and ensure that all asylum seekers, regardless of their mode of arrival, have

access to a fair and efficient process for determining their status.

- 3.2. The pursuit of efficiency, however, should not come at the expense of fairness and accuracy in decision-making, particularly where decisions could be the difference between life and death. We are therefore troubled by the proposed introduction of an Independent Assessment Authority (IAA) to act as a substitute for the Refugee Review Tribunal (RRT) for some asylum seekers.
- 3.3. The proposed structure and functions of the IAA do not, in RCOA's view, provide an adequate framework for ensuring accuracy and procedural fairness in decision-making. The overriding objective of the IAA, as stated in the Bill, is to provide "a mechanism of limited review that is efficient and quick". By contrast, the objective of the RRT under the Migration Act is to provide a "mechanism of review that is fair, just, economical, informal and quick". The RRT is also required to "act according to substantial justice and the merits of the case" – a requirement which does not apply to the IAA. The mixed objectives of the RRT require its decision-makers to strike a balance between efficiency, fairness and accuracy, while the IAA's objective essentially requires the prioritisation of speed above all other concerns.
- 3.4. RCOA is particularly troubled by the limited capacity of asylum seekers to participate in the IAA review process. Unlike the RRT, asylum seekers cannot apply to the IAA in their own right: cases must be referred to the IAA by the Minister. In most circumstances, the IAA will make assessments based solely on the information provided to it by the Secretary of the Department at the time that a case is referred. The applicant will not be permitted to participate in the process and cannot provide new information to support their claims except at the discretion of the IAA and within certain restrictions. The applicant will thus be effectively locked out of the review process unless the IAA decision-maker elects otherwise. Not only is this procedurally unfair, it also creates a conflict of interest, in that the Department will effectively control the evidence by which the accuracy of its own decision-making will be reviewed.
- 3.5. The effective exclusion of the applicant from the review process also heightens the risk of assessments being made on the basis of evidence that is inaccurate, out-dated or incomplete. As noted in the Explanatory Memorandum, "the power for the IAA to get, request or accept any new information is completely discretionary under all circumstances". Even if clear, compelling and credible evidence is available attesting that the applicant has a well-founded fear of persecution in their home country, the IAA will be under no obligation to consider it. It is difficult to see how this discretionary system can possibly ensure accurate decision-making and act as an effect safeguard against refoulement.
- 3.6. Even if the IAA does permit the applicant to provide new information, however, additional restrictions apply which further limit the types of information that the IAA can consider. There must be "exceptional circumstances" which warrant the consideration of new information and the applicant must demonstrate that the information could not have been presented at the primary stage of decision-making. There is no definition of "exceptional circumstances". In RCOA's view, these restrictions are out of step with the realities of refugees' experiences. The fast track assessment model proposed in this Bill appears to be based on a broad assumption that the provision of new evidence at a later stage of decision-making is likely to indicate that a person's claims are not credible. In reality, it is not always realistic or reasonable to expect that people fleeing persecution will be able to provide all information and evidence relevant to their claims in the first instance and many would have entirely legitimate reasons for providing additional evidence at a later stage.

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- 3.7. It often takes time for asylum seekers to develop trust in decision-makers to the point that they feel comfortable divulging their stories. For example, survivors of sexual violence and other forms of torture and trauma often find it difficult and distressing to recount their experiences, particularly to complete strangers. Similarly, those who have experienced stigmatisation (such as survivors of sexual violence or people fleeing persecution based on their sexual orientation or gender identity) may not initially reveal the full extent of their experiences due to feelings of shame or fear. People who have been persecuted by their own governments may also be fearful of revealing their stories to government authorities in another country. In these cases, the provision of new information at a later stage in the process is unlikely to indicate a lack of credibility; in fact, it would be a consequence of persecution they have suffered.
- 3.8. In other cases, asylum seekers may face challenges in navigating the visa application process. For instance, people who are experiencing mental health issues which affect memory and concentration (as is common amongst survivors of torture and trauma) may struggle to articulate their claims coherently and consistently. Lack of understanding of Australia's immigration processes and systems may also make it more difficult for asylum seekers to present complete and relevant claims, particularly if they have additional vulnerabilities (as is the case for unaccompanied minors, for example) or if they are further disadvantaged by factors such as limited financial resources and support networks, lack of English language skills and low levels of education. This is a particularly significant issue given that most of the people who will be subject to the new fast track assessment process will no longer have access to government-funded legal advice and application assistance and thus may receive no assistance at all to navigate the visa application process.
- 3.9. The examples outlined above are common experiences of people seeking protection from persecution. In most cases, however, people in these circumstances would not be permitted to present new information to the IAA. Even if the IAA was satisfied that exceptional circumstances existed which justified the consideration of new information, many people in these circumstances would still be prevented from doing so on the basis that this information could have been provided at the primary stage of decision-making. In essence, the fast track assessment process outlined in this Bill could result in people being denied refugee status not because their cases did not have merit but because they were frightened, ashamed, mentally unwell or had difficulties navigating the visa application process.
- 3.10. RCOA is also deeply concerned that certain applicants would be ineligible for any form of merits review. Access to an independent and credible system of merits review is, in RCOA's view, both a basic standard of procedural fairness and a critical safeguard against refoulement. Denying access to merits review would both undermine the fairness of the refugee status determination system and heighten the risk of asylum seekers being returned to danger.
- 3.11. RCOA notes that in its consideration of this Bill, the Joint Parliamentary Committee on Human Rights noted that:  
The obligation of non-refoulement is considered in international law as *jus cogens*, which means that it is a fundamental or peremptory norm of international law which applies to all nations, and which can never be limited. Accordingly, compliance with the obligation of non-refoulement requires that sufficient safeguards are in place to ensure a person is not removed in contravention of this obligation. ...The provision of 'independent, effective and impartial' review of non-refoulement decisions is integral to complying with non-refoulement obligations under the ICCPR and CAT.<sup>18</sup>
- 3.12. The Committee advised that it considered the proposed amendments under several Schedules of this Bill incompatible with Australia's obligations under the ICCPR and the CAT.

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

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

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

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

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

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

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

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

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

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##### 4. Schedule 5 – Non-refoulement obligations

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

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

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

4.4. RCOA is concerned that the inadequacies in the fast track process coupled with the lack of migration advice and support for applicants will mean that non-refoulement obligations will not be sufficiently considered under the new Refugee Status Determination system. Therefore, the

need for consideration of non-refoulement obligations before removal is critical to ensure that people are not returned by Australia to places of danger where they face significant harm.

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

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

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

20 See RCOA's submission to the Senate Committee on the Migration Amendment (Regaining Control

Over Australia's Protection Obligations) Bill 2013 at <http://www.refugeecouncil.org.au/r/sub/1401-CP.pdf>

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

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

RECOM M ENDATION 10: The Refugee Council of Australia recommends that the am endm ents related to the rem oval power in Schedule 5 not be passed.

5. Schedule 5 – Reinterpretation of Refugee Convention obligations

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

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

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

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

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

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

22 See the UNHCR's Guidelines on International Protection, available at <http://www.unhcr.org/3f28d5cd4.html>

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

5.6. The Memorandum's explanation that such considerations are "irrelevant" directly contradicts the examples of what constitutes serious harm in the consideration of a well-founded fear of persecution, including but not limited to "significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; and denial of capacity to earn a livelihood of any kind, where the

denial threatens the person's capacity to subsist.<sup>23</sup> This contradiction within the Bill is disturbing and signals the inappropriateness of the internal relocation provision.

- 5.7. RCOA also has concerns about provisions of the Bill which seek to codify the concept of "effective State protection". We believe these provisions are likely to obscure rather than elucidate the circumstances under which a person is likely to have a well-founded fear of persecution. The mere existence of "appropriate criminal law, a reasonably effective police force and an impartial judicial system" is not necessarily an accurate indicator of the risk of persecution to an individual asylum seeker. Status determination should not focus simply on assessing whether such institutions exist but on whether they have the capacity to provide effective protection in a particular case. For example, a police force may be "reasonably effective" in the majority of cases but may fail to provide effective protection from certain crimes (such as rape or domestic violence), to certain individuals (such as women or people who are same-sex attracted or members of a minority religious or ethnic group) or in certain circumstances (such as in a conflict situation).
- 5.8. In the same provision, the Bill seeks to equate protection measures provided by non-state actors with those provided by states. While non-state actors may be able to provide important forms of protection in some circumstances, they cannot possibly command the same level of protection capacity as a state. Non-state actors cannot, for example, confer legal status, grant visas, provide permission to access government services or prevent removal against the wishes of a state. In addition, while they are expected to adhere to certain principles of international law, non-state actors are not bound by international treaties (and their associated accountability and oversight mechanisms) in the same manner as states. RCOA is therefore of the view that protection provided by non-state actors should not be considered equivalent to state protection.
- 5.9. The introduction of new provisions regarding the modification of behaviour to avoid persecution also raises some concerns. We acknowledge that the Bill does include exemptions from this requirement in certain cases. However, while the Explanatory Memorandum provides examples of situations in which a person would be exempt from modifying their behaviour to avoid persecution, it provides no examples of situations in which a person would be expected to modify their behaviour. It is not clear, for instance, whether expressions of an individual's personality would be considered as "fundamental" to their identity and conscience as expressions of their political or religious beliefs. There is a risk that these provisions could result in the denial of refugee status to individuals who are at significant risk of harm or face undue restrictions on their liberty which, if based on other grounds, would entitle them to refugee status.
- 5.10. Potential gaps also exist within the Bill's definition of "social group". The definition in the Bill is broadly consistent with UNHCR's guidelines<sup>24</sup> on this concept. We note, however, that focusing solely on characteristics which are innate or immutable or which are fundamental to identity or conscience may exclude some social groups which are at risk of persecution. UNHCR's

<sup>23</sup> Section 5J paras 5d,e,f, p. 94 of the Bill.

<sup>24</sup> Available at <http://www.unhcr.org/3d58de2da.html>

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

RECOM M ENDATION 11: The Refugee Council of Australia recommends that the am endm ents in relation to Australia's codification of its interpretation of who is a refugee not be passed. As an alternative, RCOA recom m ends that the Governmn ent commence the processing of claim s under the current Refugee Status Determ ination System and m ake available perm anent Protection Visas to people found to be owed protection.

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

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

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

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

- 6.5. At a time when there are increased global efforts to prevent, reduce and resolve statelessness,<sup>25</sup> Australia is making laws that would contribute to statelessness.

RECOM M ENDATION 12: The Refugee Council of Australia recommends that the am endm ents in Schedule 6 in relation to children born to asylum seekers not be passed.

#### 7. Schedule 7 – Statutory limit on permanent Protection Visas

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

<sup>25</sup> See the UNHCR's most recent

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

- 7.2. RCOA is greatly concerned that allowing the Minister to suspend processing of applications for refugee status could result in asylum seekers being forced to remain in limbo for extended periods. Past experience in Australia has demonstrated that suspensions of processing can have devastating consequences for the health and wellbeing of asylum seekers. The uncertainty caused by these suspensions has a deleterious impact on mental health and hampers recovery from pre-arrival experiences of torture and trauma. Delays in processing can also result in asylum seekers spending prolonged periods in indefinite detention or in the community under very difficult conditions, with further negative impacts on health and wellbeing.
- 7.3. Delays in processing not only have serious negative consequences for asylum seekers but also work against Australia's national interests. Forcing individuals who will eventually become permanent residents (and, indeed, citizens) of Australia to endure an artificially prolonged assessment process is likely to have significant long-term costs for Australia. Past experience has shown that refugees who have experienced prolonged periods of uncertainty (especially when coupled with indefinite detention or financial hardship) often require more intensive support to settle successfully and find it more difficult to recover from their experiences, rebuild their lives and contribute to Australia.
- 7.4. RCOA also notes that the introduction of a statutory limit and accompanying suspension powers conflicts with statements made elsewhere in the Explanatory Memorandum regarding the desirability of determining cases as quickly as possible. If the Government accepts this to be true, to the point that it is deemed necessary to introduce a fast track assessment process, it makes little sense to introduce provisions which will actively prevent cases from being resolved efficiently.
- 7.5. RCOA also has reservations regarding the removal of the 90-day timeframe for deciding Protection Visa applications. While we agree that the nature of refugee status determination is such that some cases will take longer to process than others, we believe that the current 90-day timeframe sets an important benchmark which helps to ensure that claims are processed efficiently and without undue delay. The removal of this benchmark would create greater potential for prolonged delays in processing, with the associated negative impacts described above.

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

#### 8. Lack of justification for proposed changes

- 8.1. One of RCOA's overriding concerns about this Bill is the lack of evidence provided by the Government illustrating why this legislation is needed or how the amendments proposed in the Bill would achieve their stated objectives. For example, the Government has provided no evidence to demonstrate that:
  - The reintroduction of temporary protection would act as a deterrent.
  - Australia's current refugee status determination system is inefficient or open to abuse by people with unmeritorious claims.
  - Asylum seekers who arrive without visas are likely to have unmeritorious claims thus their cases should be processed in a different manner to asylum seekers who arrive with valid visas.
  - Limiting access to merits review would enhance the integrity of the refugee status determination process.

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

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

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

#### RCOA submission on the Asylum Legacy Caseload Bill 2014

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### BSL submission regarding the Migration and Maritime Powers ...

[http://www.bsl.org.au/fileadmin/user\\_upload/files/submissions/BSL\\_subm\\_Resolving\\_Asylum\\_Legacy\\_Caseload\\_Bill\\_Oct2014.pdf](http://www.bsl.org.au/fileadmin/user_upload/files/submissions/BSL_subm_Resolving_Asylum_Legacy_Caseload_Bill_Oct2014.pdf) December 11, 2014

Submission to the Legal and Constitutional Affairs Legislation Committee . regarding the. Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy

Submission to the Legal and Constitutional Affairs Legislation Committee  
regarding the

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

Brotherhood of St Laurence  
October 2014

About the Brotherhood of St Laurence

The Brotherhood of St Laurence (the Brotherhood) is an independent non-government welfare organisation with strong community links that has been working to reduce poverty in Australia since the 1930s. Based in Melbourne, but with a national profile on matters of disadvantage, the Brotherhood continues to influence in achieving its vision of an Australia free of poverty.

The Brotherhood has developed a broad portfolio of work that falls across four life transitions: children and families in the early years, young people moving through school to work, adults in and out of work and older people facing the challenges of retirement and ageing. In this work, the Brotherhood aims to strengthen the capacity of new and emerging communities to become active participants in the social and economic life of Australia. Many of the Brotherhood's settlement services have been pioneered by the Ecumenical Migration Centre (EMC), which has been at the forefront of work with new arrivals as well as longer-settled disadvantaged groups since 1956.

Today, the EMC together with the African Australian Community Centre (AACC) lead the Brotherhood's work in the area of refugees, immigration and multiculturalism. Both centres continue to work with new and emerging communities to build their capacity in the transition to settlement in Australia and to achieve full access and participation in Australian society. We specialise in developing service models and demonstration projects that work for the genuine inclusion of refugee and migrant communities in the social, economic and cultural life of the wider Australian society.

**Submitted to:**  
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 Senate Legal and Constitutional Affairs Committee  
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 Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

#### Recommendations

1. That the Bill in its current form be rejected so that refugees can continue to be afforded permanent protection in Australia.

If the Bill is passed, it should be enacted with the following amendments:

2. Reject the proposed fast track assessment and removal provisions because they carry an unacceptable risk of unfairness by forbidding access to legal aid and removing the possibility of merits review by the Refugee Review Tribunal.
3. Retain references to the Refugee Convention in the Migration Act 1958 (Cth) to ensure consistent application of the intent of the Convention under the Act.
4. Provide permanent protection for refugees if they are still found to be refugees following one 3-year period of temporary protection.
5. Establish family reunion rights for refugees holding a Temporary Protection Visa or Safe Haven Enterprise Visa.
6. Establish a program to support the effective operation of the Safe Haven Enterprise Visa scheme so that local communities and businesses are equipped to maximise the benefits of this initiative, and refugees are trained and supported to meet Australia's skills gaps.

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Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

#### Overview

The Brotherhood of St Laurence is concerned about the proposed Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Our response is informed by our experience of working with new communities over successive generations, by research and by recent consultations with communities who will be directly affected by the measures proposed in the Bill.

Our primary recommendation is that this Bill be rejected, so that people seeking Australia's protection are treated fairly under the Migration Act, with permanent protection remaining available to those found to be refugees, regardless of their mode or date of arrival. The Brotherhood strongly believes that successful settlement must be a primary consideration for the Australian Government to ensure both broader social cohesion and the economic participation of our new arrivals.

However, in the event that the Bill is passed, we offer recommendations about how it could be amended to mitigate the known harms arising from temporary protection conditions. There is clear evidence that mental health, wellbeing and employment are key factors in successful settlement. We know that mental health and wellbeing are inextricably linked to a sense of security and the opportunity to reunite with immediate family. Providing a pathway to permanent status is also critical, so that people are not living in a continuous state of limbo. These need to be key considerations in designing any future temporary protection arrangements.

We want our new arrivals to be enabled to fully contribute their potential to Australia. This requires support to enable new communities to navigate our employment system and to integrate into our social life. If the Safe Haven Enterprise Visa scheme is introduced through this Bill, the Brotherhood would welcome the opportunity to discuss what arrangements can be put in place to optimise positive outcomes under this scheme for regional communities, employers and refugees.

Australia played a key role in establishing the Refugee Convention. The Brotherhood supports rigorous application of the Convention, to ensure it only applies to those who are truly in need of protection. It is critical, however, that proposed amendments do not undermine the intent of the Convention, or introduce assessment processes that carry an undue risk of failing to identify genuine refugees.

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#### Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

##### Comments on the Bill

The Brotherhood's position on permanent protection for people who are found to be refugees

The Brotherhood supports permanent protection being granted to people who are found to be refugees, regardless of their date or mode of arrival. Providing permanent protection fully upholds our obligations under the Refugee Convention and, in contrast to temporary protection, offers two things that are crucial to successful settlement—an enduring sense of security and the ability to reunite with immediate family members. The Bill prevents certain categories of refugees from ever obtaining permanent protection.

##### Recommendation 1

That the Bill in its current form be rejected so that refugees can continue to be afforded permanent protection in Australia.

In the event that temporary protection arrangements are introduced for refugees who arrive in Australia without a valid visa, the Brotherhood recommends that measures be taken to mitigate the known and documented negative consequences that will be experienced by new arrivals affected by this proposed change.

##### The Brotherhood's concerns about the particular elements of the Bill

The Brotherhood welcomes the access to work rights, Medicare, torture and trauma counselling and education for school-aged children proposed under the Temporary Protection Visa and Safe Haven Enterprise Visa.

However we are concerned about particular elements of the Bill, including the fast track assessment and removal process, the fulfilment of Australia's Refugee Convention obligations and the conditions of the proposed Temporary Protection Visa and Safe Haven Enterprise Visa.

##### The fast track assessment and removal process

The current delay in processing onshore protection claims, resulting in a backlog of approximately 30,000 cases, has been a product of a period of policy flux rather than any identified flaws in the existing assessment process. The Brotherhood is concerned about the fairness of the proposed fast track assessment and removal process which would replace current practice. The proposed process allows only departmental assessment, forbids legal aid access and restricts merits reviews of protection applications, which are currently conducted by the Refugee Review Tribunal. A comparable fast track process introduced in the United Kingdom was ruled to be illegal in July 2014 on the basis that it carried an 'unacceptable risk of unfairness'.

A number of asylum seekers we consulted who may be subject to this process say while they would appreciate a faster assessment process, given the lengthy delays they have already experienced, it must be a fair one. There is significant concern about navigating a complex system without the support of a lawyer or migration agent and an adequate grasp of the English language. It is unreasonable to expect that traumatised asylum seekers, who are often disoriented and fearful of authority figures when they arrive in Australia, should be able to properly present their case on arrival. There is a real risk that people with legitimate and compelling claims for protection will be unable to adequately demonstrate their case without legal assistance, and will have no recourse to an independent review.

##### Recommendation 2

The proposed fast track assessment and removal provisions should be rejected because they carry an unacceptable risk of unfairness by forbidding access to legal aid and removing the possibility of merits review by the Refugee Review Tribunal.

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#### Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

##### Implementing obligations under the Refugee Convention

It is concerning that most references to the Convention would be removed from the Migration Act and replaced with an alternative interpretation of Australia's obligations, potentially undermining the intent of the Convention. Relying on the subjective and non-reviewable opinions of departmental staff in the assessment of protection claims rather than the clearly defined Convention obligations could lead to erroneous and harmful decision making. The directive that departmental decision makers will be required to consider the extent to which a person could modify his or her behaviour to avoid persecution raises questions about how this would be applied. For example, could a departmental official expect that a Christian individual from a Muslim majority country would modify the practice of their faith to avoid persecution? Such an approach could result in unfair and unreasonable expectations that are incongruent with the Convention's intention to protect those who have suffered persecution.

Removal of references to the Refugee Convention could also result in inconsistent interpretation of international obligations, which could impede attempts to achieve regional cooperation on the issue of asylum seekers. Australia played a key role in developing the Refugee Convention. It is well placed to play a leadership role in its consistent implementation internationally.

##### Recommendation 3:

Retain references to the Refugee Convention in the Migration Act to ensure consistent application of the intent of the Convention under the Act.

##### Conditions of new temporary visas

The proposal to grant temporary protection as a substitute for permanent protection when a person has been found to be owed protection is not in the spirit of the Refugee Convention. There is compelling evidence of the real and enduring harm caused by Temporary Protection Visa conditions in the 1999–2008 period. The Bill seeks to impose some of the same conditions in its Temporary Protection Visa and Safe Haven Enterprise Visa, namely the denial of the right to family reunion and the right to travel and re-enter Australia. The Bill goes further still by removing the possibility of permanent protection on refugee grounds even being granted. Those people on a Temporary Protection Visa are also precluded from applying for any other type of permanent visa to remain in Australia.

Research and experience clearly demonstrate the negative consequences of temporary protection, including:

- a) Temporary status fuels anxiety and insecurity, causing long-term damage to mental health and wellbeing.

There is much evidence from the 1999–2008 period that points to the strong likelihood of harm arising from the conditions of temporary protection. <sup>1</sup> In their 2006 Inquiry into the Administration and Operation of the Migration Act 1958 (Cth), the Senate Legal and Constitutional Affairs Committee found there was ‘no doubt’ that the operation of the Temporary Protection Visa regime had a ‘considerable cost in terms of human suffering’. <sup>2</sup>

<sup>1</sup>

Mann, R 2001, Temporary Protection Visa holders in Queensland, Multicultural Affairs, Department of the Premier and Cabinet, Queensland Government, Brisbane.

<sup>2</sup>

Senate Legal and Constitutional Affairs Committee 2006, Inquiry into the Administration and Operation of the Migration Act 1958 (Cth), [http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/migration/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/migration/report/report_pdf.ashx)

<sup>6</sup>

Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

It is known that temporary status has a detrimental impact on people who have suffered persecution and trauma. Research has identified that refugees with temporary protection are at greater risk of post-traumatic stress disorder than refugees and migrants from the same ethnic group, as their post-traumatic stress reactions are maintained by their temporary status and a state of chronic anticipatory stress.<sup>3</sup> The ongoing risk of removal to the country where they fear persecution has detrimental effects on the mental health of refugees<sup>4</sup>: the particular impacts on children’s mental health and participation in educational opportunities were documented by the Australian Human Rights Commission in 2004. <sup>5</sup> The devastating impact of prolonged uncertainty and lack of control was recently reported by psychologist Dr Greg Turner, who observed that the inability to predict or anticipate events leads to a state of hopelessness:

By the time ... people get their visa their cognition has been impaired in a major way and so their

<sup>6</sup>

capacity to contribute to Australia society – which is very much what they all want to do – is damaged.

Similarly, clients we consulted describe the uncertainty of their situation as highly anxiety-provoking and detrimental to their mental health.

Under Australia’s previous Temporary Protection Visa arrangements, permanent protection was eventually afforded to approximately 90 per cent of the 11,000 Temporary Protection Visa holders in recognition of their enduring need for protection. <sup>7</sup>

The Brotherhood believes that if the Parliament decides to grant refugees temporary protection in place of permanent protection, the temporary period needs to be limited to no more than three years. After this, if a person is still found to be owed protection, they should be granted permanent protection. Three years is a significant time for a refugee who has been dislocated from their home to remain in limbo about their future country of residence. People need to be given the opportunity to put down their roots, to form new relationships, to build their future and to embrace a new life in a safe country.

Recommendation 4:

Provide permanent protection for refugees if they are still found to be a refugee following one 3-year period of temporary protection.

<sup>3</sup>

Momartin, S et al. 2006, ‘A comparison of the mental health of refugees with temporary versus permanent protection visas’, Medical Journal of Australia, vol. 185, no. 7, pp. 357–61.

<sup>4</sup>

Marston, G 2003, Temporary protection, permanent uncertainty: the experience of refugees living on Temporary Protection Visas, Centre for Applied Social Research, RMIT University, Melbourne.

<sup>5</sup>

Human Rights and Equal Opportunity Commission 2004, A last resort? National Inquiry into Children in Immigration Detention, <https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention>

<sup>6</sup>

ABC 2014, Advocates seek better mental health support for asylum seekers waiting for visa decisions, ABC, Melbourne, <http://www.abc.net.au/news/2014-10-06/advocates-seek-mental-health-support-for-asylum-seekers/5793888>

<sup>7</sup>

Phillips, J & Spinks, H 2013, Boat arrivals in Australia since 1976, research paper, Parliamentary Library, Canberra.

<sup>7</sup>

Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

b) Denial of family reunion causes negative psychological effects for refugees and increases the risk of more boat arrivals.

The denial of family reunion has been shown to cause negative psychological effects for refugees <sup>8</sup> All clients we consulted say the most important issue to them is family reunion and many commented that they felt this was in line with the value that Australians place on families as the bedrock of our society. Our clients expressed their grave concern about the danger that their families may face retaliation in their country of origin because of their decision to seek asylum.

When Temporary Protection Visas were last in use in 1999–2008, there was an increase in the number of asylum seekers arriving by boat and in particular a significant increase in the number of women and children making this journey to join their male relatives. <sup>9</sup> It is reasonable to expect that, as a consequence of prohibiting family reunion for those granted temporary protection, family members will again put themselves at risk by attempting hazardous journeys to be reunited.

Recommendation 5:

Establish family reunion rights for refugees holding a Temporary Protection Visa or Safe Haven Enterprise Visa.

Realising the potential benefits of the Safe Haven Enterprise Visa scheme for refugees and regional communities

Refugees who accept a proposed Safe Haven Enterprise Visa will be required to relocate to a designated regional area with labour shortages. They will be required to complete three and a half years of employment in a five-year period. After this, these refugees will be able to apply for a permanent visa to remain in Australia if they are able to satisfy:

- Skilled Migration visa requirements, which require English language proficiency and ability to work in an area of skills need
- or
- Family Migration visa requirements (e.g. if they are sponsored as the spouse of an Australian).

They will remain ineligible for permanent protection on refugee grounds.

The Hugo Report found that refugees are not being fully utilised in the labour market, with a significant mismatch between skills and occupation. It highlighted that refugees would like to take up work opportunities in regional areas, use their entrepreneurial qualities and undertake volunteer work as part of a significant contribution to society. 10 Furthermore, an audit of working-age asylum seekers in 2009 indicated that 40 per cent of respondents had skills on the Department's Skilled Occupation List for General Skilled Migration. 11

8

Centre for Peace and Conflict Studies (CPACS) 2003, *Go away: punished not protected – Temporary Protection Visa holders' powerlessness, federal politicians' indifference*, University of Sydney.

9

Kaldor Centre for International Law 2014, *Temporary protection visas*, factsheet, University of Sydney, citing Senate Legal and Constitutional Affairs Committee 2012, 'Questions taken on notice', Budget estimates hearing 21–22 May 2012, Immigration and Citizenship Portfolio, [http://www.aph.gov.au/~media/Estimates/Live/legcon\\_ctte/estimates/bud\\_1213/report/report.ashx](http://www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/bud_1213/report/report.ashx)

10

Hugo, G 2011, *Economic, social and civic contributions of first and second generation humanitarian entrants*, Department of Immigration and Citizenship, Canberra.

11

Black, A 2009, *Asylum seeker skills audit: an audit of skills amongst asylum seekers in Melbourne*, Hotham Mission Asylum Seeker Project, Melbourne.

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Clients we consulted are eager to work and are generally open to the idea of working in a regional area under the Safe Haven Enterprise Visa scheme. However, they are concerned about:

- the need for assistance to understand Australian employment systems, as the current ban on work rights has left them ill-equipped to navigate it
- the need to build their skills and experience in skill shortage areas
- moving away from their local ethnic community in major cities, who provide a range of critical supports—social, material orientation and interpreting
- the receptiveness of regional communities and fears of discrimination, particularly in the current context of anti-Muslim sentiment.

The Safe Haven Enterprise scheme risks failure for regional communities and for refugees if there is no coordinated approach to providing orientation, housing and appropriate job search support.

There are a number of examples of successful integration of refugees in regional Australia. The Victorian town of Nhill has created a Karen refugee settlement program centred on employment at the local poultry company, Luv a Duck. Some 150 Karen refugees now constitute an invaluable part of the Nhill community, revitalising the local economy by saving the business from relocating elsewhere due to skill shortages. Based on this positive experience, a representative of the local AMES office which provides settlement, education, training and employment services for refugees, says that Safe Haven Enterprise visas would be welcome, but only if refugees are given access to English language tuition, job search support and a pathway to permanent residence to enable them to truly integrate and in doing so aid the stability of the local economy. 12

A number of regional communities have also attracted asylum seekers on Bridging Visas due to their capacity to provide employment opportunities and local accommodation—for example Rockhampton in the banana-growing region of Queensland and dairy farming areas in Tasmania. Their feedback around what has worked and what has hindered the integration of new arrivals into their communities and economies would be valuable in informing the design of a future Safe Haven Enterprise Visa program.

With adequate investment in preparing local communities and businesses to maximise the benefits of this initiative, and an intentional focus on building the capacity of refugees to meet future Skilled Visa, the Safe Haven Enterprise Visa program could be a success story. Some measures that would advance these aims include:

- the appointment of Community Facilitators in regional areas to liaise with local employers, Chambers of Commerce, church groups, community organisations, accommodation providers and community members to facilitate the social and economic participation of refugees who relocate under this scheme
- classification of refugee jobseekers as highly disadvantaged so that they are able to receive intensive support to build their employability through the employment services system. It is critical that refugees are able to access the intensive and culturally appropriate support, including language, literacy and digital literacy training, which is needed to aid their transition into the Australian labour market.
- establishment of a customised program to support refugees into employment in skills shortage areas. The Brotherhood's experience of developing program for new arrivals demonstrates that with the right support, new arrivals can contribute to the productive capacity of our nation.

12

ABC (2014), *New refugee visas could provide boost for rural communities and farm businesses*, ABC, <http://www.abc.net.au/news/2014-09-26/safe-haven-visas/5771662>

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Brotherhood of St Laurence submission regarding the Resolving the Asylum Legacy Caseload Bill 2014

#### Asylum seekers meeting Australia's workforce needs

The Brotherhood's Asylum Seeker Employment Program commenced as a pilot in October 2013. In less than one year, this program has exceeded its targets and successfully placed more than 80 jobseekers into employment. Asylum seekers are assisted to write résumés and job applications, improve their English through workplace-focused conversation classes, and understand how their diverse skills fit into the Australian job environment. Participants access intensive, one-to-one, employment-focused mentoring and coaching both on and off the job to enable them to understand Australian work culture. Importantly, the program also works with

employers to understand their workforce needs and tailor programs which properly match and prepare candidates. Labour hire services are brokered to offset risk for employers who want to utilise this service or who would like to suggest it to their subcontractors.

Drawing on our experience of designing and implementing supports within the Asylum Seeker Employment Program, the Brotherhood would be happy to elaborate further on our ideas in relation to maximising the success of the Safe Haven Enterprise Visa scheme.

#### Recommendation 6:

Establish a program to support the effective operation of the Safe Haven Enterprise Visa scheme so that local communities and businesses are equipped to maximise the benefits of this initiative, and refugees are trained and supported to meet Australia's skills gap.

#### Conclusion

The Brotherhood appreciates the opportunity to provide comment on this Bill. We believe we have made both evidence-based arguments for the Bill's rejection as well as constructive suggestions to mitigate negative consequences for those affected, in the event that the Bill is passed. This is done in the spirit of the Brotherhood working for an Australia free of poverty.

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## Submission to the

[http://www.amnesty.org.au/resources/activist/141107\\_Amnesty\\_International\\_Submission\\_to\\_Migration\\_Legislation\\_Amendment\\_\(Resolving\\_the\\_Legacy\\_Caseload\)\\_Bill\\_2014\\_\(2\).r](http://www.amnesty.org.au/resources/activist/141107_Amnesty_International_Submission_to_Migration_Legislation_Amendment_(Resolving_the_Legacy_Caseload)_Bill_2014_(2).r)  
December 11, 2014

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

Submission to  
Senate Legal and Constitutional Affairs Legislation Committee  
Inquiry into

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

7 November 2014  
Submitted by

Amnesty International Australia

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

#### Executive summary

Amnesty International opposes the passing into law of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill). Should this occur, Australia's recognition of and compliance with its human rights obligations would be drastically diminished.

The Bill in its entirety seeks to significantly reduce the protections for asylum seekers already in Australia, as well as those who would seek protection in this country. The Bill makes a raft of changes with adverse human rights implications. This submission addresses Amnesty International's key concerns, including:

- Changes to the Maritime Powers Act which may lead to refoulement and further abuses of the rights of asylum seekers who arrive by boat;
- The reintroduction of temporary protection visas (TPVs) for recognised refugees;
- The establishment of a fast track assessment process which provides inadequate safeguards against refoulement and which does not allow for due process; and
- The removal of references to the 1951 Refugee Convention from the Migration Act and the 'reinterpretation' of Australia's obligations under international human rights law.

Amnesty International urges the Committee to recommend that the Bill not be passed.

#### About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 3 million supporters in more than 160 countries and has over 440,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

Protecting the rights of refugees is an essential component of Amnesty International's global work. We aim to contribute to the worldwide observance of human rights set out in the UDHR, the United Nations Convention on the Status of Refugees and other internationally recognised standards. Amnesty International works to prevent human rights violations that cause refugees to flee their homes. At the same time, we oppose the forcible return of any individual to a country where he or she faces serious human rights violations.

#### Maritime Powers amendments

<http://portfoliocom/print/detailed/100/>

Amnesty International holds serious concerns about the human rights implications of the proposed changes to the Maritime Powers Act contained in Schedule 1 of the Bill.

Schedule 1 seeks to expand the powers of Australian maritime vessels to transfer asylum seekers intercepted at sea (in Australian or international waters) to another 'destination'. The Bill sets out that the term 'destination' will apply to places other than countries, such as a vessel. This would include Australian government-provided lifeboats or maritime vessels belonging to another country. The Bill stipulates that these transfers could occur irrespective of Australia's international legal obligations, or the international or domestic legal obligations of any other country.

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Item 6 of Schedule 1 seeks to amend the Maritime Powers Act to the effect that "as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers to give an authorisation under Division 2 of Part 2 of the MPA [Maritime Powers Act]."<sup>1</sup>

The Explanatory Memorandum to the Bill states that "(t)he Australian Government takes its international obligations seriously, and Australia is bound to act in compliance with its international obligations as a matter of international law. This amendment does not seek to change that fact."<sup>2</sup> The accompanying Statement of Compatibility with Human Rights goes on to state that '(i)nternational law was not intended to be a relevant consideration for the purposes of the Maritime Powers Act'.<sup>3</sup>

Amnesty International is deeply concerned by the Australian government's contention that they may legitimately circumvent their international legal obligations. The Maritime Powers Act is inextricably tied to considerations under the Migration Act which relate directly to Australia's non-refoulement obligations. The proposed changes would facilitate the denial of due process and the forced return of asylum seekers, in direct contravention of Australia's non-refoulement obligations.<sup>4</sup>

As the United Nations High Commissioner for Refugees (UNHCR) has stated, Australia's jurisdiction extends to Australian maritime vessels and therefore Australia's non-refoulement obligations extend to any person who claims asylum while on board an Australian maritime vessel.<sup>5</sup> Amnesty International strongly condemns any expansion of the Maritime Powers Act to enable the transfer of asylum seekers from Australian maritime vessels to unspecified destinations, in order to facilitate forced return of asylum seekers without appropriate assessment of their claims for protection. Such a move could constitute a direct breach of Australia's non-refoulement obligations as exercise of this power would see the Australian authorities fail to make any efforts to determine whether a well-founded fear of persecution exists in each individual case. This will inevitably lead to the return, by Australia, of asylum seekers to a country where they face a real risk of significant harm.

These proposed changes to the Maritime Powers Act remove the necessary legislative safeguards to Australia's international legal obligations, and as such Amnesty International urges the Committee to reject the proposed changes.

#### Temporary Protection Visas (TPVs)

Amnesty International considers the Australian government's use of TPVs as a deterrent to those seeking asylum in Australia to be a punitive approach to humanitarian protection. When previously implemented during 1999–2008, the use of TPVs was shown to result in increased mental health problems among refugees as a result of the instability of their residence and the lack of family reunion. Amnesty International believes that the re-implementation of TPVs will have the same effects on refugees and their families.

<sup>1</sup> Explanatory Memorandum to the Bill (EM), p.19.

<sup>2</sup> EM, p. 19.

<sup>3</sup> EM, 'Attachment A: Statement of Compatibility with Human Rights,' p.8

<sup>4</sup> Australia's fundamental obligation of non-refoulement is prescribed in Art 33, Convention Relating to the Status of Refugees (Refugees Convention) and Art 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>5</sup> High Court of Australia, 'Submissions of the Office of the United Nations High Commissioner for Refugees: Seeking leave to intervene as amicus curiae,' p.4, [http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF\\_UNHCR.pdf](http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf).

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Amnesty International has consistently opposed the policy of granting TPVs to refugees

<sup>6</sup> seeking asylum in Australia. TPVs, far from offering the protection refugees have been found to require, in fact create prolonged uncertainty, separation, frustration, fear and mental ill-health.<sup>7</sup> On recognising an individual's refugee status, Australia must provide a long-term durable solution for their protection and that of their family.

The Minister has stated that the government's re-introduction of TPVs, as set out in the Bill, is designed to prevent refugees who seek asylum in Australia from ever receiving permanent protection.<sup>8</sup> Under the Bill, asylum seekers who arrive without an authorised visa will only be eligible for a TPV. The Bill further amends the Migration Act so that all existing applications for permanent protection visas submitted by those who have arrived in Australia by boat will automatically be converted to applications for TPVs instead.<sup>9</sup> The TPV will be issued for a

maximum of three years, after which a review of ongoing protection needs will be undertaken. Following each three year period a further TPV will be issued if it is deemed that  
 10 protection needs persist.

The Bill also reinstates conditions that were formerly in place for TPV holders: cancellation of the visa if the holder departs Australia and no option for family reunion, resulting in prolonged family separation. These provisions infringe the rights of TPV holders in two distinct ways. Firstly, any restriction on freedom of movement imposed through government policy contravenes Australia's obligations under ICCPR. Restrictions on freedom of movement are only allowable in circumstances required to 'protect national security, public order, public health or morals or the rights and freedoms of others'.<sup>11</sup> Secondly, the principle of family unity is fundamental in international law<sup>12</sup> and repeated UNHCR Executive Committee Conclusions have emphasised the importance of maintaining family unity.<sup>13</sup>

As was demonstrated when TPVs were formerly in place, further damage is imposed on TPV holders as their limited residency rights in Australia have been shown to dissuade employers from engaging TPV holders in permanent, meaningful employment. While Amnesty International welcomes the right to work associated with the TPV, the three year expiry period limits refugees to finding short-term and potentially unstable employment.

The new Safe Haven Enterprise Visa (SHEV) established in Schedule 3 of the Bill, is another form of temporary visa, which ostensibly seeks to engage refugees in employment in designated areas. The Explanatory Memorandum to the Bill states that "amendments to the

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See, for example, Amnesty International, 'Detention and temporary protection damages mental health' 16 January 2007, <http://www.amnesty.org.au/refugees/comments/2251/>.

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See for example: Australian Human Rights Commission, 'A Last Resort? Summary Guide: TPVs', 2004, <https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas>; Australian Medical Association, 'Detention, uncertainty take their toll on the mental health of refugees', 1 October 2006, <https://ama.com.au/media/detention-uncertainty-take-their-toll-mental-health-refugees>.

8

Minister the Hon Scott Morrison MP, 'Restoring TPVs to Resolve Labor's Legacy Caseload', 25 September 2014, <http://www.minister.immi.gov.au/media/sm/2014/sm218127.htm>.

9

EM, p.7.

10

EM, p.9.

11

ICCPR, Art.12.

12

The Universal Declaration of Human Rights, 1948, article 16(3), International Covenant on Civil and Political Rights, 1966, article 23(1), and American Convention on Human Rights, 1969, article 17(1) each state that 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. European Social Charter, 1961, article 16, 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life ....' African Charter on Human and Peoples' Rights, 1981, article 18(1) 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.'

13

See, for instance, Executive Committee Conclusions No. 88 (L) 1999 (b)(iii) and No. 47 (XXXXVIII) 1987 (h); UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 5.

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Migration Regulations to prescribe criteria for this visa will follow in 2015".<sup>14</sup> Given the lack of detail, Amnesty International has significant questions regarding the practicalities of this visa class and its impact on human rights. It is not clear, for example, what will constitute 'work' under the visa – including whether school attendance for a child will be applicable. Similar questions exist regarding conditions for SHEV holders beyond the retirement age.

Furthermore, Amnesty International has significant concerns relating to the restricted movement of SHEV holders. In his Second Reading Speech, the Minister stated that:

"IMAs granted a SHEV will be required to confine themselves to designated regions— either a state or territory government or local government area, or an employer in a regional area can request to be designated. This would be identified through a national self-nomination process. No region would be required to compulsorily participate in such a scheme. The visa will be valid for five years and, like the TPV, will not include family reunion or a right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies, where they exist."<sup>15</sup>

It is not clear to what extent holders of a SHEV will be able to move within Australia. It is equally unclear at this stage whether any state, territory or local government area will nominate as a 'designated region'.

Amnesty International also seeks clarification about the pathways to other visa classes that SHEV holders will be eligible to apply for after they complete the required three and a half years of work in a five year period, without accessing income support.

#### Fast track assessment process

Schedule 4 of the proposed legislation introduces a new 'fast track' refugee status determination (RSD) process for the consideration of claims for protection from asylum seekers who arrived in Australia by boat after 13 August 2012.<sup>16</sup> While Amnesty International supports minimisation of the time asylum seekers spend in detention and awaiting the outcome of the RSD process, this must be achieved while maintaining due process and with appropriate safeguards to ensure that no refugee is returned to harm. In contrast to this, the Bill establishes a rudimentary RSD process, which will inevitably result in the return of those who may face persecution.

The process as set out in the legislation involves a brief initial 'administrative' assessment of a person's protection claims in an interview conducted by a Departmental official. For those rejected at this first interview, the Bill removes access to the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT).<sup>17</sup> Instead, as the Explanatory Memorandum sets out, the Bill 'require(s) the Minister to refer, as soon as reasonably practicable, certain decisions

made in respect of fast track review applicants to the Immigration Assessment Authority (the IAA).<sup>18</sup>

The IAA will be a newly established review body, which will conduct a "limited review" of cases before it.<sup>19</sup> Amnesty International has extremely significant concerns with the provisions set out in new Part 7AA of the Bill, establishing the role and function of the IAA.

14  
EM, p.7.

15 Minister the Hon Scott Morrison, Second reading speech, into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 25 Sept 2014.

16  
EM, p.8.

17  
EM, p.107.

18  
EM, p.8.

19  
Ibid.

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Of great concern is the fact that the IAA, while able to obtain new and relevant information in the "most suitable and convenient way", is under no duty to "accept or request new information or interview an applicant."<sup>20</sup> Further, and crucially, the Bill sets out that:

"As a limited review body, other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or an applicant provided it of their own volition."<sup>21</sup>

Amnesty International is deeply concerned that fast track review process as established in the Bill fails to ensure due process and will see refugees refouled. A process of review which does not necessarily involve an interview with the claimant, and in which new information may not be admitted, does not meet the appropriate standard of scrutiny for a decision that may well have life and death consequences. As Amnesty International has stated in response to the Migration Legislation Amendment (Protection and Other Measures) Bill 2014, there are many reasons for which an asylum seeker will not provide all details of their claim upfront, including fear, translation issues, confusion or lack of rapport with the initial interviewer.<sup>22</sup>

Yet more concerning, is the category of "excluded fast track" cases, established in Schedule 4 to the legislation, which sets apart certain categories of applicants who will have no access to merits review of any kind.<sup>23</sup> Those in this category include those with so-called "bogus documents" and those considered to have "unmeritorious claims". The Minister, when introducing the Bill, stated that, "(t)he fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum."<sup>24</sup> What is not clear, is what constitutes an unmeritorious claim. Indeed, this definition appears to pass judgement on a decision which requires detailed examination to determine. Furthermore, as highlighted in Amnesty International's submission to the Migration Legislation Amendment (Protection and Other Measures) Bill 2014, the possession of non-state issued identity documentation is often the reality for asylum seekers who are fleeing the authorities in their country or who have left their home in haste.<sup>25</sup>

The fast track system established by this legislation rips away Australia's rigorous processing and appropriate review for claims for protection, which safeguard against violation of the fundamental obligation not to return asylum seekers to persecution. Amnesty International is deeply concerned by this proposed system, which has been demonstrated in the UK to have disturbing consequences, including for victims of sexual and gender-based violence.<sup>26</sup>

#### International obligations

Schedule 5 of the Bill is described in the Explanatory Memorandum as "clarify(ing) Australia's international obligations".<sup>27</sup> It does so by removing references to the Refugees Convention from the Migration Act, an act that seriously undermines Australia's commitment to its non-refoulement obligations, the cornerstone of refugee protection.

20  
EM, p.9.

21  
Ibid.

22 Amnesty International, Submission to Inquiry into Migration Legislation Amendment (Protection and Other Measures) Bill 2014, 31 July 2014.

23  
EM, p.8.

24 Minister the Hon Scott Morrison, Second reading speech, into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, 25 Sept 2014.

25 Amnesty International, Submission to Inquiry into Migration Legislation Amendment (Protection and Other Measures) Bill 2014, 31 July 2014.

26 Human Rights Watch, UK: 'Fast Track' Asylum System Fails Women, 23 February 2010,  
<http://www.hrw.org/news/2010/02/23/uk-fast-track-asylum-system-fails-women>.

27  
EM, p.9.

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of particular concern to Amnesty International is the amendment to "make clear that the removal power is available independent of assessments of Australia's non-refoulement obligations, where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Migration Act." This would mean that persons could be removed from Australia, regardless of non-refoulement obligations in respect of that individual.

This is at best a fundamental misunderstanding of international law and Australia's obligations under international law, and attempts to circumvent Australia's commitment not to return a person to harm.

Non-refoulement, as outlined in Article 33(1) of the Refugee Convention, prohibits a State from expelling or returning a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened. Non-refoulement obligations are also key to Australia's obligations under the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), as well as being a norm of customary international law. Australia is bound to these commitments under the rule of treaty interpretation and cannot simply legislate away its international legal obligations, including with respect to non-refoulement.

As stated in the Explanatory Memorandum, "the duty to remove in section 198 of the Migration Act arises irrespective of whether or not there has been an assessment, according to law or procedural fairness, of Australia's non-refoulement obligations in respect of the non-citizen," clearly demonstrating that the government envisages circumstances where a removal could occur without an assessment of an individual's protection needs. This would constitute a serious breach of Australia's international law obligations and is condemned by Amnesty International.

The Explanatory Memorandum does state that Australia will continue to meet its non-refoulement obligations through "other mechanisms". This includes, it is stated, within the new fast track processing arrangements. Amnesty International, as stated above, holds significant doubts that there is sufficient rigour in the proposed system to provide any security against the return of people to their persecutors.

A further concern with regard to Australia's ability to comply with its international obligations under the amendments in this Bill relates to complementary protection claims. The Bill stipulates that they will be considered under section 36. However, it is not clear how this can be the case, particularly as there are two further Bills before the parliament that directly impact on the way Australia wishes to comply with its complementary protection obligations.<sup>28</sup> Amnesty International has previously raised objections to both Bills with this Committee.

#### Conclusion

Amnesty International condemns this proposed legislation in its ruthless attempts to remove protections from asylum seekers in Australia and circumvent fundamental obligations under international human rights law.

The proposed amendments set out in this legislation erode safeguards against refoulement, undermine due process and actively seek to avoid Australia's responsibility to provide protection to those in need.

<sup>28</sup>

Migration Amendment Legislation (Regaining Control of Australia's Protection Obligations) Bill 2014 seeks to remove the statutory process for complementary protection assessment and Migration Amendment Legislation (Protection and Other Measures) Bill 2014 seeks to increase the test for complementary protection claims to 'more likely than not', or greater than 50% chance of harm on return.

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Amnesty International rejects any argument that the provisions in this Bill can be justified as providing a deterrent to those who would seek protection. Seeking that protection is a right which must be acknowledged and appropriately afforded those who require it.

Amnesty International urges the Committee to recommend that the Bill not be passed.

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

<http://www.timebase.com.au/news/2014/AT541-article.html> December 11, 2014

... Bill 2014 ... the Federal Government introduced the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) ...

Yesterday (25 September 2014), the Federal Government introduced the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, in an effort to support the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore.

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.

The Bill fundamentally changes Australia's approach to managing asylum seekers by:

Specifically, the Bill amends the Migration Act to:

According to the ABC News:

The proposed legislation has also been criticised as it makes dramatic alterations to the Refugee Review Tribunal processes that will enshrine screening out processes through which asylum seekers are administratively prevented from having their asylum claims processed.

The Bill is currently in the House of Representatives awaiting Second Reading Debate when Parliament resumes on Tuesday 30 September 2014.

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## Joint Briefing: Migration and Maritime Powers Legislation ...

[http://www.amnesty.org.au/resources/activist/Migration\\_Maritime\\_Powers\\_Legislation\\_Amendment\\_Briefing.pdf](http://www.amnesty.org.au/resources/activist/Migration_Maritime_Powers_Legislation_Amendment_Briefing.pdf) December 11, 2014

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

Joint Briefing: Migration and Maritime Powers  
(Resolving the Asylum Legacy Caseload) Bill 2014

Legislation Amendment  
November 2014

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill), currently before the Senate, proposes radical changes to all facets of Australia's refugee protection framework.

We call on Senators to oppose this Bill.

The Bill includes changes that would:

1. Amend the Migration Act to allow the government to ignore the 1951 Refugee Convention and return refugees to harm;
2. Remove safeguards from the processes for identifying refugee status by introducing a so-called 'fast track' assessment process for asylum seekers already in Australia;
3. Narrow the definition of 'refugee' in Australian law in a way that is inconsistent with international law;
4. Make children born to asylum seekers in Australia subject to transfer to regional processing countries, including stateless children who are eligible to become Australian citizens;
5. Give the Minister unprecedented powers to direct the control of asylum seekers intercepted at sea, and to return them the countries from which they fled, with no assessment of their protection claims and without regard to international legal obligations; and
6. Introduce TPVs and a new class of visa, the Safe Haven Enterprise Visa (SHEV), which will mean that many refugees would never see their family members again.

### 1. Allowing the government to ignore the Refugee Convention

The Bill changes the Migration Act to state that the Australian Government would not be required to consider whether a person is a refugee before returning them to their country of origin. The Government has stated that Australia does not intend to breach its obligations. However, without any legal imperative, and with changes to processing that will exclude many refugees, what assurances can Australians have that the Government will meet its obligations?

This change undermines Australia's commitment to the principle of non-refoulement, the cornerstone of refugee protection and a norm of customary international law. Australia is also bound to its commitments under the Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) and cannot simply legislate away its international legal obligations.

### 2. Fast Track Assessment Process: removing access to the Refugee Review Tribunal

The proposed 'fast track' process for assessing protection claims removes access to the Refugee Review Tribunal (RRT) for anyone who arrived by boat. By removing meaningful review of the Department of Immigration's decisions on a person's refugee status, it is clear that the process will fail to reliably determine whether a person is at risk of persecution.

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Joint Briefing: Resolving the Asylum Legacy Caseload Bill 2014

No hearings, no new information

For asylum seekers who came by boat there will be no opportunity to respond to or provide explanations in relation to adverse information and no opportunity to attend a hearing. The new

review body proposed by the Bill (the Immigration

Assessment Authority) would be under no obligation to accept or consider new and relevant information. The new system would not provide a fair and robust review process.

Removing all review rights for some asylum seekers

Under the fast track process, some applicants will have no right to review of their primary decision.

This will include people who were considered to

have 'manifestly unfounded claims', as determined by the Minister. In these instances, applicants will have no opportunity to respond to the reasons for the decision or address misunderstandings of their claims. The legal safeguards provided by the review process will be entirely eliminated. This part of the proposed fast track system fails to recognise that Departmental decision makers can and do make errors.

Example case study: Fast track processing

Khaled fears persecution in his country

of origin because of his role in an opposition political party. He provided with his application his membership certificate and certain photographs as evidence of his activities in the party. His application was refused at the primary level because the decision maker in the Department of Immigration did not believe that he in fact held his claimed role within the party. After the decision, Khaled

approached the party in his country of origin, whose leaders wrote a letter corroborating his stated role in the party. Khaled provides the original copy of the letter to the proposed merits review body, the IAA.

Under the fast track process, this letter may never be considered, and Khaled would not be recognised as a refugee and would not be eligible for a visa.

### 3. A narrower meaning of refugee

The Bill seeks to remove references to the Refugee Convention from the Migration Act, replacing them with the Government's restrictive definition of the meaning of refugee. This change would represent a dangerous, isolationist approach to international law and has been criticised by the UN Committee against Torture. The new definition would exclude many

refugees from eligibility for protection visas.

#### 4. Newborn children to be transferred offshore

The Bill stipulates that children who were born to asylum seekers in Australia or a regional processing country will be 'unauthorised maritime arrivals'. The Bill will apply retrospectively to children in this situation, meaning that children born in Australia can be sent to Nauru, including stateless children who are eligible for Australian citizenship.

#### 5. Expansion of the government's maritime powers

The Bill seeks to change domestic law so that the circumstances of boat turn-backs cannot be challenged in domestic courts. Crucially, the Bill stipulates decisions made by the Minister to detain and remove people to other places need not consider international legal obligations – including the fundamental principle prohibiting the return of someone to torture or other persecution. Our organisations are concerned that these changes will inevitably lead to the return of asylum seekers to countries where they face a real risk of harm. In these instances, there will be no way to challenge these decisions in an Australian court.

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#### Joint Briefing: Resolving the Asylum Legacy Caseload Bill 2014

#### 6. TPVs and SHEVs

The Bill introduces a more punitive version of the Temporary Protection Visa (TPV) than that which existed between 1999 and 2007 and creates a new class of temporary visa, the Safe Haven Enterprise Visa (SHEV).

The proposed version of the TPV is more punitive because it denies those recognised as refugees any prospect of permanent

protection or family reunion in Australia. TPVs

have enormous, ongoing costs. They create eternal uncertainty and fear, which leads to mental ill-health and creates barriers to resettlement and integration.

When TPVs were previously part of Australian law, TPV holders suffered further harm because their temporary residency rights dissuade employers from engaging TPV

holders in ongoing, meaningful employment.<sup>1</sup> In addition to the impact of uncertainty of safety from harm and separation from family members, the three-year expiry period will limit refugees to short-term and potentially unstable jobs.

In the current policy setting, there can be no reasonable argument that temporary visas are necessary in order to deter people-smuggling ventures or prevent deaths at sea.

The SHEV is proposed as a pathway away from repeating TPVs for those refugees who are also eligible for skilled visas. However the Bill contains no meaningful detail about the SHEV. It is not clear, for example, what would constitute 'work' under the visa – including whether a child's school attendance will be treated. Similar questions exist regarding conditions for SHEV holders beyond the retirement age. It is also unclear to what extent holders of a SHEV will be able to move within Australia. It is equally unclear at this stage whether any state, territory or local government area will nominate as a 'designated region'.

Clarification is also needed about the pathways to other visa classes for which SHEV holders will be eligible to apply after they complete the required 31/2 years of work in a 5 year period, without accessing income support.

The government has stated that the measures in this Bill are necessary to deal with large numbers of asylum seekers in Australia awaiting assessment of their protection claims. This outcome can be more effectively and comprehensively achieved if the current robust system is maintained and processing commenced. The existing system includes essential safeguards against refoulement and provides durable protection to people found to be refugees.

1

See for example: Australian Human Rights Commission, 'A Last Resort? Summary Guide: TPVs', 2004, <https://www.humanrights.gov.au/publications/last-resort-summary-guide-temporary-protection-visas>; Australian Medical Association, 'Detention, uncertainty take their toll on the mental health of refugees', 1 October 2006, <https://ama.com.au/media/detention-uncertainty-take-their-toll-mental-health-refugees>.

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## Migration and Maritime Powers Legislation Amendment ...

<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898 ->

[Migration and Maritime Powers Legislation Amendment Resolving the Asylum Legacy Caseload Bill 2014.pdf December 11, 2014](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898 -)

Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 . Senate Legal and Constitutional Affairs ... Migration and Maritime Powers Legislation ...

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

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#### Executive Summary

1. The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (the Bill) forms part of the Government's Operation Sovereign Borders Policy and aims to improve the efficiency of the current system for assessing protection claims and issuing protection visas.
2. Key amendments relate to: the increase of Executive and non-Executive powers to detain and transfer people at sea and the restriction of the court's ability to invalidate such actions; the reintroduction of Temporary Protection Visas (TPVs) and the introduction of the Safe Haven Enterprise Visa (SHEV); the introduction of fast track processing for the 'legacy caseload', including the removal or restriction of merits review; the removal of most references to the Convention relating to the Status of Refugees (Refugee Convention) in the Migration Act 1958 (Cth) and the requirement to consider Australia's non-refoulement obligations; clarifying that babies born in Australia or in offshore processing centres will have the same designation under the Migration Act as their parents; and allowing the Minister to cap the number of protection visas issued.
3. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas. It considers that certainty of the legal framework for the determination protection claims is urgently needed, especially for the 'legacy caseload'.
4. The Law Council considers that the Bill's proposed amendments depart from the accepted standards of protection for asylum seekers in international and domestic

law, key rule of law principles, and procedural fairness guarantees. The Law Council's view of these standards, principles and guarantees is set out in its Asylum Seeker Policy (Policy), approved on 6 September 2014.<sup>1</sup> For example, the Law Council observes that many of the proposed measures are retrospective in application and contrary to the Policy, which states that in order to adhere to rule of law principles, laws and policies affecting asylum seekers must not have retrospective application.<sup>2</sup>

5. Further, several of these changes (such as removing the obligation for the Executive to consider international obligations and the creation of an excluded category of persons – 'excluded fast track review applicant') potentially conflict with the principle of non-refoulement, which prohibits states from returning refugees to countries where his or her life or freedoms are threatened. Moreover, the proposed amendments – especially the removal or restriction of merits review – are likely to lead to more applications to the High Court based on common law judicial review principles. This will undoubtedly lead to further inefficiencies, and prolong the process of determining Australia's protection obligations.
6. Most importantly, the Law Council considers that access to independent legal or migration advice for asylum seekers under Australia's jurisdiction is fundamental to promote compliance by Australia with its international law obligations and to be consistent with the rule of law. The provision independent advice at an early stage of the refugee status determination process will reduce inefficiencies and help ensure that asylum seekers are not at risk of returning to a place of risk, in accordance with

<sup>1</sup>

Law Council of Australia, Asylum Seeker Policy, (6 September 2014) ('LCA Policy'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

<sup>2</sup>

LCA Policy at [9(f)].

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Australia's international obligations. Such advice is critical given the changes contained in the Bill, including the fast track process, which involves substantially reduced review rights, the exercise of Ministerial discretion at the primary decision-making level and a limited ability to introduce new material following the initial assessment of status. These combine with complex changes in other legislation, including the proposals to place the burden of demonstrating claims on the applicant without any assistance from a third party. Without legal advice, the Law Council is concerned that:

- a. Asylum seekers will be left without help to make significant legal applications, and
  - b. Immigration officials will be left to make decisions on poorly prepared and incomplete applications.
7. The Law Council also observes that the Bill appears to infringe upon traditional rights and freedoms outlined in the Terms of Reference of the Australian Law Reform Commission's Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges.<sup>3</sup>
  8. The Law Council recommendation is that the Bill not be passed. However, if this recommendation is not adopted the Law Council recommends that amendments be made to the Bill to ensure that it more appropriately aligns with rule of law principles, procedural fairness and Australia's international law obligations. Further, it urges the Committee to recommend asylum seekers' lack of access to free and independent legal advice, including for those cohorts covered by this Bill, must be immediately addressed.

<sup>3</sup>

See: <http://www.alrc.gov.au/inquiries/freedoms/terms-reference>. For example, if the Bill were passed it would include laws which would appear to:

- deny procedural fairness to persons affected by the exercise of public power;
- inappropriately delegate legislative power to the Executive;
- give executive immunities a wide application;
- retrospectively change legal rights and obligations; and
- restrict access to the courts.

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#### Summary of Recommendations

9. The Law Council's primary recommendation is that the Bill not be pursued as currently drafted.

10. If, the Bill is pursued, the Law Council recommends the following changes be made:

#### Schedule 1

- That the Schedule should not apply retrospectively;
- That the proposed sections stating that the failure to consider, defective consideration or inconsistency with international obligations do not invalidate authorisations or the exercise of certain powers be removed (sections 22A, 75A);
- That the proposed sections excluding natural justice from the authorisation and exercise of certain powers be removed (sections 22B, 75B); and
- The proposed exclusion from AD(JR) Act review of the Minister's decisions under section 75D, 75F or 75H be omitted (Part 2, Item 31).

#### Schedule 2

- As TPVs are subject to inherent limitations, if they are to be reintroduced, they should only constitute a form of 'bridging visa' while people await the

determination of their claim, rather than the final outcome once an individual has been found to engage the protection obligations;

- That holders of all types of non-permanent visas are eligible to apply for permanent protection if they are still found to be owed protection after the expiration of their first term of temporary protection;
- That holders of permanent and temporary visas are permitted to sponsor family members to migrate to Australia, including unaccompanied minors sponsoring their parents or next of kin;
- That holders of temporary visas are permitted to depart and return to Australia in exceptional circumstances, such as the death or imminent death of a family member; and
- Criteria are provided for a SHEV to be included in the body of the Bill as it is in relation to TPVs, preferably as an independent class of visa.

## Schedule 4

- Free independent legal advice for fast tracked applicants should be provided;
- The proposed amendments under Subdivision C be amended to ensure that the Immigration Assessment Authority (IAA) has a duty to consider all new information and evidence provided by the Applicant, including any new claims for protection, new information provided orally or in writing, and any further primary or secondary evidence;
- The written reasons provided pursuant to new sub-section 474EA(1) are sufficiently detailed, and that a minimum quota of publishable decisions be

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determined by Parliament to ensure that the Public has access to a range of varied decisions;

- The new sub-section 473FA(1) be amended to include the word 'fair';
- The amendments should extend the jurisdiction of the Federal Circuit Court to include judicial review of screening out decisions which are affected by jurisdictional error;
- The Committee recommend the reinstatement for Immigration Advice and Application Assistance Scheme (IAAAS) funding for all applicants subject to the 'fast track' process, including the IAA, process; and
- The definition of 'excluded fast track review applicant' is removed from the Bill, or in the alternate:
  - Sub-sections 5(1)(a)(ii) to (iv), as well as (v) and (vi) be removed from the definition;
  - Greater guidance is provided around the meaning of 'reasonable explanation', 'manifestly unfounded claim' and 'bogus documents'. Any such guidance – for example, in the Explanatory Memorandum – must not detract from the fact that applications must be assessed on an individual basis, according to the applicant's particular claims.
  - The Minister be required provide an explanation to the applicant of why their documents are considered bogus, or their claims are considered manifestly unfounded, and be provided with an opportunity to respond;
  - The obligation to put adverse information to the applicant at sub-sections 57(1)(a) and (3)(b) is broadened beyond the provision of personal information to material that was relied upon by the decision maker, such as country information;
  - Excluded fast track review applicants have access to the Refugee Review Tribunal (RRT), or at the very least, access to an independent merits review system such as the existing Independent Protection Assessment system, insofar as this is in accordance with Australia's international obligations; and
  - The benefit of informing fast track applicants of what review pathways are open to them pursuant to new subsections 66(2)(e) and (f) extend to excluded fast track review applicants concerning information about judicial review in addition to information that the decision is not merits reviewable.

## Schedule 6

- Consider the ways in which procedural fairness can be guaranteed to these children. For example, the Explanatory Memorandum should be amended to make it explicit that, pursuant to proposed sub-section 198(1C) at Item 7 of Part 1, if a child is mandatorily removed (who also is effectively temporarily in Australia), then removal of the mother or child should only occur if neither mother nor child 'needs to be in Australia'. Although these needs may be linked, both the mother and child should have those potential needs recognised; and

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- The proposed amendments should not apply retrospectively.

## Introduction

11. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) as part of its inquiry into the provisions of the Bill.
12. The Bill was introduced into the House of Representatives on 25 September 2014 and forms part of the Coalition Government's Operation Sovereign Borders Policy which it has sought to implement in legislation<sup>4</sup> since outlining its key features prior to

the 2013 Federal Election.<sup>5</sup> This Bill amends a range of legislation.<sup>6</sup>

13. This submission is based on and reiterates the position adopted in the Law Council's Policy, approved on 6 September 2014. Given its Directors' support for the principles contained in the Policy, which are based on international law and rule of law principles, this submission highlights the degree to which the Bill's provisions comply with the Policy principles. In addition, the submission highlights the critical need for legal advice for asylum seekers which it urges the Committee to carefully consider in its inquiry into the Bill.

14. The submission focuses in particular on Schedules 1, 2, 4, 5, and 6 of the Bill. The Law Council has not been able to comment on every aspect of the Bill and an absence of comment should not be taken as endorsement of those measures. The

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The Bill follows the introduction of the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 on 4 December 2013; the Migration Amendment (Visa Maximum Numbers Determinations) Bill 2013 on 9 December 2013; the Migration Amendment Bill 2013 on 12 December 2014 (which received Royal Assent on 27 May 2014); the Migration Amendment Bill (No. 1) 2014 [Provisions] on 27 March 2014; the Migration Amendment (Character and General Visa Cancellation) Bill 2014 on 24 September 2014; and the Migration Amendment (Protection and Other Measures) Bill 2014 on 25 September 2014. The Government has also introduced legislative instruments, such as the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 that was made on 12 December 2013 and was open to disallowance to 14 July 2014, when the motion to disallow was voted down in the Senate: Commonwealth, Parliamentary Debates: Proof, Senate, 14 July 2014, 80-6, available at:  
[http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/toc\\_pdf/Senate\\_2014\\_07\\_14\\_2666.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/0000%22](http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/toc_pdf/Senate_2014_07_14_2666.pdf;fileType=application%2Fpdf#search=%22chamber/hansards/1ff3c533-adda-4fbc-8fc3-2e90e18c76eb/0000%22). For the Law Council's submissions, see: Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, 4 August 2014 ('Protection Bill submission'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2871-\\_Migration\\_Amendment\\_Protection\\_Obligations\\_and\\_Other\\_Measures\\_Bill\\_2014.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2871-_Migration_Amendment_Protection_Obligations_and_Other_Measures_Bill_2014.pdf) and Law Council of Australia, Supplementary Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Protection and Other Measures) Bill 2014, 10 September 2014, available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2889\\_-\\_Migration\\_Amendment\\_Protection\\_Obligations\\_and\\_Other\\_Measures\\_Bill\\_2014\\_-\\_Supplementary\\_Submission.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2889_-_Migration_Amendment_Protection_Obligations_and_Other_Measures_Bill_2014_-_Supplementary_Submission.pdf); and Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, 23 January 2014 ('Protection Obligations submission'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-2774-MigrationAmendmentRegainingControlOverAustraliasProtectionObligationsBill2013.pdf>. The Law Council has recently provided the Senate Legal and Constitutional Affairs Legislation Committee in support of the submission made to the Committee on this Bill by one of its Constituent Bodies, the Law Institute of Victoria.

5

Liberal Party of Australia and The Nationals, The Coalition's 'Operation Sovereign Borders' Policy (July 2013).

6

The Bill amends the following legislation: the Migration Act 1958 (Cth), the Migration Regulations 1994 (Cth); the Maritime Powers Act 2013 (Cth), the Immigration (Guardianship of Children) Act 1946 (Cth) and the Administrative Decisions (Judicial Review) Act 1977 (Cth).

#### Page 8

New South Wales Bar Association (NSW Bar) has provided detailed commentary on various aspects of the Bill, which complements the Law Council's submission.

#### Key Features of the Bill

15. In addition to amending various legislative instruments, the Bill also aims to give legislative effect to a number of the Government's asylum seeker policies including introducing 'fast track' processing and re-introducing Temporary Protection Visas (TPVs). It also responds to a number of recent judicial decisions and proceedings.<sup>7</sup>

16. The Bill is long and complex. It contains the following Schedules of Amendments:

- Schedule 1—Amendments relating to maritime powers;
- Schedule 2—Protection visas and other measures (including the provisions that reintroduce TPVs);
- Schedule 3—Act-based visas;
- Schedule 4—Amendments relating to fast track assessment process (this includes the establishment of a new IAA);
- Schedule 5—Clarifying Australia's international law obligations (this includes changes to removal powers and changes to the definition of 'refugee');
- Schedule 6—Unauthorised maritime arrivals and transitory persons: newborn children; and
- Schedule 7—Caseload management.

17. The Bill follows the introduction of other amendments to the Migration Act that also relate to the assessment of protection visa claims and the rights of protection visa applicants, which have also been the subject of Law Council submissions to this Committee.<sup>8</sup>

#### The Law Council's Asylum Seeker Policy

18. The Law Council's Policy was settled by the Law Council's Directors on 6 September 2014 following consultation with its Constituent Bodies and Committees and extensive consideration of Australia's international obligations and rule of law principles. As outlined in the Policy, the Law Council believes that all people seeking Australia's protection should be treated with humanity and dignity.

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These include: Plaintiff M61/2010E v Commonwealth of Australia [2010] HCA 41 and Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; Plaintiff M150 of 2013 v Minister for Immigration and

Border Protection [2014] HCA 25 and Plaintiff S297/2013 v Minister for Immigration and Border Protection [2014] HCA 24; CPCF v Minister for Immigration and Border Protection and Anor, concerning 157 asylum seekers detained on the High Seas by Australian authorities and subsequently transferred to Nauru. The matter was before the full court of the High Court of Australia on 14-15 October 2014 and judgment is pending; and Plaintiff B9/2014 v Minister for Immigration [2014] FCCA 2348 concerning the legal status of baby Ferouz, born to Rohingya asylum seekers in Brisbane in November 2013, on appeal to the Federal Court.

8

See above n 1.

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19. The Policy highlights the relevant rule of law and international human rights law principles that ought to be observed when developing and implementing laws and policies concerning asylum seekers. It reiterates the position that every person has a legal right to seek and enjoy asylum from persecution – a right that is protected under the Universal Declaration of Human Rights and other international conventions to which Australia is a party.<sup>9</sup> Chief among Australia's obligations is the principle of non-refoulement, which prohibits states from returning refugees to countries where his or her life or freedoms are threatened.
20. The Policy makes the point that to be effective and sustainable, Australia's laws, regulations and policies must be developed with due regard to regional efforts to address irregular migration. Further, the conditions of immigration detention must also be humane and dignified. The Policy takes into account the legal framework that applies to the interception of boats carrying asylum seekers by Australian authorities.

#### Legal advice

21. The Law Council's Policy stipulates that all people seeking protection in Australia should have access to legal assistance to understand their legal rights and the legal processes that apply to the determination of their protection status.<sup>10</sup>
22. This issue is critical in the context of the current Bill, particularly given:
  - a. Its proposed fast track processes – which involve substantially reduced (or excluded) review rights, the exercise of Ministerial discretion early in the process, and a very limited ability to introduce new material later in the process; and
  - b. The reintroduction of TPVs, which require claims to be made afresh every three years and will involve a substantial administrative burden. Without legal assistance, Australian immigration officials will be left to make decisions on poorly prepared and incomplete applications.
23. Such changes combine with other recently introduced complex, and often retrospective legislative amendments, such as those proposed in the Migration Amendment (Protection and Other Measures) Bill 2014 (the Protection Bill), which proposes to place the onus on the applicant to demonstrate his or her claim.<sup>11</sup>
24. The Law Council holds very serious concerns that protection visa applicants will have little capacity to understand these and other changes that affect them – including what forms of protection they can validly apply for; the requirements and obligations for setting out their claims; the process for assessment; their rights of

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Art 14 of the Universal Declaration on Human Rights, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810, (10 December 1948) ('UDHR'). See also the Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention'); the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR'); the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991) ('Second Optional Protocol to the ICCPR'); the 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) ('the CAT'); and the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990) ('the CROC').

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LCA Policy at [5], [7(b)], [9(c)] and [10(c)].

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Protection Bill, Schedule 1, Part 1, Item 1, new s 5AAA.

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review; their ability to be reunited with their immediate family members; their long term protection options; and the likelihood of removal.

25. The inherent risk is that an applicant with a legitimate claim will nevertheless fail and be returned. The Law Council considers it to be essential to help mitigate this risk, and to aid administrative efficiency, that the Australian Government provide asylum seekers with publicly funded legal advice early in the application process.
26. If passed, this Bill will highlight the Council's concerns regarding the IAAAS and Primary Application Information Service (PAIS).

#### The Immigration Advice and Application Assistance Scheme

27. On 31 March 2014, the Government announced the removal of all funding for people arriving in Australia without a valid visa, including arrivals by boat. The Law Council has previously opposed the removal of funding from the IAAAS.<sup>12</sup> Until its removal, limited forms of migration and legal assistance were available to asylum seekers in Australia.
28. The Law Council considers that the IAAAS is a necessary measure to protect and promote the rule of law. It is also a mechanism to ensure that the proposed fast track assessment process in Schedule 4 of the Bill – designed to improve efficiency and add clarity to the existing system – operate effectively, particularly given the complexity of proposed legislative reform.

PAIS

29. The Law Council acknowledges that the Government has commenced a tender process for the provision of 'additional support' to particularly 'vulnerable' asylum seekers, including unaccompanied minors,<sup>13</sup> known as the PAIS.
30. Only a small number of asylum seekers will be eligible for PAIS, to be determined at the discretion of the Department of Immigration and Border Protection (the Department). PAIS Providers will not play a role in determining eligibility.
31. Although it is unclear at this stage what exactly this support entails, the Law Council generally welcomes the PAIS, as it considers that independent, professional advice is urgently needed particularly for those most vulnerable protection visa applicants. However, a number of key aspects of the PAIS remain unclear. The Law Council suggests the Committee seek clarification on whether the PAIS will apply to, in particular, those affected by Schedules 2 (Temporary Protection Visas) and 4 (fast track processing). The Law Council considers that for the PAIS to be effective, the following issues should be addressed:
- The 'additional support' to be provided under the scheme must prioritise independent legal advice;

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Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409--\\_Law\\_Council\\_concerned\\_by\\_removal\\_of\\_IAAAS\\_Funding.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409--_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf).

13

The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (Media Release, 31 March 2014), available at: <http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>

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- How officials at the Department will determine whether a person who falls within one of the stated categories will meet requirements and be referred to the PAIS;
  - Knowing whether all unaccompanied minors, or families with young children will have access to the PAIS. The growing body of evidence<sup>14</sup> confirms the particular vulnerability of children in immigration detention environments or those issued with short term, temporary visas such as bridging visas;
  - Why only the Department is able to make referrals to the PAIS. In contrast in the IAAAS scheme applicants could self-nominate for assistance. Also there may be systemic benefit if independent experts were able to make referrals to the PAIS, or make referral suggestions to the Department; and
  - Why the best interests of the Government is a criterion for the grant of legal assistance, marking a significant departure from the principles of access and equity that underpin legal aid generally. Eligibility of applicants for PAIS will be determined by the Department, including for cases in which assistance with resolution of protection claims would otherwise be in the best interest of the Government.
32. The Law Council strongly encourages the Committee to consider and to recommend remedies to address asylum seekers' lack of access to legal advice in its inquiry into the Bill.

#### Schedules of the Bill

##### Schedule 1 – Maritime Powers

33. The Law Council questions the extension of Executive power, the removal of procedural fairness guarantees, limitations on the court's ability to invalidate Executive actions, and the undermining of Australia's compliance with its international obligations which are proposed under this Schedule.

#### Overview

34. This Schedule extends the power of the Executive to stop asylum seeker boats at sea, to detain them for potentially long periods, and take them to another country, regardless of whether there is an agreement with the particular country in place. It restricts the court's capacity to invalidate government actions at sea, provides that the rules of natural justice do not apply to certain key actions, and suspends Australia's international obligations in the context of powers exercised under the Maritime Powers Act 2013 (Cth).
35. Specifically, the Bill removes the reference in the Maritime Powers Act to the limitation of the exercise of powers outside Australia in accordance with international law.<sup>15</sup> In particular, the Bill provides the following:

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This evidence is currently being reviewed by the Australian Human Rights Commission as part of its National Inquiry into Children in Immigration Detention 2014, due to report shortly. Details of the Inquiry are available at: <https://www.humanrights.gov.au/national-inquiry-children-immigration-detention-index>

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Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) ('Caseload Bill') at Schedule 1, Part 1, Item 1.

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- An authorising officer<sup>16</sup> authorising maritime powers (including, for example, the detention and transfer of persons intercepted at sea)<sup>17</sup> is not required to consider Australia's international obligations (including, for example, the principle of non-refoulement), or the international obligations or domestic law of another country.<sup>18</sup> This also applies in relation to the exercise of certain maritime powers (including the powers to detain and transfer persons);<sup>19</sup>

- An authorisation of maritime powers is not invalid because of a defective consideration by the authorising officer of Australia's international obligations, or the international obligations or domestic law of another country.<sup>20</sup> This also applies in relation to the exercise of certain maritime powers;<sup>21</sup> and
  - An authorisation of maritime powers is not invalid if it is inconsistent with Australia's international obligations.<sup>22</sup> This also applies in relation to the exercise of certain maritime powers.<sup>23</sup>
36. The Minister's power is extended in relation to the removal and detention of a vessel or aircraft to a place either inside or outside the migration zone for such time until a decision is made on the destination of the vessel, or the Minister exercises his or her discretion under the Act.<sup>24</sup> The Minister may also give directions about powers exercised by maritime officers concerning detaining and moving vessels, aircraft and other conveyances, and the people therein – pursuant to sections 69, 69A, 71, 72 and 72A – provided that it is 'in the national interest' (section 75F(5)).
37. Maritime powers are also extended and created for maritime officers concerning detention on a vessel, and the destination of that vessel. This allows a vessel or aircraft to be detained for any period reasonably required to decide on the destination; to consider whether the destination is to be changed; to enable the Minister to make a determination under certain powers; to travel to the destination; or to make and put into effect arrangements relating to a person's release.<sup>25</sup>
38. Furthermore the Bill clarifies that a continuous exercise of powers does not end merely because the destination to which a vessel, aircraft or person is to be taken (or caused to be taken) is changed.<sup>26</sup> The effect of this amendment is to avoid any doubt that a change of destination by maritime officers under subsections 69(3A) or 72(4B) could interrupt the continuous exercise of powers. This may include pausing a journey to a destination for operational reasons.

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Maritime Powers Act 2013 (Cth) s 16(1).

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Ibid pt 3. This includes powers with regard to: boarding vessels, installations and aircraft; entering on land; obtaining information; search; things found or produced; detaining vessels, aircraft and other conveyances; placing and moving persons; arrest; and, requiring conduct to cease.

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Caseload Bill, Schedule 1, Part 1, Item 6, new s 22A(1)(a).

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Ibid Item 19. Pursuant to new s 75A(1)(a), namely the exercise of powers under new ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

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Ibid Item 6, new s 22A(1)(b)

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Ibid Item 19. Pursuant to new s 75A(1)(b), namely the exercise of powers under ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

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Ibid Item 6, new s 22A(1)(c)

23

Ibid Item 19. Pursuant to new sub-s 75A(1)(c), namely the exercise of powers under ss 69, 69A, 71, 72, 74, 72A, 75D, 75F, 75G or 75H.

24

Ibid. Pursuant to new ss 75D (exercising powers between countries); 75F (the Minister's directions about exercise of powers) and associated 75G (compliance with directions given under 75F); or 75H (certain maritime laws do not apply to certain vessels detained or used in the exercise of powers)

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Ibid Items 15-19. See, for example: new sub-s 72(3) and (4) and associated amendments; new s 72A; and new s 75C.

26

Ibid Item 5: amends s 11 of the Maritime Powers Act 2013 (Cth).

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39. The rules of natural justice do not apply to the authorisation of, or exercise of, certain maritime powers.<sup>27</sup> The court's ability to declare certain Executive and non-Executive actions invalid is further limited by:
- a. Those provisions which state that the authorisation or exercise of certain maritime powers is not invalid due to, for example, a failure to consider Australia's international obligations, or the international obligations or domestic law of another country;<sup>28</sup> and
  - b. The exclusion from review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (AD(JR) Act) – of decisions by the Minister under sections 75D<sup>29</sup>, 75F<sup>30</sup> and 75H.<sup>31</sup> For example, this includes directions given by the Minister about the exercise of powers including the detention of persons, or taking them to a destination.

40. Further changes under this Schedule include that the Minister's guardianship under the Immigration (Guardianship of Children) Act 1946 (Cth) does not apply to children detained or moved outside Australia in vessels, aircraft or other conveyances under the Maritime Powers Act.<sup>32</sup>

The Law Council's Policy - naval interdiction and summary return

41. This Schedule is inconsistent with the Law Council's Policy.<sup>33</sup> The Law Council considers that all rescues, interdictions, interceptions, 'push-backs', 'tow backs', and transfers of persons at sea by Australian government personnel of vessels carrying suspected irregular arrivals should comply with the international law of the sea, international refugee law, and international human rights law.
42. The Law Council considers that every person rescued or intercepted at sea by Australian personnel who expresses a fear for their safety if returned to their country of origin has a right to access effective procedures for the determination of their refugee or complementary protection claims.<sup>34</sup> Transferring at sea a person claiming protection to the authorities of the state from which the person fears harm, without processing the person's claim in accordance with minimum international standards on the determination of refugee status, risks refoulement.<sup>35</sup>

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Ibid Item 6 and 19, new s 22B, which relates to the authorisation powers under Division 2 of Part 2, and new s 75B, which relates to the exercise of powers under section 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H.

28 Ibid, new ss 22A, 75A.

29 Ibid Item 19, new s 75D (exercising powers between countries).

30 Ibid. Under new s 75F, the Minister may give directions about exercise of powers including the detention of a vessel or aircraft (s 69 of the Maritime Powers Act 2013 (Cth)), taking a vessel or aircraft to a destination (new s 69A), placing or keeping persons (s 70 Maritime Powers Act 2013 (Cth)), detaining persons on vessels or aircraft and taking them to another destination (s 72 Maritime Powers Act 2013 (Cth)), and additional provisions relating to taking a person to a destination (new s 72A),

31 Ibid, new s 75H (certain domestic maritime laws do not apply to certain vessels detained or used in exercise of powers).

32 Ibid, Schedule 1, Part 2, Items 32-5.

33 LCA Policy. See specifically, [21]-[24].

34 Pursuant to the Refugee Convention; the ICCPR; the Second Optional Protocol to the ICCPR; the CROC and, the CAT.

35 The principle of non-refoulement and other relevant obligations in Conventions to which Australia is party apply to all people seeking asylum in Australia regardless of their mode or time of arrival. These obligations are set out at LCA Policy at [7]. Australia's obligations apply whenever Australia exercises 'effective control' over people within its jurisdiction, including on the High Seas. The International Court of Justice considered this issue in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136. In doing so, it referred to Communications made by the United Nations Human

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43. Expedited asylum processing (including 'enhanced screening') at sea of persons rescued or intercepted at sea may not meet minimum international standards. Indeed, the summary maritime expulsion or return of a person claiming protection to the frontiers of a third country which lacks effective asylum procedures may amount to indirect refoulement.<sup>36</sup> This would include summary return on an interdicted vessel, by transfer onto a life boat or other vessel (including the vessel of a third state or a private or commercial vessel).

44. The Policy also states that the following obligations arise in respect of naval interdiction and summary return:

- a. Ensuring the safety of life at sea;<sup>37</sup>
- b. Treating all people in its custody or control humanely;<sup>38</sup> and
- c. Respecting freedom of navigation on the high seas.<sup>39</sup>

The Law Council's Policy - sovereign nations

45. The Law Council's Policy stipulates that Australia must respect the sovereign maritime boundaries and areas of other countries.<sup>40</sup>

46. Proposed sections 22A and 75A provide that the authorisation/ exercise of certain maritime powers is not invalid because of a failure to, or defective consideration of, Australia's international obligations, or the international or domestic obligations of another country; or if it is inconsistent with Australia's international obligations. This includes the power to detain asylum seekers at sea and take them to another country, regardless of whether an agreement with the country is in place. The Law Council agrees with the NSW Bar's comments that these sections increase the likelihood that the exercise of powers under the Maritime Powers Act will violate Australia's obligation to respect the sovereignty of other States.

47. The NSW Bar also considers that new section 75C increases the likelihood that the exercise of powers under the Act will violate Australia's obligation to respect the sovereignty of other States and will contravene Article 2(4) of the Charter of the United Nations, in the same respect as proposed new section 22A. The NSW Bar does not consider that section 75C(2) – that requires compliance with section 40 if the destination is 'in' another country – is an adequate safeguard against the Maritime Powers Act being exercised in a manner which involves the violation of the

Rights Committee (HRC), such as in *Lopez Burgos v Uruguay* (at [109]). In that case, the HRC found that 'jurisdiction' is not spatial, but rather, it is personal and based on the 'relationship between the individual and the State in relation to a violation of any of the rights set forth in the [ICCPR], wherever they occurred' – see: *Lopez Burgos v Uruguay*, UN Doc CCPR/C/13/D/52/1979 (29 July 1981) 176, [12.2].

36 Hirsi Jamaa and Others v Italy, App. No. 27765/09, European Court of Human Rights, 23 February 2012.

37 Art 98(1) of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('UNCLOS'). See also Chapter V, Reg 33(1) of the International Convention for the Safety of Life at Sea, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

38 See, for example: UDHR, ICCPR (Articles 2, 7 and 10) and the International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976) ('the ICESCR').

39 Article 110 UNCLOS: Interference with the freedom of navigation of foreign vessels outside territorial sea is only permissible under treaty arrangements (including in the case of rescue at sea), with authorisation of the flag State, or in cases such as slave trading or piracy.

40 Article 2 of the UNCLOS provides that the sovereignty of a coastal state extends to its territorial sea. Under UNCLOS coastal states also enjoy certain rights in their contiguous and exclusive economic zones.

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sovereignty or territorial integrity of other States or the violation of Article 2(4) of the

## Charter of the United Nations.

48. Further, under the law of State responsibility, which determines the responsibility under international law for the actions of State and non-State actors, Australia will be responsible for the actions of any vessel and its master or crew, acting in accordance with a direction given under the Maritime Powers Act. The actions of the vessel, master and crew will be treated, under international law, as acts of the State of Australia. Accordingly, where a vessel, acting under a direction issued under the Act, enters the territory of another State without authorisation, including the territorial sea of that State, Australia will be responsible under international law for the violation of that State's territorial integrity.<sup>41</sup>

## The Law Council's Policy - detention

49. The Law Council's Policy stipulates that Australia must refrain from arbitrarily or unlawfully detaining asylum seekers contrary to international human rights law,<sup>42</sup> including by incommunicado detention. It further emphasises that detention of asylum seekers should not be discriminatory (e.g. based on the country of origin, the mode or manner of a person's arrival into Australia); maximum limits should be imposed to guard against indefinite detention; decisions to detain should be subject to procedural safeguards including procedural fairness guarantees and the ability to challenge the lawfulness of the detention, Executive decisions concerning the detention should be subject to judicial review; and detention of children is unlikely ever to comply with the 'best interests of the child'.<sup>43</sup>

50. The Schedule's proposals do not accord with these principles in a number of ways. As the NSW Bar has noted, new section 72A expands the existing powers of maritime officers to detain persons without any due process or review. This is not consistent with the prohibition on arbitrary detention under Article 9 of the International Covenant on Civil and Political Rights (ICCPR) or the United Nations High Commissioner for Refugees (UNHCR) Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, which state that asylum seekers should only be detained as a measure of last resort;<sup>44</sup> the Law Council's Policy<sup>45</sup> or its Principles Applying to the Detention of Asylum Seekers.<sup>46</sup> The proposed detention power is open-ended other than the requirement that the detention period be 'reasonably required'. There is the potential for prolonged periods of detention. If this power is to be retained it should be subject to a maximum time period to encourage expeditious decision-making and judicial oversight mechanisms (for example, the Schedule proposes that where the Minister makes a direction concerning this power, it will not be subject to judicial review under the AD(JR) Act).<sup>47</sup>

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Such violation will involve a breach of Article 2(4) of the Charter of the United Nations, which is a breach of a peremptory norm under international law and one of the most serious breaches of international law in which a State may engage.

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Article 9 ICCPR.

43

LCA Policy at [10].

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Office of the United Nations High Commissioner for Refugees, 'Detention Guidelines: guidelines on the Applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention' (2012), Guideline 4.1 [28], available at: <http://www.unhcr.org/505b10ee9.html>.

45

LCA Policy at [10(b)].

46

Law Council of Australia, Policy Statement: Principles Applying to the Detention of Asylum Seekers, 22 June 2013 ('LCA Detention Statement'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final\\_PDF\\_18\\_Oct\\_Asylum\\_Seekers\\_Principles.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf).

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Caseload Bill, Schedule 1, Part 1, Item 19, new ss 72A, 75F and Part 2, Item 31.

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## The Law Council's Policy - non-refoulement

51. The Law Council's Policy stipulates that Australian authorities must respect the obligation of non-refoulement (including by transfers at sea to a vessel of the country of origin).
52. The Law Council acknowledges that the Government wishes to clarify the scope of its obligations under international law.<sup>48</sup> However, it considers that the Schedule does not accord with rule of law principles<sup>49</sup> or Australia's voluntarily assumed international obligations.
53. International human rights instruments to which Australia is party<sup>50</sup> do not automatically give rise to enforceable legal rights or obligations under Australian domestic law.<sup>51</sup> While it is within the power of the legislature to decide to change the application of international obligations,<sup>52</sup> Australia may be liable at the international level for breaches of instruments to which it is party. Although there may be practical limitations on the level to which some of these obligations can be enforced, there are a variety of mechanisms for promoting compliance with international obligations.<sup>53</sup> In his inaugural speech to the United Nations Human Rights Council on 8 September 2014, the United Nations High Commissioner for Human Rights stated:

Australia's policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human

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Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) ('Explanatory Memorandum'), available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346\\_ems\\_a065619e-f31e-4284-a33e-382152222022%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346_ems_a065619e-f31e-4284-a33e-382152222022%22). The Explanatory Memorandum (at 17) provides that the omission of 'In accordance with international law, the exercise of powers is limited in places outside Australia' in s 7 of Div 2 of Part 1 of the Maritime Powers Act 2013 (Cth) is for the purpose of merely reflecting that 'intention that the interpretation and application of such obligations is, in this context, a matter for the executive government, noting that the executive government is accountable to the international community for its compliance with those obligations'.

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See: Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf> ('LCA Rule of Law Principles'). For example: Principles 2 (the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds), 4 (everyone should have access to competent and independent legal advice), 6 (the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law), 7 (no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being) and 8 (States must comply with their international legal obligations whether created by treaty or arising under customary international law).

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Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. The instruments include: the Refugee Convention; the ICCPR; the ICESCR; the CAT; and the CROC.

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Minister for Immigration v Teoh (1995) 183 CLR 273 and Dietrich v The Queen (1992) 177 CLR 292.

52

See for example: Al-Kateb v Godwin (2004) 208 ALR 124, [19] (Gleeson CJ): 'Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.'

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For example, the United Nations Human Rights Committee may consider individual communications alleging violations of the rights set forth in the ICCPR by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), pursuant on the conditions set out at art 5(2). Equivalent complaints procedures are available under other instruments.

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rights violations, including arbitrary detention and possible torture following return to home countries.<sup>54</sup>

54. The NSW Bar also observes that proposed new section 75C is inconsistent with Australia's non-refoulement obligations.

55. The NSW Bar considers that sub-sections 69(2)-(3A) – that expressly allow maritime officers to take vessels to places outside Australia without consideration of whether this would result in refoulement or otherwise place people's lives at risk – is likely to result in breaches of Articles 32 and 33 of the Refugee Convention. It further notes there is no prohibition on returning people to countries that are not a signatory to the Refugee Convention. Further, the fact that such actions will occur outside of Australian waters does not obviate Australia's obligations under international law. <sup>55</sup>

The Law Council's Policy - Executive power

56. The Law Council's Policy stipulates that, in order to comply with the rule of law:

- a. Executive discretion relating to the detention of asylum seekers must be subject to prescribed limits and to judicial review;<sup>56</sup> and
- b. Australian authorities must provide accessible, timely and effective remedies for alleged violations of Australia's international human rights law obligations.<sup>57</sup>

57. Proposed new sections 22B and 75B provide that the rules of natural justice do not apply to certain actions<sup>58</sup>. This removes protection against wrongful decision making. In particular, the NSW Bar has suggested that these proposed amendments could risk breaching Article 32 of the Refugee Convention, which provides that a refugee may only be expelled after due process has been followed. This is contrary to what the NSW Bar understands to be the principle in Plaintiff M70/2011 v Minister for Immigration and Citizenship – that persons who claim to have a well-founded fear of persecution should not be returned to the country from which they fled unless their claims have been assessed and rejected.<sup>59</sup>

58. Proposed amendments to the Schedule 1 of the AD(JR) Act seek to exclude review by the Federal Court of decisions by the Minister under sections 75D60, 75F61 and 75H62 and conflicts with the Law Council Policy.

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Mr. Zeid Ra'ad Al Hussein, 'Opening Statement' (Speech delivered at the Human Rights Council 27th Session, Geneva, 8 September 2014) 7, available at: [http://hrc.org.au/wp-content/uploads/2014/09/AdvancedCopy\\_HRCOpeningStatement\\_Sep2014.pdf](http://hrc.org.au/wp-content/uploads/2014/09/AdvancedCopy_HRCOpeningStatement_Sep2014.pdf).

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For example, Committee Against Torture, Decision: Communication No. 323/2007 UN Doc CAT/C/41/D/323/2007 (11 November 2008) ('JHA v Spain'), [8.2]. The Committee found that Spain had obligations under the CAT in respect of persons rescued by Spain in international waters. By parity of reasoning, the same obligations apply under the ICCPR and the Refugee Convention.

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LCA Policy at [10(b)].

57

Ibid at [22(g)]. See also Article 2 ICCPR.

58

Caseload Bill, Schedule 1, Part 1, Items 6 and 19. Namely, Division 2 of the Maritime Powers Act 2013 (Cth), concerning the authorisation of the exercise of maritime powers – new s 22B; and the exercise of powers under ss 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H – new s 75B.

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(2011) 244 CLR 144 at [94], [215], [233] and [237].

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Ibid Item 19, new s 75D (exercising powers between countries)

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Ibid. Under new s 75F, the Minister may give directions about exercise of powers including the detention of a vessel or aircraft (s 69 of the Maritime Powers Act 2013 (Cth)), taking a vessel or aircraft to a destination (new s 69A), placing or keeping persons (s 70 Maritime Powers Act 2013 (Cth)), detaining persons on vessels

59. As the NSW Bar points out, without recourse to the Federal Court, litigants will have to bring any judicial review challenges in the High Court, based on common law judicial review principles. This is likely to increase the costs and delays to all parties, compared to the more efficient and streamlined judicial review procedures available in the Federal Court which should be available.

#### The Law Council's Policy - retrospectivity

60. The Law Council questions the need for retrospective application of the proposed amendments. This is contrary to the Law Council's Policy<sup>63</sup>. Retrospectivity has the potential to unfairly:

- a. Penalise persons for taking actions which were lawful at the time that they were taken; and
- b. Sanction actions which were unlawful at the time, depriving innocent parties of their legitimate entitlement for redress for breach of the law.

#### Recommendation

61. The Law Council suggests that the Committee recommend that this Schedule not be enacted.

62. If the Committee is minded to recommend the Schedule, the Law Council suggests that the Committee recommend:

- That the Schedule should not apply retrospectively;
- That the proposed sections stating that the failure to consider, defective consideration or inconsistency with international obligations do not invalidate authorisations or the exercise of certain powers be removed (sections 22A, 75A);
- That the proposed sections excluding natural justice from the authorisation and exercise of certain powers be removed (sections 22B, 75B); and
- The proposed exclusion from AD(JR) Act review of the Minister's decisions under section 75D, 75F or 75H be omitted (Part 2, Item 31).

#### Schedule 2 – Temporary Protection Visas

63. The Law Council acknowledges the urgent need for the Government to deal with the many thousands of asylum claims that have yet to be fully assessed. It supports an efficient, fair approach to the assessment of protection claims and welcomes efforts to bring certainty and dignity to the lives of vulnerable men, women and children. It supports access to work rights, and also acknowledges that TPVs are a step to ensure people, and especially families with children are out of restricted detention environments.

or aircraft and taking them to another destination (s 72 Maritime Powers Act 2013 (Cth)), and additional provisions relating to taking a person to a destination (new s 72A),

62 Ibid, new s 75H (certain domestic maritime laws do not apply to certain vessels detained or used in exercise of powers).

63 LCA Policy at [9(f)].

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64. However, the current proposal for TPVs is inconsistent with the Law Council's Policy. The Law Council questions the necessity of the reintroduction of TPVs for those found to genuinely invoke Australia's protection obligations, as they do not provide durable protection outcomes, potentially contribute to mental health issues as a result of associated uncertainty and family separation; result in an administrative burden on government and may not have the desired deterrent effect.<sup>64</sup> If TPVs are to be reintroduced, to be consistent with international obligations, the Law Council would support them as only constituting a form of 'bridging visa' while people await the determination of their claim. However, they should not be supported as the final outcome once an individual has been found to engage the protection obligations.

#### Overview

65. This Schedule seeks to reintroduce TPVs and to introduce a new category of visa, the Safe Haven Enterprise Visa (SHEV).

66. The changes to the Migration Act under this Schedule include:

- Expansion of the meaning of 'protection visa' to include permanent protection visas, TPVs and any other class of permanent or temporary protection visas so prescribed by the Migration Regulations;<sup>65</sup>
- Applicability of these changes to the definition of protection visas to applications that have not been finally determined;<sup>66</sup> and
- Conversion of visas so that an application for one type of visa can be validly taken to be an application for another type of visa, including that an application for permanent protection visa made whilst an applicant was on a bridging visa can be considered an application for a TPV. The amendments explicitly state that subsection 7(2) of the Acts Interpretation Act 1913 (Cth) – prohibiting certain retrospective measures – does not apply.<sup>67</sup>

67. The effect of these measures is that no asylum seeker who has arrived or will arrive by boat or by air without a valid visa will ever be eligible for a permanent protection visa.

68. This Schedule also makes changes to the Migration Regulations 1994 (Cth), such that TPVs will be issued in respect of all asylum seekers who:

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Department of Parliamentary Services, Parliament of Australia, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Bills Digest No 40, 2014-15) 14 citing Senate Legal and Constitutional Affairs Committee, Answers to Questions on Notice, Immigration and Citizenship Portfolio, Budget Estimates 2012-13, 21-22 May 2012, Question BE12/0265.

65

Caseload Bill, Schedule 2, Part 1, Item 1: see the new definition at s 5(1). See also new s 35A at Item 5.

66 Ibid Item 19.

67

Ibid Part 2, Item 20, new s 45AA. For example, section 7(2) of the Acts Interpretation Act relevantly provides:

If an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:

"(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or

"(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment

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- Hold, or have ever held, a Temporary Protection (Class XD) visa or a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; or
- Hold, or have ever held, a Temporary Safe Haven (Class UJ) visa or a Temporary (Humanitarian Concern) (Class UO) visa; or
- Did not hold a visa that was in effect on the person's last entry into Australia; or
- Are unauthorised maritime arrivals; or
- Were not immigration cleared on the person's last entry into Australia.<sup>68</sup>

69. Under the proposed amendments to the Migration Regulations, TPVs will:

- Be of a duration of three years, after which time a TPV holder can be reassessed for eligibility for a further TPV, involving a fresh analysis of their claim;
- Include unrestricted work rights and access to Medicare and other benefits, subject to Social Security legislation. TPV holders will be required to meet mandatory activity testing requirements but are exempt from activity testing for the first 13 weeks;
- Prevent applicants from sponsoring family members to migrate to Australia, however, a family member can also apply for a TPV at the same time and place as the applicant, where the family member's application is combined with that of the applicant. This measure also applies to unaccompanied minors;
- Prevent departure and return to Australia, as TPVs cease automatically if the holder departs Australia;
- Prevent eligibility for Settlement Services; and
- Permit children of TPV holders to access school education through public schools and through non-government schools.

70. Further, the Explanatory Memorandum to the Bill provides that:

A new visa to be known as Safe Haven Enterprise Visas (SHEV) will be created. Amendments to the Migration Regulations to prescribe criteria for this visa will follow in 2015.

71. The Law Council understands that this visa will be an alternative to TPVs and will encourage 'earning and learning' in regional areas.<sup>69</sup> It will only apply to the 'legacy case load', as asylum seekers who come to Australia by boat in the future are

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Caseload Bill, Schedule 2, Part 4, Item 29.

69

Commonwealth, Parliamentary Debates, House of Representatives, 25 September 2014, 6 (Scott Morrison) ('Second Reading Speech'), available at: [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/a526371b-b2dd-4037-ba7a-649c0c3fb696/0021/hansard_frag.pdf;fileType=application%2Fpdf).

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subject to offshore processing.<sup>70</sup> It will not lead to permanent protection.<sup>71</sup> As the Hon Scott Morrison MP, Minister for Immigration and Border Protection, has explained:

The visa will be valid for five years and, like the TPV, will not include family reunion or a right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies, where they exist, and will have access to the same support arrangement as a TPV holder.

SHEV holders who have worked in regional Australia without requiring access to income support for 3½ years will be able to apply and if they meet eligibility requirements be granted other onshore visas—for example, a family or skilled visa as well as temporary skilled and student visa.<sup>72</sup>

72. The current proposal for TPVs is inconsistent with the Law Council's Policy.<sup>73</sup>
73. The Law Council questions regulatory efforts designed to exclude certain categories of asylum seekers (i.e. unauthorised air or sea arrivals) from ever accessing permanent protection in Australia, regardless of the veracity of their protection claims.
74. In the past, TPVs were a type of visa available to people who arrive in Australia without a visa and were found to be owed protection obligations.<sup>74</sup>
75. The reintroduction of TPVs reignites questions about the administrative burden associated with them. As noted by Dr. Angus Frances, the International Law Section's Migration Law Committee's observer on the Papua New Guinea/Nauru Roundtable:

In terms of the workability of the policy, it was something of a disaster when first implemented because the TPVs had to be renewed every three years. It is resource-consuming enough to determine someone as a refugee once. The amount of resources that would go into determining whether that person is still owed protection on the three year rolling cycle is huge.<sup>75</sup>

76. Further, the Australian Human Rights Commission (AHRC) has stated that the use of such visas (when previously adopted from 1999 to 2008):<sup>76</sup>
- Contribute to ongoing mental health problems by creating uncertainty and insecurity;
  - Can lead to permanent separation of family members and a breach of Australia's obligations to support families to reunify.<sup>77</sup> The AHRC observed

70 Ibid.

71 Ibid.

72 Ibid.

73 LCA Policy at [7]

74 These protection obligations are set out in s 36 of the Migration Act 1958 (Cth).

75 See: Law Council of Australia, 'Asylum seekers and immigration detention' (2013) 7 Law Council Review 17, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LawCouncilReview/Issue%207%20Web.pdf>.76 Australian Human Rights Commission, Tell Me About: Temporary Protection Visas (2013), available at: <https://www.humanrights.gov.au/publications/tell-me-about-temporary-protection-visas>.

77 Article 23 ICCPR; Human Rights Committee, General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), UN Doc HRI/GEN/1/Rev.6, 149 (1990) [3] and [5]

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that restrictions on family reunion and overseas travel may have directly contributed to the increase in the number of family members, particularly women and children, risking their lives by making the boat journey to Australia;<sup>78</sup> and

- Constitute a discriminatory approach to refugee protection as the regime distinguishes between asylum seekers who arrived in Australia with a valid visa (permitted to apply for a permanent protection visa), and those who did not (only eligible for a TPV).
77. UNHCR has criticised Australia's policy of using TPVs and welcomed the end of TPVs in 2008. At that time, UNHCR's Regional Representative, Mr Richard Towle, said the agency had long held concerns about denying refugees access to family reunion and travel rights, stating that the use of TPVs:
- ...also perpetuated uncertainty for refugees who had already suffered enormous hardship, impeding their ability to restart their lives and prolonging the separation of families.<sup>79</sup>
78. While supporting in principle the use of temporary protection stay arrangements in limited situations,<sup>80</sup> UNHCR has said of the European Union's system of offering temporary protection in place of permanent protection for people found to be refugees:
- has a considerable impact on refugees' attitudes. Short-term residence permits are detrimental to refugees' security and stability...Regular reviews with the objective of ending refugee status can create considerable uncertainty, making it difficult for a refugee to focus on the longer term, and are thus not conducive to integration.<sup>81</sup>

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Australian Human Rights Commission (AHRC), A last resort? (April 2004) [16.2.2.], ('A last resort?'), available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf). See also Evidence to the Senate Standing Committee on Legal and Constitutional Affairs (Estimates), Canberra, 24 February 2009, 73 (Senator Chris Evans, Minister for Immigration and Citizenship), available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F1640%2F001%22>. See also: Sue Hoffman, 'Temporary Protection Visas & SIEV X', 6 February 2006, available at: <http://sievx.com/articles/challenging/2006/20060206SueHoffman.html>.

79

United Nations High Commissioner for Refugees, 'UN refugee agency welcomes end of TPVs' (Media Release, 14 May 2008), available at: <http://www.unhcr.org/pdfs/UNHCRwelcomesbudgetannouncementmay08.pdf>.

80

United Nations High Commissioner for Refugees, 'Guidelines on Temporary Protection or Stay Arrangements' (February 2014), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=5304b71c9&query=%22mass%20influx%22%20+tempora>

ry<sup>80</sup>+protection. UNCHR notes that Temporary Protection or Stay Arrangements are suited to the following situations:

- (i) large-scale influxes of asylum-seekers or other similar humanitarian crises;
- (ii) complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios;
- (iii) fluid or transitional contexts [e.g. at the beginning of a crisis where the exact cause and character of the movement may be uncertain, or at the end of a crisis, when the motivation for departure may need further assessment]; and
- (iv) other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity

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United Nations High Commissioner for Refugees, 'Note on the Integration of Refugees in the European Union' (May 2007), available at: <http://www.refworld.org/pdfid/463b24d52.pdf>.

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79. These issues also apply to the current Government's use of TPVs,<sup>82</sup> including the proposed amendments to the Migration Act and Migration Regulations under this Bill.
80. The Law Council considers that its Policy provides a framework that could be utilised to develop a workable approach to the determination of protection claims. For example, a fair, efficient, statutory approach to determining whether someone is a refugee, which allows the person to access independent legal advice, could reduce uncertainty and assist in the timely resolution of claims. Once a person has demonstrated his or her genuine protection needs, durable protection options could be made available without compromising other aspects of the Government's border protection policies.
81. Further, the Law Council questions giving the proposed amendments retrospective operation. As the NSW Bar observes, there is also a common law presumption against retrospectivity of legislation.<sup>83</sup> As such, people who have made a valid visa application, under the state of the law as it stood, should be entitled to enjoy the rights attaching to that application.
82. While this submission does not provide detailed remarks about the SHEV scheme as an alternative to TPVs, the Law Council agrees with concerns raised about whether it is an appropriate pathway for asylum seekers. It agrees that pathways to permanent residency in Australia should not be dependent on the capacity of a refugee to meet skilled visa requirements or the likelihood of refugees qualifying for standard onshore migration visas.<sup>84</sup>
83. In addition to these general observations, the Law Council notes that the Schedule makes a number of technical changes to the Migration Act and Migration Regulations that will result in significant effects on asylum seekers. The NSW Bar has provided a detailed overview of these changes in its submission.
84. In respect of the SHEV, the combined effect of amendments at Item 18 and Item 7 of Schedule 3 is particularly significant. Unless and until the Executive makes a Regulation prescribing criteria for a SHEV (in addition to the criteria in section 36 of the Migration Act), no valid application can be made. As there is no requirement that the Executive specify the criteria for a SHEV within a particular period of time, the Executive could in fact decline to specify the criteria altogether, such that the SHEV

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As part of its election policy, the Government committed to reintroducing TPVs. On 23 September 2013, the Government reintroduced TPVs and on 18 October 2013, the Migration Amendment (Temporary Protection Visas) Regulation 2013 (the 2013 Regulation) entered into force. The Senate, led by the Greens and the Labor Party – who held the balance of power in the Senate at that time, subsequently disallowed the amendment on 2 December 2013. As a result of this disallowance, the Government was unable to reintroduce a similar regulation for another six months. However, any TPVs granted between 18 October 2013 and 2 December 2013 remain in effect. The Government has since asserted that the disallowance of the 2013 Regulation is the reason that the many thousands of outstanding protection claims made by people in immigration detention or on bridging visas have not been processed.

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*Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ

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Refugee Advice and Casework Service, 'Proposed amendments to legislation signal radical shift in Australian refugee law' (Media Release, 14 October 2014), available at: <http://www.racs.org.au/wp-content/uploads/RACS-FACT-SHEET-Asylum-Legacy-Caseload-Bill-Oct-20141.pdf>; Andrew & Renata Kaldor Centre for International Refugee Law, Legislative Brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (2 October 2014), available at: [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative\\_brief\\_migration\\_amendment\\_resolving\\_the\\_asylum\\_legacy\\_caseload\\_final.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_migration_amendment_resolving_the_asylum_legacy_caseload_final.pdf).

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would be nugatory. This differs from the parts of the Migration Act that prescribe criteria for other visas.<sup>85</sup>

#### Recommendation

85. The Law Council suggests that the Committee recommend this Schedule not be enacted.
86. If the Committee is minded to recommend this Schedule, the Law Council suggests that the Committee also recommend:
- As TPVs are subject to inherent limitations, if they are to be reintroduced, they should only constitute a form of 'bridging visa' while people await the determination of their claim, rather than the final outcome once an individual has been found to engage the protection obligations;
  - That holders of all types of non-permanent visas are eligible to apply for permanent protection if they are still found to be owed protection after the expiration of their first term of temporary protection;
  - That holders of permanent and temporary visas are permitted to sponsor

family members to migrate to Australia, including unaccompanied minors sponsoring their parents or next of kin;

- That holders of temporary visas are permitted to depart and return to Australia in exceptional circumstances, such as the death or imminent death of a family member; and
- Criteria are provided for a SHEV to be included in the body of the Bill as it is in relation to TPVs, preferably as an independent class of visa.

#### Schedule 4 – The Fast Track Assessment Process

87. The Law Council supports efforts to provide a clear legal framework to the process of determining whether a protection visa applicant engages Australia's protection obligations and meets its other visa requirements. However, the Law Council does not support measures that truncate the refugee status determination process by removing safeguards that operate to ensure each claim is fairly and carefully assessed on its merits. The Law Council considers that 'fast track processing' measures in this Bill, combined with asylum seekers' general inability to access legal advice, risk refoulement contrary to Australia's international obligations.

#### Overview

88. This Schedule amends the Migration Act to create a new, fast track system of processing for protection claims<sup>86</sup> and establishes the IAA within the RRT.<sup>87</sup>

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Caseload Bill, Schedule 2, Part 4, from Item 32. See, for example: Subclass 785 (Temporary Protection) visa, at Schedule 2, Part 4, 35–44; Permanent Protection Visas.

86

Ibid Schedule 4, Part 1, Item 21. Pursuant to new Division 1 of new Part 7AA.

87

Ibid. Pursuant to new Division 8 of new Part 7AA. The IAA will also limit independent review of certain categories of protection visa applicants (In accordance with the new definitions of 'excluded fast track review applicant' and fast track applicant' at s 5(1) of the Migration Act 1958 (Cth)); require claims to be referred to the IAA by the Minister (Pursuant to new s 473CA of new Division 2 of new Part 7AA); and limit the circumstances in which new material can be considered (Pursuant to new Division 3 of new Part 7AA).

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89. The Schedule seeks to limit the avenues of merits review available to a specific cohort of asylum seekers – fast track applicants. A new process will apply only to all unauthorised maritime arrivals who arrived on or after 13 August 2012 and whose visa status has not yet been finally determined,<sup>88</sup> replacing the existing refugee status determination process that is currently available to these applicants and their children.<sup>89</sup> The Bill will also exclude some people – excluded fast track review applicants – from this process entirely.

90. Fast track applicants will no longer be entitled to merits review at the RRT. In some cases – but not all – they will be entitled to a fast track review by a new independent body within the RRT – the IAA. The IAA will provide merits review of the initial decision with instruction to 'pursue the objective of a mechanism of limited review that is efficient and quick'.<sup>90</sup>

91. The IAA:

- Will make a decision on the papers, and will not offer a review applicant an interview or the opportunity to comment on an application, except where 'exceptional circumstances' exist;<sup>91</sup>
- Is prohibited from considering new information or evidence except for where 'exceptional circumstances' exist;<sup>92</sup> and
- Is under no obligation to provide an applicant with any documents relied upon in the initial decision by the delegate.<sup>93</sup>

92. The IAA can either affirm a decision to refuse the fast track applicant's protection visa application, or can refer to the matter to the Minister for his or her consideration with directions or recommendations; however the Minister is under no obligation to grant a protection visa.<sup>94</sup>

93. The proposed amendments also seek to establish a subset of applicants – excluded fast track review applicants – who will not have access to either the RRT or the IAA.<sup>95</sup> A fast track applicant can become 'excluded' from the merits review process for various reasons, including if he or she:

- Has previously had a claim for protection refused in Australia, any other country or by the UNHCR;<sup>96</sup>

88

Ibid Item 1 – definition of 'fast track applicant' at sub-s (a)(i)–(iii).

89

This will also apply to children of fast track applicants who are born in Australia. As with TPVs and SHEV's, this process will not apply to asylum seekers arriving by boat in the future, as under the current policy, these people will be sent offshore for processing and resettlement. See: Explanatory Memorandum, 114 [761]: 'The purpose of the combined effect of the note at the definition of fast track applicant and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or after 13 August 2012 be processed under the Fast Track Assessment process' (emphasis in original).

90

Caseload Bill, Schedule 4, Part 1, Item 21, new s 473BA.

91

Ibid, new s 473DB.

92

Ibid, new s 473CC.

93

Ibid, new s 473DE.

94

Ibid, new s 473CC(2).

95

For the definition of an 'excluded fast track review applicant' see: Caseload Bill, Schedule 4, Part 1.

96

Caseload Bill, Schedule 4, Part 1, Item 1, definition of an 'excluded fast track applicant' at (a)(iv)

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- Makes claims for protection which the Minister considers to be 'manifestly unfounded';<sup>97</sup>
  - Is considered to have provided 'bogus documents' to the Department without a reasonable explanation;<sup>98</sup> or
  - Is considered to have effective protection available to him or her in a country other than Australia.<sup>99</sup>
94. The Minister is also able to determine other classes of people to fit within the definitions 'excluded fast track review applicant' and 'fast track applicant'.<sup>100</sup>
95. The Law Council also notes the interaction of this particular Schedule with Schedule 1 of the Protection Bill, which introduces section 5AAA into the Migration Act, seeking to place upon a non-citizen in relation to protection claims.<sup>101</sup>
96. The Government considers that its fast track process will 'efficiently and effectively respond to unmeritorious claims for asylum' and is 'specifically aimed at addressing the backlog of [illegal maritime arrivals]'.<sup>102</sup> It notes that:

These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims.<sup>103</sup>

#### The Law Council's Policy - non-refoulement

97. The Law Council's principal concern with this Schedule is that the fast track review process will preclude certain asylum seekers from accessing a thorough refugee status determination process.
98. Comparisons with international review mechanisms heighten concerns about the breadth of the proposed Australian scheme. For example, the Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) noted in relation to the United Kingdom's Detained Fast Track (DFT) system<sup>104</sup>, that it applies to cases that can be decided quickly and contains safeguards to ensure certain people – such as unaccompanied children – are not placed in that system.
99. The Law Council considers that the increased power of the Minister within the operation of the fast track system to exclude certain applicants based on his or her opinion lacks necessary safeguards to protect against the risk of refoulement, including:

- a. The Minister's exercise of discretion to determine whether a claim is manifestly unfounded; or

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Ibid at (a)(v).

98

Ibid at (a)(vi).

99

Ibid (a)(i).

100

Ibid Item 2, new sub-s (1AA).

101

It also notes the interaction of this particular Schedule with proposed changes to the operation of MRT-RRT at Schedule 4 of the Protection Bill.

102

Second Reading Speech, 6.

103

Ibid 7.

104

Andrew & Renata Kaldor Centre for International Refugee Law, Factsheet: 'Enhanced screening' and 'fast track' policies (7 November 2013) ('Kaldor Centre summary'), available at: [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced\\_screening\\_07.12.2013.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced_screening_07.12.2013.pdf).

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- b. Whether or not an applicant has a reasonable explanation for providing a bogus document.<sup>105</sup>

100. In this context, the NSW Bar has emphasised that the existing scheme in the Migration Act would allow decisions to be made very quickly, if they are to be favourable to an applicant. It considers that, given the traditional high proportion of unauthorised maritime arrivals who have been found to be owed protection, these existing procedures should be adequate to deal with the existing caseload.

#### The Law Council's Policy - review of Executive action

101. The Law Council's Policy is that access to a robust and independent system of merits review should be provided for all administrative decisions concerning protection status. It considers that merits review is a vital element of the legal process which assists correct decisions to be made.
102. As the Parliamentary Joint Committee on Human Rights has previously observed in relation to the proposed changes to the MRT-RRT under the Protection Bill, Ministerial discretion is not sufficient to protect against the risk of non-refoulement or satisfy the 'independent, effective and impartial' review standards under the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>106</sup>
103. Further, the Law Council's Policy provides that protection determination processes should include procedural fairness guarantees, such as the right to present and

challenge evidence, and be accompanied by the provision of independent legal advice.

104. The Law Council highlights issues in two key areas:

- a. The proposed IAA review process; and
- b. The denial of merits review to a person found to be an 'excluded fast track review applicant'.

#### The IAA process

105. The Bill provides that the IAA will be 'required to pursue the objective of providing a mechanism of limited review that is efficient and quick', which is in stark contrast to the RRT's current objectives, which include that it must be 'fair' and 'just'.<sup>107</sup> To achieve an efficient and quick process, the IAA process risks not offering an application procedure that provides procedural fairness.<sup>108</sup>

105

As defined at s 97 of the Migration Act 1958 (Cth).

106

Parliamentary Joint Committee on Human Rights, Parliament of Australia, Ninth Report of the 44th Parliament; Bills introduced 23 - 26 June 2014; Legislative Instruments received 7 - 20 June 2014, 15 July 2014, 45-46.

107

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

108

In this context, the NSW Bar has observed that new section 473DA (at Schedule 4, Part 1, Item 21) – that provides for an exhaustive statement of the natural justice hearing rule – greatly diminishes the requirements of procedural fairness and the applicant's chances of correcting factual errors or wrong assumptions in the primary decision, particularly where these errors are based on a misreading of country material. The proposed amendments therefore ensure that any natural justice defects are not cured by the review, requiring judicial review in the High Court of the primary decision. Proposed s 473DA consequently permits actual and apprehended bias on the part of the decision maker, including in the making of template decisions which rubber stamp the primary decision. The NSW Bar has further observed that certain measures in new Subdivision C ensure that the reduced content of procedural fairness is preserved, however, the limits on

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106. The Law Council notes that statistics published by the Department<sup>109</sup> and the MRT-RRT<sup>110</sup> on the turnover rate of negative primary decisions reinforce the need for a proper merits review. It observes that asylum seekers arriving by boat are more likely to have genuine claims for protection than those arriving by plane<sup>111</sup>. This illustrates that a thorough and independent merits review process is necessary to protect against the risk of refoulement.

107. Whilst the IAA sits in the RRT, its ability to provide effective review is uncertain, given that:

- a. Negative fast track decisions will only be referred to the IAA by the Minister;
- b. The IAA will only be able to conduct a review on the papers. Applicants will not generally have the ability to provide new information, or attend an interview; and
- c. The IAA does not reflect the inquisitorial merits review process that characterises other statutorily independent merits review bodies.

108. When a review of a primary decision is conducted, the Law Council considers that new information about the Applicant's claims for protection should be considered by a merits review authority.<sup>112</sup>

109. In the Law Council's view, there are a number of ways information can become available only after the primary decision has been made, for example:

- The situation in the Applicant's home country worsens from the time that the primary decision was made; and
- Events occur which specifically reinforce the applicant's claims. In some cases, if an asylum seeker who is being specifically targeted flees his or her home country, persecuting authorities will often target family members or friends of the applicant after the applicant has departed. If this occurs, it should be considered by the merits review authority as strong evidence of the applicant's objective fear of persecution.

procedural fairness are such that the overall effect, is that any limited protections for procedural fairness are unsatisfactory. For example, new s 473EA requires reviewers to make a 'written statement of decision'. While the contents of this statement must include the reasons for the decision, unlike the similar provision at s 473CB for the primary decision maker, new s 473EA does not require the reviewer to set out any findings of fact or to refer to the evidence on which the findings were based. As a result, the review may not 'cure' any jurisdictional error in the primary decision, for which only the High Court has jurisdiction to conduct judicial review.

109

Department of Immigration and Border Protection, Asylum Trends: Australia 2012-13 Annual Publication (2013), available at: <https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf>. Of the top six countries of citizenship for asylum seekers of seeking protection in Australia, the amount of decisions that are overturned at the merits review stage has been over 50% for the last four years. In 2012-2013 the Independent Merits Review (IMR) body overturned 66.4% of decision made at the first instance, for 2011 -2012 the 85.3% primary decision were overturned, and between 2010 - 2011, 87% were overturned – at 29.

110

Migration Review Tribunal-Refugee Review Tribunal, Annual Report 2012-13 (2013) ('MRT-RRT Annual Report'), available at: <http://www.mrt-rrt.gov.au/AnnualReports/MRTRRTR201213.pdf>. The set aside rate for unauthorised maritime arrival case load for 2012 - 2013 was 65% and '[m]ost RRT remittals were on the basis that the applicant was a refugee' – at 21.

111

Refugee Council of Australia Statistics on asylum seekers arriving in Australia (February 2014), available at: <http://www.refugeecouncil.org.au/r/stat-as.php>.

112

This includes new information or evidence that has developed since the initial application was refused, as well as information that existed at the time of primary application but was not disclosed at this time.

110. Further, there are numerous reasons that applicants may not have disclosed all relevant information with their initial application, including:

- The applicant was unaware that the information was relevant to their claims;
- The applicant did not have access to a document at the time of primary application;
- The applicant was not aware that information or documents existed at time of primary application, but subsequently learns of their existence during the merits review stage; and
- The applicant may be unwilling or unable to disclose personal information that is critical to a claim owing to the trauma experienced, or without first establishing a relationship of trust with the decision maker.<sup>113</sup>

#### Excluded fast track review applicants

111. The Law Council particularly questions the proposal to deny any form of refugee status determination – however truncated by the fast track process – to a person considered to be an ‘excluded fast track review applicant’, noting that the group is potentially extremely broad.

112. On a practical level, the Law Council considers that excluding access to primary decision making and merits review may lead to applicants to seek the limited form of judicial review that is available to them in the High Court.<sup>114</sup>

113. The Law Council therefore suggests that the definition of ‘excluded fast track review applicant’ is removed from the Bill. It further suggests that all asylum seekers are given the same access to primary and merits review as other visa applicants, regardless of the mode of arrival to Australia.

114. More specifically, the Law Council makes the following comments in relation to excluded fast track review applicants who:

- a. Have had their protection refused or withdrawn in Australia or overseas<sup>115</sup> – a previous refusal does not necessarily mean that an applicant is not a genuine refugee. For example, the circumstances in his or her home country may have changed significantly since their initial application. In addition, other countries’ processes and standards for processing refugee applications differ, and the applicant may nevertheless meet the prescribed Australian standards;

113

See for example, Amina Memon, ‘Credibility of Asylum Claims: Consistency and Accuracy of Autobiographical Memory Reports Following Trauma’ (2012) 26:5 Applied Cognitive Psychology 677. Memon sights research in which ‘Brewin (2011) review studies that questioned rape survivors soon after a clearly specified event noting significant gaps in their memory initially but an improvement in recall 3 months on (Mechanic, Resick, & Griffin, 1998). Memon states that “[i]t is clear that like all types of memory, memory for traumatic events changes over time and further that this appears to be associated with the severity of PTSD syndromes’.

114

The only Court with jurisdiction to review judicially the screening out process would be the High Court, the screening out being a primary migration decision: see ss 476 and 477 of the Migration Act 1958 (Cth). Because the Federal Circuit does not have jurisdiction in relation to primary decisions, the High Court could not remit proceedings to it: s 476B.

115

Caseload Bill, Schedule 4, Part 1, Item 2, sub-ss 5(1)(a)(ii) to (iv).

- b. Make a ‘manifestly unfounded claim for protection’. Guidance is not provided on what types of claims would fit this category;
- c. Without ‘reasonable explanation’ provide bogus documents – there are legitimate reasons why false documents may be provided in a protection visa application. As noted in the MRT-RRT’s Credibility Guidelines, ‘the use of false documents does not necessarily mean that an applicant’s claims are untrue’<sup>116</sup>.

115. It is noted that there is no guidance about what may be deemed a ‘reasonable explanation’.<sup>117</sup> Although a ‘reasonable explanation’ is an important safeguard, this provision is dependent on the views of the Minister, which are not subject to any form of review.

#### The Law Council’s Policy – legal advice and assistance

116. As discussed, the Law Council’s Policy stipulates that legal assistance should be provided to all people seeking protection in Australia.

117. Neither the Bill nor the Explanatory Memorandum set out whether any form of legal advice and assistance will be provided to asylum seekers who will be excluded from the fast track process, or part of the fast track process. Without the provision of legal advice and assistance, the Law Council is of the view that the fast track process may not achieve its stated objective of ‘efficiently and effectively respond to unmeritorious claims for asylum’<sup>118</sup>.

118. In this context, the Law Council notes that the United Kingdom High Court has found the DFT system unlawful on the basis that there is an ‘unacceptable risk of unfairness’ in that the system does not provide for ‘early instruction of lawyers to advise and prepare the claim, and to seek referrals for those who may need them, with sufficient time before the substantive interview.’<sup>119</sup> The Court also identified other shortcomings in the system.<sup>120</sup>

119. The Law Council is concerned that the issues discussed in relation to Schedule 4 may be further compounded by the proposed changes to the Migration Act in the Protection Bill, currently before the Senate.

120. For example, proposed new section 5AAA of the Protection Bill will introduce a burden of proof requirement more suited to an adversarial process that seeks to test claims relating to past or existing factual events that are within the applicants knowledge or that can be readily demonstrated by reference to documentary or other evidence.<sup>121</sup> The combined changes in these Bills to the Migration Act will serve to increase the burden on applicants who are likely to have little or no understanding of Australia's complex legal system.

116 MRT-RRT Credibility Guidelines, [9.4].

117 Protection Bill submission, 14-19.

118 Second Reading Speech, 6.

119 Detention Action v Secretary of State for the Home Department [2014] EWHC 2245, [220]-[221] (Justice Ouseley).

120 Such as: flaws in the screening process and lack of safeguards for 'vulnerable' categories of asylum seekers in the DFT.

121 See discussion of this provision at: Protection Bill submission, 9-13.

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121. The risk with these changes – the 'fast track' process, the withdrawal of IAAAS funding and the increased burden on applicants to demonstrate claims – is that applicants for protection status will fail to clearly articulate their protection claims during the 'fast track' process. Accordingly, applicants with genuine protection claims may be at risk of return to their place of origin.

#### Recommendations

122. The Law Council suggests that the Committee recommend this Schedule not be enacted, as all asylum seekers should be given the same access to merits review, regardless of the mode of arrival to Australia.

123. If the Committee wishes to recommend this Schedule, the Law Council suggests that:

- Free independent legal advice for fast tracked applicants should be provided;
- The proposed amendments under Subdivision C be amended to ensure that the IAA has a duty to consider all new information and evidence provided by the Applicant, including any new claims for protection, new information provided orally or in writing, and any further primary or secondary evidence;
- The written reasons provided pursuant to new sub-section 474EA(1) are sufficiently detailed; and that a minimum quota of publishable decisions be determined by Parliament to ensure that the Public has access to a range of varied decisions;
- The new sub-section 473FA(1) be amended to include the word 'fair';
- The amendments should extend the jurisdiction of the Federal Circuit Court to include judicial review of screening out decisions which are affected by jurisdictional error;
- The Committee recommend the reinstatement for IAAAS funding for all applicants subject to the 'fast track' process, including the IAA, process; and
- The definition of 'excluded fast track review applicant' is removed from the Bill, or in the alternate:
  - Sub-sections 5(1)(a)(ii) to (iv), as well as (v) and (vi) be removed from the definition;
  - Greater guidance is provided around the meaning of 'reasonable explanation',<sup>122</sup> 'manifestly unfounded claim' and 'bogus documents'. Any such guidance – for example, in the Explanatory Memorandum – must not detract from the fact that applications must be assessed on an individual basis, according to the applicant's particular claims.
  - The Minister be required provide an explanation to the applicant of why their documents are considered bogus, or their claims are considered manifestly unfounded, and be provided with an opportunity to respond;

122 A broad interpretation should be provided for the meaning of a 'reasonable explanation'. This would ensure that applicants with genuine refugee claims are not unfairly disadvantaged.

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- The obligation to put adverse information to the applicant at sub-sections 57(1)(a) and (3)(b) is broadened beyond the provision of personal information to material that was relied upon by the decision maker, such as country information;
- Excluded fast track review applicants have access to the RRT, or at the very least, access to an independent merits review system such as the existing Independent Protection Assessment system,<sup>123</sup> insofar as this is in accordance with Australia's international obligations; and

- The benefit of informing fast track applicants of what review pathways are open to them pursuant to new subsections 66(2)(e) and (f) extend to excluded fast track review applicants concerning information about judicial review in addition to information that the decision is not merits reviewable.

Schedule 5 – Australia’s international law obligations  
Overview

124. This Schedule clarifies the Government’s intention of when Australia’s non-refoulement obligations should arise, and the meaning of certain words and terms including ‘refugee’ and ‘well-founded fear of persecution’. The Explanatory Memorandum makes it clear that these changes are made in response to a series of High Court and Federal Court decisions.<sup>124</sup>

125. An officer’s duty to remove a person from Australia arises under section 198 of the Migration Act. Proposed section 197C provides that an officer must remove an unlawful non-citizen pursuant to section 198 irrespective of Australia’s non-refoulement obligations.

126. The Explanatory Memorandum states that proposed section 197C seeks ‘to ensure that the Parliament is able to control how Australia’s non-refoulement obligations will be implemented domestically.’<sup>125</sup> It also states that there ‘are a number of personal non-compellable powers available for the Minister to use, before the exercise of the removal power, to allow a visa application or grant a visa where this is in the public interest’.<sup>126</sup>

127. The proposed amendments in Part 2 seek to remove most references to the Refugee Convention from the Migration Act, replacing them with a ‘new, independent and self-contained statutory framework which articulates Australia’s interpretation of its protection obligations under the Refugee Convention’.<sup>127</sup>

128. Proposed changes include:

123 Department of Immigration and Border Protection, ‘Fact Sheet 9 – Litigation Involving Migration and Citizenship Decisions’ (27 August 2014), available at: <https://www.immi.gov.au/media/factsheets/09litigation.htm> – ‘Departmental decisions for refugee determination in offshore protection obligation assessments are reviewable by the Independent Protection Assessment (IPA). This assessment process replaced the similar Independent Merits Review (IMR) system in March 2011.’

124 Explanatory Memorandum. In respect of Australia’s non-refoulement obligations, see 165–6 at [1134]–[1136]. In respect of the ‘internal relocation’ principle, see 171–2 at [1182]–[1188]. In respect of the meaning of ‘well-founded fear of persecution’ see 174 at [1194]. In respect of the meaning of ‘membership of a particular social group’ see 177–9 at [1216]–[1217] and [1223].

125 Ibid [1138].

126 Ibid 9.

127 Ibid 10.

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- Section 5H, that defines the term ‘refugee’ by reference to Article 1A(2) of the Refugee Convention and the exclusion clause at Article 1F;
- Section 5J, which seeks to define a key requirement of refugee status – ‘well-founded fear of persecution’ – that appears undefined in the Refugee Convention:<sup>128</sup>
  - Section 5J(1) provides that a person only has a well-founded fear if that person has a ‘real chance’ of persecution in all areas of the receiving country (the ‘internal relocation’ principle). This removes the High Court’s test for ‘reasonableness’ in internal relocation cases,<sup>129</sup> so that the principle will no longer encompass consideration of whether the relocation is ‘reasonable’ in light of an applicant’s individual circumstances.<sup>130</sup> In addition, the real persecution must relate to ‘all areas of the receiving country’, which is broader than existing law;<sup>131</sup>
  - Section 5J(2), that codifies the interpretation of effective protection measures provided by the State. Under this provision, a well-founded fear of prosecution will not be established if an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State exists or if adequate and effective protection measures are provided by a source other than the relevant State;<sup>132</sup> and
  - Section 5J(3), that creates a new ‘reasonable steps’ test for assessing whether a person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution (other than through a modification which would conceal or conflict with a fundamental characteristic of the person’s identity or conscience);<sup>133</sup>
- Section 5L, that restricts the definition of membership of a particular social group (as grounds for determining a well-founded fear of persecution) by requiring that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member’s identity or conscience, that the member should not be forced to renounce it.<sup>134</sup> This change is ‘intended to reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups’.<sup>135</sup> The Explanatory Memorandum notes that the current approach of the High Court with respect to the meaning of a particular social group, combined with

128 Ibid [1198]: This amendment is not intended to change the meaning of s 91R, but makes it explicit that this requirement should be considered in the context of a well-founded fear of persecution at new s 5J.

129

As set out in SZATV v Minister for Immigration and Citizenship [2007] HCA 40. While the Court considered that this ‘internal relocation’ principle was within the scope of the Refugee Convention, it placed emphasis on the reasonableness test.

130

Explanatory Memorandum [1183].

131

Ibid [1181]-[1183]: this codifies the existing internal relocation principle, but unlike the existing principle, makes no reference to reasonableness.

132

Ibid [1188]-[1189]: This proposed amendment seeks to codify Minister for Immigration and Multicultural Affairs v S152/2003 (2004) 222 CLR 1 and Siaw v Minister for Immigration and Multicultural Affairs [2001] FCA 953.

133

Ibid [1194]: This overturns the High Court's decision in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71, where it was held that an assessment under the Refugee Convention does not extend to what a person could or should do if they were returned to their country of origin, but what they would do.

134

In this way, the proposed section overturns the broader test of the High Court in Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25.

135

Explanatory Memorandum, 11.

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'minimal legislative guidance' on this term, has resulted in a broad interpretation of the term;<sup>136</sup>

- Section 5M, which defines a 'particularly serious crime' for the purposes of codifying the exception to refoulement at Article 33(2) of the Refugee Convention. This change removes existing references to the Refugee Convention;<sup>137</sup> and
- Section 36(1C), that codifies the exception to the principle of non-refoulement at Article 33(2) of the Refugee Convention.

The Law Council's Policy - non-refoulement

129. As noted above, the Law Council's Policy recognises Australia's chief international obligation of non-refoulement. The Law Council does not consider that proposed section 197C accords this the principle. There is no legislative requirement on the Minister to consider this obligation when exercising these powers.<sup>138</sup>

130. The Law Council acknowledges that the Minister may turn his or her mind to this principle in exercising certain discretionary powers,<sup>139</sup> and that these mechanisms may 'enable non-refoulement obligations to be addressed before a person becomes ready for removal'.<sup>140</sup>

131. The NSW Bar considers that the effect of Schedule 4 of the Bill will be to degrade the visa application process in relation to those who arrived by boat on or after 12 August 2012. It is particularly concerned that:

- a. Excluded fast track review applicants are particularly vulnerable to be refouled to danger without recourse to any merits review; and
- b. Fast track applicants who have received negative decisions, which are subsequently negatively reviewed by the IAA, must be removed from Australia without further consideration of Australia's non-refoulement obligations. It is worth re-emphasising that this process will occur without legal advice, and that the review decision will be made on the papers and without the ability of the applicant to appear.

132. The Law Council therefore considers that although it may appear that there are safeguards in place to protect against refoulement through the reliance on Ministerial discretion, these safeguards may not be satisfactory.<sup>141</sup>

133. Further, the Law Council considers that the overriding issue with seeking to define the constituent elements of refugee status at proposed sections 5H, 5J, 5L, 5K and 5M and 36(1)(c), is that applicants who may have a protection claim under the Refugee Convention will be prevented from seeking protection from Australia.

136

Ibid [1216]-[1217], Applicant S v Minister for Immigration and Multicultural Affairs [2004] HCA 25.

137

Ibid [1228]: This amendment is not intended to change the meaning of s 91U.

138

For example, s 417 of the Migration Act 1958 (Cth) is not subject to the requirements of procedural fairness: Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636.

139

For example, pursuant to ss 46A(2), 195A or 417 of the Migration Act 1958 (Cth).

140

Explanatory Memorandum [1142]-[1146].

141

The Law Council has consistently advocated against the reliance on the Minister's non-compellable, non-reviewable powers – for example, see: Protection Obligations submission.

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The Law Council's Policy - adherence to other international obligations

134. The Law Council's Policy stipulates that Australia is obliged under international law to recognise the right to seek asylum and to ensure that laws and policies concerning asylum seekers adhere to the principles contained in the Refugee Convention.

135. The Law Council notes that to gain refugee status pursuant to the Refugee Convention in a State which is party to the Convention, an applicant must demonstrate that the applicant is outside his or her country of nationality or where the individual has no nationality, their country of former habitual residence; have a well-founded fear of persecution owing to the individual's race, religion, nationality, membership of a particular social group or political opinion; and owing to that well-founded fear, is unable or unwilling to return.<sup>142</sup> The Refugee Convention does not

define these elements further.

136. The Law Council questions the proposed removal of references to the Refugee Convention in the Schedule, and its narrower reinterpretation of Australia's international obligations. The Kaldor Centre noted that this approach misunderstands the system of international law in general and creates risks that Australia will violate its obligations under the Refugee Convention.<sup>143</sup>

137. The NSW Bar considers that those items that either omit or replace direct references to the Refugee Convention,<sup>144</sup> are intended to effect a structural change to the Migration Act from the interpretation by the High Court of the Act as containing, when read as a whole, 'an elaborate and interconnected set of statutory provisions directed to the purpose of responding to the international obligation which Australia has undertaken in the Refugees Convention'.<sup>145</sup> From this interpretation the Court found the removal power under section 198 was to be read in light of, and subject to, the obligations in the Refugee Convention<sup>146</sup> Consequently, the removal power at section 198 will be concerned only with the practical consideration of the removal.<sup>147</sup>

#### Well-founded fear of persecution

138. Determining whether an applicant has a well-founded fear of persecution must include 'an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.'<sup>148</sup> As noted by UNHCR, determination of whether a person has a 'well-founded fear' involves a consideration of both subjective and objective elements.<sup>149</sup> The subjective element concerns a person's fear and their state of mind. The objective element requires that a state of mind must be supported by an objective situation.

<sup>142</sup> Article 1A(2) Refugee Convention.

<sup>143</sup> Kaldor Centre summary, 5.

<sup>144</sup> Caseload Bill, Schedule 5, Part 2, Items: 10 (amending sub-s 36(2)(a)); 11 (amending sub-s 48A(1)); 13 (amending sub-s 228B(2)); 14 (amending sub-paras 336F(3)(a)(ii), 4(a)(ii) and 5(c)(i)); 15 (amending sub-para 36F5(c)(ii); 16 (amending sub-para 502(1)(a)(iii)) and 17 (repealing and replacing sub-s 503(1)(c)).

<sup>145</sup> Plaintiff M61/2010E v Commonwealth of Australia [2010] HCA 41 at [27].

<sup>146</sup> Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32.

<sup>147</sup> NATB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 292, [53]: 'Even if it is virtually certain that he or she will be killed, tortured or persecuted in that country, whether on a Refugees Convention ground or not'.

<sup>148</sup> United Nations High Commissioner for Refugees, for example: United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Office of the United Nations nd High Commissioner for Refugees, 2 ed, 1992), [37] ('UNHCR Handbook').

<sup>149</sup> Ibid [37]-[38].

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139. This well-founded fear must be one of 'persecution'. Proposed section 5J restricts the definition of 'well-founded fear of persecution'. Proposed section 5J limits the meaning of this requirement for refugee status by reducing the significance of the subjective element of 'well-founded fear' and defining persecution. For example, the Government's intention<sup>150</sup> to remove an assessment of reasonableness in determining the appropriateness of internal relocation (at section 5J(1)(c)), does not give effect to Australia's obligations. As UNHCR has noted, the inability of a person to avail him or her self of State protection 'must be determined according to the circumstances of the case'.<sup>151</sup> Where a person is unwilling to avail him or her self of State protection, this must be on the basis of that person's fear of persecution.<sup>152</sup> Although it is noted that '[t]he fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality',<sup>153</sup> removing consideration of 'reasonableness' from the determination of internal location precludes the consideration of the subjective element of a 'well-founded fear of persecution'.

140. On the basis of this reasoning, the Law Council also considers that proposed sub-sections 5J(2) and (3) limit what must primarily be a consideration of both subjective and objective factors. These do not allow for consideration of the subjective element of a 'well-founded fear', and place restrictions on this element of refugee status. As UNHCR has stated:

The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin--while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.<sup>154</sup>

#### Reasonable steps to modify behaviour

141. Proposed section 5J(3) states that a person does not have a well-founded fear of persecution if he or she could take reasonable steps to modify his or her behaviour and avoid a real chance of persecution in the receiving country.

142. The NSW Bar notes that:

- a. This is against the principle in Appellant S395/2002 v MIMA<sup>155</sup> that a Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of

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Explanatory Memorandum [1183]: 'The Government considers that in interpreting the "reasonableness" element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation'.

151

UNHCR Handbook [99]. See also: Januzi v Secretary of State for Home Department [2006] 2 AC 426 at 440 per Lord Bingham and United States Code of Federal Regulations [208.13].

152

UNHCR Handbook [100].

153

Ibid [91].

154

Ibid [42].

155

[2003] HCA 71

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origin.156 The Court found that the Tribunal's task was to assess what the applicant will do, not what he or she could or should do; and

- b. The claim in the Explanatory Memorandum that this new sub-section is not inconsistent with the section 395 principles is not supported by the decision of the Full Court in Minister for Immigration and Border Protection v SZSCA157, the Minister's appeal from which is yet to be decided by the High Court. The proposed section would allow for a Tribunal to impose modifications of behaviour by which a person may avoid an incorrect imputation of any one of the Refugee Convention's reasons, even where such modifications may cause significant hardship to the person and effectively amount to acquiescence in persecution.

#### Membership of a particular social group

143. Proposed section 5L requires that to meet the definition of a particular social group (other than family), the relevant characteristic must be innate or immutable, or so fundamental to a person's identity that he or she should not be required to renounce it. The NSW Bar observes that although the stated intention of this section may be to clarify and limit the definition of membership of a particular social group, it will almost certainly encourage litigation for further judicial clarification of these statutory terms. This provision reduces Australia's protection obligations under the Refugee Convention to members of these social groups who might be targeted for reasons other than those personal characteristics in new subsection 5L(1)(b), for example for logistical reasons, or as part of a campaign to destabilise or create fear in a society.

#### Recommendation

144. The Law Council suggests that the Committee recommend this Schedule not be enacted.

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

145. The rationale behind the proposed changes to the Migration Act under Schedule 6 is to:

reinforce the government's view that the children of [illegal maritime arrivals] who are born in Australia are included within the existing definition of 'unauthorised maritime arrival', known as UMA, in the Migration Act.158

146. Such children will be subject to offshore processing and unable to apply for a visa while they remain in Australia, unless the Minister intervenes.159 The definition of a 'UMA' will also extend to children born in regional processing countries.160

156

Ibid, at [40] and [50] per McHugh and Kirby JJ and at [80] and [82] per Gummow and Hayne JJ.

157

[2013] FCAFC 155.

158

Second Reading Speech, 8. Caseload Bill, Schedule 6, Part 1, Items 1-3, new sub-s 5AA(1A) and (1AA). Associated amendments are also made to ss 198, 198AD and 198AH of the Migration Act 1958 (Cth), that concern removal, including to a regional processing country.

159

Ibid, new sub-s 5AA(1A).

160

Ibid.

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147. The Schedule161 makes clear the Government's intention that the above changes apply retrospectively in certain circumstances – i.e. in relation to an 'applicable matter'162 – such that it applies to babies already born to unauthorised maritime arrivals or transitory persons. Item 12 stipulates that the changes do not apply if an application for a visa has been finally determined.

148. The Schedule163 further provides that, should the Migration Act be applied retrospectively pursuant to certain provisions,164 a child would be barred from applying for a visa unless an application for a visa was made before the commencement date of the Schedule, or the Minister has lifted the bar for the parent of the child.165

149. The Schedule166 sets out that certain matters are to have prospective application, namely, that children of unauthorised maritime arrivals – including transitory persons – born in the migration zone or a regional processing country will become unauthorised maritime arrivals if they are born on or after the commencement day of the Schedule.

150. As one of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV) observes, the amendments proposed in Schedule 6 would have the effect of preventing children born in Australia with a parent designated as an unauthorised maritime arrival from applying for protection visas.

151. The proposed changes in Schedule 6 are contrary to the Law Council's Policy. Paragraphs [4], [7](g) and [10](h) of the Policy refer to Australia's international obligations, including those under the Convention on the Rights of the Child (CROC), such as the requirement that, in any decision making affecting the rights of a child, the best interests of the child must be a primary consideration.

152. The United Nations Committee on the Rights of the Child has stated that assessment and determination of the best interests should be undertaken in each individual case, in the light of the specific circumstances of each child, group of children, or children in general.<sup>167</sup> The elements to be taken into account when assessing and determining the child's best interests include: the child's views and identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; vulnerability; and the child's rights to health and education.<sup>168</sup> Further, States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration.<sup>169</sup> As the Committee on the Rights of the Child has noted:

Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but

<sup>161</sup> Ibid Part 2, Items 11.

<sup>162</sup> Ibid. Set out at (a)-(f).

<sup>163</sup> Ibid Items 13-4.

<sup>164</sup>

Ibid. Pursuant Item 11, sub-s 46A(1) and 46B(1) apply to a child.

<sup>165</sup>

Ibid. Pursuant Item 11, sub-s 46A(2) and 46B(2) apply to a child.

<sup>166</sup>

Ibid. Pursuant to Item 15.

<sup>167</sup>

Committee on the Rights of the Child, General Comment 14: (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (29 May 2013) CRC/C/GC/14, [48].

<sup>168</sup>

Ibid [52]-[79].

<sup>169</sup>

Ibid [36]-[37].

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especially when an action has an undeniable impact on the children concerned.<sup>170</sup>

153. The NSW Bar notes that the CROC imposes a package of obligations upon Australia, and reliance on one Article – such as those relating to family unity – cannot justify non-compliance with another.<sup>171</sup> It also notes the recommendations in the AHRC's report A last resort?<sup>172</sup> and the concluding observations by the Committee on the Rights of the Child,<sup>173</sup> that Australia's immigration policy must be made to comply with its international obligations.

154. Although the Law Council's Policy emphasises the importance of family unification,<sup>174</sup> the proposed amendments that seek to maintain the family unit also effectively render children stateless until the point at which they can claim the nationality of their parents, whether they are born in Australia or under Australia's jurisdiction in its regional processing centres.<sup>175</sup> The Law Council notes Article 7 of the CROC relates to the right to acquire a nationality.<sup>176</sup>

155. Australia is also party to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. As the NSW Bar notes, the Bill could do more than is presently proposed to ensure the right of a child to a nationality and to avoid the circumstance of statelessness and its attendant adverse consequences.

156. Despite Australia's obligations under these instruments, the Bill's Statement of Compatibility with Human Rights, annexed to the Explanatory Memorandum, provides:

A stateless child's status as a UMA does not alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country.<sup>177</sup>

157. The following requirements are relevant concerning eligibility for Australian citizenship:

- For children under 15 years – the child must be living with a responsible parent who is an Australian citizen or a responsible parent who is not an Australian citizen and you would otherwise suffer significant hardship or disadvantage;<sup>178</sup> or
- For unaccompanied humanitarian minors – wards of the Minister require the consent of the Minister's delegate or unaccompanied humanitarian minors

<sup>170</sup> Ibid [40].

<sup>171</sup> See arts 7, 9, 10 and 22.

<sup>172</sup> A last resort? Recommendation 5.

<sup>173</sup> Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 th of the Convention, 40 sess, CRC/C/15/Add.268 (20 October 2005) [62], available at:

<http://www.refworld.org/pdfid/45377eac0.pdf>.

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LCA Policy, [7(f)].

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This is a question of the extraterritorial application of Australia's obligations under human rights instruments to which it is party. For example, see: Article 2(1) of the CROC, and Article 2(1) of the ICCPR.

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See also Article 24(3) of the ICCPR that provides: 'Every child has the right to acquire a nationality'.

177

At 31.

178 Department of Immigration and Border Protection, 'Children aged 15 years and under or unaccompanied minors' (13 February 2014), available at:  
[http://www.citizenship.gov.au/applying/how\\_to\\_apply/15\\_and\\_under/](http://www.citizenship.gov.au/applying/how_to_apply/15_and_under/).

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who are not wards of the Minister require the consent of their responsible carer;179 or

- For refugee or humanitarian entrants – the child must be a permanent resident, satisfy the residence requirements and be of good character. If children apply for citizenship once they have turned 18 years, they are further required to have lived in Australia for 4 years on a permanent residency.<sup>180</sup>

158. These requirements suggest that it is extremely unlikely that children affected by the proposed measures in Schedule 6 will be eligible for Australian citizenship.<sup>181</sup>

159. Under the proposed amendments, it is difficult to see how a child of UMA persons will be able to adopt the citizenship of their parents. The Law Council also notes that, since the reintroduction of regional processing under the former Government in late 2011,<sup>182</sup> no refugees have been granted citizenship in either Nauru or Papua New Guinea (PNG). Further, the memoranda of understanding governing the resettlement of refugees in Nauru, PNG and, most recently, Cambodia,<sup>183</sup> do not contain any provisions regarding eligibility for citizenship, at any stage of that person's residency.

160. The LIV notes that the legislation seeks to change the definition of UMA to include a child of an UMA (new section 5AA(1A) of the Migration Act) if:

- The person is born in the migration zone;
- A parent is, at the time of the birth, a UMA; and
- The person is not an Australian citizen at the time of birth.

179

Ibid.

180

Department of Immigration and Border Protection, 'Refugee and Humanitarian Entrants' (13 February 2014), available at: [http://www.citizenship.gov.au/applying/how\\_to\\_apply/refugee/](http://www.citizenship.gov.au/applying/how_to_apply/refugee/)

181

Section 21(8) of the Citizenship Act 2007 (Cth) does create an eligibility for citizenship in the case of a person born in Australia but who is stateless. The provisions in schedule 6 are likely to make it more difficult for a child of unauthorised maritime arrivals born in Australia to exercise their rights to turn that eligibility into actual rights of citizenship. Ferouz, the Rohingya baby discussed below in this submission, falls into this category.

182

See: Janet Phillips, 'A comparison of Coalition and Labor government asylum policies in Australia since 2001' (Research paper, Parliamentary Library, Parliament of Australia, 28 February 2014) 4-5. The current arrangements for the transfer, processing and resettlement of asylum seekers from Australia to PNG are governed by the 6 August 2013 memorandum of understanding (MOU) between the Governments of PNG and Australia: Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, 6 August 2013 – see: <http://www.dfat.gov.au/geo/png/joint-mou-20130806.html>. This MOU supports the 19 July 2013 Regional Resettlement Arrangement between Australia and Papua New Guinea on Further Bilateral Cooperation to Combat People Smuggling (RRA). The RRA was made under the (now superseded) 8 September 2012 Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues. On 29 August 2012 the Australian Government signed a MOU with the Government of Nauru: Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, signed by the Participants on 29 August 2012. This was superseded by the Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, signed by the Participants on 3 August 2013 – see: <https://www.dfat.gov.au/issues/people-smuggling-mou.html>.

183

Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia, signed by the Participants on 26 September 2014 – see: <http://www.minister.immi.gov.au/scottmorrison/files/cambodia-australia-mou-operational-guidelines.pdf>.

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161. The LIV considers that this means that babies born in Australian hospitals and issued with Australian birth certificates will not be eligible to apply for protection in Australia in accordance with section 46A of the Migration Act, and 'must' be taken to a regional processing centre 'as soon as is reasonably practicable' in accordance with section 198AD of the Act.<sup>184</sup>

Ferouz

162. The LIV provides the example of Baby Ferouz, who was born to parents who arrived in Australia by boat. Ferouz's parents are stateless (Rohingyas from Myanmar) and were sent to Nauru, contrary to medical advice after a doctor examined his mother on Christmas Island and alerted the Department to her high risk pregnancy. Ferouz's mother was flown to the Australian mainland shortly after arriving in Nauru, and Ferouz was born in Brisbane. As such, he has an Australian birth certificate and has spent every day of his life in Australia. Ferouz will not be

entitled to apply for a permanent protection visa and is liable with his parents to be transferred back to Nauru at any time. The LIV estimates that there are at least a hundred families in this situation.

163. As Ferouz's parents have previously been detained in Nauru, he will also not be eligible for a TPV under the terms of the agreement between the Government and the Palmer United Party, in the event the Bill passes in its current form.
164. In respect of the amendment to section 5(1) – the definition of 'transitory persons' – the LIV notes that this means that a child born in Australia to parents who have previously been transferred to a regional processing centre before being returned to Australia for a specific purpose (i.e. childbirth) must also return to that same regional processing centre, in accordance with sections 198AD / 198AH of the Migration Act.

165. Because Ferouz's mother has spent time on Nauru and was flown to Australia for a (temporary) medical reason, she is considered to be a 'transitory person'. If these reforms are passed, Ferouz will also be classified as a transitory person and the whole family will be sent back to Nauru. They will not be entitled to apply for a TPV under other reforms contained in this Bill. The LIV estimates that there are at least sixteen families in this situation.

166. By way of contrast, there are a number of families who were never sent to Nauru and are not considered transitory persons. For example, law firm Maurice Blackburn secured undertakings from the Department that 100 Australian born babies and their immediate family members will not be removed from Australia until the Ferouz case is resolved. These families would have otherwise been sent to a regional processing centre some time ago. They have remained in Australian detention centre facilities, including on Christmas Island. These family members are not transitory persons and will be entitled to apply for a TPV under other provisions of this Bill. They will avoid being sent to Nauru.

167. The LIV considers that there is no clear policy purpose in treating these two family groups differently.

168. On 15 October 2014, the Federal Circuit Court handed down judgment in Plaintiff B9/2014 v Minister for Immigration.<sup>185</sup> The Court found that there was no

<sup>184</sup> Note that the legislation states 'a parent', so only one of the parents needs to be an UMA for the child to also be a UMA. Note 2 under this section states that a parent may be a UMA even if the parent holds a visa.

<sup>185</sup> [2014] FCCA 2348

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jurisdictional error, and that on Ferouz's birth he entered Australia and became an 'unlawful non-citizen' under the Migration Act, on the basis that neither of his parents held a valid visa.<sup>186</sup> It was found that he did not enter on an aircraft, but he did enter after 1 June, 2013 at 'any other place'. The Court found that Ferouz was an 'unauthorised maritime arrival', and that his application for a protection visa was invalid.<sup>187</sup> This decision is currently under appeal.

169. The LIV notes that the Minister has indicated publicly that, in an agreement struck with the Palmer United Party, certain UMAs who arrived post 13 August 2012 will be entitled to apply for a temporary visa. It considers that it is unclear exactly how this will work, however it is presumed that the Minister will exercise his discretion to lift the bar against applying for a protection visa<sup>188</sup> for this certain group of asylum seekers, and allow them to apply for a certain category of temporary visa. The LIV notes that the Minister has made it clear that he will not allow transitory persons, currently in Australia, to apply for protection in Australia. In effect, this means that any Australian born baby born to parents who arrived in Australia after 12 August 2013 will be entitled to apply for temporary protection in Australia, unless one or both of their parents have previously been detained in a regional processing country, regardless of the fact they are currently in Australia and were born in Australia.

170. The LIV considers that this is an arbitrary distinction to make, with significant implications. If the Bill passes in its current form, and the Court upholds the Plaintiff B9/2014 decision, a number of babies who have been born in Australia and detained here for close to one year (under undertakings preventing their removal until their status is determined in the matter of Plaintiff B9/2014) will be transferred to a regional processing country simply because their parents were previously detained offshore, in some cases for a very short period.

#### The Law Council's Policy - retrospectivity

171. The Law Council's Policy notes that principles defining the rule of law require that laws and policies affecting asylum seekers should not have retrospective operation.

172. As the LIV observes, the amendments proposed in Schedule 6 are intended to operate retrospectively. This means that any visa applications from children born to UMAs prior to the commencement of the Act will be invalid.

173. This has significant implications for a number of Australian born babies who have lodged applications for Protection Visas, and are waiting on the appeal of the Federal Circuit Court's judgment in the matter of Plaintiff B9/2014. This case will determine whether Australian born babies born to UMAs are also UMAs under section 5AA of the Migration Act as it is currently drafted.

174. In accordance with the Bill's retrospective operation, even if the Applicant in this matter has judgment awarded in his favour, and then successfully applies for a protection visa, his claim for protection will be nullified and he will be liable for transfer to a regional processing country once the Bill passes.<sup>189</sup>

175. For example, as Ferouz's matter is currently on appeal, even if Ferouz was successful on appeal and subsequently successfully applied for a protection Visa,

<sup>186</sup> An appeal has been lodged against this decision.

<sup>187</sup> Pursuant to s 46A(1) of the Migration Act 1958 (Cth).

<sup>188</sup> Ibid.

<sup>189</sup>

Unless his application for a Protection Visa has been 'finally determined' per Caseload Bill, Schedule 6, Part 2, Item 12.

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these reforms would mean he would have his protection visa removed, and would be transferred to Nauru.

176. These proposed amendments will therefore have an important impact on those children waiting on the appeal to the Federal Court in the matter of the Plaintiff B9/2014, as, even if the final decision of the Court is that these children are able to claim protection visas, this Bill will exclude them from that possibility.

177. The Law Council therefore suggests that the Committee recommend that Schedule 6 be omitted from this Bill and that the Government should wait to see the final outcome of the Federal Court decision in the above matter before introducing any further legislation addressing this issue.

#### Recommendation

178. The Law Council suggests that the Committee does not recommend the enactment of this Schedule, at least until the outcome of the appeal to the Federal Court in the matter of the Plaintiff B9/2014.

179. If the Committee is minded to recommend the enactment of this Schedule, the Law Council suggests that the Committee:

- Consider the ways in which procedural fairness can be guaranteed to these children. For example, the Explanatory Memorandum should be amended to make it explicit that, pursuant to proposed sub-section 198(1C) at Item 7 of Part 1, if a child is mandatorily removed (who also is effectively temporarily in Australia), then removal of the mother or child should only occur if neither mother nor child 'needs to be in Australia'. Although these needs may be linked, both the mother and child should have those potential needs recognised; and
- Recommend against the retrospectivity of the Schedule.

#### Conclusion

180. The Law Council supports efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas and considers that certainty of the legal framework for the determination protection claims is urgently needed, especially for the 'legacy caseload'. It also underscores the importance of access to independent legal or migration advice for asylum seekers, under Australia's jurisdiction. If the Committee recommends no other changes, the Law Council urges it to consider recommending that free, independent legal or migration advice be reinstated for asylum seekers, including those who fall under the auspices of this Bill.

181. The significance of the changes proposed in this Bill should not be understated. Along with the other Bills before Parliament, this Bill constitutes the single biggest change to Australia's asylum seeker policy ever made, and as such demands careful public and parliamentary scrutiny of its many detailed and complex provisions.

182. The Law Council suggests the Bill not be passed. If the Committee is minded to support the Bill, the Law Council has attempted to provide constructive recommendations for improvements.

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#### Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the following Constituent Bodies and Committees in the preparation of this submission:

Law Institute of Victoria

New South Wales Bar Association

International Law Section's Migration Law Committee

National Human Rights Committee

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#### Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia

- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

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## Canberra Refugee Action Committee Submission to Senate Legal and Constitutional Affairs Legislation Committee – Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

<http://refugeeaction.org/20141102/canberra-refugee-action-committee-submission-to-senate-legal-and-constitutional-affairs-legislation-committee-migration-and-maritime-powers-legislation-amendment-resolving-the-asylum-legacy/> December 11, 2014

... number 3 of 4 August 2014 to this Committee on the Migration ... and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill ...

In addition, the applicant should have an opportunity to “know and meet the case against him or her”.<sup>65</sup> Such due process is hard to imagine in security cases under Australian law.

Consideration of whether there are risks in an individual case that “preclude refoulement absolutely and without exception” would include “circumstances in which there is a danger of torture or cruel, inhuman or degrading treatment or punishment”.<sup>66</sup> As Goodwin-Gill and McAdam suggest, Art. 33(2) may be redundant in view of “the broadened principle of non-refoulement under international human rights law”. They point out that a person who fears persecution “necessarily also fears at least inhuman or degrading treatment or punishment, if not torture.”<sup>67</sup> While the Minister has expressed his intention not to refoul refugees in this situation, the proposed introduction of section 197C (above) makes breaches of non-refoulement virtually inevitable. The Minister’s personal powers are not sufficient to guarantee against refoulement.

While the present provisions for complementary protection prevail, an applicant can have his or her claims for non-refoulement under human rights conventions considered in the same decision-making process as claims under the Refugee Convention. Even if the Government’s proposed repeal of complementary protection fails,<sup>68</sup> so long as the proposed section 36(1C) operates, it would seem to trump consideration of complementary protection at that point.

In the words of the Bills Digest on this Bill: “If this crucial element of the 1951 Refugee Convention [the principle of non-refoulement in Art. 33(1)] was [like Art. 33(2)] to be similarly incorporated into the Act, it would arguably make the Government’s assertions that it will abide by its international obligations more convincing”. (No. 40, 2014–15, 23 October 2014, at 19, and see 17)

Again, given the continued operation of present section 36(1B) providing that it is a criterion for a protection visa that ASIO does not assess an applicant to be “directly or indirectly a risk to security” (as defined in section 4 of the Australian Security Organisation Act 1979), a specific provision such as section 36(1C)(a) would appear unnecessary for the protection of Australia’s security.

(1) Minister’s Second Reading Speech on this Bill, Hansard, House of Representatives, 25 September 2014, online; and see below on this issue.

(2) See Parliamentary Joint Committee on Human Rights (PJCHR), Ninth Report of the 44th Parliament, 15 July 2014, at para 1.207: “... the existence of ministerial discretion (and administrative review processes) does not sufficiently protect against the risk of refouling a person with valid protection claims in breach of Australia’s non-refoulement obligations. ....”.

(5) Andrew and Renata Kaldor Centre for International and Refugee Law, UNSW (Kaldor Centre), Legislative brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, at 5, accessible from: [www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative\\_brief\\_migration\\_amendment\\_resolving\\_the\\_asylum\\_legacy\\_caseload\\_final.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/legislative_brief_migration_amendment_resolving_the_asylum_legacy_caseload_final.pdf) See also PJCHR 9th Report, 15 July 2014, note 2 above.

(6) Maria O’Sullivan, “The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK”, chap 5 of Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives, ed. Susan Kneebone, Cambridge University Press, Cambridge & New York, 2009, at 258.

(7) See section 36(2) of the Migration Act.

(8) Kaldor Centre, Legislative brief on this Bill, note 5, page 5.

(10) Vienna Convention on the Law of Treaties , Art. 31.

(11) R v Asfaw [2008] 1 AC 1061 (House of Lords) at [11]. See also Applicant M61/2010E v Commonwealth of Australia [2010] HCA 42, discussed below.

(12) Lord Bingham in Sepet v Secretary of State for the Home Department [2003] 1 WLR 856 (House of Lords) at 862, [6]; quoted in James Hathaway and Michelle Foster, The Law of Refugee Status, Cambridge University Press, Cambridge, 2nd ed, 2014, consulted in ebook form, location 4524 , and note 34.

(15) "Morrison and Palmer strike deal for TPVs, but no Senate majority yet", ABC, The World Today with Eleanor Hall, 25 September 2014, transcript on ABC online.

(16) See RAC's objections to most of the provisions of that Bill in Submission No. 3 to this Committee's Inquiry on that Bill.

(17) However, we note that Mr Palmer has recently expressed strong concern that the Bill may contain "a lot more in it than we ever agreed": Lenore Taylor, "Temporary protection visa deal with Palmer United party looking shaky", Guardian, 24 October 2014, online.

(18) See eg the broad and flexible proposal for a network of partnerships between refugees and local communities suggested by Anne Kilcullen, "A win-win welcome", in Refugees and asylum seekers: Finding a Better Way: Contributions by Notable Australians, ed. Bob Douglas and Jo Wodak, Australia 21, December 2013.

(19) Kaldor Centre, Legislative brief on this Bill, note 5, at 3.

(20) Liberal and National Parties, The Coalition Policy to Clear Labor's 30,000 Border Failure Backlog, 2013, accessed on the Liberal Party's website.

(22) Ibid. See also the Kaldor Centre's point that breaches of various principles, combined with "the known adverse mental health impacts of temporary protection", may lead to a breach of Art. 7 of the International Covenant on Civil and Political Rights: Legislative brief on this Bill, 2-3.

(23) For earlier studies of returnees who were tortured or killed afterwards, see: Edmund Rice Centre, Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seekers, ERC and School or Education, Australian Catholic University, September 2004; Deported to Danger II: The Continuing Study of Australia's Treatment of Rejected Asylum Seekers, ERC, September 2006; David Corlett, Following Them Home: The Fate of Returned Asylum Seekers, Black Inc, Melbourne, 2005.

(24) See eg Plaintiff M61/2010E v Commonwealth of Australia & ors [2010] HCA 41 at [34]. We have made minor amendments to this dot point.

(26) Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law, Oxford UP, Oxford, 3rd ed., 2007, at 143.

(27) Jane McAdam and Fiona Chong, Why Seeking Asylum is Legal and Australia's Policies Are Not, New South Books, Sydney, at 25. Of those on TPVs under the Howard Government between 1999 and 2007, "around 90% ... eventually gained permanent visas. Considerable psychological damage was done to people who are now permanent residents and Australian citizens."

(28) The date of PM Rudd's statement that no further boat arrivals would be permitted to resettle in Australia.

(29) The PJCHR concludes that "the proposed exclusion of merits review for excluded fast track review applicants is incompatible with Australia's obligations of non-refoulement": 14th Report, 44th Parliament, [1.412] at 88.

(32) Kaldor Centre, Legislative brief on this Bill, note 5, 6, at note 2

(33) Migration Amendment (Protection and Other Measures) Bill 2014 (the earlier Bill).

(34) See many submissions to this Committee on the earlier Bill, including submission No. 3 from Canberra RAC. For example, false documents are sometimes used without the applicant being aware they are false, or were necessary to enable the applicant to get out of the country of origin or pass through other countries. Art. 31 of the Refugee Convention clearly requires non- penalisation of refugees arriving without valid papers.

(36) UNHCR, 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, HCR/GIP/03/04, 23 July 2003.

(37) See Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, not yet passed by the Senate.

(38) "The High Court in S152/2003 found it unnecessary to consider what the relevant standards are or how they would be ascertained, and courts have commented on the difficulties in identifying and defining their practical content." (Refugee Review Tribunal (RRT) Guidelines, "8. State Protection", RRT website, at 8-9) See also Hathaway and Foster, note 12, at location 1816: "It is, however, vital that an individual assessment be made as to whether there is a real chance that this 'infrastructure of protection' will not in fact accord protection to the applicant whose claim is at issue."

(39) The RRT Guidelines refer to specific cases where the courts and the RRT have grappled with these issues: see footnotes at 8-11.

(68) As proposed in the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013

### **UNHCR Submission to Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014**

[http://unhcr.org.au/unhcr/index.php?option=com\\_content&view=article&id=527&catid=37&Itemid=61](http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=527&catid=37&Itemid=61) December 11, 2014

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

UNHCR is reviewing the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 which raises a number of serious questions in relation to the interpretation of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (together 'the 1951 Convention'). Click here to read the ....

Report on Asylum-seekers on bridging visas in Australia: Protection Gaps 16 December 2013: A consultation process undertaken by UNHCR found that many asylum-seekers living in the community on bridging visas without work rights are unable to meet their basic needs and are living in a state of destitution. Housing conditions are poor and many asylum-seekers are without essential furniture items such as beds and refrigerators. An income below the poverty line has led to an overwhelming reliance on community organizations (specifically, material aid organizations) for ....

UNHCR Submission to the Expert Panel on Asylum-seekers 13 August 2012 Statement UNHCR Regional Office Canberra Expert Panel Report UNHCR notes with deep interest the recommendations of the Expert Panel on Asylum-Seekers, in its report released today. UNHCR agrees that there are no quick or simple solutions to the complexity of irregular movement of people coming into and through the region, including, but by no means exclusively to Australia. In principle, UNHCR supports the Report's conclusion that a sustained and strategic engagement, ....

Submission by UNHCR on the New Zealand Immigration Amendment Bill 2012 8 June 2012: The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the Immigration Amendment Bill 2012, introduces a number of measures that will have a direct impact on the manner in which a new category of asylum-seeker and refugee is received and processed on arrival in New Zealand. download ....

UNHCR Supplementary Submission to the Joint Select Committee on Australia's Immigration Detention Network 16 December 2011: UNHCR draws the attention of the Joint Select Committee to the experience in a number of jurisdictions, notably Canada, New Zealand and the United Kingdom, which provide for the role of a special advocate to represent the interests of an applicant in any proceedings involving classified

information.

download ....

UNHCR Submission to the Joint Select Committee Inquiry into Australia's Immigration Detention Network 19 August 2011: UNHCR has longstanding and well-known concerns about the mandatory detention of asylum-seekers and refugees who arrive in Australia in an 'unauthorized' manner." UNHCR welcomed the introduction of the Key Immigration Detention Values, but is concerned that they are not enshrined in law, nor are they being applied systematically to refugees, asylumseekers and stateless persons throughout Australia, particularly in relation to 'irregular maritime arrivals'. download ....

9 -10 June 2011: The Expert Roundtable outlined the Australian legal and policy settings, monitoring and oversight mechanisms, and NGO perspectives on detention reform. The main objectives of the Expert Roundtable were to explore the expansion of the alternatives presently available in Australia, and to identify potential alternatives to immigration detention in light of international best practices... Download Co-Chairs' Statement & Download Roundtable Summary ....

1 April 2011: UNHCR's submission addresses issues specifically relating to the third key issue identified in the Terms of Reference of the Review, notably the working arrangements and relationships between the intelligence agencies – in particular the Australian Intelligence Security Organisation (ASIO) – and policy and operational areas of government,<sup>3</sup> insofar as they affect refugees, asylum-seekers and stateless persons, and focuses specifically on the implications of the activities of the ....

19 October 2010: UNHCR welcomes the Government of New Zealand's release of the consultation paper, Legal Aid Quality Framework Paper, and the opportunity to provide comments on the two aspects of the framework – proposed criteria for approval as a legal aid provider (entry criteria) and standards which legal aid lawyers should meet to ensure that legal aid services are of an acceptable quality (practice standards)...download ....

October 2009: Australia's resettlement programme is in many ways a model for other resettlement countries. UNHCR appreciates the ongoing partnership of the Government of Australia in protection of refugees through resettlement and is pleased to provide comments in the interests of the further development of that program. Within the Australian Offshore Humanitarian Program, UNHCR is of the view that it is essential that protection remain the paramount objective and that human rights ....

September 2008: UNHCR welcomes the opportunity to provide a submission to the Joint Standing Committee on Migration in its Inquiry into Immigration Detention in Australia. UNHCR's submission address its comments only to issues that affect asylum-seekers, refugees and stateless persons, and takes into account policy announcements with regard to immigration detention made on 29 July 2008 by the Minister for Immigration and Citizenship...download ....

## **Advocacy Brief: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014**

<http://www.unitingjustice.org.au/refugees-and-asylum-seekers/information-and-action-resources/item/979-advocacy-brief-asylum-seekers-nov-14> December 11, 2014

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

On 25 September 2014 the Minister for Immigration introduced the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 to Parliament to amend sections of the Migration Act 1958 and the Maritime Powers Act 2013.

This Bill seeks to put into domestic law the powers the Government wishes to exercise under its current refugee and asylum seeker policy entitled âOperation Sovereign Bordersâ.

The Bill removes Government decision-making from the reach of the courts, and attempts to absolve Australia of many of its obligations under international law. The Bill undermines human rights and threatens the accountability and transparency upon which our democratic government should operate.

This is a resource to help you talk to your local politician, your friends, work colleagues and congregation about why these latest changes to asylum seekers policy should not be passed by the Parliament.

## **Committee Secretary Senate Legal and Constitutional ...**

<http://www.psychology.org.au/Assets/Files/2014-APS-submission-Migration-and-Maritime-Powers-Legislation-Amendment-Bill-October.pdf> December 11, 2014

31 October 2014 To Whom it May Concern, Re: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

31 October 2014

To Whom it May Concern,

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

The Australian Psychological Society (APS) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's Consultation on the draft Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

The APS is not in a position to comment in detail on all the proposed measures. However, based on the weight of evidence from psychological research and practice, the Society has concerns about each of the measures outlined, as well as the intent of the Bill..

The APS is the premier professional association for psychologists in Australia, representing more than 21,000 members. Psychology is a discipline that systematically addresses the many facets of human experience and functioning at individual, family and societal levels. Psychology covers many highly specialised areas, but all psychologists share foundational training in human development and the constructs of healthy functioning.

For over a decade, psychologists have been actively involved in advocating for the mental health needs and human rights of those seeking asylum in Australia. The APS, in consultation with psychologists working directly with asylum seekers, has long expressed concern regarding the impact of policies

of deterrence such as mandatory detention and temporary visas on the psychological wellbeing and mental health of asylum seekers.

Along with this submission, the APS draws the committee's attention to its Position Statement on the psychological wellbeing of refugees and asylum seekers, comprehensive Literature Review on the psychological wellbeing of refugees resettling in Australia, and numerous submissions made to Government and Human Rights inquiries into detention and migration policy and reforms over the past 10 years. These resources can be accessed at: <http://www.psychology.org.au/community/public-interest/refugees/>

#### The mental health and wellbeing of asylum seekers and refugees

Psychologists recognise the vulnerability of people seeking asylum and the potential for mental health problems amongst refugees. A comprehensive literature review commissioned by the APS in 2008 identified a range of significant impacts and outcomes of the refugee experience.

Importantly, the review identified:

- the significant psychosocial impact of the refugee experience, including experiences of pre-migration trauma, migration and resettlement
- that people seeking asylum are at risk of mental health problems based on specific risk factors including loss and trauma both prior to and post arrival. Such problems may be expressed in various ways depending on cultural background, personal experience and reception factors
- the key role that post-migration stressors may have in adjustment, including the experience of loss, restricted access to appropriate supports, and limited educational and employment opportunities
- the heightened risk of mental health problems among refugees who are placed in detention, especially children.

The paper highlights, however, that positive settlement outcomes are evident when refugees are afforded adequate rights and appropriate legal, settlement, mental health, education and employment supports. The presence of family was noted as having a therapeutic effect on people who had survived traumatic experiences, with a pivotal role in providing emotional, physical and economic support to refugees upon resettlement.

Also acknowledged is the importance of positive and accurate representation of refugee issues (e.g., in the media, by government), to the successful settlement and wellbeing of refugees.

#### Understanding the context for seeking asylum

The APS understands that those seeking asylum in Australia, particularly people who board and/or arrive by boat, are most often people who have come from or via countries that are not signatories to the 1951 United Nations Refugee Convention, and as such, asylum seekers are forced to continue to travel to another country to find protection.

The decision for an asylum seeker to come to Australia by boat is likely to be the biggest decision that person will make in their lifetime. The high stakes indicate that those who make this decision are likely to be afraid for their lives, fleeing brutal regimes and in situations in which they are no longer safe or have any hope of safer means of achieving asylum and resettlement. Arriving without adequate documentation (e.g., not having any documents, false documents or having disposed of documents) is likely to be linked to the fear and anxiety that characterize an asylum seeker's journey by boat (Hoffman, 2010) and done for safety reasons; for example, they or their families are at risk for speaking out against the government of their original country and in fear of refoulement if captured en route and identified (Pedersen et al., 2008). This likelihood is supported by the refugee recognition rates which show that the majority of those who seek asylum are subsequently found to be refugees and granted protection in Australia or elsewhere (Human Rights Commission, 2011).

The APS believes therefore that it is important to understand this context in which asylum seekers flee and the reasons they embark on dangerous journeys by boat, rather than to look merely for ways to stop or turn boats away. Seeking such understanding would be in accord with our obligations as part of the 'distress at sea' framework. As outlined by the United Nations High Commissioner for Refugees (2011), distress at sea situations raise grave humanitarian concerns for those involved (including exposing Australian Naval personnel to harm).

Any re-introduction of Temporary Protection Visas, as has been mooted, is likely to result in an increase in the number of families (women and children) attempting to come to Australia by boat, due to the ensuing significant delay and uncertainty in processes for family reunion.

Similarly, for asylum seekers who have fled their country, living in countries within the region (such as Indonesia or Malaysia) for years without any status or certainty of protection and/or while awaiting resettlement leads to feelings of hopeless and despair that contribute to people taking the extremely risky decision of coming to Australia by boat.

People in this situation are vulnerable, displaced and disenfranchised and are likely to be experiencing serious psychological effects of their refugee journey including trauma (post-traumatic stress disorder), feelings of fear, displacement, anxiety and despair. It is likely they have also experienced the violent loss of family members, and/or have been separated from other family members in the course of their journey.

#### Responding to the proposed measures

On the basis of the evidence presented above, the APS is gravely concerned about the measures outlined in the Amendment Bill, and urges the Government to reconsider its approach to asylum seekers. We are concerned in particular that:

- changes to the Maritime Powers Act will in effect mean that asylum seekers will be able to be detained at sea, thereby creating further unsafe conditions for an already vulnerable group, heightening mental health issues and causing distress for those involved;

- the proposed changes do not enable Australia to meet its obligations under the UN Refugee Convention, with several measures aimed at de-emphasising and bypassing the convention altogether (e.g., including changes to the definition of a refugee and non-refoulement obligations);
- the processing and assessment of visa applications should ensure legal and language assistance is provided so that a fair and just assessment can be made, and should be conducted in a sensitive and humane way, neither of which is possible on a boat that has not even reached Australian waters. Fast-tracking assessment processes in ways that compromise fair treatment and risk refouling asylum seekers to the traumatic, dangerous and life-threatening situations they have fled is no way to resolve 'the Asylum Legacy Caseload'.

The APS is also concerned about the proposed changes to protection visas, particularly the re-introduction of Temporary Protection Visas (TPVs). TPVs have been found to be associated with ongoing psychological distress among refugees released into the community, with these visa holders exhibiting greater levels of psychiatric symptomatology than those on permanent protection visas (Momartin et al., 2006; Steel et al., 2006). The insecurity of tenure and living with fear of forced removal significantly decreases wellbeing among refugee claimants (Rees, 2003).

Psychological research has highlighted the importance of family to individual mental health and wellbeing, and has specifically identified that arriving in Australia as a refugee with family members is a strong predictor of positive adjustment and source of resilience among refugees and asylum seekers (APS, 2008). But TPVs would prevent holders from seeking family reunion and thus deprive them of these clear benefits of family support.

The APS holds serious concerns regarding the extension of ministerial (or Government) power and diminished legal and ethical accountability associated with the proposed measures. Psychologists are aware of the dangers of unfettered power from the evidence gathered in classic experiments by social psychologists such as Stanley Milgram and Philip Zimbardo. A number of measures in the proposed legislation would open up the risk of politicians, senior public servants, military personnel and detention centre staff exhibiting exactly the kinds of behaviours predicted by such research - unquestioning compliance with unethical and dangerous directives, and increasing inability to display empathy, and misuse of assigned power.

#### Policies that protect rights and minimise psychological harm

The APS recommends that the Australian Government prioritise policies which protect the human rights of those seeking asylum in Australia and minimise psychological harm to an already vulnerable group.

The APS Position Statement on the Psychological Wellbeing of Refugees and Asylum Seekers in Australia (2010) considers it imperative that Australia meet its obligations under the UN Refugee Convention and uphold the fundamental right of refugees to seek protection, by adopting a fair refugee status determination process. This should include onshore processing of asylum seekers who come to Australia seeking our protection. Once security and health checks have been completed, asylum seekers should not be held in detention but allowed to live in the community while their claims for refugee status are being assessed. This is commensurate with international human rights standards as well as psychological research and best practice.

Furthermore, rather than policies of deterrence (such as immigration detention or attempting to turn boats back) which risk lives, compromise human rights and exacerbate poor mental health, focusing on policies that provide refugees with viable alternatives to boarding boats in the first place would provide more durable solutions for asylum seekers and refugees in the region. These should involve developing a comprehensive regional framework that works with the UNHCR to increase annual intake and ensure more efficient processing of applications for asylum. The framework should also provide safeguards to guarantee people are treated with dignity throughout the asylum process to prevent further distress and trauma occurring.

Along with policy responses, social psychology research has found widespread community prejudice against asylum seekers, and that this prejudice relates to the rhetoric of both the media and government, which has perpetuated misunderstanding and misrepresented those seeking asylum and their circumstances (APS, 2010; Pederson et al, 2012;). Myths that refugee who arrive by boat are 'queue jumpers' and 'illegal', and that people who arrive unauthorised are not 'genuine refugees' are associated with fear and mistrust in the community.

The positive and accurate representation of refugee issues, including the magnitude of the issue (e.g., relatively low numbers of asylum seekers arriving by boat, Australia's refugee intake in the global context) is also an essential part of Australia's response. This should include the use of accurate language in reference to refugees and asylum seekers, education about the contexts within which refugees have fled, anti-racism education, the promotion of positive survival stories and the identification of the contribution refugees make to the broader community (APS, 2010).

Adopting policies that prioritise the migration of family units and enhance reunion of refugee families, including recognising the extended nature and cultural ties among many refugee communities, is also an important strategy to prevent families from unsafely coming to Australia by boat.

We would be happy to provide further comment on this Bill; or for further information about our submission please contact me on 03 8662 3327.

Yours sincerely,

Heather Gridley FAPS  
Manager, Public Interest

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

<http://alcva.blogspot.com/2014/10/migration-and-maritime-powers.html> December 11, 2014

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

I live to grow, develop, evolve, enjoy the moment, and stay open to all of life's possibilities; I'm concerned with the evolution to a plant based diet; positive ageing; social justice based on human rights and equality; an awareness and awakening to the matrix and its obnoxious techniques.

This website is shy of the multi-levelled capability of the all powerful arcane, interconnected world of multinational corporations, government departments, think tanks and collectives that exerts its power over the flow of information by its propaganda arms. My eclectic approach draws upon multiple theories, styles, ideas.

I'm apposed to wars in all circumstances! And, I loath the madmen responsible for the death and mayhem and trauma and destruction of infrastructure and nature. Tun Dr Mahathir bin Mohammad asks,

Why is it that the murder of one man is considered a criminal act whereas the killing of hundreds of thousands of innocent people committed in wars, is not considered so?

I'm a pilgrim to Santiago de Compostela, Rome, Jerusalem and other amazing destinations. Pilgrimages are a reassuring experience that I yearn to re-experience for as long as I'm able to.

A pilgrim requires a great deal of humour, some common sense and a spirit of recklessness that's lost to today's travellers in search of comfort. Oh, I have often heard this said!

Say hello. I appreciate like-minded people.

**Proposed migration changes condemned as reminiscent of 'White Australia policy'**

<http://www.sbs.com.au/news/article/2014/11/28/proposed-migration-changes-condemned-reminiscent-white-australia-policy> December 11, 2014

The government's proposed new migration laws have been condemned by human rights and church groups. The Migration and Maritime Powers Legislation Amendment Bill ...

The government's proposed new migration laws have been condemned by human rights and church groups.

The Migration and Maritime Powers Legislation Amendment Bill (Resolving the Asylum Legacy Caseload) includes a reintroduction of temporary protection visas and would enshrine asylum seeker boat turn-backs into law.

It also removes references to the United Nations Refugees Convention from the Migration Act.

The government said the changes would also assist it to fast-track an asylum seeker caseload of about 30,000 people.

But Chairman of the Social Responsibilities Commission of the Melbourne Anglican Church, Reverend Gordon Preece has labelled the proposal "a disaster for human dignity". "The Government's proposed new migration laws are the most draconian since White Australia." Reverend Preece said. "(It) will deprive asylum seekers of human dignity and the most basic human rights." Dr Preece said the bill was barbaric, as it unilaterally removed references to the UN Refugee Convention. A number of advocacy groups, including the Human Rights Law Centre, UNICEF Australia, Save the Children and the Human Rights Council of Australia have opposed the bill in a joint submission to Parliament. Director of Legal Advocacy at the Human Rights Law Centre, Daniel Webb said the changes would breach international law. "The reforms aren't needed," Mr Webb said. "The government should do the right thing and process people quickly and fairly under the current law."

 **Inquiry into the Migration and Maritime Powers Legislation ...**

[http://www.unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/download/629\\_bf4fc6b298c3973f6ddcf59644d185](http://www.unitingjustice.org.au/refugees-and-asylum-seekers/submissions/item/download/629_bf4fc6b298c3973f6ddcf59644d185) December 11, 2014

Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. ... (Resolving the Legacy Caseload) Bill 2014, ...

OCTOBER 2014

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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

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Introduction  
The Uniting Church in Australia (UCA) believes in the dignity of all people and is committed to work for justice and to oppose all forms of discrimination. In the Statement to the Nation made by the Inaugural Assembly in 1977, the Uniting Church promised to "seek the correction of injustices wherever they occur", to "work for

We believe that, upon arrival, asylum seekers should have access to the protections afforded them in international law as foreign nationals seeking protection from persecution. They also must be provided with adequate psychological, social and medical care and legal advice. In particular, decisions about child asylum

the eradication of poverty and racism within our society and beyond' and 'to oppose all forms of discrimination which infringe basic rights and freedoms'. 1

We approach the protection of asylum seekers and refugees in the context of the words of Jesus. He spoke of a new community established on righteousness and love, and based on a fellowship of reconciliation—a community in which all members work together for the good of the whole. We affirm the belief that asylum seekers and refugees have the same rights as all people.

We believe that the principles expressed above should apply to Australia's policies, legislation, and practices toward asylum seekers, refugees and humanitarian entrants. The Australian Government must uphold the international treaties and conventions that Australia has signed including:

- the Refugee Convention and Protocol;
- the Universal Declaration of Human Rights;
- the Convention on the Rights of the Child; and
- the International Covenant on Civil and Political Rights.

We also believe that, in line with Article 3 of the United Nations Convention Relating to the Status of Refugees (known as the Refugee Convention) there should be no discrimination of asylum seekers for reasons of race, religion, country of origin or mode of arrival. 2 The Australian response towards asylum seekers should be culturally sensitive and take into account the situations from which people have come.

1 <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

2 Convention and Protocol Relating to the Status of Refugees, available at <http://unhcr.org.au/unhcr/images/convention%20and%20protocol.pdf>

seekers should be made with the best interests of the child as the primary consideration. The right to education for child asylum seekers should be upheld. We believe that the immigration system should be accountable and transparent.

UnitingJustice Australia (UJA) welcomes the opportunity to comment on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Given the Uniting Church's position (described briefly above) regarding the appropriate treatment of asylum seekers and Australia's protection obligations, we have concerns about the implications of this proposed legislation. The Bill is a significant challenge to Australia's obligations to protect victims of persecution. It gives greater power to the Minister for Immigration and Border Protection to make decisions irrespective of international obligations, and legislates policies of deterrence rather than upholding our responsibilities for protection. Our main concerns relate to the following schedules in the Bill:

#### SCHEDULE 1: MARITIME POWERS

- Increased powers for maritime officers to detain, move and take control of vessels or people are contrary to international law.

- Legislating permission for the Commonwealth Government to ignore court decisions threatens our robust and transparent democracy.

#### SCHEDULE 2: TEMPORARY PROTECTION VISAS

- The re-introduction of temporary protection visas without the possibility of permanent protection will mean greater uncertainty, stress, anxiety and psychological illness for asylum seekers.

- Lack of family reunion provisions in temporary protection visas may lead to more women and

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##### Schedule 1: Maritime Powers

Under the proposed legislation the Department of Immigration and Border Protection (DIBP) will have greater powers at sea. In particular, the Minister will be able to exercise powers in relation to detention, movement, and control of vessels or people in vessels. Maritime Officers

will be able to transfer a person to a 'destination' in the migration zone or outside the migration zone, including a

place outside Australia, whether or not Australia has an agreement or arrangements with that country regarding reception of vessels or people.

These proposed powers are contradictory to Australia's obligations in relation to asylum seekers who arrive by boat. According to Article 31 of the Refugee Convention Australia is prohibited from restricting the freedom of movement of refugees who arrive without authorisation, with the exception of restrictions necessary for regularising their status. 3 Further, detention of people at sea is contrary to the intent of the Universal Declaration of Human Rights, (which stipulates in Article 9 that people should not be arbitrarily detained)<sup>4</sup> and the International Covenant on Civil and Political Rights (which also states in Article 9 (1) that people should not be arbitrarily detained).<sup>5</sup> In addition, it is of great concern that the Government is seeking to legislate permission to ignore court decisions with respect to international obligations. A new section (22A) to be added to the Maritime Powers Act 2013 allows that power to give an authorisation will not be deemed to be invalid even if there has been:

- failure to consider international obligations or the domestic law of any other country;
- defective consideration of international obligations; or domestic law of any other country; or
- exercise of power inconsistent with international obligations.

This sets an alarming precedent. That the Government would seek to legislate for such powers and remove any legal challenges not only undermines our commitment to international human rights but challenges foundational democratic principles. We are particularly concerned that the addition of the words "failure to consider international

3 op. cit.

4 1948 Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/>

5 1966 International Covenant on Civil and Political Rights <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

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obligations etc. does not invalidate authorisation<sup>6</sup> into the Maritime Powers Act 2013 is an attempt to enshrine into domestic law a disregard for international legal obligations.

Amendments to the Maritime Powers Act 2013 appear to be a direct reaction to the case of the 157 Sri Lankan asylum seekers who were held on the Australian Navy ship the Ocean Protector for almost a month during July 2014.<sup>7</sup> These people were held without adequate access to communication with family, without their basic needs met, without legal advice and without transparent communication to the Australian people about the situation. In the case of CPCF v Minister for Immigration and Border Protection & Anor which is currently before the High Court and relates to the same 157 asylum seekers, the plaintiff challenges the lawfulness of his detention outside of Australia and Australia's contiguous zone and seeks damages for wrongful imprisonment. The case also challenges Australia's power to intercept and detain asylum seekers and take them to a place outside Australia, in this case India.<sup>8</sup>

These proposed legislative changes are extremely significant because they attempt to substantially broaden the powers of maritime officers to intercept, detain, move and return vessels carrying asylum seekers. It is likely that such powers, if implemented, will place Australia in breach of its non-refoulement obligations. In addition, the ongoing secrecy that surrounded the detainment of the 157 asylum seekers, and which continues to shroud 'on-water operations', threatens the accountability and transparency upon which our democratic government should operate.

## Schedule 2: Temporary Protection Visas

The legislation enables the Government to re-introduce Temporary Protection Visas (TPVs), amends the definition of protection visas to include TPVs and adds a new TPV—the Safe Haven Enterprise Visa (SHEV). There are a number of reasons that these TPVs are problematic. Firstly, TPVs do not provide refugees with the range of services that

would make settlement in Australia easier. There is no

<sup>6</sup> Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Bill 2014, (22A and 75A)

<sup>7</sup> S. Whyte, 'Asylum Seekers detained on a customs vessel for a month suffered tortuous journey high court hears', SMH, 14 Oct 2014 <http://www.smh.com.au/federal-politics/political-news/asylum-seekers-detained-on-customs-vessel-for-a-month-suffered-torturous-journey-high-court-hears-20141014-115s89.html>

<sup>8</sup> High Court of Australia (HCA), 'CPCF v Minister for Immigration and Border Protection', HCA website, accessed 29 Oct 2014

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provisions that are available in permanent protection visas, the only way for family members to unite with a person on a temporary protection visa is to board a boat. Former Immigration Minister Chris Evans indicated that the numbers of women and children arriving in Australia by boat increased from 25 to 40 per cent in 2001, the year following the introduction of TPVs.<sup>14</sup> According to the Refugee Council of Australia, of the 353 people aboard the SIEV X when it sank in 2001, 142 were women and 146 were children hoping to reunite with husbands and fathers already in Australia on TPVs.<sup>15</sup>

In light of this evidence, we consider TPVs used in this way to be contrary to the Refugee Convention. They are also an infringement of people's basic rights and freedoms, and reduce opportunities for safe reunion with family members.

## Schedule 4: Enhanced Screening

The 'fast track' or 'enhanced screening' processes that intend to remove people could have significant and harmful consequences. One of Australia's obligations under the Refugee Convention is non-refoulement (Article 33),<sup>16</sup> the obligation to not send a person back to a situation of danger. However, under the proposed legislation, the emphasis on brief initial assessment shortly after arrival, without adequate opportunity to prepare paperwork or seek legal advice would lead to an increase in incorrect negative assessments.

The introduction of limited appeal mechanisms and then 'prompt' removal of failed asylum seekers risks refoulement.<sup>17</sup> The Minister will also have the power to expand the class of people that will be excluded from merits review altogether, as well as expanding the class of people subject to the fast track process. The Human Rights Law Centre, in its report on Australia's interception and return of Sri Lankan Asylum Seekers, condemns the return of 1,100 Sri Lankan asylum seekers

right to travel outside Australia, and no right to family reunion, as well as limited welfare and work benefits. There are also limited entitlements to services such as accommodation, food, household goods, finances, language training, employment advice and medical care. In addition, people granted a TPV will be expected to undergo a re-assessment of status process every three or five years.

Due to these uncertain circumstances, people on TPVs have in the past been shown to experience higher levels of anxiety, depression, post-traumatic stress and other psychiatric illnesses than the rest of the population. For example, a study published in the Medical Journal of Australia<sup>9</sup> found that temporary visa status was a significantly stronger predictor of anxiety, depression and post-traumatic stress disorder than permanent protection visa status. A Senate Inquiry in 2006<sup>10</sup> found that there was little real evidence of the deterrent value of TPVs and that TPVs imposed a significant cost in terms of human suffering. A submission by the UNHCR to the Expert Panel on Asylum Seekers expressed serious concerns about TPVs, specifically that they subject refugees to unnecessary hardship and perpetual uncertainty.<sup>11</sup>

One key difference between this legislation and the TPV regime under the Howard Government is the refusal to provide permanent protection. The Minister has made it clear in his second reading speech that permanent protection will not be offered.<sup>12</sup> Under the previous TPV policy implemented by the Howard Government, around 90 per cent of TPV holders were eventually granted permanent protection.<sup>13</sup> Refusal to grant permanent protection will only exacerbate the mental and psychological suffering experienced by TPV holders. In addition to the psychological impacts of TPVs, there is some evidence to suggest that TPVs may increase rather than decrease the likelihood of people arriving in Australia by boat. Without the possibility of family reunion

<sup>9</sup> S. Momartin et al (2006) 'A comparison of the mental health of refugees with temporary vs permanent projection visas', Medical Journal of Australia, 185 (7): 357-361

<sup>10</sup> [http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/migration/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/migration/report/report_pdf.ashx)

<sup>11</sup> UNHCR Submission to the Expert Panel on Asylum Seekers, 27 July 2012 <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/UNHCR.pdf>

<sup>12</sup> S Morrison, Second reading speech: Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Bill 2014, House of Representatives, Debates, 25 September 2015, p5

<sup>13</sup> Australian Government, Report of the Expert Panel on Seekers, August 2012, accessed 29 Oct 2014

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'enhanced screening' with decisions being made without giving applicants proper access to legal advice.<sup>18</sup>

In the past, the rate at which decisions made during a fast track process were subsequently found to be incorrect was significantly high.<sup>19</sup> In its submission to the Expert Panel on Asylum Seekers, the UNHCR expressed concern about the inconsistency of Australia's refugee application processes, highlighting numerous discrepancies between initial assessment and final review outcome.<sup>20</sup> The introduction of removal powers under Section 198 of the Migration Act will be independent of assessments of Australia's non-refoulement obligations. We are concerned that fast track removal processes, without recognition of rights of asylum seekers or concern for non-refoulement obligations, will lead to greater numbers of people returned to situations of harm and danger. The only case we see for fast-track assessment would be in the situation where approval of protection is sped up. For example, when it is clear that all members of a particular minority group have experienced persecution, the Australian Government might choose to fast track protection application approval of all people from that particular minority group.

It is also distressing that the Australian Government does not monitor the wellbeing of people who have been returned to their place of origin. Given that Sri Lanka continues to produce refugees, there is concern for the wellbeing of the more than 1,000 Sri Lankan asylum seekers who have been returned.<sup>21</sup> The Human Rights Law Centre believes follow-up on returned Sri Lankan asylum seekers has been inadequate. At least one person who had been tortured was refused an interview with an Australian Federal Police representative in Colombo to assess his wellbeing.<sup>22</sup> People have also been returned to Afghanistan, where a Hazara man was tortured by

since 2012 and draws on data to suggest that the majority of

those asylum seekers are ultimately found to be refugees, due to the continuing human rights abuses and war crimes committed by the Sri Lankan Government. Sri Lankan asylum seekers were the first group to be subjected to

14        [http://parlinfo.aph.gov.au/parlInfo/download/committees/Seekers,\\_estimate/11640/toc\\_pdf/6539-3.pdf;fileType=application%2Fpdf#search=%22committees/estimate/11640/0001%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/Seekers,_estimate/11640/toc_pdf/6539-3.pdf;fileType=application%2Fpdf#search=%22committees/estimate/11640/0001%22)  
 15        [http://refugeecouncil.org.au/n/mr/1409\\_TPVs.pdf](http://refugeecouncil.org.au/n/mr/1409_TPVs.pdf)  
 breaking  
 16        1951 Convention on the Status of Refugees  
 17        Factsheet: Fast Track and Enhanced Screening policies, Kaldor Centre, [http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced\\_screening\\_07.12.2013.pdf](http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/enhanced_screening_07.12.2013.pdf)

18        Howie, E Can't Flee, Can't Stay: Australia's interception and return of Sri Lankan asylum seekers, Human Rights Law Centre, 2014 [http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC\\_SriLanka\\_Report\\_11March2014.pdf](http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf)  
 19        UNHCR Submission to the Expert Panel on Asylum Seekers, 27 July 2012 <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/UNHCR.pdf>  
 20        UNHCR Submission to the Expert Panel on Asylum  
 2012 <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/UNHCR.pdf>  
 21        Dehghan, S and Laughland, A, Australia accused of  
 law returning asylum seekers to Sri Lanka, The Guardian, 7 July 2014 <http://www.theguardian.com/world/2014/jul/07/australia-accused-breaking-law-returning-asylum-seekers-sri-lanka>  
 22        Howie, E

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 the Taliban upon his return.<sup>23</sup> In accordance with our obligations Australia needs to monitor and provide support to those who are returned to their place of origin, whether the decision to return is voluntary or not.

#### Schedule 5: Australia's International Law

##### Obligations

A number of changes to law within the proposed legislation are of concern because they dismiss international obligations. The addition of section 197(c): "Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198"

to the Migration Act expresses a blatant disregard for international law. As indicated above, this change would enable the government to ignore Australia's non-refoulement obligations and instead continue with its practices of 'enhanced screening' methods and return of people to situations of danger.

The addition of section 5H (the Government's own definition of a refugee) and 5J (the Government's own definition of well-founded fear of persecution) to the Migration Act 1958 provides a more limited view of who can be considered a 'refugee'. In particular, Section 5J(1)(c) states that the person has a well-founded fear of persecution if the real chance of persecution relates to all areas of a receiving country and subsection 5J(3) states that an asylum seeker will be deemed not to have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid persecution. Under these proposed changes, fewer people will be categorised as refugees, and greater numbers could be returned to their country of origin and still be at risk of harm.

These changes threaten Australia's reputation as a responsible global citizen. Australia has already received negative reports from international human rights experts regarding breaches of international obligations in implementation of our asylum seeker and refugee policy. The UNHCR visited both Nauru and Manus Island detention centres in 2013 and condemned the failure to adequately meet Australia's obligations in relation to the care and protection of asylum seekers. Following the visit to Manus Island in June 2013, <sup>24</sup> the UNHCR found that conditions in detention were below the international standard and that arbitrary detention is against the

23        Hekmat, A Taliban tortures Abbott government deportee, [http://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-government-deportee/14123448001068#.VDy2M\\_msx6U](http://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-government-deportee/14123448001068#.VDy2M_msx6U)  
 24        [http://unhcr.org.au/unhcr/files/2013-07-12\\_Manus\\_Island\\_Report\\_Final\(1\).pdf](http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final(1).pdf)

UDHR<sup>25</sup> and ICCPR.<sup>26</sup> In November 2013 during a monitoring visit to Nauru, UNHCR found that Australia had not met its obligations with respect to arbitrary detention, providing safe and humane treatment, or providing fair, expeditious and efficient system for refugee claim assessment<sup>27</sup>. The UNHCR has also issued a press release stating concern

about Australia's use of enhanced screening procedures and non-compliance with international law.<sup>28</sup> Australia has both legal and moral responsibilities to meet its international obligations and an obligation, as a wealthy, secure democracy to be a model nation in its commitment to upholding the rights of all people, both regionally and internationally. This legislation is an abrogation of all those obligations and responsibilities.

#### Schedule 6: Newborn Children

The Bill specifically defines 'Unauthorised Maritime Arrivals (UMAs)' to include children of asylum seekers arriving by boat who are born in Australia or in a regional processing country. Children who arrived after 13 August 2012 will be subject to the same conditions as their parents—possible transfer to a regional processing country and mandatory detention. We are concerned that this legislative amendment will restrict the rights of newborn children in relation to Australia's international obligations. In 2005 the Migration Act was amended to indicate that children should only be detained as a matter of last resort, in keeping with Article 27 of the CRC<sup>29</sup> which states that children should not be held in detention. As the Human Rights Commission's National Inquiry into Children in Immigration Detention<sup>30</sup> report concluded, children in immigration detention for long periods of time are at high risk of serious mental harm. We maintain the conviction that newborn children should not be detained

in immigration detention centres for any length of time or subjected to Australia's punitive refugee policies.

25        Universal Declaration of Human Rights 1948, Article 9  
 26        1966 International Covenant on Civil and Political Rights, Article 9  
 27        <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>  
 28        UNHCR, Returns to Sri Lanka of individuals intercepted at sea, media release, 7 July 2014, accessed 29 Oct 2014  
 29        1989 United Nations Convention on the Rights of the Child  
 Saturday Paper, Oct 4, 2012 [http://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-government-deportee/14123448001068#.VDy2M\\_msx6U](http://www.thesaturdaypaper.com.au/news/politics/2014/10/04/taliban-tortures-abbott-government-deportee/14123448001068#.VDy2M_msx6U)  
 30        HREOC, A last resort? National Inquiry into Children in Immigration Detention 2004 <https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004>

#### SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE Conclusion & Recommendations

The Uniting Church in Australia believes that Australia must always legislate in a manner consistent with our obligations under international law. Our domestic law with respect to refugees and asylum seekers should reflect the intent of the Refugee Convention, which is to offer protection and provide for the basic human needs of those fleeing persecution. The human rights, safety and protection of refugees should be the focus of our laws, and not a "zealous fixation on deterrence".<sup>35</sup>

would otherwise be stateless". Australia's Citizenship Act 2007 affirms this obligation, stating that any child who was born in Australia, and who is not and has never been a citizen of another country and is not entitled to apply for citizenship elsewhere, is eligible for Australian citizenship. We would like to see clarification within the legislation that a child born in Australia (including excised offshore places) whose parents arrived in Australia by boat would be granted Australian citizenship and would not be subjected to the same punitive refugee policy.

We strongly urge that the Bill not be passed and in particular, we make the following recommendations:

1. Cease the interception and return of asylum seekers at sea and work positively within the region to develop a genuine regional protection system that would remove the need for refugees and asylum seekers to use people smugglers.
2. All asylum seekers seeking to arrive in Australia by boat must be brought to Australia for processing in accordance with our international obligations.
3. Provide permanent protection visas for asylum seekers arriving in Australia by boat who are found to be refugees.
4. End enhanced screening assessment processes, except in cases where it is appropriate to fast-track a positive decision.
5. Monitor the wellbeing of all asylum seekers returned to their place of origin.
6. Recognise children born in Australia of parents seeking asylum as Australian citizens.

31 International Covenant on Civil and Political Rights  
 32 1989 United Nations Convention on the Rights of the Child  
 33 United Nations Convention on the Reduction of Statelessness  
 http://www.unhcr.org/3bbb286d8.html  
 34 1961 United Nations Convention on the Reduction of Vol.  
 Statelessness http://www.unhcr.org/3bbb286d8.html

35 S. Dechent, Operation sovereign borders: The very real risk of refoulement of refugees [online]. Alternative Law Journal, 39, No. 2, Aug 2014: 110-114.

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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## Restoring TPVs to resolve Labor's legacy caseload

<http://www.liberal.org.au/latest-news/2014/09/25/restoring-tpvs-resolve-labors-legacy-caseload> December 11, 2014

Restoring TPVs to resolve Labor's legacy caseload Media Release ...

The Hon. Scott Morrison MP

Minister for Immigration and Border Protection

The Coalition Government has secured support of the Palmer United Party to reintroduce Temporary Protection Visas (TPVs) to assist resolving Labor's legacy caseload of 30,000 Illegal Maritime Arrivals (IMAs).

"We are stopping the boats, with just one venture having arrived this year, and we are now seeking to resolve the backlog of 30,000 IMAs who arrived under the previous government by restoring TPVs," Minister Morrison said.

"TPVs were foolishly abolished by Labor and the Greens in 2008 in their pursuit of weaker borders, providing a product for people smugglers to sell.

"The support of the Palmer United Party to restore TPVs through legislation to be introduced this week after they were abolished by Labor and the Greens following the last election is welcome.

"We will continue to engage other crossbenchers on our proposals. The discussions we have had to date have been very positive.

"Denying permanent protection visas to IMAs has been Coalition policy for over a decade and was overwhelmingly backed by the Australian people at the election.

"Under new legislation – the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 – two new temporary visas will be established. These visas will not provide a pathway to a permanent protection visa in Australia.

"IMAs found to be owed protection will be offered a TPV for up to 3 years. TPVs do not include family reunion or a right to re-enter Australia. Holders will have access to targeted support arrangements including: work rights, access to employment services and mutual obligation, access to Medicare and income support, torture and trauma counselling, translating and interpreting services, complex case support and access to education for school aged children.

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

"SHEVs will be valid for 5 years and like TPVs will not include family reunion or a right to depart and re-enter Australia.

"SHEV holders who have worked in regional Australia without requiring income support for three and a half years of their visa period will then be eligible to apply for other onshore visas to be granted where they satisfy the relevant criteria. They will not be eligible for a permanent protection visa.

"If a SHEV holder was to access government assistance to study for a degree, diploma or trade certificate in a designated regional area, this would not be classified as accessing social security benefits for the purposes of calculating the period required before the holder becomes eligible to apply for other onshore visas.

"The new visa arrangements will allow the government to commence processing asylum claims of the legacy caseload. More rapid processing and streamlined review arrangements, as detailed at the election, will be implemented.

"Any further delays in processing or repeated processing of claims simply adds to cost and uncertainty and prevents people getting on with their lives.

"Upon passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and the Migration Amendment (Protection and Other Measures) Bill 2014 the government will agree to process IMAs currently on Christmas Island and the mainland who arrived last year and who have not been transferred to Nauru or Manus Island, as part of the legacy caseload.

"If found to be refugees they will be provided a TPV or SHEV. They will not be eligible for a permanent protection visa. These visas only apply to those IMAs who are part of the legacy caseload."

"All IMAs already transferred to Nauru or Manus Island will remain subject to the offshore processing policy, regardless of their date of arrival. They will remain on Nauru or Manus Island, where their asylum claims will be assessed. Under this policy, they will not be resettled in Australia."

"Furthermore, any and all new illegal maritime arrivals will continue to be transferred to Manus Island or Nauru for offshore processing and resettlement, as was demonstrated by the recent 'Indian' venture where all 157 IMAs were sent to Nauru. This will apply in all such cases, without exception, as a necessary part of our border protection regime that is successfully stopping the boats."

"The Government will also continue to support Assisted Voluntary Return (AVR) packages for those in the legacy caseload, particularly as a mechanism to reunite unaccompanied minors with their families in their home countries."

"I thank the Palmer United Party for their support of temporary protection visas. The Coalition Government is stopping the boats, restoring integrity to our immigration programme and can now get on with the job of resolving Labor's legacy of failed border protection," Minister Morrison said.

## **Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Treasurer, Coalition Government « ForeignAffairs.co.nz**

<http://foreignaffairs.co.nz/2014/12/09/migration-and-maritime-powers-legislation-amendment-resolving-the-asylum-legacy-caseload-bill-2014-treasurer-coalition-government/>  
December 11, 2014

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Treasurer, Coalition Government.  
Published By MILNZ ...

Ray Hadley: Scott Morrison, the Immigration Minister joins me in the studio, a little later than normal, Minister good morning to you.

Hadley: Now, you are a rare breed. You got your bill for Temporary Protection Visas and other matters through the Senate. You had to make some qualifications to it and some changes to it, but take us through how difficult that must have been given the lunacy – and my words, not yours – of the Senate.

Minister Morrison: Well, look, we've been working on this for six months, and you've really got to commit to it and it just shows that when you can get people around a table and doing so in good faith, then there is the opportunity to do that through this Senate. Now there certainly wasn't that opportunity under the previous Senate, with Labor and the Greens, they have ruled this out and actually knocked back TPVs twice. So we went to work on it, we came up with the compromises and they're all compromises that I'm very happy to support. What we're saying here is that you stop the boats and then you get your policies in place and you strengthen things like turn-backs, then that gives you the room to do things like further reduce the number of children in detention. We've already reduced it by 50 per cent, this will take us right back to just a small number now and it's my objective to get them all out eventually. But also, we've been able to increase the intake, which is something that people have been calling for, but only once we've dealt with the backlog of the 30,000 cases Labor left behind. So I think what people are seeing in this bill is a real dividend, and it's the dividend of all of these things we were able to convince the cross-benchers to support.

Hadley: Ricky Muir was critical to it in the end, were you worried, was he wavering, was there a chance that he would pull the pin on what he thought he would do?

Minister Morrison: I was very impressed with Ricky, because this was probably the biggest decision that he's had to make certainly in politics – I'm sure he's had other decisions in his life. There were very real human consequences for his decision and I was impressed with the way he went about it, the way he engaged with us, he didn't sort of engage in flapping his mouth around in the media, nor did I, on these things.

Hadley: Why have you got to bring Jacqui Lambie into it? Why have you got to bring her into it?

Minister Morrison: Well I think what it also demonstrated Ray, is that Jacqui Lambie has her view on things, but basically in taking that view she made herself completely and utterly irrelevant to this debate. I mean, she told me that she supported the bill; she thought it was a good idea, but she voted against it, so she'll have to size up the Tasmanian electors on that.

Hadley: Will you accept now, that's it's a complete – well not a complete futility – but it's an exercise that perhaps you shouldn't be going down with trying to deal with Jacqui Lambie again? I mean–

Minister Morrison: Well that's really up to Jacqui Lambie. If you're going to go and make this position to the government, you're just going to vote against everything, well that's not really someone you can have a sensible conversation with. What I've found with all the other cross-benchers, including Senator Madigan, who voted against us on the bill, but he engaged with us, he had a sensible conversation with us and I respect his reasons for doing what he did. But whether it's Senator Leyonhjelm, and Bob Day and the PUP Senators and Clive, they all came to the table. My view on these things has always been I'd rather have 80 per cent of something than 100 per cent of nothing. I think Senator Xenophon in particular showed a lot of leadership on this. You wouldn't believe – well, I'm sure you would actually Ray – the level of bitter and vitriolic hatred that was poured out against Ricky Muir and Senator Xenophon in particular over their decision was just despicable.

Hadley: What, from Jacqui Lambie alone?

Minister Morrison: No, no. Not from Jacqui. From refugee advocates, the Greens and the left wing of the Labor party–

Hadley: Oh, from outside of Parliament? –

Minister Morrison: It was abhorrent the way they just piled on the pressure and the abusive texts and emails and various things – going into their offices. They were basically trying to intimidate them out of making the decision they did. Those Senators have achieved more for refugees last week than any of those other idiots have over a very long period of time, and particularly Senator Hanson-Young likes to go out there and wear compassion on her sleeve, but she was voting against really good outcomes for refugees last week and thankfully there were some common sense Senators who were more interested in results than rhetoric and puffing themselves up.

Hadley: Given you're one of the few to get legislation through the upper house, I was thinking about a circuit breaker out loud on the programme this morning. I don't know what the circuit breaker would be, but obviously – a bloke's written to me and said well it's only one opinion poll. Well it's not one opinion poll, mate, it's a series of opinion polls that are dire for the Prime Minister. Maybe, he could make you, there's talk about you being the next Treasurer, maybe he could make you the next Minister for the Senate?

Minister Morrison: Well I've got to tell you that what we achieved in the Senate wasn't just me, Ray. We had a lot of support from our Senators there as well. Mathias Cormann had been enormously helpful through this process. Of course Minister Cash, my Assistant Minister, she was heavily involved in all this as was Mitch Fifield and Christopher Pyne was also very helpful in all of this as well. So it was a team effort. I mean obviously it was my responsibility but I worked with a lot of people to get this done and look, I've had one enormous job to do on fixing one of Labor's filthy messes on our borders. Joe has had the other, I would argue, even bigger job to do, in fixing Labor's other big filthy mess on the budget and the economy, so he has my full support for that. I'm still working on cleaning up this other mess and I know Joe will go to work hard as he has been on fixing that mess.

Hadley: Well the difference is, you solved yours, even if you've only got 80 per cent of it through. He's solved nothing.

Minister Morrison: But he's still in there fighting and that's the thing. He's still in there fighting and Christopher Pyne's back in there fighting.

Hadley: But it doesn't matter. It's the 12th round, Christopher's in the corner, the towel is in his hand, ready to be thrown in-

Hadley: And Joe's leading with the left, leading with the right, and the problem is he's getting punched round the ring, if you'll pardon the expression, mercilessly.

Minister Morrison: You'll see Joe Hockey be the comeback kid I think next year and for this reason – he knows he has to get this result for the Australian people because that is what we were elected to do and we will continue to see Joe apply himself to getting that result. I don't think it is the 12th round at all Ray. I think we are barely into the second. There is still a lot of fight in all of this and it is a fight we intend to win.

Hadley: He wants to hope the three knockdown rule doesn't apply because he has had two knockdowns a third will see him out. If he comes back from this – I will give you this – the greatest sporting achievement I have ever broadcast in the boxing ring was Jeff Harding and Dennis Andries in the early 90s for the WBC light heavyweight title. Andries led by at least ten points in the 12th round and Harding knocked him out. It was the only way he could win. For Joe to still be Treasurer this time next year he is going to have to come up with a Jeff Harding type performance I can assure you.

Minister Morrison: And I am really confident he will because you know when you are fighting for something you believe in there is a lot more fight in you and we have got a lot of fighters as a government because we believe what we are doing. Next year they will see it. You have got to look at – an election is always a contest. I have read the same polls you have today Ray but as an election gets closer they will start to look at Bill Shorten's rap sheet when they were in government, they will start to look at Chris Bowen's rap sheet. They will start to look at Tony Burke's and Tanya Plibersek's. They were integral to the former failed government under Rudd-Gillard-Rudd and when people look at their rap sheet of failure as a government I think when that comes into focus – it wasn't like in Victoria with Bracks and Brumby. The former Rudd-Gillard-Rudd wasn't like the Bracks-Brumby Government. The former Rudd-Gillard-Rudd Government was an absolute shocker and Bill Shorten was up to his neck in it as was their entire front bench.

Hadley: I think the Labor party may well be dabbling in cryogenics. I saw Kate Lundy I thought wheeled out this morning for the first time since her infamous announcement with Jason Clare...

Minister Morrison: We all remember that.

Hadley: So where has Kate been, has she been warehoused? Has she been hidden?

Minister Morrison: Well she is retiring, she is actually retiring from the Senate and I understand the ACT Chief Minister is coming in to take her place.

Hadley: But was did she wait so long to say something?

Minister Morrison: I don't know but I do know that Bill Shorten is guilty of many things and one thing he is guilty of is he was guilty of being part of the Rudd-Gillard-Rudd Government and he has to wear that carcass around his neck all the way to the next election and I can guarantee you we will be making sure he does.

Hadley: Well based on that can you believe the opinion poll today finds him more trustworthy than your Prime Minister?

Minister Morrison: I think the focus has been on us this year not on Bill Shorten and that focus will be firmly set on his very glass jaw.

Hadley: Now back to more matters pertaining to your portfolio – a paedophile Ali Jaffari came here in 2010, remains in detention thanks to you after being sentenced for accessing child porn while on a community corrections order for accessing child porn. He is a 36 year old from Afghanistan, assaulted a boy in Geelong last year, then accessed child abuse material between July last year and May this year. Had a three month sentence imposed fully suspended if he is a good boy for 15 months. When can you tip him out of the joint? When can he go back to Afghanistan?

Minister Morrison: First of all there is the sentencing still to come as I understand it in this case. If you are going to put a character provision for creep into the Migration Act this bloke would certainly qualify for it. But there is no way I can see, certainly for me as Minister, where this bloke would ever be coming out of detention with these very serious issues and the threat he poses in the community. We will constantly reassess his claim for protection back in Afghanistan. That opportunity will come up when he ends whatever sentence he serves if he is indeed sentenced to serve a custodial sentence.

Hadley: They keep suspending it Minister that is the problem. You can't get him slotted for two years even though he should be slotted for 22 because they keep him in good behaviour bonds or corrections orders.

Minister Morrison: He won't be leaving any of my detention facilities. The minute we are able to send this guy back if he doesn't have any legitimate protection grounds then on a plane he will go.

Hadley: Brings me to Ali Mahmood, the bloke who was featuring in last week's newspaper claiming the disability support pension for almost a decade – 2004 to this year – then remarkably the Administrative Appeals Tribunal got it right and said no that is it for you. He has been, this is the point, he sought asylum from Iraq where he keeps going back to for 195 days.

Minister Morrison: This is the problem with permanent protection visas and this is why we introduced the legislation and had it passed last week as we did. A permanent protection visa is a permanent passport to welfare. They just got on a boat, came here and got on the dole. That is what this character did. He had come under previous governments, he had been paid these benefits under previous governments. But that said that is why I was so focused on ensuring that we don't have that sugar on the table. The refugee convention is not there to allow people to come and take advantage of your immigration laws and your welfare system. We don't want Centrelink seekers coming into Australia. We want people who come and make a contribution not take one and that is what our migrant communities have done for generations going all the way back to the first fleet. That is why we put these protections in place.

Hadley: Just on Jaffari – this has recently come through – he has actually been sentenced for three months but suspended wholly.

Minister Morrison: Well he won't be leaving immigration detention I can assure you of that.

Hadley: It makes that point he is in immigration detention but he has been sentenced, the matter has now been finalised.

Hadley: Ok. Thanks very much for your time. We will chat to you next Monday if we get the chance and then we will wind up for the year and catch up with you in the new year. All the best.

Minister Morrison: Excellent. Thanks a lot Ray, Good to be with you.

Submission on Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill ... the Migration and Maritime Powers Legislation ...

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31 October 2014!  
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Committee Secretary !  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600!  
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Dear Committee Secretary, !  
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Submission on Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

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Australian Lawyers for Human Rights (ALHR) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Bill).!

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

This submission does not address all of ALHR's potential concerns regarding

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this Bill or all of the potential threats that the Bill poses to human rights. Instead, ALHR will focus this submission on four key areas in which the Bill seeks to change current Australian refugee law which, in ALHR's views, are clearly in contravention of Australia's international human rights obligations. These four areas are: increased powers to detain people at sea and transfer them to any country; the introduction of temporary forms of protection including temporary protection visas and safe haven enterprise visas; the establishment of a fast-track assessment process of refugee claims; and the introduction of a new domestic interpretation of Australia's refugee obligations that contravenes international refugee law and existing Australian jurisprudence on refugee law.

ALHR wishes to acknowledge the contributions of Dr Cristy Clark, Joanna Mansfield and Imogen Selley to this submission.

#### General Comments on the Bill

As will be detailed below, several key aspects of this Bill are incompatible with Australia's international human rights obligations and, as such, ALHR recommends overall that this Bill not be passed. The particular human rights obligations that ALHR believes Australia will contravene if this Bill is passed are obligations that Australia has voluntarily assumed and are contained in international human rights treaties ratified by Australia including: Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees (Refugee Convention), International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC), and Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

At a time when, more than ever, people require the protection of other States from the persecutory actions of their own and the increasing barbarity of non-state actors, ALHR believes that this Bill represents a low water-mark in Australia's standing as nation which takes human rights obligations seriously and which heeds the call to protect and assist those in need. ALHR is deeply concerned about the extent to which this Bill breaches Australia's human rights obligations and denies asylum seekers protection for the Government's underlying purpose of dissuading people from fleeing to our shores. The Senate should be in no doubt that if this Bill is passed it will result in the most significant contraction of Australian refugee law since

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the Migration Act 1958 (Cth) (Migration Act) first provided protection for refugee status to be accorded to asylum seekers. It will stand contrary to Australia's reputation as a liberal democracy and its commitment to international human rights as one of the eight drafting states of the Universal Declaration of Human Rights and one of the 26 founding states of the Refugee Convention.

Further, these proposed legislative amendments pose a significant threat to the rule of law in Australia and leave undue power in the hands of the executive, removing a large amount of critical oversight by Australian courts. ALHR is concerned that this Bill entrenches Australia's refugee protection regime as a matter almost entirely for executive or Ministerial discretion. In ALHR's view, the lack of procedural safeguards that will be effected by the Bill increase the risk of erroneous decisions being made with little or no regard for individual rights and principles of natural justice. In addition, the limiting of merits and judicial review will reduce transparency of decision-making and deny the Australian public and the individuals concerned the right to know the truth and to participate in decision-making.

Whilst it is acknowledged that the power to transform Australia's treaty obligations into domestic law lies with Parliament, this Bill's flagrant disregard for Australia's international treaty obligations represents a concerning move away from fundamental principles of human rights law towards an isolationist and self-interest-focused approach to international law. It is well recognised under Australian law that the ratification by Australia of an international human rights treaty is not "merely platitudeous" but rather "a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance" with the convention.<sup>1</sup>

**Schedule 1 – Increased Powers to Detain at Sea and Transfer to any Country**

ALHR has serious concerns about the powers contained in Schedule 1 of the Bill which give maritime officers and the Minister the power to detain people at sea and transfer them to any country (or a vessel of another country) that the Minister chooses.<sup>2</sup> This amendment appears to be an attempt to counteract the High Court

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1!Per Mason CJ and Deane J in Teoh, [at 34]; Also Brennan J in Mabo v Queensland [No 2] [1992] HCA 23 at [42].

<sup>2</sup> See proposed sections 69(2) and (3) and 72(3) and (4) of the Bill.

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<sup>!</sup> challenge<sup>3</sup> currently on foot regarding the legality of the Government's policy of turning back asylum seeker boats which is said to give rise to the risk that Australia will breach its international human rights obligations.

Under the Bill's proposed section 75D, a vessel or a person may be taken to a place outside Australia irrespective of whether Australia has an agreement with that particular country concerning the reception of the vessel or persons and irrespective of that country's international obligations or domestic law. The only condition for a vessel/person to be taken to a place outside Australia is that the Minister considers that the action is in the "national interest"<sup>4</sup> – an undefined and subjective term with such breadth<sup>5</sup> as to create difficulties to challenging any decision made on that basis.

ALHR notes that, under international law, it is recognised that States conducting interdiction and return operations will generally fulfill the 'effective control test' with respect to vessels and persons on board vessels intercepted at sea and that, consequently, the international obligations of these States are triggered with respect to those vessels or persons.<sup>6</sup> On this basis, ALHR holds the view that Australia's international obligations are triggered with respect to vessels it intercepts at sea (irrespective of whether those vessels are intercepted within Australian territorial waters or on the high seas). The international human rights obligations that are triggered include, importantly, the principle of non-refoulement<sup>7</sup> and the obligations to ensure that all people deprived of liberty are treated with dignity and no one is arbitrarily deprived of life or subjected to cruel, inhuman or degrading treatment or punishment.<sup>8</sup>

Section 95 of the existing Maritime Powers Act 2013 (Cth) (Maritime Powers Act) ensures that people who are detained are treated with respect and dignity and not subject to cruel, inhuman or degrading treatment. However, pursuant to the

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<sup>3</sup>

CPCF v Minister for Immigration and Border Protection & Anor, No S169 of 2014 (Judgment reserved as at 27 October 2014). This case involves the forcible detention of 157 Sri Lankan Tamils, who arrived off Christmas Island from India. They were held on board an Australian customs vessel on the high seas for a month while Australia tried to negotiate to send them back to India.

<sup>4</sup> See subsections 75D(4) and 75F(5) of the Bill.

<sup>5</sup> See Explanatory Memorandum at [105].

<sup>6</sup> Sophie Roden, Turning their Back on the Law? The Legality of the Coalition's Maritime Interdiction and Return Policy, (2013), paper in fulfillment of requirements for honours in law, the Australian National University Paper <[https://law.anu.edu.au/sites/all/files/acmlj/turning\\_their\\_back\\_on\\_the\\_law\\_v2.pdf](https://law.anu.edu.au/sites/all/files/acmlj/turning_their_back_on_the_law_v2.pdf)> (accessed 16 October).!

<sup>7</sup> Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), art. 3; Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees (Refugee Convention), art. 33.

<sup>8</sup> International Covenant on Civil and Political Rights (ICCPR), art. 6, 7 and 10.

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<sup>!</sup> provisions of this Bill, ALHR submits that there is a considerable risk that Australia will breach its human rights obligations and potentially its non-refoulement obligations by transferring asylum seekers to countries that do not offer effective human rights protections and where the person may be subjected to cruel, inhuman or degrading treatment or even torture. ALHR notes that a State cannot 'contract out' of its non-refoulement obligations or transfer responsibility for its obligations to another State.<sup>9</sup> ALHR also submits that the condition imposed by the Bill that a transfer be in the "national interest" does not offer any real human rights protection for those transferred or suggest that the Minister will even consider human rights in his decision to transfer those on board the vessel.

**Arbitrary detention**

ALHR is concerned that the Bill's proposed amendments regarding the permitted period of detention may result in Australia breaching its human rights obligations with respect to freedom from arbitrary detention. Under proposed section 72(4), a maritime officer has the power to detain a person. Proposed sections 69A and 72A set out that a vessel, aircraft or person may be detained for any reasonable period while the destination is determined or the Minister considers whether to give a direction. The permitted period of detention includes the time that it actually takes to travel to the destination (irrespective of whether the travel time is reasonable) and may continue for any period reasonably required to make arrangements relating to the release of the person. The Bill's Explanatory Memorandum states that: "this subsection strikes a balance between the need for clear operational powers and the desirability of imposing constraints on the exercise of power by [...] a reasonableness requirement."<sup>10</sup>

The Government has acknowledged that the proposed amendments provide for a longer period of detention under the new 72(4) than is allowed under the existing provisions of the Maritime Powers Act. Despite this, the Government claims that, by restricting the purpose of the detention and providing that (in respect of some purposes of detention) the length of time must be "reasonable" the detention is reasonable and proportionate to the goal of protecting Australia's borders and

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<sup>9</sup>

See TI v United Kingdom, 2000-III ECtHR 435 at 456–57.

See Explanatory Memorandum at [48] and [79].

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therefore compatible with Article 9(1) of the ICCPR.<sup>11</sup> ALHR disagrees with the Government's assertion of compatibility for the reason that these provisions do not provide adequate protection against unduly lengthy and therefore arbitrary detention. The arbitrariness of detention must be considered on an individual basis. The UN Human Rights Committee has previously made clear that prolonged immigration detention "without individual justification and without any chance of substantive judicial review" is arbitrary and constitutes a violation of the ICCPR.<sup>12</sup>

With no definition of what period of detention may be "reasonable", the power of the Government to change the destination to a different place at any time and on multiple occasions<sup>13</sup> and to continue detention while arrangements are being made for a person's release (for example, in order for a receiving vessel from another country to agree to accept a person) it is likely that a person will be subject to prolonged or even indefinite detention, without the possibility of judicial review.

Furthermore, article 9(4) of the ICCPR provides that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court" so that the court can decide on the lawfulness of his/her detention and potentially order the person's release. The only way in which the right to freedom from unreasonable or arbitrary detention can be meaningfully enforced is if there is an opportunity to challenge the reasonableness of the detention. The Government's statement that "decisions will continue to be taken by the executive government in accordance with Australia's human rights obligations" 14 is incongruous with the principle contained in the ICCPR that review of detention must be conducted by a court rather than the executive. ALHR is opposed to the introduction of proposed sections 69A and 72A as they stand in contravention of Australia's obligations.

No requirement to consider international obligations including non-refoulement

The Bill's proposed section 75A sets out that the exercise of maritime power will not be invalid where those actions do not consider, defectively consider, or are inconsistent with Australia's international obligations.<sup>15</sup> As noted by the Explanatory Memorandum, the intention of this provision is that "the failure to consider or comply

<sup>11</sup> See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 8.

<sup>12</sup> See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 8  
C v Australia, Communication No 900/00, UN Doc CCPR/C/76/D/900/1999 (2002), at [8.2]. See also A v Australia, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), at [9.4].

See subsection 69(3A) of the Bill.

<sup>14</sup> See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 8.

<sup>15</sup> See also section 22A of Bill (dealing with authorisations of the exercise of maritime powers).

! with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge."<sup>16</sup> ALHR is deeply concerned that, when detaining and transferring a person to another country, the Minister is not required to consider Australia's international obligations. This has the effect of rendering Australia's human rights obligations nugatory with respect to transfers and paving the way for Australia's human rights obligations to be breached with no possibility of redress through domestic courts.

The Explanatory Memorandum states that the amendment "merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government."<sup>17</sup> ALHR submits that it is a fundamental principle of human rights law, and the rule of law, that breaches of individual rights are able to be challenged through judicial processes and that those who have had their rights violated have the opportunity to seek legal redress. The Bill's proposed "administrative arrangement"<sup>18</sup> to support Australia meet its non-refoulement obligations is non-compellable and non-reviewable and, therefore, an inadequate protection for individuals affected by the exercise of the detention and transfer power.

The Government has acknowledged that: "on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which

may not be consistent with Australia's non-refoulement obligations".  
Government's unspecific assurance that it "intends to continue to comply with these obligations"<sup>20</sup> is, in ALHR's view, insufficient. Article 2(3) of the ICCPR provides for the right to an effective remedy for violations of ICCPR rights. The UN Human Rights Committee has noted the importance of States ensuring that individuals have accessible and effective remedies to vindicate those rights, through "appropriate judicial and administrative mechanisms" which investigate "allegations of violations promptly, thoroughly and effectively through independent and impartial bodies."<sup>21</sup> By removing the requirement to consider international obligations such as non-refoulement and freedom from arbitrary detention, the Government is removing international obligations as a ground for challenging Government actions. This, in !!!!!!!

See Explanatory Memorandum at [85].

<sup>17</sup> See Explanatory Memorandum at [86].

See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 5

<sup>19</sup> See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 7  
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See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 7

<sup>21</sup> General Comment 31, UN Doc CCPR/C/21/Re.1/Add.13 (2004) at [15].

! turn, removes any remedy for violation of those obligations, which clearly contravenes Article 2(3) of the ICCPR. ALHR submits that international obligations must be a consideration in the exercise of the executive's power, particularly when it concerns the rights of vulnerable people who seek Australia's protection. Therefore, ALHR opposes this proposed amendment.

**Removal of natural justice**

Through proposed section 75B, the Bill further reduces the scope for judicial scrutiny of Government actions in detaining and transferring people and vessels at sea by removing the right to natural justice.<sup>22</sup> Natural justice ensures procedural fairness in executive decision-making, to those whose interest may be adversely affected by the exercise of the power. It includes the right to make submissions and be heard in respect of the decision, and for the neutrality of decisions.

ALHR submits that denying natural justice to asylum seekers who are detained at sea will result in asylum seekers being unable to assert their right to human rights protections, such as the protection from refoulement, leading to a high risk of human rights abuses and no avenue for redress. As stated above in respect of detention, denying the ability of a detained person to take proceedings to court is in direct conflict with the ICCPR.

**Recommendations:**

1. The Senate not pass Schedule 1 of the Bill as it currently stands.
2. Concerning any possible amendments to Schedule 1, these amendments should at a minimum:

- Prohibit transfer to any other country in situations where adequate safeguards are not in place to ensure that human rights will be protected during detention and transfer and on arrival at the other country.

- Remove proposed sections 22A and 75A and replace with a requirement to consider international human rights obligations in authorising and exercising powers under the Maritime Powers Act.

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In addition, through proposed section 22B, natural justice also does not apply to authorisations of the exercise of maritime power.

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- Amend proposed sections 69A and 72A and stipulate total maximum time limits in which a person may be detained.

- Remove proposed sections 22B and 75B entirely.

**Schedule 2 & 3 – Re-Introduction of Temporary Protection Visas and Denial of Permanent Protection****Temporary Protection Visas (TPVs)**

ALHR has grave concerns about the Bill's proposed re-introduction of TPVs – a form of protection visa that was first introduced in 1999 under the Howard Government and later abolished under the Rudd Government in 2008. The Bill's Explanatory Memorandum makes clear that the Government is seeking to ensure, by re-introducing TPVs, that "illegal arrivals" who seek protection in Australia will not be granted permanent protection.<sup>23</sup> Pursuant to the Bill, asylum seekers who arrive in Australia without a visa, whether by boat or plane, and who are not subject to offshore processing, will be eligible only for temporary protection.<sup>24</sup>

ALHR submits that the following aspects of the proposed TPV regime are particularly concerning:

- TPVs will be granted for a maximum of 3 years or for any shorter period determined by the Minister;
- TPV holders will never be eligible for permanent protection in Australia and, no matter how long they reside in Australia on a TPV, will only be permitted to continue to apply for TPVs for a maximum of 3 years;
- The new regime will have retrospective effect in relation to deeming existing applications for permanent protection visas (ie applications which, at the date of the Bill's commencement, were applications for permanent protection visas) to be applications for TPVs only; and
- TPV holders will not be permitted to bring their family to Australia and will not be allowed to re-enter Australia if they choose to leave.

ALHR's human rights concerns regarding this proposed protection regime will be discussed further below. However, before doing so, it is worth pointing out the

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See Explanatory Memorandum at 6.

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See Explanatory Memorandum at 6.

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lack of evidence that TPVs have the deterrent effect, which the Government has asserted is the underlying purpose for the re-introduction of TPVs. The Bill's Explanatory Memorandum states that TPVs are a key element in the Government's "border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia."<sup>25</sup> However, contrary to this statement, an inquiry into the Migration Act conducted by the Senate Legal and Constitutional References Committee in 2006 found there was "little real evidence of [TPVs'] deterrent value".<sup>26</sup> Moreover, in its 2004 inquiry into children in immigration detention, the Australian Human Rights Commission (AHRC) expressed concern that the restriction imposed by TPVs on family reunion and travel contributed to an "increase in numbers of women and children making the perilous journey to Australia by boat" rather than acting as a deterrent.<sup>27</sup>

The adverse mental health impact of TPVs on refugees has been well documented and stands in contradiction to the statement made in the Second Reading Speech that TPVs "provide refugees with stability and a chance to get on with their lives."<sup>28</sup> To the contrary, ALHR submits that the uncertainty surrounding the status of TPV holders, including the potential fear that they will have to return to the country from which they fled persecution, is more likely to result in TPV holders experiencing instability and being unable to move on with their lives. The 2006 Senate Inquiry (mentioned above) found that the operation of the TPV regime "had a considerable cost in terms of human suffering".<sup>29</sup> Similarly, the AHRC's 2004 inquiry found that the uncertainty faced by TPV holders was likely to compound existing mental health problems faced by refugees in relation to past trauma suffered.<sup>30</sup>

In addition to the exacerbation of mental health problems caused by the

temporary nature of TPVs, ALHR submits that the denial of family reunion for TPV holders and the restrictions on TPV holders leaving the country is also likely to exacerbate mental health problems. The effect of denying TPV holders the right to

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See Explanatory Memorandum at 6.

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Senate Legal and Constitutional References Committee, Inquiry into the Administration and Operation of the Migration Act 1958 (2006), available at:  
[http://www.aph.gov.au/-/media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2004\\_07/migration/report/report\\_pdf.ashx](http://www.aph.gov.au/-/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/migration/report/report_pdf.ashx) at [8.33].

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Human Rights and Equal Opportunities Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004), available at: <https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004>, at 818.

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See Second Reading Speech at 5

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Above n. 26 at [8.33].

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Above n. 27 at 820.

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family reunion and the ability to travel overseas means that families will likely be separated for prolonged, or even indefinite, periods of time. The AHRC's 2004 inquiry found that, in relation to child asylum seekers, "the prolonged absence of immediate family can also have a very serious impact on the mental health, development and reintegration of children from backgrounds of trauma."<sup>31</sup> ALHR suggests that, in a similar way, the absence of immediate family can have a detrimental impact on the mental health of adult asylum seekers.

ALHR submits that, if this Bill is passed, the operation of the TPV regime will result in Australia contravening several of its existing human rights obligations under the Refugee Convention and other international human rights treaties including the ICCPR, CRC and CAT. In ALHR's view, the implementation of the proposed legislative amendments will likely breach the following human rights principles:

- The right to seek asylum and for countries to offer a durable solutions (rather than temporary solutions) to refugees;<sup>32</sup>
- The right of asylum seekers not to be discriminated against, including on the basis of how they arrive in the country;<sup>33</sup>
- The right of asylum seekers not to have penalties imposed for entering the country without a valid visa, provided they present themselves to the authorities without delay and show good cause for their entry;<sup>34</sup>
- The right to family unity and to be free from arbitrary interference with family life;<sup>35</sup> and
- Numerous rights concerning children under the CRC, including that, in all actions concerning children, the best interests of the child shall be a primary consideration.<sup>36</sup>

The cumulative effect of the uncertainty surrounding TPVs and the human rights violations highlighted above may also constitute cruel, inhuman or degrading

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Above n. 27 at 841.

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Universal Declaration of Human Rights, art. 14; See also Jane McAdam and Fiona Chong, Refugees: Why Seeking Asylum is Legal and Australia's Policies Are Not (2014), UNSW Press, Sydney at 25:  
 "Under international law, temporary protection is accepted as a short term emergency mechanism designed for mass influx situations that overwhelm the normal asylum system."

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Refugee Convention, art. 3.

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Refugee Convention, art. 31.

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Refugee Convention, Recommendation B; ICCPR art. 17; Universal Declaration of Human Rights, art. 12

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CRC, art. 3(1), 6(2), 10(1), 20(1), 22(1), 24(1) and 39.

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treatment in violation of the ICCPR and CAT.<sup>37</sup> Furthermore, ALHR submits that the retrospective application of some of the Bill's provisions concerning TPVs is in contravention of basic tenets of the rule of law.

#### Safe Haven Enterprise Visas (SHEVs)

SHEVs are another form of temporary protection visas, which is made clear in the text of the Bill and the Minister's Second Reading Speech. Further, like TPV holders, it appears that SHEV holders will not have the right to family reunion or the right to leave and re-enter Australia.<sup>38</sup> Therefore, SHEVs will likely have a similarly detrimental mental impact on refugees by creating uncertainty about the SHEV holder's status and by forcing them to endure long or indefinite periods of separation from family overseas. In this sense, the operation of SHEVs will likely breach many of the same human rights obligations highlighted in the section above on TPVs.

Moreover, one of ALHR's major concerns about the introduction of SHEVs is that there is very little known about how SHEVs will operate including who will be eligible for SHEVs and what conditions will be imposed on SHEV holders. The Bill's Explanatory Memorandum stipulates that amendments to the Migration Regulations "to prescribe criteria for this visa will follow in 2015."<sup>39</sup> Though the Minister's Second Reading Speech contains a brief elucidation on SHEVs, there is an enormous lack of clarity surrounding the introduction of SHEVs and, if this Bill (including its provisions on SHEVs) is passed, it will essentially create a head of power left undefined. In ALHR's view, leaving the specifics of SHEVs to be determined by later regulations has the effect of circumventing democratic processes and should not be permitted given the dangers in creating an undefined head of power.

In relation to what the Government has stated publicly about SHEVs, it appears that the visas are designed to offer alternative temporary protection for up to five years by virtue of visa holders studying or working in regional Australia. The Minister has also said that SHEV holders who have earned an income in regional Australia for 3.5 years "will be able to apply and if they meet eligibility requirements be granted other onshore visas—for example, a family or skilled visa as well as

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37 ICCPR, art. 7; UNCAT, art. 16.

38 See Second Reading Speech at 6.

39 See Explanatory Memorandum at 7.

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! temporary skilled and student visa." 40 ALHR does not wish to make specific comments on the proposed SHEV regime before it is properly understood what it entails. However, at this stage, ALHR wishes to express its concern that introducing SHEVs for those found to be refugees risks conflating the Government's refugee protection obligations with skilled migration programmes.

#### Recommendations:

1. The Senate disallow the re-introduction of temporary protection visas by ensuring that Schedule 2 and 3 of the Bill are not passed.

2. That new forms of visas, including the proposed safe haven enterprise visa, are not permitted to be enacted into legislation without the proposed legislation clearly enunciating the details of the new form of visa.

#### Schedule 4 – Introduction of Fast Track Assessment Process

ALHR is concerned by the proposed introduction of a new fast track process for assessing the claims of asylum seekers who arrive by boat ('irregular maritime arrivals' or 'IMAs') on or after 13 August 2012. These fast track applicants would be divided into two groups: 'fast track review applicants,' who would have access to a very limited form of a merits review in the event of an adverse assessment, and 'excluded fast track review applicants,' who are ineligible for any form of merits review.

Under the Bill's proposed Part 7AA, fast track applicants are to be completely denied access to the Refugee Review Tribunal (RRT). In lieu of the merits review available at the RRT, fast track review applicants must instead be referred by the Minister to a new review body called the Immigration Assessment Authority (IAA), which will be established as a statutory body within the RRT. A person cannot apply directly to the IAA. Unlike the merits review process at the RRT, the IAA review is not required to be "fair and just". Instead, it is mandated to conduct a limited review process that is "efficient and quick".

ALHR is deeply concerned that the Government's objective of efficiency in processing refugee claims is sought to be achieved under this Bill by stripping the

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See Second Reading Speech at 6.

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! refugee claims review process of most of its procedural safeguards. The RRT currently perform a de-novo review, in which hearings are held and applicants have the opportunity to comment on adverse findings and present new evidence. In contrast, the IAA is only required to consider the material that was available to the Department of Immigration and Border Protection (DIBP) during the primary assessment stage. New information can only be introduced in "exceptional circumstances" and where the fast track review applicants can establish that they could not have provided this information at the primary assessment stage. This is particularly concerning given the lack of legal assistance currently available to asylum seekers to prepare their initial applications.

The second group of applicants, the excluded fast track review applicants, are to be denied access to any form of merits review. Under subsection 5(1) of the Bill, this group includes those who, in the opinion of the Minister:

- (i) can access protection in a 'safe third country';
- (ii) have previously been refused protection in Australia, in another country or by the United Nations High Commissioner for Refugees (UNHCR) or previously withdrawn their claim in Australia;
- (iii) make a manifestly unfounded claim for protection; or
- (iv) have provided 'a bogus document' in support of their claim without reasonable explanation.

Significantly, the Bill grants power to the Minister to expand this class of people who will be permanently denied access to any form of merits review to include any other group by means of a legislative instrument. In ALHR's view, these proposed legislative changes raise a number of significant human rights concerns, including discrimination, lack of procedural fairness and the potential breach of Australia's non-refoulement obligations.

As has been noted by commentators, "the introduction of a fast track assessment and review process for most of the [IMAs] who arrived on or after 13 August 2012 appears to presuppose that most of this caseload are not genuine refugees and that their applications should thus be finalised and disposed of as quickly as possible."<sup>41</sup> However, the statistical evidence demonstrates that almost 50% of

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Elibritt Karlsen, Janet Phillips and Harriet Spinks, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014,' Parliamentary Library, Bills Digest

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! IMAs who arrived between 2007 and 2012 were granted a final protection visa, with over 90% of IMAs from some countries (such as Afghanistan, Iraq and Iran) being the norm.<sup>42</sup> ALHR submits that this arbitrary discrimination based on time and mode of arrival breaches Australia's international human rights obligations under Articles 3 and 31 of the Refugee Convention, Articles 2, 3 and 26 of the ICCPR and Article 2 of the CRC. It is also arguably a breach of the fundamental common law principle of equality before the law.

ALHR also submits that both the highly limited form of IAA review and the absolute denial of merits review rights strip away important procedural justice

safeguards within the immigration assessment process. The right to procedural justice is an importance principle of the rule of law and natural justice, and is supported by Articles 13 and 14 of the ICCPR. Access to a robust form of merits review is also essential in a context in which the primary decision maker (in this case, the DIBP) has a poor track record in denying protection visas to applicants who are subsequently found to qualify for asylum. In 2012, the Expert Panel on Asylum Seekers found that between 2009 and 2012 between 66% and 82% of all IMA applicants who sought merits review had their primary assessments overturned.<sup>43</sup> Given the serious consequences of an incorrect adverse assessment, these rates are cause for concern.

Finally, the proposed legislative amendments contained in Schedule 4 of the Bill pose a risk that Australia will breach its non-refoulement obligations under Article 33(1) of the Refugee Convention. The arbitrary denial of procedural fairness to more than 30,000 asylum seekers creates a significant risk that Australia will breach this fundamental obligation and potentially place considerable numbers of refugees in grave danger.

#### Recommendations:

1. The Senate disallow the introduction of a fast track assessment process by ensuring that Schedule 4 of the Bill is not passed.

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No. 40, 2014-15 (23 October 2014), 17,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdg%2F3464004%22>

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Report of the Expert Panel on Asylum Seekers (2012) available at:

[http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf) at [1.24]

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Ibid at 98

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2. Concerning any possible amendments to the Bill, these amendments should at a minimum:

- Delete s 473DC(2), which states that the IAA does not have a duty to get, request or accept any new information.

- Delete s 473DD, which prohibits the IAA from considering any new information, except in 'exceptional circumstances.'

- Amend s 473FA(1) to include a statutory objective that the 'mechanism of limited review' is fair and just, in addition to being efficient.

- Amend Division 8 and s 473JC to incorporate minimum qualifications for people appointed as Reviewers by the Minister.

#### Schedule 5 – New Domestic Interpretation of Australia's Refugee Obligations

##### Removal of Unlawful Non-Citizens

A central concern of the Migration Act is to provide for the making of decisions to grant or refuse visas that enable an unlawful non-citizen to remain in Australia. Unlawful entry into Australia exposes a person to compulsory removal. Section 198 of the Migration Act sets out the various circumstances in which a Government officer must remove an unlawful non-citizen. Primarily, an officer must remove the person as soon as reasonably practicable following a final determination of their visa application. However, section 198 also compels an officer to remove a person in some circumstances where no visa application has been made.

ALHR has concerns about the Bill's new section 197C which makes clear that an officer must remove an unlawful citizen pursuant to section 198 even if Australia's non-refoulement obligations to the individual have not been assessed. The intention of the proposed section 197C appears to be to confine the consideration of Australia's non-refoulement obligations to the process of an application for a protection visa or the Minister's exercise of discretionary powers. It therefore presupposes that these two processes can effectively prevent Australia from breaching its non-refoulement obligations. In ALHR's view, this presumption is flawed.

First, section 198 of the Bill compels the removal in certain circumstances of non-citizens who have not applied for a visa. Secondly, the Minister's discretion to

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grant a protection visa<sup>44</sup> or waive the bar to an application for a protection visa<sup>45</sup> on public interest grounds lacks the safeguards of due legal process. This discretion is non-compellable and does not assure consideration of whether Australia possesses non-refoulement obligations to the individual concerned. Even if the Minister were to consider the question, there is no obligation upon him to consider it in the terms prescribed by the existing section 36(2)(aa) of the Migration Act, which sets out Australia's non-refoulement obligations under the CAT and ICCPR in terms generally consistent with international law. ALHR's concern is that, if left to the executive's discretion, a narrow view of Australia's non-refoulement obligations may be applied which fails sufficiently adhere to Australia's international obligations.

Further, the potential impact of section 197C must be assessed alongside the changes to merits review put forward in Schedule 4 of the Bill. As noted above, ALHR has grave concerns that the highly limited form of IAA review and the denial of merits review rights will lead to erroneous determinations of protection visas standing, leading to refugees and others to whom Australia owes protection obligations being removed in breach of Australia's non-refoulement obligations.<sup>46</sup>

ALHR is of the view that the comment in the Government's Statement of Compatibility with Human Rights accompanying the Bill that the proposed section 197C will not violate international law because "anyone who is found through visa or ministerial intervention processes to engage Australia's non-refoulement obligations will not be removed in breach of these obligations" is misleading. It is clear on the face of the section that officers will be compelled to remove unlawful non-citizens in circumstances where Australia's non-refoulement obligations have not been assessed and that the lack of such assessment is intended to be irrelevant.

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Refugee Convention Definition of 'Refugee'

Part 2 of Schedule 5 seeks to remove most references to the Refugee Convention from the Act to "codify in the Migration Act Australia's interpretation of its protection obligations" and create a "new, independent and self-contained statutory

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44 See sections 195A and 417 of the Bill.

45 See sections 46A(2) and 48B of the Bill.

46 According to Gilbert, non-refoulement is a right under customary international law, protection not just refugees but anyone whose life or freedom would be threatened: Gilbert, G, Is Europe Living Up to Its Obligations to Refugees? 15(5) EJIL 963 (2004) at 966, citing Lauterpacht (2003) at 87

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! framework."<sup>47</sup> The Bill proposes for the first time since a mechanism to provide a non-citizen with refugee status was originally introduced into the Migration Act that such a mechanism not be explicitly founded in Australia's protection obligations under the Refugee Convention and, in particular, its obligation to protect a refugee, as defined in Article 1 of the Convention.

The definition of a 'refugee' under Article 1 can be said to be the Refugee Convention's pillar. Whilst the Convention recognises the principle of state sovereignty in matters such as burden sharing, it does not envisage States developing isolationist approaches to the meaning of a refugee. Like Article 33 (principle of non-refoulement), Article 1 is non-derogable and States cannot make any reservations or alterations to its terms if they wish to become a signatory. Its importance is therefore of the highest order.

Until the present Bill was introduced, the responsibility to interpret the meaning of a refugee has largely rested with the Australian judiciary. The definition of a refugee that Australian courts have been charged with interpreting is that in Article 1 of the Convention, with some limited clarification and curtailment by sections 91R and 91S, introduced by the Howard Government and maintained in the current Bill. The Minister has stated that the intention of these proposed amendments is to ensure Parliament defines Australia's international obligations, rather than international courts or "someone sitting out of Australia commenting and interpreting international conventions."<sup>48</sup> However, in ALHR's view, this misrepresents the work of the Parliament and Australian judiciary to date in developing Australian and international law regarding the meaning of a refugee.

As required by the rule of law and the doctrine of the separation of powers, it has been the Australian courts that have been interpreting Australia's international obligations as the Parliament intended. This has necessarily involved, as a matter of international law, comprehensive judicial efforts to resolve the most challenging controversies in Article 1 with a commitment to developing common ground on the basis that the Refugee Convention must be given its one true, autonomous and international meaning "without taking colour from distinctive features of the legal

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47 See Explanatory Memorandum at 28.

48 Statement made by Minister for Immigration in interview with ABC AM Radio (26 September 2014), see: <http://www.abc.net.au/am/content/2014/s4095083.htm>.

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! system of any individual contracting state".<sup>49</sup> It is an approach founded in both treaty and customary international law, in particular the principle that in interpreting domestic legislation that seeks to give effect to Australia's international obligations, a holistic approach is required, giving primacy to the text of the Convention but also making it mandatory that courts look to the context, object and purpose of treaty provisions.<sup>50</sup> ALHR submits that, by proposing to move to an entirely statutory definition of a refugee that does not precisely adopt the language of Article 1 of the Convention, the Government is signalling that it wishes to be bound by something less than current international and Australian law.

The extent to which the proposed definition in Schedule 5 deviates from international law, and the consequences of such deviation for the quality of decision-making and ultimately Australia's fulfilment of its international obligation not to refoul refugees, requires a further and more thorough examination. ALHR is concerned that the pressure being mounted by the Government to pass the Bill does not allow for proper scrutiny. However, ALHR has decided to highlight certain matters below as being of particular concern. This is not an exhaustive analysis.

A move to a wholly statutory definition of a refugee will narrow the responsibility of the High Court to construe these proposed provisions in light of international law. If "it is not possible to construe a statute comfortably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law".<sup>51</sup> This will not only limit the role of the third arm of government on which the rule of law depends but in practical terms, it leaves the development of what is necessarily a fluid area of law to the legislature and, in respect of many provisions of the Bill, the executive.

Exclusion of Refugee Convention grounds from the definition of a 'refugee' and inclusion within the meaning of 'well-founded fear'

The Government has stated that "the new subsection 5H(1) is intended to codify Article 1A(2) of the Refugee Convention, as interpreted in Australian case

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49 R v Secretary of State for the Home Department; ex parte Adan and Aitseguer [2001] 2 WLR 143.

50 The leading High Court decision on the application of Article 31 of the Vienna Convention to the Refugees Convention is Applicant A v MIEA 142 ALR 331 and the judgments of Brennan CJ and McHugh J in particular, at 350-353.

51 Per Heydon J in M70/2011, at 153.

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law, into Part 1 of the Migration Act".<sup>52</sup> In ALHR's view, this is not accurate. The proposed definition of 'refugee' omits a key passage of Article 1A(2) that the well-founded fear must be for one of five Refugee Convention grounds: political opinion, race, religion, nationality and membership of a particular social group. The proposed sub-section 5J does contain the Convention grounds but subsumes them within the definition of well-founded fear of persecution. Whilst the practical implications of this construction are difficult to assess, ALHR submits that the proposed subsection does not reflect current Australian or international law. The High Court has frequently pointed to the likelihood of breaking the Convention definition into its component parts leading to errors in decision-making and has noted that "a well-founded fear of being persecuted for reasons of ... membership of a particular social group" is a compound conception and to be construed as a whole<sup>53</sup>, not a concept of which there is a greater and a lesser part.

#### Restrictive interpretation of the principle of internal relocation

Section 5J(c) states that an applicant does not have a well-founded fear of persecution and is, therefore, not a refugee unless the real chance of persecution "relates to all areas of the receiving country".<sup>54</sup> In ALHR's view, this is not an accurate statement of international or Australian law concerning refugee status.

Australian law frames the principle of 'internal relocation' in terms that a person does not have a well-founded fear of persecution if they can reasonably relocate to another area of the country.<sup>55</sup> In practical terms, once a well-founded fear of persecution in the applicant's home area is established the onus is on the decision-maker to inquire into the possibility of relocation and to be satisfied that the fear is localised. The proposed new subsection, however, places the onus on the applicant to establish that the entire country is safe. This places a more onerous and potentially unfair evidentiary burden on the applicant, especially in circumstances where the persecutor might not be an agent of the state.

Secondly, the proposed subsection deliberately excludes the current requirement under Australian law that the requirement to relocate be "reasonable" on

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<sup>52</sup> See Explanatory Memorandum at [1167].

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Per McHugh J, Applicant A, at 353. Similarly, Brennan CJ identified as "The leading concept in the definition as 'the fear of 'being persecuted' for a discriminatory reason" at 337.

<sup>54</sup>

In most instances the reference to "receiving country" will mean the refugee's country of nationality or former habitual residence.

<sup>55</sup>

SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18 (SZATV).

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! the basis that "decision makers are now required to consider aspects such a potential diminishment in quality of life or financial hardship which may result from the relocation". In ALHR's view, this somewhat misrepresents the current position. Whilst an applicant might raise financial hardship, the High Court has taken a narrow view of reasonableness and made it clear that the Refugee Convention is not concerned to ensure living standards.<sup>56</sup> Any codification of the internal relocation principle should therefore include the requirement of reasonableness.

#### State Protection

The Bill's proposed subsection 5J(2) is an attempt to "codify the effective State protection principle consistent with current case law" as expressed by the majority in Minister for Immigration and Multicultural Affairs v S152/2003.<sup>57</sup> The principle of state protection is complicated, both in its legal expression and practical application. Whilst S152 contains the most recent High Court dicta on the issue, ALHR submits that the place of the principle in Australian or international law should not be taken as settled.

The dissenting positions of McHugh J in S152 and of McHugh and Gummow JJ in Khawar<sup>58</sup>, that a state protection test has no place in the definition of a refugee, are not infrequently followed by decision-makers. The view is consistent with the position of UNHCR<sup>59</sup> that the ability of a State to protect an applicant is a question of fact going to the assessment of whether there is 'a real chance' of persecution<sup>60</sup>. Leading Australian academics have expressed the view that 'protection theory' or the notion of 'surrogate protection' developed by the UK House of Lords on which the majority view on state protection in S152 is based is unnecessarily distracting, complicating and burdensome for claimants.<sup>61</sup>

In ALHR's view, there are also further problems with the proposed subsection. The development of the principle of state protection has arisen with the emergence of non-state actor cases and the position in Australia and in the UK is that

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<sup>56</sup> SZATV, (2007) 233 CLR 18 per Gummow, Hayne and Crennan JJ at [25], citing Januzi v SSHD [2006] 2 AC 426 per Lord Bingham at 447 and Lord Hope of Craighead at 457.

<sup>57</sup>

Minister for Immigration and Multicultural Affairs v S152/2003 (2004) 222 CLR.

<sup>58</sup>

Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14.

<sup>59</sup>

Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (April 2001), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b20a3914>.

<sup>60</sup>

Refugee Status Appeals Authority, No 71427/99.

<sup>61</sup>

Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2007), 3rd edition, Oxford University Press at 10.

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! there is no adequate state protection in cases where the persecutor is the State.<sup>62</sup> ALHR submits that including a test in the Migration Act that will apply in the latter situation will unnecessarily complicate and extend the decision-making process and is likely to lead to erroneous decision-making.

In ALHR's view, refugee decision-makers are not well placed to make objective findings concerning the existence or otherwise of an appropriate criminal law, a reasonably effective and impartial police force, and judicial system which would be required of them under the proposed new provision. A priority of the process is to be quick and the evidence required by such a legislative test is potentially extensive. This is particularly so in relation to the proposal under section

5J(2) that adequate and effective protection measures can be provided by a source other than the State.

ALHR submits that the application of this subsection could lead to perverse decisions such as claimants from Syria and Iraq being able to avail themselves of the protection of the Islamic State and women being denied protection from state-sanctioned domestic violence because there is a male relative they could return to live with. The 2001 decision in Siaw, on which the Government has relied, pre-dates recent political and legal developments. Internationally, the capacity of non-state actors to provide effective protection in circumstances where there is no full-functioning State is considered to be controversial and unsettled.<sup>63</sup> ALHR's view is, therefore, that there should be no codification of the principle in the Migration Act.

#### Recommendations:

1. The Senate disallow the Bill to pass with the inclusion of Schedule 5 in order to ensure that the executive is not permitted to introduce into legislation an interpretation of Australia's refugee obligations that is inconsistent with current international law and current Australian jurisprudence.

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<sup>62</sup> Per Lord Hope, Horvath v Secretary of State for the Home Department [2001] 1 A.C. 489, at 497. Similarly, "Where the State is involved in persecution, it will certainly be in breach of its duty to protect its citizens from persecution": per McHugh J, S152/2003, at para 65.

<sup>63</sup> O'Sullivan M, "Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?" 24(1) International Journal of Refugee Law 85 (2012).

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2. At a minimum, before any changes are enacted into legislation concerning the definition of 'refugee' or fundamental criteria relating to refugee status, such changes and their effects are carefully and thoroughly scrutinised.

If you would like to discuss any aspect of this submission, please contact Claire Hammerton, ALHR Refugee Sub-Committee Coordinator by email: refugees@alhr.org.au.

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Yours faithfully,

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Claire Hammerton!  
Refugee Sub-Committee Coordinator!  
Australian Lawyers for Human Rights!

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#### House debates (OpenAustralia.org)

<http://www.openaustralia.org/debates/?id=2014-10-22.11.1> December 11, 2014

Bills Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014; Second Reading

Richard Marles (Corio, Australian Labor Party, Shadow Minister for Immigration and Border Protection) Share this | Link to this | Hansard source

I rise to speak in relation to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. I want to start by putting on record my thanks to the Minister for Immigration and Border Protection and the managers of business, both government and opposition, and including the whips offices, for allowing this debate to occur now—for a range of reasons which I do not need to go into—and for enabling me to participate in what is, obviously, a very significant debate within this portfolio area. I would like my thanks recorded.

This is perhaps the most significant piece of legislation which has been put to the parliament since the election of the Abbott government in respect of immigration and asylum seekers. It is a bill which has many parts to it—some we agree with and we see as being sensible; some we do not agree with. As always, the politics in this bill is highly leveraged. There is much in this bill which is, in effect, a legislative response to actions of the judiciary. Some of that is understandable, but some of it is occurring where, really, the courts ought to be allowed to do their work. Whenever we are in the space of balancing the relationship between the legislature and the judiciary, balance is the key word. That certainly forms part of the judgements that we have made in respect of how to approach this piece of legislation.

Labor will be opposing this legislation in the House of Representatives because there are elements to it which we disagree with. Of course, how the legislation has been bundled is not of our making, but there are elements to this which we disagree with. That said, we will be seeking to move amendments in the Senate to give expression to those parts of this legislation that we agree with and those that we do not agree with. In addition, we may well end up moving amendments in the Senate to take into account the outcome of the inquiry that is being undertaken by the Senate and is due to be completed on 24 November. That said, my intention now is to go through the bill in detail and articulate to the House exactly what Labor's position is in respect of every component of the bill so that there can be no doubt about what we support and what we do not and what will then eventuate in terms of the amendments that ultimately arise from us in the other place.

The first schedule of this bill—there are seven—has been characterised by the minister as, in a sense, being a legislative decision in this place in respect of the question of turning back asylum seeker vessels. Let me be very clear in relation to that position up-front. Our view about the question of turning back asylum seeker vessels is simply this: we are open to any measure which saves lives at sea. Labor has been completely committed to doing everything we can to seeing an end to the human tragedy which unfolded on our borders. That is why we put in place the PNG arrangement, which has done an enormous part of the work in seeing an end to the flow of asylum seeker vessels. We understand that that needs to happen in order to end that human tragedy, and, touch wood, we are in a place now where we hope that we have seen the last of the deaths at sea.

We retain two anxieties in relation to the question of turning back asylum seeker vessels. The first is in respect of the impact that that policy has on our relationship with Indonesia. This is clearly a policy which the Indonesian government does not accept. This is clearly a matter which has been eroding our relationship with Indonesia rather than building it. If we are to have a policy in place which does not just have an impact on the flow of asylum seeker vessels over the course of the last few months but also resolves this issue over the course of the next few decades, then we need to have a relationship of co-operation between ourselves and our nearest neighbour—the country from which the bulk of the asylum seeker vessels emanates. So it is plain common sense: we must have a hand-in-glove relationship with Indonesia in respect of dealing with asylum seeker vessels.

That is what existed when Labor was in government. Our concern about the policy in relation to turning back asylum seeker vessels is the impact that it has on that relationship over the long term.

Our second anxiety in respect of the policy of turning back asylum seeker vessels is the question of safety at sea. Previously, we have had advice from Navy to this parliament about the question of safety at sea. It is, to be honest, difficult to have that question answered openly in this parliament in circumstances where the conduct that is occurring on our high seas is said by the government to be one of an operational matter and, therefore, the details are not made public.

Having any sense of public confidence then in the safety of these operations is simply an open question. We do not know. And we need to know, from the point of view of Labor, in order to have our support for a position of turning back boats at sea. Given there has been a history of advice to this parliament that there is danger in this, we need to be satisfied that this is a policy which can be carried out safely. They are our two issues in relation to the question of turn-backs—firstly, our relationship with Indonesia; secondly, the question of safety at sea. That is where we stand. I reiterate, our mind is open to any measure which seeks to save lives at sea.

The minister has sought to characterise schedule 1 as being, in essence, a vote on this question. It is not. Schedule 1 is about the government dealing with a case currently on foot in the High Court—the case of CPCF v Minister for Immigration and Border Protection and Others. That was being heard in the High Court last week. In essence, what this legislation seeks to do is to scuttle one High Court case. It deals with each of the elements which are being put forward by the applicants in that case and, in a sense, were it to be passed through this parliament, would render the precedent value of that case redundant. It is a case which is fundamentally about the Maritime Powers Act. To be sure, the outcome of that case may well have an impact on the government's ability to conduct its turn-back policy.

If it is the case that we now have a situation by virtue of this legislation that raises the question of the legality of turn-backs, that is a point which the government must be clear about. In that context, it is important to say now that the rule of law matters. The High Court has a role to play. Were this schedule to be passed, it would make the role of the High Court redundant. In our view, that is inappropriate. It is inappropriate to be walking down this path right now when there is a case before the High Court. If, after the High Court has made its decision, the government believes that it requires legislation in order to empower it to do what it seeks to do, at that point it can come back to this parliament, it can come to the opposition and talk through what that proposal is.

What we have before us is a schedule which seeks to, in effect, scuttle a High Court case which is on foot right now, and in our view that is not an appropriate way to proceed. On that basis, we have a position of opposing schedule 1. That should not be read simplistically as a statement about our position in relation to turn-backs and that is why I spent some time articulating what that position is. But we do not think it is appropriate to be using this place, right now when this matter is before the High Court, to make a matter before the High Court redundant. The High Court should be allowed to continue the work that it has to do. That is our position in relation to schedule 1.

Schedule 2 deals with the question of temporary protection visas and a new visa class which will be called temporary safe haven enterprise visas. In relation to temporary protection visas, Labor's position is well known. We oppose temporary protection visas and, therefore, we oppose that part of this schedule and indeed those components of this schedule which are consequential on a reintroduction of temporary protection visas. Our view, very simply, is that people who come to Australia who are found to have invoked Australia's protection obligations ought to be provided with permanent protection visas from our humanitarian program and provided assistance in settling within our community as quickly as possible, so that they are off the government tab as quickly as possible and become constructive and contributing members to our society as quickly as possible.

Rather than keeping these people in a state of limbo through temporary protection visas, which in effect would mean this, any decision that these people would take in their lives that would be longer than three years in duration—three years being the duration of the temporary protection visa—would effectively be a decision that they cannot take. Taking out a personal loan, taking out a mortgage, going to university, falling in love—none of these decisions that we all make in our lives which are about being a member of this society, being a settled member of this country, will be on offer to people who are here on temporary protection visas because they do not know whether they will be here after three years.

But let us be clear, the vast majority of these people will be here for the rest of their lives. That is the experience that we saw during the Howard government when, in effect, temporary protection visas were abandoned. We saw that after the first period of review, people were able to convert their temporary protection visa to a permanent protection visa. The vast majority of people were able to do that.

What we would have with this legislation would be this situation: where people's circumstances back in the countries from where they have come have not substantially changed, they will be able to spend the rest of their lives here but they will have to do so on this three-year rolling basis of limbo and that will prevent them from contributing to our society in a way which we would want to see. That is therefore not in our interest as a nation and certainly not in their interest as individuals. That is why we oppose temporary protection visas.

This schedule also puts in place, just, temporary safe haven enterprise visas. I say 'just' because all the legislation does is name the visa class. It makes clear in the explanatory memorandum that next year regulations will be developed which will put meat on the bones, but right now all this legislative package is doing is putting a name in the act. This comes about, as we have heard, from the minister's statements and through discussions and an agreement between the Palmer United Party and the government in relation to this bill. It would seem that the Palmer United Party are concerned to have in place, to deal with some of the issues I have just addressed, a mechanism whereby people have a pathway to permanency. That, as an objective, is one we support. We think it is a good thing to have a situation, for all the reasons I have just described, where those people who are found to invoke Australia's protection are able ultimately to have a pathway to permanency and ultimately to have a pathway to citizenship. I do not think you could say right now that this legislative package guarantees that—far from it. In that respect, the Palmer United Party ought to be concerned with the fine print of the deal they have struck with the government.

We support conditionally the proposal of safe haven enterprise visas but in saying that we will be seeking to move amendments in the Senate which absolutely clarify that this visa class will provide a pathway to permanency pursuant to what we understand was the objective of the Palmer United Party when they entered into the agreement with the government. Accordingly, those provisions of schedule 2 which are consequential to the introduction of safe haven enterprise visas we would also support.

Schedule 3 is an important and technical machinery provision being proposed for the act. We support this. It would seek to clarify the relationship in respect of named visas between how they are described in the act versus how they would be described in the migration regulations. That makes sense. We would make the point that this says that, if there are no regulations which back up the way these visas are described in the act, then the visas will not be operative. One of the visas which are named is the safe haven enterprise visa. Of course, it is absolutely essential, therefore, that regulations ultimately be made for the safe haven enterprise visas or else they will not be operative. We do accept that there should be a clear alignment between the way in which eases are described in the act and in the regulations and that there should be a consistency in the way in which they are dealt with. So on that basis we support as a sensible reform those measures which are set out in schedule 3 of this bill.

Schedule 4 of the bill relates to the refugee assessment process. There are two aspects to this. Firstly, the bill seeks to speed up the process of assessing a person's refugee claim for those people who I might describe as being in Australia in an unauthorised way—that is, they are here either through an overstay on their visa or they are here having come by plane or sea and not having appropriate paperwork. For people who are here in an unauthorised way this will seek to fast track the assessment process for them. We are not sure how that will operate because regulations need to be developed for that and we are told they are coming. We will be opposing the entirety of schedule 4. The fast track process is the first part. The second part of this schedule, which is perhaps more concerning, is the establishment of what is described as the Immigration Assessment Authority, which would displace the role of the Refugee Review Tribunal in respect of those who are here in an unauthorised way and mean that for those people their assessments would have only a limited review right in relation to an adverse decision made about them.

We have, in this place, since the Abbott government was elected, supported much legislation which has come through the parliament and sought to make more robust and to strengthen the refugee assessment process. That was something which, when in government, we also sought to do. There is work which can be done to ensure that the processes of assessing people's protection claims are as robust as possible and to make sure that the ability to game the system is reduced as much as possible. What we have in schedule 4, in our view, goes well beyond that. This becomes something of a gutting of the assessment process. When talking about the limiting of people's review rights to the extent contained in this schedule, we cannot go there. Equally, the fast-tracking process would seem to us to not achieve much in terms of time but would go a long way in reducing people's rights. That is particularly the case in the timing of assessment processes when later on the government is seeking to remove the obligation which requires a decision to be made in respect of an application within 90 days. In any event, for all those reasons we would oppose schedule 4.

Schedule 5 has two components. The first is to seek that the removal powers of the act be seen and read separately from the refugee assessment process and without regard to the refugee convention. We support this. This is a situation where people have gone through their assessment process, having sought to invoke Australia's protection obligations, may take their case, if they get leave, all the way to the High Court but ultimately, having been found not to be a genuine refugee, in the normal course of events the removal powers of the act would then take effect and those persons would be facilitated back to the country from which they came. The act has been read through a number of court decisions as giving effect to the refugee convention in each and every one of its parts and therefore there has been ability for people to effectively relitigate their assessment claim in the context of the exercise of the removal power. We do not think that it is appropriate or reasonable and therefore we do support what the government is seeking to do here in making it absolutely clear that the removal power sits separately from the question of assessing a person's protection application and considerations of the refugee convention. It does not mean that the refugee convention does not apply to people when they seek to invoke Australia's protection obligations; of course it does. But it does in the context of their assessment as a refugee, not in the context of whether or not they ought to be removed, having had that assessment fail through the system of decision making and review that we have under the Migration Act.

The second component of schedule 5, we do not support. This is a component which seeks to remove any reference to the refugee convention within the act and, as the government would say, to codify the obligations which exist under the refugee convention into the act and indeed codify the state of Australia's law in respect of the refugee assessment process into the act. There is no good reason for this.

The stated reason by the government is that they would want, as jurisprudence develops in this area, to have Australian courts' decisions determine the progress and path that our law takes, rather than the decisions of international courts and other countries. I do not think, even if this were to pass the parliament, it will achieve that end. If you are using a set of words which are used in other countries—in other Commonwealth countries—inevitably, our courts are going to refer to decisions that they make in trying to work out how you interpret those words within our own system. It is clear from the minister's second reading speech that we remain a party to the refugee convention, and the Migration Act is the way in which we give a legislative effect to that. I do not think this will achieve the objective that the government seeks to achieve anyway, but there is no good reason for it.

Our concern is that, in seeking to codify the law in this way, mistakes can be made. There is, for example, a requirement that would be inserted into the act that, if persons are able to alter their behaviour reasonably, then they would not be able to seek protection in Australia. There are cases, which currently are being dealt with in the Australian legal system and decisions that have been made in the past, which do give effect to a version of that. Once you write it down, it raises a whole lot of questions, which will become more complicated. Would, for example, somebody who seeks protection on the basis of sexual preference be denied that protection on the basis that an alteration of their behaviour could result in them not being persecuted or harmed in their home country? I am not suggesting for a second that that is the intention of the codification which is being put in place here, but the moment that you walk down that path is the moment that those sorts of issues will arise. There is no good reason for codifying the act here other than through in a sense false nationalism about saying that we do not want international courts to have a say on the development of our law—they will anyway, because our courts will refer to them, even if this were to pass this parliament. In any event, we oppose that part of schedule 5.

Schedule 6 deals with the question of the children of unauthorised maritime arrivals and goes to the matters which are being dealt with in the case of Plaintiff B9/2014 against the Minister for Immigration and Border Protection. This is known as the Baby Ferouz case, and it is clear that this legislation will not specifically apply to the participants within that case. It will be prospective but it deals with the substance of the matters that come from that.

We support the government in respect of this schedule. We accept that the underlying principle throughout our immigration system is that children inherit the immigration status of their parents. If a parent is an unauthorised maritime arrival, then it is appropriate that children, no matter where they are born, inherit that same immigration status. That applies throughout our system with the one exception: permanent residents living in Australia giving birth to somebody in Australia would become an Australian citizen. Australians born overseas are Australians. Children born to persons holding a temporary visa of any kind in Australia will have a temporary status in this country. Consistent with that, we think schedule 6 is an appropriate piece of legislation and we support it.

Finally, schedule 7 relates to the question of the ability for the minister to put in place caps in relation to the protection visa stream. This comes by virtue of the case of Plaintiff S297/2013 against the Minister for Immigration and Border Protection. We support the right of the minister to have an ability to cap the protection visa program, just as the minister has a right to cap visas throughout our entire migration system. It is hard to see how you could manage this appropriately without the minister having that power. We absolutely support that. We do so on the basis that actions the minister took last year in seeking to cap the protection visa program at the number of visas which had been issued to the point in time when the government's attempt to introduce temporary protection visas had been disallowed by the Senate. We saw that as an effective abuse of process that was in effect the substantive decision that was litigated through the court system, and the government lost that case. To be completely clear about this issue: we want to make sure that the 6,000-odd people for whom the bar had been lifted and that case applied would be able to seek a permanent protection visa, and so we will be pursuing an amendment to that effect in the Senate.

The final part of schedule 7 deals with the question of the 90-day rule, which was an important part of the case that was litigated. The government is seeking to remove the 90-day rule. We oppose that. The 90-day rule is an important accountability measure of any government about the speed with which it handles the decision-making load in relation to protection visa applications. It was, as I understand it, a rule that was introduced under the Howard government. At the time of the last election, when Labor left government, about half the decisions that were made in relation to protection applications were made within the 90-day rule. In the last report on the government's performance against the 90-day rule it has been found that only 14 per cent of decisions are being made within the prescribed 90 days. The 90-day rule is an important accountability measure and, accordingly, we would oppose any attempt to remove that from the legislation.

That outlines in detail our position on this bill. I reiterate that what we will seek to do is give expression to those positions, as well as any other amendments that may arise by virtue of the Senate inquiry, through amendments that we will move in the Senate. We will be opposing this bill in its entirety in the House by virtue of those components of the bill which we disagree with here.

## **Debate Heats Up at the Migration Resolving the Asylum Legacy Caseload Senate Inquiry**

<http://www.timebase.com.au/news/2014/AT652-article.html> December 11, 2014

Debate Heats Up at the Migration Resolving the Asylum Legacy Caseload Senate ... Maritime Powers Legislation Amendment ... Bill 2014 (CTH) Migration Amendment ...

On 26 September 2014, we reported on the Federal Government's Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) (introduced into the House of Representatives on 25 September 2014). The Bill is said by the Government to be

a part of the Government's key strategies for combating people smuggling and managing asylum seekers both onshore and offshore. The Bill was said by the Government to be a continuation of the Government's protection reform agenda:

The Bill seeks to introduce measures that:

The Bill was referred to Senate Legal and Constitutional Affairs Legislation Committee (the Senate Committee) on 25 September 2014 and the Senate Committee is due to report back to the Senate on 27 November 2014. The Guardian reports that at a meeting of the Senate Committee on Friday (14 November 2014) a "robust exchange" regarding the true purpose of the proposed legislation took place, with Liberal Senator Ian Macdonald being reported to have indicated that:

A statement made in reply to a question from the Migration Institute of Australia inquiring as to why the government was introducing the legislation and whether it was related to Australia not wanting to feel like it is ". . . beholden to a 1951 convention [the United Nations High Commission for Refugees Convention] any longer . . ."

Given Senator Macdonald's response, there is, as The Guardian reports, strong concern especially among migration lawyers and legal experts that the proposed legislation has behind it the aim of heading off a number of recent and upcoming High Court decisions, including the looming decision regarding the detention of 157 Tamil asylum seekers at sea in July 2014.

Questioned about the Government's legal intentions regarding the Bill, the Immigration Minister Mr Morrison is reported as rejecting that it was seeking to head off adverse decisions from the courts, saying it was,

The Minister's denial is challenged however, by those who say that attempting to codify Australia's interpretation of its protection obligations under the UNHCR's Convention, as the Bill proposes to do, will substantially limit the way the courts are able to consider treaties that Australia has signed up to, including the the 1951 refugee convention.

The Guardian quotes, Dr Michelle Foster, the director of the international refugee law research programme at Melbourne University, who is reported to have told the Senate Committee that:

Further cause for concern about the Federal Government's intentions regarding the observance of international obligations is also coming from today's media reports that the Federal Government has:

It is reported that the Immigration Minister on Tuesday (18 November 2014) announced Australia will no longer accept asylum seekers who applied for resettlement after 1 July 2014 through the UNHCR office in Indonesia. This reaction is being seen in the media as response to UNHCR's criticism of the Cambodian refugee resettlement deal although the immigration Minister has told the ABC the governments actions were:

" . . . taking the sugar off the table, . . . trying to stop people thinking that it's okay to come into Indonesia and use that as a waiting ground to get to Australia. . . I mean, Indonesia is not a refugee generating country. It's a transit country and it's used by smugglers. And we've had great success in stopping people coming to Australia by boat and for most of that time over the past year that has seen a significant reduction of people moving into Indonesia."

The Immigration minister's comments are indicative of the Governments approach which seems to be a creeping attempt to first stop physical arrival by alleged "illegal" asylum seekers and then remove even the hope of one day arriving by those prepared to wait in "transit countries" like Indonesia.

It is interesting, if not alarming, to see that the debate has moved from the alleged "illegality" of seeking asylum and accusations of "queue jumping" to justify the harsh treatment of some refugees to the actual removal of the queue and almost any prospect of seeking asylum legal or otherwise in Australia.

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## Migration and Maritime Powers Legislation Amendment ...

[http://www.jss.org.au/files/Docs/policy-and-advocacy/sub\\_nov\\_14.pdf](http://www.jss.org.au/files/Docs/policy-and-advocacy/sub_nov_14.pdf) December 11, 2014

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

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31 October 2014

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

#### Submission

#### Introduction

Jesuit Social Services welcomes the opportunity to make a submission to the inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Hereafter referred to as "the Bill"].

Our comments and concerns regarding the Bill draw from our experiences working directly with people seeking asylum and other people in our community in need of support.

Jesuit Social Services' work with people seeking asylum  
For over 37 years, Jesuit Social Services has worked to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged young people, families and the community. This has included several decades working with refugee and newly arrived migrant communities as well as people seeking asylum. Since 2011, as part of a consortium with MacKillop Family Services and Catholic Care, Jesuit Social Services has provided accommodation and case management support to people placed in community detention while their immigration status is being determined. Support is provided to young people (under 18), vulnerable adults and families in need of a safe and caring living environment. Through a holistic and therapeutic approach we support people to improve their physical and mental health, wellbeing, reduce isolation and grow capacity to transition into independent community life.

**Serious concerns about the Bill**

Jesuit Social Services believes that this Bill denies people basic human rights and will place vulnerable people at serious risk of harm or death. Consequently we oppose the Bill, and urge the Senate to reject it.

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We object to the Bill fundamentally undermining principles of natural justice that underpin the fairness and integrity of our Australian legal system; and to the effective denial of the critical right to family reunion for most applicants found to be refugees.

We note that the crisis of people displaced by war and conflict is a global one, and that Australia has an important role to play as a wealthy global citizen responding humanely to devastation wreaked on human lives and communities. That we live far away from many of these conflicts doesn't lessen our responsibility to respond to each person who claims our assistance with warmth, fairness and humanity.

People who come to Australia seeking asylum are extremely vulnerable. They have both a legal and moral claim to our protection and assistance. Respect for their human dignity and health and well being requires that their basic needs for food, shelter, safety, educational opportunities, and medical care are met; that their claims are adjudicated fairly within a reasonable timeframe; and that they are able to re-establish their family relationships and connections.

Although we have concerns with many provisions of the Bill, we have limited our submission to four main areas of serious concern:

1. The removal of references/ adherence to the refugee convention
2. The limitations imposed on judicial reviews
3. The re-introduction of temporary protection visas
4. The cap on the number of protection visas

#### 1. The removal of references/ adherence to the refugee convention

The Bill removes most references to the Refugee Convention from the Migration Act and instead creates a new statutory framework setting out Australia's own interpretation of its protection obligations under the Convention.

The Bill asserts that:

- The Minister may detain and transfer people on the high seas even if the Minister fails to consider Australia's obligations, including the principle of non-refoulement and the prohibition of arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR)
- Part 1 of Schedule 5 authorises an officer to remove a person even if the non-refoulement obligation has not been considered
- Each time a person's TPV expires they must make a fresh application for a visa, contrary to article 1C of the Convention
- The removal of references to the Convention will result in replacement of Convention definitions with Australian interpretation of its obligations
- Australian courts will be excluded from their role of interpreting Australia's obligations under the Convention
- Options for internal relocation within the country of origin would have to be considered without any regard to a test of reasonableness

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- Decision makers would be required to consider the extent to which a person could modify their behaviour in order to avoid persecution
- The definition of "membership of a particular social group" will be restricted
- There would be an expanded interpretation of who can be excluded as a refugee
- Australia would define what constituted effective protection

We oppose removal of reference to the United Nations Convention on Refugees because we believe the 1951 Refugee Convention and its 1967 Protocol enshrine fundamental principles including respect for human dignity and solidarity within and between people and nations. These make the flourishing of the weakest the concern of all, and Australia has a moral obligation to continue to uphold them. These global legal instruments have helped to protect millions of people worldwide. They effectively and explicitly cover important aspects of asylum seekers' rights and the responsibilities of signatory countries.

Further, Australia has a broader obligation as a citizen among nations to respect and uphold the ongoing international processes that sit around these instruments, including the interpretation of their meaning.

#### 2. The limitations imposed on judicial reviews

The Bill significantly limits the possibility of judicial review of decisions made under extraordinary powers granted to the Minister to detain people at sea and transfer them to any country. The Bill also excludes access to merits review of some refugee status determinations.

The Bill asserts that:

- Asylum seekers who arrived irregularly on or after 13 August 2012 are "fast track applicants" who will no longer have access to the Refugee Review Tribunal (RRT)
- Such applicants will only be permitted a review on the papers to a new authority, the Immigration Assessment Authority. There will be no hearing and very limited rights to produce new evidence
- Some fast track applicants are excluded from even this form of review

We oppose the restrictions imposed on judicial review because the critical principle that should underpin our processes for assessing refugee applications should be ensuring as far as possible that genuine claimants of asylum are recognised and granted refugee status.

History has shown that the review processes in place in Australia are essential to correcting administrative oversights and incorrect rejections of genuine claims. By denying the right to review, these new processes risk denying asylum to genuine claimants. This will lead to their subsequent refoulement. This is a grave affront to natural justice and will result in people being returned to significant danger, torture or even death. The limits to or exclusion of merits review are substantial and the proposed "fast track" processing scheme was ruled unlawful by the United Kingdom High Court in

July 2014 as it carried an "unacceptably high risk of unfairness."

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### 3. The re-introduction of temporary protection visas

Schedules 2 and 4 of the Bill allow the reintroduction of Temporary Protection Visas (TPVs) and the creation of a new Safe Haven Enterprise Visa (SHEV).

The Bill asserts that:

- TPVs and SHEVs would become the only visas available to people owed protection. People granted these visas would not have the right to:
  - Access to family reunion
  - Apply for permanent protection
- Under a SHEV visa there would be no entitlement to government assistance to study for a degree, diploma or trade certificate
- Asylum seekers detained on Christmas Island and on the mainland who arrived between 19 July and 31 December 2013 may be eligible for release and to apply for a TPV or SHEV
- People who arrived in that period but have been transferred to Nauru or Manus Island would remain subject to offshore processing and not allowed to apply for a TPV or SHEV
- People found to be in need of refugee protection have no pathway to permanent protection unless, after working in a designated region for three and a half years and satisfying a number of requirements, they may only be able to apply for another visa subject to highly restrictive criteria
- All future boat arrivals will be subject to offshore processing

We oppose the introduction of Temporary Protection Visas (and the creation of a new Safe Haven Enterprise Visas) because people who are found to meet the definition of a refugee under the 1951 convention ought to be granted permanent protection and all of the entitlements that this affords. There is no justification for people found to be refugees to be left to live in uncertainty, with no prospect of resettlement in Australia. TPVs do not provide a sustainable solution for refugees, they risk exacerbating psychological problems and may infringe the right to family and freedom from arbitrary interference with family life.

### 4. The cap on the number of protection visas

The Bill places a cap on the number of protection visas that can be issued in any year, allowing the Minister to suspend processing of the excess applications.

The Bill asserts that:

- Extraordinary power will be conferred on the Minister to determine the fate of people's visa status following positive refugee determination with limited parliamentary or judicial scrutiny
- There will be no pathway to permanency for large numbers of refugees who will be found to be refugees but forced to live with no security and no possibility of reuniting with separated family members
- Arbitrary and prolonged detention may occur for people in detention whose applications are suspended until the cap is lifted

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We oppose a cap on the number of protection visas issued as it will leave people found to be refugees in a state of protracted uncertainty, potentially waiting many years to receive the acknowledgement and entitlements that a protection visa provides. Unless there is some pathway to permanency, large numbers of refugees will struggle to survive. This is not a good faith implementation of Australia's international obligations and it is contrary to Catholic Social Teaching that sees unity of the family as the central social institution that must be supported and strengthened, not undermined.

### Recommendations

Jesuit Social Services calls upon our Government to adhere to the following principles in all policy and legislation relating to people seeking asylum:

1. Australia should continue to work within the region and international context to lead a more humane, ordered response to processing the claims of people seeking asylum.
2. All asylum seekers who make a claim on Australia must be processed with respect for their human dignity demanded by the UNHCR Convention on the Status of Refugees. Their claims for protection should be processed promptly and fairly.
3. The principles of deterrence, by which the members of one group of people who have come to Australia to seek protection are treated harshly in order to modify the behaviour of others, should form no part of Australian policy.
4. People seeking asylum should not be referred to as "illegal" or in other derogatory terms.
5. People who come to Australia to seek protection should not be transferred from Australian territory to other nations for processing or protection unless there is a firm regional agreement assuring that they will have appropriate rights and support in the countries to which they are transferred, and that they will be promptly resettled if found to be refugees.
6. Arbitrary or indefinite detention at any stage of the refugee determination process is unacceptable.
7. People who seek asylum should live in the Australian community. Respect for their humanity demands that they have the right to work, access to basic services, and to some financial support if they cannot find work. The financial burden of their support should be accepted by the Government and not be shifted to the community sector.
8. Children should not be held in detention in Australia or in offshore detention centres, but housed in the Australian community with the full range of services necessary for their welfare. Young unaccompanied children and adults, families with children and those with mental and physical health issues should also be carefully supported when living in the community.
9. People should have the opportunity to be reunited with separated close family members promptly once they are found to be refugees.
10. Those who have exhausted all appeals against rejection of their claims but who cannot be returned to their countries should not be compelled by destitution to return in keeping with the principle of non-refoulement.

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### Conclusion

As an organisation with a commitment to social justice and upholding the human dignity of every person, we hold serious concerns about the impact of this Bill on the inherent dignity and wellbeing of

## Restoring TPVs to resolve labor's legacy caseload

<http://www.minister.immi.gov.au/media/sm/2014/sm218127.htm> December 11, 2014

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

The Coalition Government has secured support of the Palmer United Party to reintroduce Temporary Protection Visas (TPVs) to assist resolving Labor's legacy caseload of 30,000 Illegal Maritime Arrivals (IMAs).

'We are stopping the boats, with just one venture having arrived this year, and we are now seeking to resolve the backlog of 30,000 IMAs who arrived under the previous government by restoring TPVs,' Minister Morrison said.

'TPVs were foolishly abolished by Labor and the Greens in 2008 in their pursuit of weaker borders, providing a product for people smugglers to sell.

'The support of the Palmer United Party to restore TPVs through legislation to be introduced this week after they were abolished by Labor and the Greens following the last election is welcome.

'We will continue to engage other crossbenchers on our proposals. The discussions we have had to date have been very positive.

'Denying permanent protection visas to IMAs has been Coalition policy for over a decade and was overwhelmingly backed by the Australian people at the election.

'Under new legislation - the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 - two new temporary visas will be established. These visas will not provide a pathway to a permanent protection visa in Australia.

'IMAs found to be owed protection will be offered a TPV for up to 3 years. TPVs do not include family reunion or a right to re-enter Australia. Holders will have access to targeted support arrangements including: work rights, access to employment services and mutual obligation, access to Medicare and income support, torture and trauma counselling, translating and interpreting services, complex case support and access to education for school aged children.

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

'SHEVs will be valid for 5 years and like TPVs will not include family reunion or a right to depart and re-enter Australia.

'SHEV holders who have worked in regional Australia without requiring income support for three and a half years of their visa period will then be eligible to apply for other onshore visas to be granted where they satisfy the relevant criteria. They will not be eligible for a permanent protection visa.

'If a SHEV holder was to access government assistance to study for a degree, diploma or trade certificate in a designated regional area, this would not be classified as accessing social security benefits for the purposes of calculating the period required before the holder becomes eligible to apply for other onshore visas.

'The new visa arrangements will allow the government to commence processing asylum claims of the legacy caseload. More rapid processing and streamlined review arrangements, as detailed at the election, will be implemented.

'Any further delays in processing or repeated processing of claims simply adds to cost and uncertainty and prevents people getting on with their lives.

'Upon passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and the Migration Amendment (Protection and Other Measures) Bill 2014 the government will agree to process IMAs currently on Christmas Island and the mainland who arrived last year and who have not been transferred to Nauru or Manus Island, as part of the legacy caseload.

'I found to be refugees they will be provided a TPV or SHEV. They will not be eligible for a permanent protection visa. These visas only apply to those IMAs who are part of the legacy caseload.

'All IMAs already transferred to Nauru or Manus Island will remain subject to the offshore processing policy, regardless of their date of arrival. They will remain on Nauru or Manus Island, where their asylum claims will be assessed. Under this policy, they will not be resettled in Australia.

'Furthermore, any and all new illegal maritime arrivals will continue to be transferred to Manus Island or Nauru for offshore processing and resettlement, as was demonstrated by the recent 'Indian' venture where all 157 IMAs were sent to Nauru. This will apply in all such cases, without exception, as a necessary part of our border protection regime that is successfully stopping the boats.

'The Government will also continue to support Assisted Voluntary Return (AVR) packages for those in the legacy caseload, particularly as a mechanism to reunite unaccompanied minors with their families in their home countries.

'I thank the Palmer United Party for their support of temporary protection visas. The Coalition Government is stopping the boats, restoring integrity to our immigration programme and can now get on with the job of resolving Labor's legacy of failed border protection,' Minister Morrison said.

### 18 November 2014 Ms Sophie Dunstone Committee Secretary ...

[http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2900-2999/2906\\_-](http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2900-2999/2906_-)

[Inquiry into the Migration and Maritime Powers Legislation Amendment Resolving the Asylum Legacy Caseload Bill 2014.pdf](http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2900-2999/2906_-Inquiry into the Migration and Maritime Powers Legislation Amendment Resolving the Asylum Legacy Caseload Bill 2014.pdf) December 11, 2014

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

18 November 2014

Ms Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Legislation Committee

PO Box 6100  
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CANBERRA ACT 2600

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

Dear Ms Dunstone

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

Thank you for the opportunity to provide a written submission to the Senate Standing Committee on Legal and Constitutional Affairs's (the Committee) inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill). The Law Council also welcomed the invitation to speak to its submission at the Committee's hearing on the Bill last Friday.

During the remainder of the hearing, the Committee raised certain questions which the Law Council would like to address in the following material.

Why can't we just trust the Executive to do their job properly – why do we need the courts involved?

- The Department of Foreign Affairs in its overview of Democratic Rights and Freedoms, notes that an independent judiciary forms one of the bulwarks against abuses of power and denials of fundamental freedoms in Australia.<sup>1</sup>
- An independent, impartial and competent judiciary serves as a necessary check upon Executive power.
- The Law Council considers that the rule of law requires:
  - Executive powers to be carefully defined by law, so that it is not up to the Executive to determine what powers it has, and how they should be used; and
  - Executive decision-making to comply with the principles of natural justice and be subject to meaningful judicial review.
- The judiciary therefore has a legitimate role in ensuring the Executive's accountability to the Australian people.
- Features of the Bill which are not consistent with the principles expressed above include:
  - Schedule 1 – which: removes the possibility of court challenges in relation to the exercise of maritime powers which do not accord with Australia's international obligations; removes judicial review of Ministerial decisions

<sup>1</sup>

[http://www.dfat.gov.au/facts/democratic\\_rights\\_freedoms.html](http://www.dfat.gov.au/facts/democratic_rights_freedoms.html).

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which are based on broad criteria, and removes the obligation of the Executive to comply with the usual natural justice principles;

- Schedule 4 – which provides for a diluted form of merits review, and removes this form of review altogether for a potentially broad group of applicants, including a category to be determined by the Minister with no applicable criteria; and
- Schedule 5 – which: precludes legal challenges aimed at preventing the removal of individuals without consideration of Australia's non-refoulement obligations; and removes or curtails the ability of the courts to determine the refugee status of an individual by reference to Australia's obligations under the Refugee Convention.

Don't we need the Bill to deal with the existing caseload? How can we make the process more streamlined?

- The Law Council agrees with comments made during the hearings that people can be processed using existing legislation, and that there is no need for this Bill to deal with the existing backlog of unprocessed protection claims.
- During the inquiry, Committee members referred to the likelihood that processing the existing asylum seeker caseload of around 30,000 applicants would take up to seven years. The Law Council is unfamiliar with this timeframe as it does not appear in either the Explanatory Memorandum or the Department of Immigration and Border Protection's (the Department's) submission to the inquiry.
- Currently, the Department appears to be able to handle large numbers of applications adeptly. Its annual report notes that the Department's 2013-14 Migration Programme delivered 190,000 places, and that it dealt with 67.7% of the relevant applications within the Department's service standards.<sup>2</sup> It has also been able to cope with the lodgement of 78,345 student visa applications lodged between 1 April 2014 to 30 June 2014 and grant 73,288 during the same period.<sup>3</sup> These figures suggest that the outstanding caseload can be processed efficiently within the existing processes.
- The proposed reintroduction of Temporary Protection Visas (TPVs) may place a heavy ongoing administrative burden on the Department which appears to be at odds with the increased efficiency objective of the Bill.
- The Law Council agrees with comments made that ensuring applicants have access to independent legal advice helps to achieve a more streamlined process. This is a preferred approach than one that diminishes elements of procedural fairness – such as merits review.

There is nothing to prevent asylum seekers from getting legal advice is there? Is it a good use of taxpayers funding to pay for legal advice for asylum seekers? Can't people approach their local MP for help?

- While there may be no official barriers to obtaining legal advice, the Law Council is concerned that many applicants will not be in a position to access it, given:
  - the withdrawal of the Immigration Advice and Application Assistance Scheme (IAAAS) earlier this year;
  - the fact that many applicants in the existing asylum seeker caseload remain in detention; and

<sup>2</sup> Department of Immigration and Border Protection, Annual Report 2013-2014, Part 3, p. 48.

<sup>3</sup> BR0097 Student visa and Temporary Graduate visa programme quarterly report, 30 June 2014, p. 9.

- 2014 11 9 – S – Migration Amendment and Maritime Powers Bill
- o many applicants do not have the funds to access paid legal assistance where free assistance is not available.
  - The Law Council submits that access to independent legal advice early in the application process will lead to more comprehensive, informed and accurate applications. This improves administrative efficiency by reducing applications which are poorly prepared and incomplete.
  - Legal advice is a safeguard against the possibility that a person with a genuine protection claim may be erroneously returned to a place of possible persecution or harm in contravention of Australia's non-refoulement obligations.
  - For these reasons, the Law Council considers that publicly funded legal advice to asylum seekers is of great public value. It further considers that means-testing is an appropriate way to ensure that publicly funded legal advice is provided only to asylum seekers who lack sufficient means to engage a lawyer.
  - The Law Council appreciates that many Members of Parliament go to great lengths to assist individuals in their electorate, including asylum seekers. However, it does not consider this to be a practical solution given that asylum seeker claims rely on knowledge of particularly complex legislation, and the volume of assistance required may be too great a burden to place on so few elected representatives.
  - While the legal profession has always demonstrated great generosity in providing pro bono services to those most in need, it cannot underwrite the totality of the need for assistance. This is best addressed by the Australian Government.

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Does the Bill just codify the Refugee Convention or actually change its meaning? What exactly in the Bill is inconsistent with the Refugee Convention?

- The Law Council encourages the Committee to have regard to the United Nations High Commissioner for Refugees (UNHCR) submission on this issue.
- In the summary of its concerns regarding the codification of Australia's interpretation of the refugee definition at Schedule 5, and the narrowing of the personal scope as established by Article 1A(2) of the Refugee Convention, the UNHCR refers to a number of issues including:
  - o disregarding consideration of the "reasonableness" of the proposed area of internal flight or relocation;
  - o concluding that a person does not have a well-founded fear of persecution if the receiving country has an appropriate criminal law system, a reasonably effective police force and an impartial judicial system provided by the relevant State, without an assessment of the effectiveness, accessibility and adequacy of State protection in the individual case;
  - o concluding that a person does not have a well-founded fear of persecution if "adequate and effective protection measures" are provided by a source other than the relevant State;
  - o concluding that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour relating to certain characteristics; and
  - o limiting the interpretation of a "particular social group" by requiring a cumulative, rather than alternative, application of the protected characteristics and the "social perception" approaches. 4

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United Nations High Commissioner for Refugees submission, p. 2.

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- The Schedule further removes most references to the Refugee Convention. The UNHCR emphasises that these combined proposals would not alter Australia's international obligations to refugees. In this respect, the Law Council notes that:
  - o the Vienna Convention on the Law of Treaties requires States to implement their obligations in good faith and stipulates that a State may not invoke the provisions of internal law as a justification of its failure to perform its obligations under a treaty; and
  - o Article 42 of the Refugee Convention stipulates that States cannot make reservations to certain articles, including Article 1 (which includes the definition of a refugee). 5
- The Law Council considers that the above proposals could, however, increase the likelihood that Australia will fail to meet its obligations under the Refugee Convention, with the possibility that people with legitimate claims under the Convention will be returned to possible harm.
- Other changes which increase this likelihood include:
  - o proposed section 197C at Schedule 1, which provides that an officer must remove an unlawful non-citizen pursuant to section 198, irrespective of Australia's non-refoulement obligations; and
  - o amendments in Schedule 1 which remove the need for those exercising or authorising of certain maritime powers, including those to detain and transfer people at sea, to ensure that the exercise or authorisation complies with Australia's international obligations. 6

Is there an obligation of family unity towards people who are accepted as refugees?

- As the UNHCR has stated in its submission to the Committee, the right to family unity is a fundamental human right that is applicable to refugees. 7 This is also explicitly recognised by the Australian Government in the Bill's Statement of Compatibility with Human Rights in the Explanatory Memorandum. 8
- The following provisions set out the human rights regarding the family unit:
  - o Article 17 of the International Covenant on Civil and Political Rights (ICCPR): no one shall be subjected to arbitrary or unlawful interference with his or her family;
  - o Article 23 of the ICCPR: the family is the natural and fundamental group unit of society and is entitled to protection by society and the State ...;
  - o Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR): the right to just and favourable conditions of work which ensure, including a decent living for themselves and their families in accordance with the provisions of the present Covenant;
  - o Article 10 of the ICESCR: the family is the natural and fundamental group unit of society and should be accorded the widest possible protection and assistance;

5

Article 1A(2) of the Refugee 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The Refugee Convention does not further define the term "refugee".

6

Proposed sections 22A and 75A, Schedule 1 of the Bill.

7

Ibid, p. 14.

8

Explanatory Memorandum, pp. 30-31 at Attachment A.

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- o Article 11 of the ICESCR: everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- o Articles 9(1) and 16(1) of the Convention on the Rights of the Child (CROC): children have a right to remain with their parents (unless contrary to their best interests), and to have their family protected from arbitrary or unlawful interference;
- o Article 20(1) of the CROC: children who are without their family have a right to special protection and assistance; and
- o Article 22 of the CROC: a child that is considered a refugee, whether accompanied or unaccompanied, shall receive appropriate protection and assistance, including in regard to family tracing and reunification.
- It is also in the spirit of the Refugee Convention to ensure family reunification. The Conference that completed the drafting and signing of the Refugee Convention, held 2-25 July 1951, unanimously passed a recommendation on the "principle of unity of the family". There were two elements to this recommendation:
  - (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; and
  - (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.
- Further, the Refugee Convention expressly provides that Australia cannot return a person, including an unaccompanied minor, who has been found to be a refugee to his or her country of origin or former habitual residence. To do so would be a breach of Australia's non-refoulement obligations, as it would return a person to a place where they have a well-founded fear of persecution.

The Law Council would be pleased to provide any additional information that the Committee requires.

Yours faithfully

MARTYN HAGAN  
SECRETARY-GENERAL

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## The Bill of Horror

<http://speakupforthose.wordpress.com/2014/10/22/the-bill-of-horror/> December 11, 2014

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

As well as the reintroduction of Temporary Protection Visas, which leave refugees in constant statelessness and fear of being returned to persecution, the Australian Minister for Immigration is proposing changes to the Migration Act which are utterly alarming. The 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014' removes references to the UN Refugee Convention to allow Australia's domestic law to ignore Australia's obligations under international law. It also removes the ability of the High Court to challenge refugee and asylum seeker policy and operations.

The bill exempts vessels involved in Operation Sovereign Borders from the appropriate maritime laws. There will be nothing to stop fuel, food, water and safety devices from being removed from intercepted boats. The Government will have the power to send boats or individuals anywhere it chooses. The bill removes the need for Australia to have a Memorandum of Understanding in place, or for the country to be a signatory to the Refugee Convention. The bill will allow boats to be towed outside of Australian waters and left there without regard for the safety of passengers.

The bill proposes a fast track assessment process which removes access to the Refugee Review Tribunal. Fast turnaround processing was ruled illegal in the United Kingdom earlier this year due to an "unacceptable risk of unfairness". The bill seeks to change the definition of 'refugee' to allow the government to reject a refugee status application if it decides that there is a 'safe area' in the country of origin, or that the nation's police force is 'reasonably effective'. This is nothing short of playing with people's lives. It will allow the Australian government to send back asylum seekers, regardless of whether they face a real chance of torture or execution on return. What does Scott Morrison think happens to Hazara people when they are returned to Afghanistan or to Tamil people who are returned to Sri Lanka? Does he really believe that members of the Taliban or Rajapaksa's regime are unable to travel to target their victims? If he had converted to Christianity in Iran, or spoken against the Iranian Government, would he really trust the Iranian police force to protect him?

Children born in Australia, to asylum seekers who arrived by boat, will be classified as "transitory persons", creating a new generation of stateless people, and giving them no access to permanent residency or citizenship. Does Scott Morrison really believe that these babies pose a serious threat to Australia as we know it? Or is his disdain, even hatred, for asylum seekers so great that detaining innocent children indefinitely doesn't satisfy his lust for vengeance; does he feel the need to ensure that his punishments will continue for each of their lifetimes?

The 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014' gives the Australian Government, under domestic law, the power to ignore international law and to engage in state-sanctioned human rights abuses. It will allow Australia to be complicit, even collaborative, in the persecution, torture and execution of innocent people. The Minister for Immigration will have absolute power, and his actions under Operation Sovereign Borders will not be brought to account by Australia's justice system. He will become untouchable. This sets a very dangerous precedent for Australian politics and law.

I see so many people ‘liking’ and sharing messages about Australia’s terrible mistreatment of asylum seekers, on social media. I read the comments they write, pouring out their outrage and their grief. Yet, when it comes to asking them to take the time to write to politicians to urge them to oppose this horrific bill, the passion and the anger appear to evaporate. I for one, need to know that I have done everything in my power, and then some, to persuade the Senators to vote against this bill. Will you join me in writing to them? You don’t need to produce a perfectly crafted, eloquent letter; you just need to write! A few lines will do. If you are an Australian citizen, tell them that you cannot support politicians who sanction human rights abuses. If you are an expat, tell them how horrified you are at what Australia has become while you have been away. Most of all, tell them to oppose this bill.

“All tyranny needs to gain a foothold is for people of good conscience to remain silent.” — Thomas Jefferson

Here are the addresses you will need:

Here are the contact details for the cross bench Senators who will ultimately pass or reject the bill:

Write to Clive Palmer too, as he will be instructing his PUP Senators:

Mr Clive Palmer MP

Palmer United Party

PO Box 1978

Sunshine Plaza QLD 4558

You’ll find the other Senators for your state here. You can search by state by using the map. Then click on their names for contact details.

[http://www.aph.gov.au/Senators\\_and\\_Members/Senators](http://www.aph.gov.au/Senators_and_Members/Senators)

Join the Combined Refugee Action Group’s Letter Blitz group on Facebook to access information and letter writing tips.

<https://www.facebook.com/groups/805601422837175/>

\* Information on the Migration and Maritime Powers Legislation Amendment Bill was sourced in analyses undertaken by ChilOut Revived; Refugee Council of Australia; Human Rights Law Centre; and Professor Mary Crock, Sydney University

## **Morrison moves to boost Maritime Powers Act; Enshrine screening out, Restrict children's rights and undermine the Refugee Convention**

<http://www.refugeeaction.org.au/?p=3500> December 11, 2014

The government’s “Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014” introduced Thursday 25 September goes ...

The government’s “Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014” introduced Thursday 25 September goes much further than establishing TPVs.

In sweeping changes to definitions and processing arrangements, the Minister is trying to use the legislation to undermine human rights and remove appeal rights for asylum seekers.

The legislation also attempts to change the laws to avoid existing legal challenges over the powers of the Maritime Powers Act to hijack and detain asylum seekers on the high seas as well as to deny rights to children born in Australia to be considered Australian citizens.

The new legislation makes dramatic alterations to the Refugee Review Tribunal processes that will enshrine screening out processes through which asylum seekers are administratively prevented from having their asylum claims processed.

Morrison is even removing references to the Refugee Convention from the Migration Act. The ‘Explanatory Memorandum’ that accompanies the Bill states: “[It will] remove most references to the Refugees Convention from the Migration Act and replace them with a new statutory framework which articulates Australia’s interpretation of its protection obligations under the Refugees Convention.”

In particular the government is obviously concerned that the High Court hearing on 14, 15 October will find that the government’s kidnapping and removal of the 157 Tamils to Nauru will be found to be unlawful.

It seems also to be concerned that a court hearing regarding whether or not children born in Australia but whose parents are incarcerated on Nauru will be found to be Australian citizens or owed protection by Australia.

The Memorandum states ‘with retrospective effect, that children born to transitory persons either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act’ and can be removed to ‘a regional processing country’.

“This Bill must be stopped. This omnibus bill is not just about temporary protection visas; it is an attempt to fundamentally change the rights of asylum seekers and to remove human rights’ obligations that Australia has under international treaties,” said Ian Rintoul, from the Refugee Action Coalition.

Refugee rallies are being held in Sydney and Melbourne on 11 October. Brisbane is holding a protest at the Brisbane Immigration Transit Accommodation, Saturday 27 September, 1.00 pm, 100 Sugarmill Road, Pinkenba.

## **Asylum seeker bill allows Australia to ignore risk of persecution**

<http://www.theguardian.com/australia-news/2014/oct/15/asylum-seeker-bill-allows-australia-to-ignore-risk-of-persecution> December 11, 2014

... but the ruling may be overtaken by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, ... Maritime Powers ...

A test case before the high court on the legality of Australia intercepting boats and forcibly taking asylum seekers to foreign countries may be rendered irrelevant by new legislation before parliament. The new laws would grant sweeping powers to the immigration minister and his department.

The high court has been asked to rule on the forcible detention of 157 Sri Lankan Tamils, held on board an Australian customs vessel on the high seas for a month while Australia tried to negotiate to send them to India, the country their boat left from.

The court has reserved its decision, but the ruling may be overtaken by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, currently before the House of Representatives, which would strengthen the government’s ability to forcibly

remove people from Australian territory, and allow the government to disregard whether those people would face persecution in whichever place Australia left them.

The bill would remove almost all references to the UN Refugee Convention in Australia's Migration Act, replacing them with Australia's own interpretation of the convention.

It would also grant the government the power to take an asylum seeker to a foreign country, even if that foreign country was hostile and had not agreed to accept them.

The bill would ensure those powers "cannot be invalidated because a court considers there has been a failure to consider ... Australia's international obligations".

In the high court, the government solicitor argued the Australian government acted within current laws at all times in detaining 157 Sri Lankan Tamil asylum seekers at sea for 28 days as it tried to arrange to transport them to India, the country their boat had left from.

Justin Gleeson, SC, put the government's case to the High Court on Wednesday, arguing Australia had a sovereign right to protect its borders, and was empowered under the Maritime Powers Act to detain unauthorised arrivals and take them to "a place outside Australia".

Gleeson argued Australia was within its powers to intercept asylum seekers, who had no right to enter Australia, outside territorial waters and that it was impractical to consider individual asylum cases at sea.

Such an obligation would, he argued, "turn the vessel, by law, into a floating tribunal".

Craig Lenehan, acting on behalf of the refugees said Australia could not take asylum seekers to a place where they might face danger, or where they had no right to be.

On the final day of hearings on Wednesday, the court focused on the legality of Australia's ultimately unsuccessful attempt to take the asylum seekers to India, despite not having permission from that country for them to disembark there.

The asylum seekers were taken twice across the Indian Ocean, from 16 nautical miles off Christmas Island to the coast of India and then back again to Australia, over 28 days on customs vessel Ocean Protector. The asylum seekers were ultimately taken to Nauru, where they remain.

Justice Kenneth Hayne suggested Australia's India plan was akin to promising to take someone to the MCG and leaving them at the bounds of Yarra Park. "To take means to take and leave," he said.

Gleeson offered a parallel analogy, of driving a young child in a car to 50 metres from the MCG, and leaving them with instructions on how to enter the ground.

"You might say you took the child to the MCG, though you didn't deposit the child through the turnstiles of the MCG."

"India is a fairly obvious place to return them. It couldn't be regarded as speculative in nature."

However, Gleeson agreed Australia could not forcibly "take them [the asylum seekers] down the gangplank against their will and deposit them in India".

## **New migration Bill would allow Government to breach international law and sideline the courts say leading human rights organisations**

<http://hrlc.org.au/new-migration-bill-would-allow-government-to-breach-international-law-and-sideline-the-courts-say-leading-human-rights-organisations/> December 11, 2014

Proposed changes to migration laws would ... by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 ...

Proposed changes to migration laws would widen the Immigration Minister's power, marginalise international law and wind back the ability of Australian courts to scrutinise the Government's treatment of asylum seekers, leading human rights organisations will tell the Senate's Legal and Constitutional Affairs Legislation Committee today.

The Human Rights Law Centre, UNICEF Australia, Save the Children, Plan, the Human Rights Council of Australia and Children's Rights International, made a joint written submission earlier this month outlining the grave human rights risks posed by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), introduced into Parliament by Immigration Minister Scott Morrison on 25 September 2014.

HRLC's Executive Director, Hugh de Kretser, said the Bill contains a suite of proposed changes that carry significant human rights risks.

"The Prime Minister and Immigration Minister repeatedly tell the public that Australia complies with international law, but in this Bill they're seeking a licence to breach it," said Mr de Kretser. "The Bill creates clear dangers that we will return people to harm in breach of international law and it winds back the power of the courts to do anything about it."

UNICEF Australia Chief Executive Officer Norman Gillespie said among the risks posed by the Bill was authorisation to lock babies born in Australia in mandatory detention on Nauru.

"The Bill put forward by Immigration Minister Scott Morrison seeks to classify children born in Australia as 'unauthorised maritime arrivals' if one of their parents is labelled such, leaving those children subject to mandatory detention and transfer to Nauru," said Dr Gillespie.

Dr Gillespie said this inherently arbitrary and inhumane process for dealing with newborn children threatened to render these babies as stateless and cut their access to health care, legal protection and longer term education and even job opportunities.

"Statelessness has profound, negative effects on children's identities and their development and creates greater risks of children experiencing labour exploitation, sexual exploitation, trafficking, poverty and discrimination," said Dr Gillespie.

The CEO of Plan International Australia, Ian Wishart, is also deeply concerned.

"Far from meeting its international obligations to protect children under the Convention on the Rights of the Child, the government would be making children more vulnerable to exploitation and abuse," said Mr Wishart.

The Bill would remove references to the Refugees Convention from the Migration Act and replace them with the Government's own interpretation of the Convention.

"The Refugees Convention is the cornerstone of international refugee protection with 145 nations who are parties to it around the world. Yet, the Government is now trying to unilaterally redefine the Convention to suit its own purposes," said Mr de Kretser.

The Bill (as well as some promised regulations) introduce various forms of temporary protection visas, denying permanent protection to thousands of refugees solely on the basis of the mode of transport they used to seek it.

Save the Children's Chief Executive Officer, Paul Ronalds, said TPVs cause harm.

"Save the Children welcomes the Government's proposal to remove children and their families from immigration detention. This must happen as a matter of urgency because the prolonged detention of children is harmful to their physical and mental well-being. Temporary protection is not the answer however. It will mean people fleeing persecution are left in limbo, forced to prove and re-prove they are refugees. The emotional and mental cost of such uncertainty is enormous and well documented."

"We are also shooting ourselves in the foot. It is in our interests that people are settled quickly, recover from their trauma, find work or study and contribute economically and socially to their new home. The bottom line is, people found to be refugees must be given permanent protection from persecution," said Mr Ronalds.

The Bill introduces "rapid processing" and "streamlined review arrangements" for asylum seekers coming by boat, who will be denied the right to appeal to the Refugee Review Tribunal.

"This Bill would introduce dangerous administrative shortcuts into a process that makes life or death decisions. Efficient processing is important so that families aren't left languishing in detention for years, but speed can't come at the expense of fairness and accuracy," said Mr de Kretser.

The Bill seeks to amend the Maritime Powers Act 2013 to effectively license the Government to breach international law and the rules of natural justice when conducting boat turn-backs and detaining asylum seekers at sea.

"The Bill expands the Government's powers at sea whilst at the same time dramatically cutting the judiciary's oversight of them. This combination of increased power and decreased legal scrutiny is particularly concerning given the secrecy currently surrounding 'on-water' operations," said Mr de Kretser.

The joint submission recommends that the Bill not be passed.

"Both at sea and within Australian territory, this Bill will expand government power, widen personal ministerial discretions, exclude international law and the rules of natural justice and sideline the courts. It will increase Government power but decrease the checks and balances on its exercise. The Bill should be rejected outright," said Mr de Kretser.

## MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT ...

<http://oppenheimer.mcgill.ca/IMG/pdf/24082719-RESOLVING-THE-ASYLUM-LEGACY-CASELOAD.pdf> December 11, 2014

2 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 OUTLINE The Migration and Maritime Powers Legislation Amendment ...

2013 – 2014

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection,  
the Hon. Scott Morrison MP)

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

### OUTLINE

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) amends the Migration Act 1958 (the Migration Act), the Migration Regulations 1994 (the Migration Regulations); the Maritime Powers Act 2013 (the Maritime Powers Act), the Immigration (Guardianship of Children) Act 1946 (IGOC Act) and the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) to support the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore. The Bill fundamentally changes Australia's approach to managing asylum seekers by:

reinforcing the Government's powers and support for our officers conducting maritime operations to stop people smuggling ventures at sea, clarifying and strengthening Australia's maritime enforcement framework to provide greater clarity to the ongoing conduct of border security and maritime enforcement operations;

introducing temporary protection for those who engage Australia's non-refoulement obligations and who arrived in Australia illegally;

introducing more rapid processing and streamlined review arrangements, creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently;

deterring the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia;

supporting a more timely removal from Australia of those who do not engage Australia's protection obligations; and

codifying in the Migration Act Australia's interpretation of its protection obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention).

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.

Specifically, the Bill amends the Maritime Powers Act to:

clarify the powers provided by sections 69 and 72 to move vessels and persons, and related provisions;

explicitly provide the Minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72 to ensure that government has appropriate oversight;

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ensure that maritime powers may be exercised between Australia and another country, provided the Minister administering the Maritime Powers Act has determined this should be the case;

provide that the rules of natural justice do not apply to a range of powers in the Maritime Powers Act, including the powers to authorise the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons;

ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;

clarify for the purposes of sections 69 and 72 that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons;

clarify that for the purposes of sections 69 and 72 a -place|| is not limited to another country or a place in another country;

clarify the time during which a vessel or person may be dealt with under sections 69, 71 and 72;

clarify that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and that there is no implication to be drawn from the Migration Act, particularly from the existence of the regional processing provisions;

provide an explicit power exempting certain vessels involved in maritime enforcement operations from the inappropriate application of the Marine Safety (Domestic Commercial Vessel) National Law, the Navigation Act 2012 and the Shipping Registration Act 1981;

make a number of minor consequential and clarification amendments to the Maritime Powers Act, Migration Act, and the ICGO Act; and

ensure that decisions relating to operational matters cannot be inappropriately subjected to the provisions of the Legislative Instruments Act 2003, the Judiciary Act 1903, or the ADJR Act.

Specifically, the Bill amends the Migration Act to:

introduce Temporary Protection visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;

create a new visa class to be known as a Safe Haven Enterprise Visa (SHEV);

explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;

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clarify that the application bars in sections 48, 48A and 501E of the Migration Act also apply in relation to persons in the migration zone who have been refused a visa or held a visa that was cancelled, in circumstances where the refused application or the application in relation to which the cancelled visa was granted earlier was an application that was taken to have been made by the person;

allow for multiple classes of protection visas;

include a definition of protection visas;

create an express link between certain classes of visas that are provided for under the Migration Act (including Permanent Protection visas and Temporary Protection visas) and the criteria prescribed in the Migration Regulations in relation to those visas;

create a new fast track assessment process and remove access to the Refugee Review Tribunal (RRT) for fast track applicants, who are defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa, and other cohorts specified by legislative instrument;

require the Minister to refer fast track reviewable decisions to the Immigration Assessment Authority (the IAA) which will conduct a limited merits review on the papers and either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;

create discretionary powers for the IAA to get new information and permit the IAA

to consider new information only in exceptional circumstances;

provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents and disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;

establish the IAA within the RRT, and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration and specify delegation powers and employment arrangements to apply to the Senior Reviewer and Reviewers of the IAA;

clarify the availability of the removal powers independent of assessments of Australia's non-refoulement obligations;

remove most references to the Refugees Convention from the Migration Act and replace them with a new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention;

clarify, with retrospective effect, that children born to unauthorised maritime arrivals (UMAs) under the Migration Act either in Australia or in a regional processing country are also UMAS for the purposes of the Migration Act;

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clarify, with retrospective effect, that children born to transitory persons either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act;

ensure that children born in Australia to a parent who is a transitory person can also be taken to a regional processing country;

clarify, with retrospective effect, that any visa application of the child of a UMA or transitory person is invalid, unless the Minister has allowed the application, or the application of that child's parent, to be made; and

restore the Government's ability to place a statutory limit on the number of protection visas granted in a programme year including repealing of section 65A and section 414A of the Migration Act which require applications for protection visas to be decided in 90 days as well as the associated reporting requirements in section 91Y and 440A, and provide that the requirement for the Minister in section 65 to grant or refuse to grant a visa is subject to sections 84 and 86.

Schedule 1 to the Bill will clarify a range of matters relating to the exercise of maritime powers. Maritime powers are used to respond to a range of threats to Australia's national interest, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal ecosystems from environmental damage and countering people smuggling. The amendments to the Maritime Powers Act are focussed on strengthening Australia's maritime enforcement framework and will provide greater clarity to the ongoing conduct of border security and maritime enforcement operations.

As with the original Maritime Powers Act, these amendments do not seek to create new powers beyond what is already available to maritime officers – instead, they clarify the intended operation of those powers and their relationship with other law. Limited new powers are provided to the Minister personally, to ensure that the Government has appropriate oversight in this important area of significant policy interest.

Countering people smuggling has been a long-standing bipartisan aspiration. Australia has the right to determine and address national security issues that relate to its national interest. This includes protecting and safeguarding Australian territorial and border integrity. People smugglers operate in organised criminal syndicates, and their activities have serious consequences. Not only does people smuggling support a criminal economy that exposes individuals to serious harm, it also provides an avenue for a large number of undocumented arrivals to gain entry into Australia, potentially including individuals of security concern. The Commonwealth will continue to protect Australia's borders from serious criminal activity, and its consequences.

Protecting Australia's sovereignty is not the only reason to ensure that the powers available to protect Australia's maritime boundaries are robust and flexible. The dangers of attempting to travel to Australia by boat are real. The journey is hundreds of nautical miles long, and is often attempted in bad weather and rough sea conditions. Boats are often unseaworthy and crowded. Crew can be inexperienced or unqualified. Life jackets, when worn, can be of poor quality and unlikely to save lives. Between 2008 and 2013 it is estimated that up to 1,203 people may have died at sea trying to reach Australia illegally by boat. This includes countless tragic incidents: 201 dead or presumed drowned in December 2011; 92 dead or presumed drowned in June 2012 and 55 dead or presumed drowned in June 2013. These

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tragic numbers do not take into account the numerous reports received from those who believe their family and friends were on-board a boat to Australia and have not been heard from since.

In the dynamic on-water environment, there is an ongoing requirement to be both flexible and adaptable. People smugglers run profit-based businesses. They operate using tested business models, and as these models are thwarted they will rapidly adapt. Australia must be ready and able to respond to these changes, which can only be done through being able to adapt ourselves, ensuring that maritime officers continue to be appropriately equipped with the legal tools they need.

The challenges in Australia's maritime security environment are complex. It is vital that legislation underpinning maritime security operations remains sustainable and robust and affords the flexibility to respond to complexities as they arise. It has always been Parliament's intent to equip maritime officers with the necessary means to undertake their duties. Significant flexibility was built into the Maritime Powers Act specifically for this purpose, and the amendments in this Bill serve to reinforce and clarify the measures available to maritime enforcement officers when targeting criminal on-water activity.

Schedule 2 to the Bill will address the Government's objective that any illegal arrivals who seek asylum in Australia will not be granted a Permanent Protection visa. The intention is that those who are found to be in need of protection either through existing assessment processes or through the fast track assessment process will be eligible only for grant of temporary protection visas.

The Migration Act and associated Migration Regulations will be amended to establish TPVs for people who have arrived in Australia without visas and are found to engage Australia's protection obligations.

In particular, new section 35A in the Migration Act and the proposed Migration Regulations would create a new Class XD Temporary Protection (Subclass 785 (Temporary Protection)) visas, which would be the protection visa (a visa that may be provided to people within Australia who engage Australia's protection obligations) available to people who:

- are unauthorised maritime arrivals as described in the Migration Act; or
- otherwise arrived in Australia without a visa; or
- were not immigration cleared on their last arrival in Australia; or
  - o are the member of the same family unit as a person mentioned above; and
  - o that person has been granted a Subclass 785 (Temporary Protection) visa; or
- already hold a TPV.

The introduction of TPVs is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

The proposed Migration Act amendment and Migration Regulations would prevent people in the above cohort from being eligible to apply for, or being granted, a Permanent Protection

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visa that allows the holder to remain in Australia indefinitely (i.e. Subclass 866 (Protection) visas).

The Subclass 866 (Protection) visa would remain available to applicants from outside the cohort, but people within the cohort would be unable to make a valid application for Subclass 866 (Protection) visas, and any existing un-finalised Permanent Protection visa (PPV) application from the cohort would be unable to meet the requirements for grant (as the application will have been deemed to a TPV application).

A new visa to be known as Safe Haven Enterprise Visas (SHEV) will be created. Amendments to the Migration Regulations to prescribe criteria for this visa will follow in 2015.

Schedule 2 to the Bill provides explicit authority for the making of regulations which deem an application for one type of visa to be an application for a different type of visa (conversion regulations), if one or more specified events occur. The Bill also makes conversion regulations that deem Permanent Protection visa applications made by prescribed classes of applicants to be applications for Temporary Protection visas.

These amendments are two key measures which will enable the Government to more effectively manage asylum seekers who have arrived in Australia illegally, and ensure that illegal arrivals who are found to engage Australia's protection obligations are not granted Permanent Protection visas to remain in Australia.

The amendment authorising the making of conversion regulations will have broader future utility as it facilitates greater flexibility in the department's management and processing of on-hand applications for any class of visa (not just Protection visas) in response to changing Government priorities.

Sections 48, 48A and 501E of the Migration Act limit or prohibit the making of further visa applications ('application bars') by non-citizens in the migration zone who, since they last entered Australia, have been refused a visa or held a visa that was cancelled.

Schedule 2 to the Bill will clarify that the application bars will also apply in circumstances where the refused application was taken to have been made by the non-citizen under a provision of the Migration Act or the Migration Regulations, and where the cancelled visa was granted because of an application that the non-citizen was taken to have made under a provision of the Migration Act or the Migration Regulations.

The Bill will also clarify that there may be multiple classes of visas that are 'protection visas' under section 35A and that they may be temporary or permanent visas. Protection visas will include the Class XA Permanent Protection visa, the Class XD Temporary Protection visa and the Safe Haven Enterprise visa. The criteria that need to be satisfied for these visas will be in section 36 and in the Migration Regulations.

Section 5 and regulation 1.03 will be amended to include a definition of protection visas, to make it clear that throughout the Migration Act and the Migration Regulations, the term protection visa includes a Permanent Protection visa (subclass 866) and a Temporary Protection visa (subclass 785), and a Safe Haven Enterprise visa; and any additional classes of permanent or temporary visas that are prescribed as protection visas by the Migration Regulations.

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Schedule 3 to the Bill will create an express link between classes of visa provided for by sections 32 (Special Category visas), 37 (Bridging visas), 37A (Temporary Safe Haven visas), 38B (Maritime Crew visas) and new section 35A (Permanent Protection visas, Temporary Protection visas and Safe Haven Enterprise visas) of the Migration Act, and the criteria prescribed in the Migration Regulations in relation to those classes of visa.

For each of those visas, the amendment will ensure that if the Migration Regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa.

The amendment will also ensure that if there are regulations in effect that prescribe the requirements for making a valid application, or the criteria that must be met in order for the visa to be granted, then an application for the visa will not be valid unless the application in fact meets all the prescribed requirements. A visa must not be granted unless the applicant satisfies the criteria prescribed in the Migration Regulations as well as any other criteria provided for in the Migration Act.

The amendment will also clarify that for each of those visas, the Migration Regulations may, but need not, prescribe criteria which relate to making a valid application for the visa and being granted the visa.

Schedule 4 to the Bill establishes a new fast track assessment process for UMA's who entered Australia on or after 13 August 2012 and made a valid application for a protection visa. The Minister will also be able to later specify other types of applicants who should be subject to the new fast track assessment process, by way of legislative instrument (for example, unauthorised air arrivals). The fast track assessment process will be conducted under existing provisions of the Migration Act. It is intended that the process will be supported by a code of procedure with shorter time frames which will be prescribed in the Migration Regulations. All fast track applicants will receive a full and comprehensive assessment of their claims for protection.

A key component of the fast track assessment process is that fast track applicants will not be permitted to seek review from the RRT of their protection visa decisions. The Bill will instead, require the Minister to refer, as soon as reasonably practicable, certain decisions made in respect of fast track review applicants to the Immigration Assessment Authority (the IAA). The IAA will conduct a limited review of these decisions.

There will also be fast track applicants who in turn, will be excluded fast track review applicants. After an assessment of their protection claims, excluded fast track applicants will be those who have found to have put forward claims that indicate they have been previously been refused protection, already have protection available elsewhere or have unmeritorious claims and as such, their cases suggest prompt resolution of their status should be a priority. Excluded fast track review applicants will not have access to any form of merits review. Excluding these applicants from merits review will stop unmeritorious claims being considered by the IAA which can lead to delays in departure and an inefficient and costly use of resources. Decisions made in relation to certain excluded fast track applicants who are identified as vulnerable can be referred to the IAA by way of a legislative instrument. All fast track applicants will continue to have access to judicial review.

New Part 7AA establishes the IAA and the new limited merits review framework. Under this Part, the Minister will be required to refer fast track reviewable decisions to the IAA and

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provide the IAA with review material as soon as reasonably practicable after the primary decision to refuse to grant a protection visa has been made under section 65 of the Migration Act. Similar to the RRT, the IAA will have the power to either affirm the decision or remit the decision to the department for reconsideration in accordance with prescribed directions or recommendations.

In carrying out its functions under the Migration Act, the IAA is to pursue the objective of providing a mechanism of limited review that is efficient and quick. While there will be discretionary powers for the IAA to get new and relevant information and to get information in the most suitable and convenient way from applicants, the IAA is under no duty to accept or request new information or interview an applicant.

As a limited review body, other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or an applicant provided it of their own volition. New information will only be considered if the IAA is satisfied that there are exceptional circumstances to justify the consideration of that new information. For example, exceptional circumstances may be found where there is evidence of a significant change of conditions in the applicant's country of origin that means the applicant may now engage Australia's protection obligations. Where an applicant provides or seeks to provide the IAA with new information of their own volition, they would also have to satisfy the IAA that the new information could not have been provided to the Minister before the primary decision was made. The limited review mechanism supports the measures in the Migration Amendment (Protection and Other Measures) Bill 2014 which clarify the responsibility of asylum seekers to specify the particulars of their claim, provide sufficient evidence to establish their claim and encourage complete information to be provided upfront. The measures will prevent those asylum seekers who attempt to exploit the merits review process by presenting new claims or evidence to bolster their original unsuccessful claims only after they learn why they were not found to engage Australia's protection obligations by the Department of Immigration and Border Protection.

The IAA will be independent of the Department of Immigration and Border Protection and be established as a separate office within the RRT. The Principal Member of the RRT will be responsible for the overall operation and administration of the IAA and will be able to issue practice directions and guidance decisions to the IAA. A Senior Reviewer will be appointed to oversee the functions and operations of the IAA and perform any powers and functions delegated by the Principal Member. The Senior Reviewer and reviewers of the IAA will all be engaged under the Public Service Act 1999.

Schedule 5 to the Bill will clarify Australia's international law obligations. It is important that the right mechanisms are in place to ensure that those who do not engage our protection obligations can be removed from Australia. This amendment will support onshore protection processing (including the fast track Assessment process). The Bill will make clear that the removal power is available independent of assessments of Australia's non-refoulement obligations, where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Migration Act. This is in response to a series of High Court decisions which have found that the Migration Act as a whole is designed to address Australia's non-refoulement obligations. There are a number of personal non-compellable powers available for the Minister to use, before the exercise of the removal power, to allow a visa application or grant a visa where this is in the public interest.

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The form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government. Prompt removal of failed asylum seekers from Australia supports the integrity of the protection status determination process, including the fast track Assessment Process.

The Bill also removes most references to the Refugees Convention from the Migration Act and instead creates a new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention. It is not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention but rather to codify Australia's interpretation of these obligations within certain sections of the Migration Act. These amendments set out the criteria to be satisfied in order to meet the new statutory definition of a refugee. They also clarify those grounds which exclude a person from meeting the definition or which (where a person satisfies the definition of a refugee) render them ineligible for the grant of a Protection visa.

Paragraph 36(2)(a) of the Migration Act will be amended to provide as a criterion for the

grant of a protection visa that the applicant satisfy the definition of a refugee as set out by the new statutory framework. Australia's interpretation of Article 1A(2) of the Refugees Convention will be implemented through the new section 5H which defines the term 'refugee' and also provides the grounds where the meaning of 'refugee' does not apply (consistent with the exclusion clause under Article 1F of the Refugees Convention).

It is not intended to incorporate Article 1D of the Refugees Convention into the Migration Act. Following the Full Federal Court's finding in Minister for Immigration and Multicultural Affairs v WABQ [2012] FCFCA 329 Palestinian refugees as a class of persons do not fall within the scope of Article 1D due to protection from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees, having ceased for this group. Consistent with this finding, any Palestinian refugees making claims for protection in Australia are to be considered against the definition of refugee under the new section 5H in the Migration Act.

The new section 5J sets out the circumstances that must be satisfied for a person to have a well-founded fear of persecution. This amendment sets out the five grounds for refugee status consistent with those listed in Article 1A(2) of the Refugees Convention. Under the new statutory framework a person will continue to be assessed as to whether they have a 'real chance' of being persecuted. The 'real chance' test is consistent with the High Court's decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379. New paragraph 5J(1)(b) is a statutory implementation of this test.

The new paragraph 5J(1)(c) makes it clear that a person only has a well-founded fear if that person has a 'real chance' of persecution in all areas of the receiving country. When determining whether a person can relocate to another area of the receiving country where they do not have a real chance of persecution, a decision maker should take into account whether the person can safely and legally access the area upon returning to the receiving country.

It is the Government's intention that this statutory implementation of the 'internal relocation' principle not encompass a 'reasonableness' test which assesses whether it is reasonable for an asylum seeker to relocate to another area of the receiving country. Australian case law has

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broadened the scope of the 'reasonableness' test to take into account the practical realities of relocation. Decision makers are currently required to consider information that is additional to protection considerations under Article 1A(2) of the Refugees Convention such as a diminishment in quality of life or potential financial hardship. In the Government's view, these considerations are inconsistent with the basic principle that protection ought be offered by the international community only in the absence of protection within all areas of a receiving country.

The new subsection 5J(2) clarifies Australia's interpretation of the standard of effective state or non-state protection within the receiving country that is required in order to make a determination of whether a person has a well-founded fear of persecution in that country. It is the Government's intention to provide a statutory formulation of these concepts which is consistent with current Australian case law on effective state protection. The new paragraph 5J(2)(a) codifies the interpretation of effective protection measures provided by the State consistent with the High Court's decision in Minister for Immigration and Multicultural Affairs v S152/2003 (2004) 222 CLR. The new paragraph 5J(2)(b) codifies the adequate and effective protection measures provided by sources other than the relevant State consistent with the reasoning in Siaw v Minister for Immigration and Multicultural Affairs [2001] FCA 953.

It is the intention of Government by inserting the new subsection 5J(3) to expressly make it clear that a person does not have a well-founded fear of persecution if they could objectively take reasonable steps to modify their behaviour so as to avoid a real chance of persecution in the receiving country. A modification that would be in conflict with a characteristic that is fundamental to the person's identity or conscience is excluded, as are modifications that would require the person to conceal an innate or immutable characteristic. The purpose of this amendment is to clarify that any assessment of whether a person has a 'well-founded fear of persecution' is to take into account not only what a person would do but also what they could do upon returning to a receiving country to avoid the relevant persecution.

New section 5L seeks to clarify and limit the definition of membership of a particular social group which is one of the grounds for a well-founded fear of persecution set out in new paragraph 5J(1)(a). The new section 5L applies to membership of a particular social group other than the person's family. Currently there is minimal legislative guidance for decision makers to determine what constitutes a particular social group in this circumstance, which has resulted in a broad interpretation of the term being taken by the High Court in Applicant S v Minister for Immigration and Multicultural Affairs [2004] 217 CLR 387. The breadth of this interpretation has led to long lists of increasingly elaborate potential particular social groups being drawn for the purposes of protection visa applications thereby making implementation of the term complex and difficult for decision makers to apply, and is broader than that being applied in other jurisdictions (eg. Canada, the United States of America, New Zealand and the European Union). The new section 5L is based on the approach taken in these other jurisdictions and is intended to reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups. The new section 5L is not intended to exclude a finding that a person's family constitutes a particular social group. Rather, it is intended to clarify that membership of a particular social group consisting of family will be dealt with separately under the new section 5K. The new section 5K is unchanged from its previous formulation at section 91S and is intended to provide legislative guidance to decision makers to determine what constitutes a particular social group other than the person's family.

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The Government intends the codification of Article 33(2) of the Refugees Convention, which operates as an exception to the prohibition against refoulement, to make it clear that it is both appropriate and desirable for decision makers to consider this concept as part of the criteria for a protection visa. The statutory implementation of Article 33(2) of the Refugees Convention is through the new subsection 36(1C). Where a person is found to meet the definition of 'refugee' but does not meet the criterion under subsection 36(1C) they will be ineligible for grant of a Protection visa. This criterion is consistent with the ineligibility criteria under paragraph 36(2C)(b) in relation to the complementary protection provisions in the Migration Act.

Schedule 6 to the Bill will clarify the legal status of children of UMA and transitory persons.

Section 5AA of the Migration Act will be amended to include the children of UMA, who are born in Australia or in a regional processing country, within the definition of UMA in this section. Such children are not currently explicitly included in the definition of UMA in the

Migration Act. This means that the policy intent, which is that such children are prevented from applying for a Permanent Protection visa while in Australia by virtue of being a UMA, is not explicit on the face of the legislation.

This amendment will also make it clear that children of UMAs who arrive post-13 August 2012 are subject to transfer to a regional processing country, which will place them in a position consistent with their parents. If the children of UMAs are not subject to offshore processing then this may undermine the government's offshore processing policies, both in respect of the children and the children's family members. In terms of both preventing UMAs from applying for Permanent Protection visas and making UMAs subject to offshore processing, it is important to maintain consistency within the family unit and ensure families are not separated by the operation of the Migration Act. The new subsection 198AD(2A) will make clear that the children of UMAs who arrived in Australia prior to 13 August 2012 are not subject to offshore processing, consistent with their parents.

Consequential amendments will also be made to sections 5, 198 and 198AH of the Migration Act to ensure provisions relating to 'transitory persons' in the Migration Act account for the new definition of UMA.

These measures will commence on the day after the day of the Royal Assent is received and will operate with retrospective effect. This will clarify that any visa applications from children born to UMAs prior to commencement are invalid. However, the retrospective effect of the amendments will not apply to visa applications in respect of which the Minister has previously intervened to allow a valid visa application to be made. Accordingly, on-hand visa applications that the Minister has already allowed to proceed can continue to be assessed.

Schedule 7 to the Bill will make amendments so that the Minister for Immigration and Border Protection is able to place a statutory limit on the number of protection visas granted in a programme year.

In Plaintiff S297/2013 v MIBP [2014] HCA 24 a majority of the High Court interpreted the time limit created by current section 65A for processing protection visas as conflicting with the section 85 power to limit the number of visas that may be granted in a specified financial year. The Court resolved that conflict by finding that section 85 did not apply to protection visas. To address that decision, sections 65A and 414A of the Migration Act which require

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applications for protection visas to be decided in 90 days, and corresponding reporting requirements in sections 91Y and 440A, will be repealed.

In addition the initial policy intent for introducing a 90 day requirement was to support flexible, fair and timely resolution of protection visa applications, but it is no longer an effective mechanism to achieve this outcome. Ministerial directions have been put in place regarding the order of consideration for processing of protection visa applications which achieve a more effective and responsive approach to different caseloads, without generating resource-intensive reporting.

The amendments in the Bill will also make clear that the requirement for the Minister in section 65 to grant or refuse to grant a visa after considering a valid application is subject to sections 84 and 86 of the Migration Act. The Bill will also amend sections 84 and 85 of the Migration Act to specifically state that a visa of a specified class includes protection visas.

#### FINANCIAL IMPACT STATEMENT

The financial impact of the Bill is medium. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

#### REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted and a regulation impact statement is not required. The advice references are 17300, 17451, 17519 and 17433.

#### STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.

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#### MIGRATION AND MARITIME POWERS LEGISLATION (RESTORING THE ASYLUM CASELOAD) BILL 2014

#### AMENDMENT

#### NOTES ON INDIVIDUAL CLAUSES

##### Clause 1 Short title

1. Clause 1 provides that the short title by which this Act may be cited is the Migration and Maritime Powers Legislation Amendment (Restoring the Asylum Legacy Caseload) Act 2014.

##### Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.
3. Table item 1 provides that sections 1 to 3 and anything in this Act not elsewhere covered by the table commences on the day this Act receives the Royal Assent.
4. Table item 2 provides that Schedule 1 commences the day after this Act receives the Royal Assent.
5. Table item 3 provides that Schedule 2, Part 1, Division 1 commences the day after this Act receives the Royal Assent.
6. Table item 4 provides that Schedule 2, Part 1, Division 2 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

7. Table item 5 provides that Schedule 2, Part 1, Division 3 commences the day after this Act receives the Royal Assent.
8. Table item 6 provides that Schedule 2, Parts 2 and 3 commence the day after this Act receives the Royal Assent.
9. Table item 7 provides that Schedule 2, Part 4, Division 1 commences the day after this Act receives the Royal Assent.
10. Table item 8 provides that Schedule 2, Part 4, Division 2 commences immediately after the commencement of the provisions covered by table item 7.
11. Table item 9 provides that Schedule 2, Part 4, Divisions 3 and 4 commence the day after this Act receives the Royal Assent.
12. Table item 10 provides that Schedule 3 commences the day after this Act receives the Royal Assent.
13. Table item 11 provides that Schedule 4 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of

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6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

14. Table item 12 provides that Schedule 5, items 1 and 2 commence the day after this Act receives the Royal Assent.
15. Table item 13 provides that Schedule 5, item 3 commences immediately after item 4 of Schedule 2 to the Migration Amendment (Protection and Other Measures) Act 2014 commences.
16. Table item 14 provides that Schedule 5, Part 2 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
17. Table item 15 provides that Schedule 5, item 18 commences at the same time as the provisions covered by table item 3. However, if item 3 of Schedule 2 to the Migration Amendment (Protection and Other Measures) Act 2014 commences at or before that time, the provisions do not commence at all.
18. Table item 16 provides that Schedule 5, items 19 to 22 commence at the same time as the provisions covered by table item 3. However, if Schedule 1 to the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014 commences at or before that time, the provisions do not commence at all.
19. Table item 17 provides that Schedule 5, item 23 commences immediately after the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014 commences.
20. Table item 18 provides that Schedule 5, item 24 commences immediately after item 3 of Schedule 3 to the Migration Amendment Act 2014 commences.
21. Table item 19 provides that Schedule 5, item 25 commences immediately after item 5 of Schedule 3 to the Migration Amendment Act 2014 commences.
22. Table item 20 provides that Schedule 5, item 26 commences immediately after the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014 commences.
23. Table item 21 provides that Schedule 5, item 27 commences the day after this Act receives the Royal Assent.
24. Table item 22 provides that Schedule 5, items 28 and 29 commence at the same time as the provisions covered by table item 3.
25. Table item 23 provides that Schedules 6 and 7 commence the day after this Act receives the Royal Assent.
26. A note after the table in subclause 2(1) of this Act provides that the table in subclause 2(1) relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

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27. Subclause 2(2) provides that any information in column 3 of the table in subclause 2(1) is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

#### Clause 3      Schedules

28. Subclause 3(1) provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
29. Subclause 3(2) provides that the amendment of any regulation under subsection 3(1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

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#### SCHEDULE 1 – Amendment relating to maritime powers

##### Maritime Powers Act 2013

##### Item 1      Section 7

1. This item omits –In accordance with international law, the exercise of powers is limited in places outside Australia.|| in section 7 of Division 2 of Part 1 of the Maritime Powers Act.
2. Section 7 is a guide that describes the operation of the Maritime Powers Act. The

omitted provision was for the purpose of acknowledging that Australia's extraterritorial jurisdiction is limited as a matter of international law, particularly under the United Nations Convention on the Law of the Sea. However, it created an ambiguity due to its lack of specificity. This amendment does not change the need to give effect to Australia's international obligations. It merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government, noting that the executive government is accountable to the international community for its compliance with those obligations.

## Item 2 Section 8

1. This item inserts a new definition of destination and Marine Safety (Domestic Commercial Vessel) National Law in section 8 of Division 3 of Part 1 of the Maritime Powers Act.

2. The new definition of **-destination** provides that:

destination:  
 in relation to a vessel detained under subsection 69(1) – see subsections 69(2), (3) and (3A); or  
 in relation to a person detained under subsection 72(4) – see subsections 72(4), (4A) and (4B).

Note: see also section 75C.

Marine Safety (Domestic Commercial Vessel) National Law has the meaning given by section 17 of the Marine Safety (Domestic Commercial Vessel) National Law Act 2012.

3. Subsection 69(1) of the Maritime Powers Act provides that a maritime officer may detain a vessel or aircraft. Subsection 72(4) of the Maritime Powers Act, as substituted by item MP1F of Schedule MP to the Bill, provides that a maritime officer may detain a person who is or was on a detained vessel or aircraft and take the person, or cause the person to be taken, to a place in the migration zone or outside the migration zone, including a place outside Australia.
4. Subsection 69(2) is amended by items MP1B and MP1BA of Schedule MP to the Bill. Subsection 69(3) is repealed and substituted with a new subsection 69(3) by item MP1C of Schedule MP to the Bill and new subsection 69(3A) is inserted by the same item. Subsection 72(4) is repealed and substituted with new subsection 72(4) item MP1F of Schedule MP to the Bill and new subsection 82(4A) is inserted by the same

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item. The new defined term **-destination** is used to replace the un-defined term **-place** in sections 69 and 72. The purpose of those changes is explained below in items MP1B and MP1D.

5. The new definition of **-Marine Safety (Domestic Commercial Vessel) National Law** refers to the **-national law** established by the Marine Safety (Domestic Commercial Vessel) National Law Act 2012, which is referred to in new section 75H.

## Item 3 Section 8 (paragraph (e) of definition of monitoring law)

6. This item inserts **-73 or** after **-Division** in paragraph (e) of the definition of monitoring law in section 8 of Division 3 of Part 1 of the Maritime Powers Act.

7. The current definition provides that monitoring law means:

the Customs Act 1901; or  
 the Fisheries Management Act 1991; or  
 the Migration Act 1958; or  
 the Torres Strait Fisheries Act 1984; or  
 section 72.13 or Division 307 of the Criminal Code; or  
 clause 8 of Schedule 1 to the Environment Protection and Biodiversity Conservation Act 1999; or  
 a law prescribed by the regulations.

8. The effect of this amendment is to provide that Division 73 of the Criminal Code is a monitoring law for the purposes of this definition. Division 73 of the Criminal Code deals with people smuggling and related offences. This will ensure that the people smuggling offences in the Migration Act and Criminal Code will be treated similarly for the purposes of the Maritime Powers Act, and reflect the importance and original intention of the Maritime Powers Act in countering people smuggling operations.

## Item 4 Section 11

9. This item inserts **-(1)** before **-For the purposes** in section 11 of Division 3 of Part 1 of the Maritime Powers Act.

10. Current section 11 provides that for the purposes of the Maritime Powers Act, the continuous exercise of powers does not end only because there is a period of time between the exercise of one or more of the powers.

11. The effect of this change is to reorganise the current content of Section 11 into new subsection 11(1). This facilitates the insertion of new subsection 11(2) by item 5 below.

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## Item 5 At the end of section 11

12. This item inserts **-(2) To avoid doubt, a continuous exercise of powers does not end merely because the destination to which a vessel, aircraft or person is to be taken (or caused to be taken) is changed to a different place under subsection 69(3A) or 72(4B).||** in section 11 of Division 3 of Part 1 of the Maritime Powers Act.

13. The effect of this amendment is to avoid any doubt that a change of destination under

subsections 69(3A) or 72(4B) could interrupt the continuous exercise of powers. Parliament's intent is that this is a broad provision which provides maritime officers with the flexibility and discretion needed to effectively exercise maritime powers in real-world operational circumstances. Other examples of matters which would not put an end to the continuous exercise of powers include arrival at a destination while detention continues, or pausing a journey to a destination for other operational reasons, for example to rescue persons from a vessel in distress or to reprovision a vessel.

Item 6 At the end of Division 2 of Part 2

14. This item adds new section 22A Failure to consider international obligations etc. does not invalidate authorisation and new section 22B Rules of natural justice do not apply to authorisations at the end of Division 2 of Part 2 of the Maritime Powers Act.
15. New subsection 22A(1) provides that the exercise of a power to give an authorisation under a provision of this Division is not invalid
  - because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or
  - because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or
  - because the exercise of the power is inconsistent with Australia's international obligations.
16. The intention of this provision is that, as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers to give an authorisation under Division 2 of Part 2 of the MPA.
17. The Australian Government takes its international obligations seriously, and Australia is bound to act in compliance with its international obligations as a matter of international law. This amendment does not seek to change that fact. Appropriate measures are always taken to ensure that operational activities involving the exercise of maritime powers comply with Australia's international obligations. This amendment merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government. The Parliament's intent in passing this amendment is that it be put beyond doubt that Australia's international obligations, the international obligations of other countries and other countries' domestic law cannot form the basis of an invalidation of the exercise of the powers in Division 2 of Part 2 as a matter of domestic law.

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- domestic law cannot form the basis of an invalidation of the exercise of the powers in Division 2 of Part 2 as a matter of domestic law.
18. New subsection 22A(2) provides that subsection 22A(1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraphs 22A(1)(a), 22A(1)(b) or 22A(1)(c).
  19. The purpose of subsection 22A(2) is to make it clear that there should be no implication drawn from the inclusion of section 22A that international law or the laws of other countries may be used to impugn other exercises of power or decisions under the Maritime Powers Act.
  20. New subsection 22B(1) provides that the rules of natural justice do not apply to the exercise of a power to give an authorisation under a provision of Division 2 of Part 2 of the Maritime Powers Act.
  21. New subsection 22B(2) provides that subsection 22B(1) Subsection (1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.
  22. The purpose of subsection 22B(1) is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation under Division 2 of Part 2 of the Maritime Powers Act.
  23. The purpose of subsection 22B(2) is to make it clear that there should be no implication drawn from the inclusion of section 22B that the rules of natural justice may be used to impugn other exercises of power or decisions under the Maritime Powers Act.
  24. The original intention of the Maritime Powers Act was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives. The Replacement Explanatory Memorandum to the Maritime Powers Bill 2012 stated on page 62 that

Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.

25. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the –unique circumstances...in a maritime environment|| render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.

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Item 7 Paragraph 31(a)

26. This item inserts –or prevent|| after –investigate|| in paragraph 31(a) of Subdivision C of Division 4 of Part 2 of the Maritime Powers Act
27. The purpose of this amendment is to put it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of the law.

## Item 8 Subsection 41(1) (note)

28. This item omits –note|| and substitutes –note 1|| in the note to subsection 41(1) of Subdivision B of Division 5 of the Maritime Powers Act.
29. This is a consequential amendment that reflects the insertion of a second note to the subsection.

## Item 9 At the end of subsection 41(1)

30. This item adds –note 2: This section does not apply to the exercise of powers under Divisions 7 and 8 of Part 3 in some circumstances: see section 75D.|| at the end of subsection 41(1) of Subdivision B of Division 5 of the Maritime Powers Act.
31. The purpose of this note is to direct the reader to section 75D. Section 75D is inserted by this bill, as discussed below, and provides a ministerial power to determine that the exercise of powers between countries may take place in certain circumstances.

## Item 10 At the end of subsection 69(1)

32. This item adds –Note: For other provisions affecting powers under this section, see section 69A and Division 8A.|| at the end of Subsection 69(1) of Division 7 of Part 3 of the Maritime Powers Act.
33. The purpose of this note is to direct the reader to section 69A and Division 8A. These were inserted by this Bill, as discussed below, and may affect the exercise of powers under section 69.

## Item 11 Subsections 69(2) and (3)

34. This item repeals subsections 69(2) and 69(3) and substitutes new subsection 69(2), 69(3) and 69(3A).
35. New subsection 69(2) provide that the officer may take the vessel or aircraft, or cause the vessel or aircraft to be taken, to a place (the destination) and remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at the destination, until whichever of the following occurs first:

the vessel or aircraft is returned to a person referred to in subsection 87(1);  
action is taken as mentioned in subsection 87(3) in relation to the vessel or aircraft.

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36. Current section 69(2) provides that an officer take a detained vessel or aircraft, or cause the vessel or aircraft to be taken, to a port, airport or other place that the officer considers appropriate, and may remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at that place until the vessel is released or disposed of. Current subsection 69(3) provides that a maritime officer may take the vessel or aircraft, or cause it to be taken, to the port, airport or other place even if it is necessary for the vessel or aircraft to travel outside Australia to reach the port, airport or other place.
37. The effect of this change is to use the new term destination in lieu of the phrase –port, airport or other place that the officer considers appropriate||, and to clarify the period of time during which maritime officers may remain in control of a vessel. The new term destination is intended to provide clarity and consistency. It also harmonises the language with that in subsection 72(4). Section 75C contains additional provisions about the place that may be the destination.
38. New subsection 69(3) provides that the destination may be in the migration zone or outside the migration zone (including outside Australia).
39. A new note after new subsection 69(3) notes that Section 75C contains additional provisions about the place that may be the destination.
40. New subsection 69(3A) provides that a maritime officer may change the destination to a different place at any time (including a time after arrival at the place that was previously the destination). If the destination is changed to a different place, that different place is then the destination, but this does not affect the exercise of powers under the Maritime Powers Act before the change.
41. A note after new subsection 69(3A) advises that it is possible that the destination may change more than once.
42. This amendment is to clarify the intended operation of section 69, putting it beyond doubt that a maritime officer may change the place to which a vessel is to be taken. This understanding is reflected in the explanatory memorandum for the Maritime Powers Bill 2012 (see page 50 of the replacement memorandum).

## Item 12 After section 69

43. This item inserts –69A Additional provisions relating to taking a vessel or aircraft to a destination under section 69|| after section 69 of Division 7 of Part 3 of the Maritime Powers Act.
44. New subsection 69A(1) provides that for the purpose of taking a vessel or aircraft (or causing a vessel or aircraft to be taken) to a destination under paragraph 69(2)(a), the vessel or aircraft may be detained under subsection 69(1)

for any reasonable period required to decide which place should be the destination or to consider whether the destination should be changed to a different place under subsection 69(3A), and (if it should be changed) to decide what that different place is; and

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for any period reasonably required for the minister to consider whether to give a direction under section 75D, 75F or 75H in relation to a matter referred to in subparagraphs 69A(a)(i) or 69A(a)(ii) or any other matter relating to the vessel or aircraft, or in relation to persons on (or suspected as having been on) the vessel or aircraft; and

for the period it actually takes to travel to the destination.

45. A new note to new subsection 69A(1) notes that the total period for which the vessel or aircraft is detained may be longer than the periods covered by this subsection: see subsection (3) and section 87.
46. The effect of subsection 69A(1) is to provide further clarity and certainty in respect of maritime officers' power to detain a vessel or aircraft while exercising the power to take a vessel or aircraft to a place under paragraph 69(2)(a). This enables a vessel or aircraft to be detained while a destination is determined, to consider whether the destination should be changed, or while the Minister considers whether to give a direction under 75D, 75F or 75H. This subsection also allows for the vessel or aircraft to be detained during actual travel time.
47. New subsection 69A(2) clarifies that for the purposes of paragraph 69A(1)(c) the period it actually takes to travel to the destination may include stopovers at other places on the way to the destination, and any time for other logistical, operational or other contingencies relating to travelling to the destination and there is no requirement that the most direct route to the destination must be taken. It was always intended that the powers to move a vessel contemplated such periods of time; however, this provision is intended to ensure that result is as clear as possible.
48. The purpose of new section 69A is to confirm that the powers in section 69 are intended to account for the real time it takes to deal with a vessel detained under section 69 safely and in an operationally realistic way, including all the elements which may delay operations, both predictable and unpredictable. This subsection strikes a balance between the need for clear operational powers and the desirability of imposing constraints on the exercise of power by making paragraphs 69A(1)(a) and 69A(1)(b) subject to a reasonableness requirement. Paragraph 69A(1)(c) is not subject to an equivalent requirement of reasonableness as it is confined to the time that it actually takes to travel to a destination.
49. The safe exercise of the power to move a vessel requires the clear ability to undertake stopovers (for example to re-provision or conduct a crew replacement), and to account for logistical issues, operational or other contingencies. Explicitly providing that there is no requirement that the most direct route to the destination be taken puts it beyond doubt that Australia's maritime personnel are able to undertake operations safely and in a manner that they consider appropriate to the circumstances. These provisions are designed to provide maritime officers with the flexibility they need to exercise their professional judgement to perform their difficult work in the safest and most effective way.
50. New subsection 69A(3) provides that days in periods covered by subsection 69A(1) do not count towards the 28 day limit specified in paragraph 87(2)(a).

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51. The effect of this provision is to clarify the relationship between new subsection 69A(3) and paragraph 87(2)(a). This reflects the policy that the holding period should not commence until after the vessel or aircraft reaches its destination.

Item 13 Subsection 72(1) (note)

52. This item omits ~~-Note:~~ and substitutes ~~-Note 1:~~ in the note to section 72(1) of Division 8 of Part 3 of the Maritime Powers Act.
53. This is a consequential amendment that reflects the insertion of a second note after the current note to subsection 72(1).

Item 14 At the end of subsection 72(1)

54. This item adds ~~-Note 2: For other provisions affecting powers under this section, see section 72A and Division 8A.~~ at the end of subsection 72(1) of Division 7 of Part 3 of the Maritime Powers Act
55. The purpose of this note is to direct the reader to new sections 69A, 72A and Division 8A, all of which are inserted by this act and may affect the exercise of power under section 72.

Item 15 Subsections 72(3) and (4)

56. This item repeals subsections 72(3) and 72(4) and substitutes new subsections 72(3), 72(4), 72(4A) and 72(4B) of Division 7 of Part 3 of the Maritime Powers Act.
57. Current subsection 72(3) provides that a maritime officer may require that the person remain on the vessel or aircraft until it is taken to a port, airport or other place (see section 69) or permitted to depart from the port, airport or other place. The note to current subsection 72(3) states that it is an offence to fail to comply with a requirement under this subsection: see section 103.

58. Current subsection 72(4) provides that a maritime officer may detain the person (who is or was on a detained vessel or aircraft) and take the person, or cause the person to be taken, to a place in the migration zone or to a place outside the migration zone, including a place outside Australia.

59. New subsection 72(3) provides that a maritime officer may require the person to remain on the vessel or aircraft until whichever of the following occurs first:

the vessel or aircraft is returned to a person referred to in subsection 87(1);  
action is taken as mentioned in subsection 87(3) in relation to the vessel or aircraft.

60. A new note states that it is an offence to fail to comply with a requirement under this section: see section 103.

61. The effect of this is to clarify the period during which a maritime officer may require a person to remain on a detained vessel or aircraft, and to harmonise the language between this provision and amended paragraph 69(2)(b).

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62. New subsection 72(4) provides that a Maritime officer may detain the person and take

- the person, or cause the person to be taken, to a place (the destination). New subsection 72(4A) provides that the destination may be: (a) in the migration zone or (b) outside the migration zone (including outside Australia).
63. The new note to new section 72(4A) states that section 75C contains additional provisions about the place that may be the destination.
64. The effect of these amendments is to clarify the places to which a person may be taken, and to harmonise the language between sections 69 and 72.
65. New subsection 72(4B) provides that a maritime officer may change the destination to a different place at any time (including a time after arrival at the place that was previously the destination). If the destination is changed to a different place: (a) that different place is then the destination; but (b) this does not affect the exercise of powers under this Act before the change. The new note to new section 72(4B) states that it is possible that the destination may change more than once.
66. This amendment is to clarify the intended operation of subsection 72(4), putting it beyond doubt that a maritime officer may change the place to which a person is to be taken. This understanding is reflected in the explanatory memorandum for the Maritime Powers Bill 2012 (see page 51 of the replacement memorandum).

## Item 16 Subsection 72(5)

67. This item omits -another place and substitutes -the destination in subsection 72(5) of Division 8 of Part 3 of the Maritime Powers Act.
68. Current subsection 72(5) provides that for the purposes of taking the person to another place, a maritime officer may within or outside Australia place the person on a vessel or aircraft or restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.
69. This is a consequential amendment that replaces the reference to -another place with -the destination. This reflects the consistent use of the term -the destination throughout the Act. The use of this term is further explained in item 16.

## Item 17 Paragraphs 72(5)(a) and (b)

70. This item inserts -, or in a particular place on a vessel or aircraft after -or aircraft in paragraphs 72(5)(a) and 72(5)(b) in Division 8 of Part 3 of the Maritime Powers Act.
71. Current subsection 72(5) provides that for the purposes of taking the person to another place, a maritime officer may within or outside Australia place the person on a vessel or aircraft or restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.
72. The purpose of this provision is to clarify that a maritime officer may place or restrain a person to whom section 72 applies in a particular place on a vessel or aircraft, in addition to on a vessel or aircraft generally. This reflects a power already provided in section 71, but explicitly applies it in circumstances where a person is detained under subsection 72(4).

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## Item 18 After section 72

73. This item inserts new section 72A Additional provisions relating to taking a person to a destination under subsection 72(4) in Division 8 of Part 3 of the Maritime Powers Act.
74. New subsection 72A(1) provides that a person may be detained under subsection 72(4) for any period reasonably required to decide which place should be the destination or to consider whether the destination should be changed to a different place under subsection 72(4B), and (if it should be changed) to decide what the different place is; and for any period reasonably required for the Minister to consider whether to make or give a determination or direction under sections 75D, 75F or 75H in relation to a matter referred to in subparagraphs 72A(a)(i) or 72A(a)(ii) or any other matter relating to the exercise of powers in relation to the person and for the period it actually takes to travel to the destination and for any period reasonably required to make and effect arrangements relating to the release of the person.
75. New subsection 72A(2) provides that for the purpose of paragraph 72A(1)(c) the period it actually takes to travel to the destination may include stopovers at other places on the way to the destination, and time for other logistical, operational or other contingencies relating to travelling to the destination and there is no requirement that the most direct route to the destination must be taken.
76. New subsection 72A(3) provides that the person must not be detained under subsection 72(4) for any longer than is permitted by subsection 72A(1).
77. New subsection 72A(4) provides that powers may be exercised in accordance with subsection 72(5) in relation to the person at any time while the person continues to be detained under that subsection.
78. New subsection 72A(5) provides that subsection 72A(3) does not prevent the arrest of the person or the detention of the person or the exercise of any other power in relation to the person.
79. The purpose of new section 72A is to put it beyond doubt that the Maritime Powers Act is intended to account for the real time it takes to deal with a person under 72(4) safely and in an operationally realistic way. This section strikes a balance between the need for clear operational powers and the desirability of imposing constraints on the exercise of power by making paragraphs 72A(1)(a), 72A(1)(b) and 72A(1)(d) subject to a reasonableness requirement. Paragraph 72A(1)(c) is not subject to an equivalent requirement of reasonableness as it is confined to the time that it actually takes to travel to a destination.
80. The effect of 72A(3) is to make it clear that subsection 72A(1) places limits on the time during which a person may be detained under subsection 72(4).
81. The purpose of subsection 72A(4) puts it beyond doubt that the powers to place, restrain or remove a person under section 72(5) can be exercised at any time while a person is detained.

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82. This purpose of this provision is to remove doubt about the relationship between subsection 72A(3) and other provisions by specifying that while subsections 72A(1) and 72A(3) together limit detention under subsection 72(4), this should not be interpreted to prevent either the arrest or detention of a person under Australian law or other exercises of power in relation to such a person.

Item 19 After Division 8 of Part 3

83. This item inserts new Division 8A General provisions relating to powers under Divisions 7 and 8 after Division 8 of Part 3 of the Maritime Powers Act and new sections 75A Failure to consider international obligations etc. does not invalidate exercise of powers, 75B Rules of natural justice do not apply to exercise of powers, 75C Additional provisions about destination to which a vessel, aircraft or person may be taken, 75D Exercising powers between countries, 75E Powers are not limited by the Migration Act 1958, 75F Minister may give directions about exercise of powers, 75G Compliance with directions and 75H Certain maritime laws do not apply to certain vessels detained or used in exercise of powers.

84. New subsection 75A(1) provides that the exercise of a power under section 69, 69A, 71, 72, 74 72A, 72D, 75F, 75G or 75H is not invalid

because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or

because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or

because the exercise of the power is inconsistent with Australia's international obligations.

85. The intention of this provision is that, as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers under the relevant sections of the Maritime Powers Act.

86. The Australian Government takes its international obligations seriously, and Australia is bound to act in compliance with its international obligations as a matter of international law. This amendment does not seek to change that fact. Appropriate measures are always taken to ensure that operational activities involving the exercise of maritime powers comply with Australia's international obligations. This amendment merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government. The Parliament's intent in passing this amendment is that it be put beyond doubt that Australia's international obligations, the international obligations of other countries and other countries' domestic law cannot form the basis of an invalidation of the exercise of the affected powers as a matter of domestic law.

87. New subsection 75A(2) provides that subsection 75A(1) does not prevent the exercise of a power under a provision referred to in that subsection from being invalid because it was not in accordance with Part 2.

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88. Part 2 of the Maritime Powers Act provides a framework within which the exercise of maritime powers is authorised and limited. The purpose of subsection 75A(2) is to make it clear that subsection 75A(1) should not prevent invalidity of a decision or exercise of power for reasons of a failure to comply with the conditions placed on that decision or exercise by the Maritime Powers Act itself – that is, the act should be internally consistent, including in circumstances where by the terms of the Act itself a maritime power is limited under an international obligation, for example when maritime powers are exercised under section 33. It should be noted that Division 2 of Part 2 will contain in new section 22A an equivalent provision to new section 75A which applies to that division (but not to the rest of Part 2).

89. New subsection 75A(2) provides that subsection (1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraphs 75A(1)(a), 75A(1)(b) or 75A(1)(c).

90. The purpose of this subsection is to clarify that specifying that the Australia's international obligations or the domestic laws of another country will not lead to the invalidity of an exercise of power under section 69, 69A, 71, 72, 74 72A, 75D, 75F, 75G or 75H] is not intended to imply that such considerations will lead to the invalidity of other powers or provisions under the Maritime Powers Act.

91. New subsection 75B(1) provides that the rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 74 72A, 75D, 75F, 75G or 75H.

92. The original intention of the Maritime Powers Act was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives. The Replacement Explanatory Memorandum to the Maritime Powers Bill 2012 stated on page 62 that:

Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.

93. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the -unique circumstances...in a maritime environment|| render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.

94. New subsection 75B(2) provides that subsection 75B(1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.

95. The purpose of this subsection is to clarify that specifically excluding the rules of natural justice from the exercise of power under section 69, 69A, 71, 72, 74, 72A, 75D, 29

75F, 75G or 75H is not intended to imply that the rules of natural justice do apply to other powers or provisions under the Maritime Powers Act.

96. New section 75C provides in subsection 75C(1) that to avoid doubt:

- a) the destination to which a vessel, aircraft or person is taken (or caused to be taken) under section 69 or 72:
  - i. does not have to be in a country, and
  - ii. without limiting subparagraph (i)—may be just outside a country; and;
  - iii. may be a vessel; and
- b) a vessel, aircraft or person may be taken (or caused to be taken) to a destination under section 69 or 72:
  - o whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it), or the person; and
  - o irrespective of the international obligations or domestic law of any other country.

97. The effect of new section 75C is to put it beyond doubt that a destination does not need to be inside a country and that a vessel, aircraft or person may be taken to a destination that is not inside a country whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country. While this amendment simply gives explicit voice to Parliament's intent in the original Maritime Powers Act, as demonstrated particularly by the fact that section 40 provides for the agreement of another country only for the exercise of maritime powers inside another country, this amendment puts the matter beyond doubt.

98. A new note to new section 75C states that the definition of country in section 8 includes the territorial sea and archipelagic waters of the country, as well as various other areas.

99. The purpose of this provision is to draw the reader's attention to a relevant defined term in section 8.

100. New subsection 75C(2) provides that if the destination is in another country, section 40 must be complied with.

101. The purpose of this provision is to draw the reader's attention to the fact that, to exercise powers in another country (including its territorial sea or archipelagic waters) with the authorisation of the Maritime Powers Act, section 40 must be complied with. While taking persons or a vessel to a place in another country requires either a request from or the agreement of that country to exercise maritime powers, it is intended that nothing further is required, such as an agreement as to the reception of the persons taken. It is Parliament's intent that issues beyond mere permission to exercise powers in another country are more properly dealt with by the executive government.

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102. New subsection 75D(1) provides that section 41 (foreign vessels between countries) does not apply to an exercise of power under section 69, 69A, 71, 72, 72A or 74 if the exercise of power is covered by a determination in force under subsection (2), the exercise of power is part of a continuous exercise of powers and the continuous exercise of powers commenced in accordance with any applicable requirements of Division 5 of Part 2.

103. New subsection 75D(2) provides that for the purpose of subsection 75D(1), the Minister may make a written determination that is expressed to cover the exercise, in a specified circumstance, of powers under one or more of the sections referred to in subsection 75D(1).

104. New subsection 75D(3) provides that the Minister may, in writing, vary or revoke a determination made under subsection 75D(2).

105. New subsection 75D(4) states that the only condition for the exercise of the power to make a determination under subsection 75D(2), or to vary a determination, is that the Minister thinks that it is in the national interest to make or vary the determination. The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, the prevention of transnational and organised crime, national security, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for the effective management of Australia's maritime security are in the national interest.

106. The new note to subsection 75D(4) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a determination.

107. New subsection 75D(5) provides that a determination under subsection 75D(2), or an instrument varying or revoking a determination, comes into force unless paragraph 75D(5)(b) applies – when it is made or if the determination or instrument specifies a later time as the time when it is to come into force—at that later time.

108. New subsection 75D(6) provides that a determination under subsection 75D(2) remains in force until whichever of the following occurs first: an instrument revoking the determination comes into force or if the determination is expressed to cease to be force at a specified time—the time so specified.

109. New subsection 75D(7) provides that a determination under subsection 75D(2), or a variation or revocation of a determination, is not a legislative instrument.

110. New section 75D creates an exception to the general limits on the exercise of powers in relation to foreign vessels between countries created by section 41. Subsection 75D(1) provides limited circumstances in which the exception is applicable. Subsection

75D(2) allows the minister to make a written determination that will enliven the exception, in relation to such an exercise of power, in those limited circumstances. The purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict.

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111. New section 75D provides a mechanism for ensuring that Australia's international law obligations can be taken into account by the executive government. This power is broadly framed and is subject to the exclusion of new section 75A such that its exercise cannot be invalidated, as a matter of domestic law, on the basis of international law. This is because the intention in this context is that the interpretation and application of such obligation is a matter for the executive government. Parliament's intent in passing this amendment is that the Minister have the personal ability to provide for the exercise of maritime powers in circumstances not otherwise covered by the Maritime Powers Act, provided that exercise is part of a continuous exercise of powers which commenced consistent with Division 5 of Part 2.
112. New subsection 75D(3) provides a power to vary or revoke a determination made under subsection 75D(2). This is incidental to the power to issue the determination. New subsection 75D(4) provides that the only condition for the Minister to vary or revoke a subsection 75D(2) determination is that the Minister thinks that it is in the national interest to do so. This is intended to preserve flexibility for the Minister to issue a determination in a wide variety of difficult to predict situations if the Minister considers it in the national interest to do so. The note to this subsection makes it clear that there are no conditions on the exercise of the power to revoke a decision.
113. New subsections 75D(5) and 75D(6) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.
114. Subsection 75D(7) provides that a determination under subsection (2) or variation or revocation is not a legislative instrument. This means that the requirements of the Legislative Instruments Act 2003 (LIA) will not apply to it. This is a substantive exemption from the LIA. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information. dangerous and unique maritime operational environment.
115. New subsection 75E(1) provides that Powers under sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H are not in any respect subject to, or limited by, the Migration Act 1958 (including regulations and other instruments made under that Act).
116. This provision puts it beyond doubt that the powers in sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H powers operate in their own right, and that there is no implication to be drawn from the provisions of the Migration Act. This provision aids in refuting the incorrect claim that the existence of the regional processing arrangements in the Migration Act limits the extent to which maritime powers may be used to address maritime people smuggling. It is Parliament's intent that the existence of the Regional Processing arrangements particularly, and the Migration Act generally, is not to be used as a basis or part of a basis to read down or limit the relevant provisions of the Maritime Powers Act, which are intended to operate in their own right.

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117. New subsection 75E(2) provides that subsection (1) of this section is not to be taken to imply that other powers under this Act are subject to, or limited by, the Migration Act 1958 (including regulations and other instruments made under that Act).
118. The purpose of this subsection is to clarify that specifying that the powers under section 69, 69A, 71, 72, 72A, 74 75D, 75F, 75G or 75H are not subject to or limited by the Migration Act 1958 is not intended to imply that other powers or provisions under the Maritime Powers Act are limited by or subject to the Migration Act 1958.
119. New subsection 75F(1) provides that this section applies in relation to the powers in sections 69, 69A, 71, 72 and 72A. New subsection 75F(2) provides that the Minister may, in writing, give directions requiring the exercise of a power or powers in a specified circumstance, or in circumstances in a specified class, or relating to the exercise of a power or powers in a specified circumstance, in a specified class of circumstances or more generally. New subsection 75F(3) provides that without limiting subsection (2), the Minister may give a direction under that subsection specifying a place that is to be, or is not to be, the destination to which a vessel, aircraft or person is taken under paragraph 69(2)(a) or subsection 72(4) or specifying matters to be taken into account in deciding the destination to which a vessel, aircraft or person is to be so taken.
120. The effect of subsections 75F(1), 75F(2) and 75F(3) is that the Minister may, by written direction, require that powers under sections 69, 69A, 71, 72 and 72A are exercised, relating to the exercise of those powers, which includes specifying a place that is to be, or not to be a destination for a vessel, aircraft or person, or specifying matters to be taken account into making a decision about the destination to which a vessel, aircraft or person is to be taken. Such directions may also be directed by the Minister at a class of circumstances, rather than a particular circumstance. The purpose of this provision is to put it beyond that the Minister has the power to provide instructions to direct the exercise of these powers.
121. Subsection 75F(4) provides a power for the minister to vary or revoke a direction given under subsection 75F(2). This is incidental to the power to issue the determination.
122. New subsection 75F(5) provides that the only condition for the exercise of the power to give a direction under subsection 75F(2), or to vary a direction, is that the Minister thinks that it is in the national interest to give or vary the direction. The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia's economic interests, Australia's international obligations and its relations with other countries.

Measures for the effective management of Australia's maritime security are in the national interest. The note to new subsection 75F(5) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a direction.

123. New subsection 75(6) provides that a direction under subsection 75(2) may specify the circumstances in which the direction need not be complied with.

124. New subsections 75F(7) and 75F(8) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made

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unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.

125. New subsection 75F(9) provides that a direction made under paragraph 75F(2)(a) authorises the exercise of powers (as contemplated by Part 2 of the Maritime Powers Act) in accordance with the direction and the authorisation remains in force while the direction is in force. Paragraph 75F(9)(b) specifies that such an authorisation remains in force while the direction is in force, despite section 23 which provides other circumstances when an authorisation will generally cease to be in force.

126. New subsection 75F(10) provides that a direction under subsection 75F(2), or an instrument varying or revoking a direction, is not a legislative instrument. The effect of this provision is that the requirements of the Legislative Instruments Act 2003 will not apply to a determination made under subsection 75F(2). This is a substantive exemption from the LIA. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information.

127. New subsection 75G(1) provides that subject to subsections 75G(2), 75G(3) and 75G(4), a maritime officer must comply with any applicable directions in force under section 75F. However, a failure to comply does not invalidate the exercise of a power.

128. The purpose of this provision is to clarify that while maritime officers must comply with applicable directions in force under section 75F, failure to do so does not result in invalidity of the exercise of power. This is intended to avoid the situation where a technical failure to comply, or a failure in circumstances of compelling operational matters, for example, may otherwise lead to the conclusion that the failure to comply invalidated the exercise of powers.

129. New subsection 75G(2) provides that a maritime officer who is a member of the Australian Defence Force is not required to comply with a direction under section 75F to the extent that the direction is inconsistent with an order or other exercise of command under sections 8 and 9 of the Defence Act 1903.

130. The effect of this provision is to preserve the command power given under sections 8 and 9 of the Defence Act 1903.

131. New subsection 75G(3) provides that a maritime officer is not required to comply with a direction under section 75F to the extent that he or she reasonably believes that it would be unsafe to do so.

132. The purpose of this provision is to preserve the role of maritime officers in making independent judgements about the safety of exercises of maritime power, and to enable a maritime officer to act other than in compliance with a direction under section 75F where it is reasonably believed to be unsafe to do so.

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133. New subsection 75H(1) provides that the laws specified in subsection 75H(3) (including regulations and other instruments made under those laws) do not apply in relation to a vessel at any time when the vessel is detained in exercise (or purported exercise) of powers under section 69.

134. New subsection 75H(2) provides that the laws specified in subsection 75H(3) (including regulations and other instruments made under those laws) do not apply in relation to a vessel at any time when the following paragraphs are satisfied:

the vessel is being used in the exercise (or purported exercise) of powers under subsection 72(4) or 72(5), or is intended for use in the exercise of such powers;

the vessel is specified in, or is included in a class of vessels specified in, a determination under subsection 75H(4) that is in force;

if the determination states that it has effect, in relation to the vessel or class of vessels, only in specified circumstances—those circumstances exist;

if the determination states that it has effect, in relation to the vessel or the class of vessels, only in one or more specified periods—the time is in that period, or one of those periods.

135. The note to new subsection 75H(2) states that paragraphs 75H(2)(c) and 75H(2)(d) do not have to be satisfied unless the determination states as mentioned in those paragraphs, i.e. if the determination does not state that it has effect in relation to a class of vessels only in specified circumstances, 75H(2)(c) has no effect.

136. New subsection 75H(3) provides that the laws that, because of subsection 75H(1) or 75H(2), do not apply in relation to a vessel are the Navigation Act 2012 and the Shipping Registration Act 1981 and the Marine Safety (Domestic Commercial Vessel) National Law.

137. Subsections 75H(1), 75H(2) and 75H(3) provide that certain other laws do not apply to certain vessels that are subject to the exercise of power under the Maritime Powers Act. The vessels that are subject to this disapplication of certain laws are vessels detained under section 69, vessels used in exercise of powers under subsections 72(4) and 72(5) and vessels specified by the minister through subsection 75H(4). The laws that are disapplied are specified by subsection 75H(3). They are the Navigation Act 2012, the Shipping Registration Act 1981 and the Marine Safety (Domestic Commercial Vessel)

National Law (as defined in section 8 – see above). The purpose is to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, intended to apply to vessels with a requisite connection to Australia, do not inappropriately restrict the operational freedom of maritime officers.

138. New subsection 75H(4) provides that for the purpose of subsection 75H(2), the Minister may make a written determination specifying a vessel, or a class of vessels. The determination may also state either or both of the following:

that it has effect, in relation to the vessel or class of vessels, only in specified circumstances;

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that it has effect, in relation to the vessel or the class of vessels, only in one or more specified periods.

139. The effect of this provision is to allow the minister to specify a vessel or class of vessels to which the legislation specified in subsection 75H(3) will not apply through the operation of 75H(2). The intention of this provision is to provide the Minister with further flexibility in directing the exercise of the relevant maritime powers.

140. New subsection 75H(5) provides that the Minister may, in writing, vary or revoke a determination made under subsection 75H(4).

141. New subsection 75H(6) provides that the only condition for the exercise of the power to make a determination under subsection (4), or to vary a determination, is that the Minister thinks that it is in the national interest to make or vary the determination. The term ‘national interest’ has a broad meaning and refers to matters which relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for the effective management of Australia’s maritime security are in the national interest.

142. The note to new subsection 75H(6) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a determination.

143. Subsection 75H(5) provides a power for the Minister to vary or revoke a direction given under subsection 75H(4). This is incidental to the power to issue the determination. New subsection 75F(6) provides that the only condition for the Minister to vary or revoke a determination is that the Minister thinks that it is in the national interest to do so. This is intended to preserve flexibility for the Minister to issue a determination in a wide variety of situations if the Minister considers it in the national interest to do so.

144. New subsection 75H(7) provides that a determination under subsection 75H(4), or an instrument varying or revoking a determination, comes into force:

unless paragraph 75H(7)(b) applies, when it is made or

if the determination or instrument specifies a later time as the time when it comes into force, at that later time.

145. New subsection 75H(8) provides that a determination made under subsection (4) remains in force until whichever of the following occurs first:

an instrument revoking the determination comes into force;

if the determination is expressed to cease to be in force at a specified time, the time so specified.

146. New subsections 75H(7) and 75H(8) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made

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unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.

147. New subsection 75H(9) provides that a determination under subsection 75H(4), or a variation or revocation of a determination, is not a legislative instrument.

148. The effect of this provision is that the requirements of the Legislative Instruments Act 2003 will not apply to a determination made under subsection 75H(4) or a variation or revocation thereof. This is a substantive exemption from the Legislative Instruments Act. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information..

#### Item 20           Section 79

149. This item omits –Written notice must be given to the owner or person who was in possession or control of a seized, retained or detained thing.|| and substitutes –Written notice must be given to the owner of a seized, retained or detained thing, or to a person who had possession or control of the thing.||

150. Section 79 is a guide to Part 4 of the Maritime Powers Act. This amendment alters the guide to clarify the person to whom written notice must be given to better reflect operational reality.

#### Item 21           Paragraph 80(1)(b)

151. This item omits the words –the person|| and substitutes –a person||. The effect of this is to provide greater flexibility in providing notice of seizure, retention or detention to a person, as it may not always be clear that a single person is the owner or person in possession.

#### Item 22           At the end of section 81

152. This item adds –(3) if a detained vessel or aircraft is taken to a destination under paragraph 69(2)(a), the information must also explain the effect of subsection 69A(3).|| at the end section 81 of Division 2 of Part 4 of the Maritime Powers Act.
153. Division 2 of Part 4 of the Maritime Powers Act provides for the provision of notice and information about a seized or detained thing to the owner, or person in possession of the thing when it was seized or detained. New subsection 81(3) creates a requirement for information to be provided when powers are exercised to take a detained vessel or aircraft to a destination under paragraph 69(2)(a) the effect of 69A(3) must also be explained. This is significant because new subsection 69A(3) has the effect that the time covered by subsection 69A(1) (such as the period it takes to travel to the destination) do not count towards the 28 day limit.

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## Item 23 Paragraphs 86(1)(b) and 87(1)(b)

154. This item omits –the person|| and substitutes –a person||. The effect of this item is to clarify to whom seized, retained and detained things should be returned, to better reflect operational reality.

## Item 24 At the end of subsection 87(2)

155. This item adds a new note which states –In the case of a detained vessel or aircraft that is taken to a destination under paragraph 69(2)(a), days in periods covered by subsection 69A(1) (such as the period it takes to travel to the destination) do not count towards the 28 day limit: see subsection 69A(3).|| at the end of subsection 87(2) in Division 4 of Part 4 of the Maritime Powers Act.
156. The purpose of this note is to direct the reader to newly inserted subsections 69A(1) and 69A(3), which may impact the calculation of periods of time of detention.

## Item 25 Subsection 93(1)

157. This item repeals the subsection and substitutes:

1. If the thing is disposed of under paragraph 91(1)(a), (b) or (c) (reasons for disposal), the Minister must give written notice, as soon as practicable after the disposal, to:
  - the person who owned the thing; or
  - a person who had possession or control of the thing immediately before it was seized, retained or detained.

158. The effect of this provision is to clarify to whom written notice must be given, to better reflect operational reality.

## Item 26 Subsection 93(3)

159. This item omits the words –the person|| and substitutes –any person to whom the notice may be given under that subsection||. The effect of this item is to clarify to whom written notice must be given, to better reflect operational reality.

## Item 27 Section 94

160. This item omits –Persons from detained vessels and aircraft may be required to remain on the vessel or aircraft, or may be taken to another place.|| from section 94 of Division 1 of Part 5 of the Maritime Powers Act.
161. Section 94 is a guide to Part 5 of the Maritime Powers Act. This amendment alters the guide to reflect changes made to the operation of Part 5 by item 28, which are described further below.

## Item 28 Section 97

162. This item repeals section 97 of Division 2 of Part 5 of the Maritime Powers Act.

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163. Current subsection 97(1) provides that if a person is detained and taken to another place under subsection 72(4) (persons on detained vessels and aircraft), the detention ends at that place.

164. Current subsection 97(2) provides that subsection (1) does not prevent:

- the person being taken to different places on the way to the other place; or
- the arrest of the person; or
- the detention of the person under another Australian law; or
- the exercise of any other power in relation to the person.

165. The purpose of repealing section 97 is because provision for persons on, or from, detained vessels or aircraft taken to other places is now provided for by section 72A which is inserted by this Act. The intention of those new provisions is explained by item 18 above.

## Item 29 Section 107

166. This item inserts –, whether civil or criminal,|| after proceeding in section 107 of Division 1 of Part 7 of the Maritime Powers Act.

167. Current section 107 states that none of the following is liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the exercise or performance, or the purported exercise or performance, of a power or function under this Act: an authorising officer, a maritime officer, a person assisting, any other person acting under the direction or authority of a maritime officer. The note to current section 107 states that for person assisting see subsection 38(5).

168. The purpose of this amendment is to make it clear that actions in good faith are excluded from liability to actions, suits or proceedings of both a civil and criminal nature. While this was always Parliament's intent, this amendment puts the matter

beyond doubt.

Item 30 Subsection 121(1)

169. This item inserts –, other than the powers under section 75D, 75F or 75H,|| after –this Act|| in subsection 121(1) in Division 6 of Part 7 of the Maritime Powers Act.

170. Current subsection 121(1) provides that the Minister may, by writing, delegate any or all of his or her functions and powers under this Act to:

the Chief of the Defence Force, the Chief of Navy, the Chief of Army or the Chief of Air Force; or

the Commissioner or a Deputy Commissioner of the Australian Federal Police; or

an Agency Head (within the meaning of the Public Service Act 1999); or

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an officer of the Australian Navy who holds a rank not below Commodore; or

an officer of the Australian Army who holds a rank not below Brigadier; or

an officer of the Australian Air Force who holds a rank not below Air Commodore; or

an SES employee with a classification not below Senior Executive Band 1 or equivalent.

171. The effect of this amendment is that the general power of delegation in subsection 121(1) does not apply to powers created by sections 75D, 75F and 75H. This reflects the policy intention that those powers can only be exercised by the minister personally.

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**Part 2–Other amendments**

**Administrative Decisions (Judicial Review) Act 1977**

Item 31 After paragraph (p) of Schedule 1

172. This item inserts –(pa) decisions under section 75D, 75F or 75H of the Maritime Powers Act 2013;|| after paragraph (p) of Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977.

173. Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) lists classes of decisions that are not decisions to which the ADJR act applies. This item adds decisions under section 75D, 75F or 75H to the list of such classes of decision. The effect is that such decisions are not reviewable under the ADJR Act.

**Immigration (Guardianship of Children) Act 1946**

Item 32 At the end of paragraph 6(2)(d)

174. This item adds –or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013|| at the end of paragraph 6(2)(d) of the Immigration (Guardianship of Children) Act 1946 (the Guardianship of Children Act).

175. Current subsection 6(1) provides that the Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of the Guardianship of Children Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of the Guardianship of Children Act cease to apply to and in relation to the child, whichever first happens.

176. Current paragraph 6(2)(d) provides that a non-citizen child leaves Australia permanently if the child is taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.

177. The effect of this amendment is that powers to take a child to a place outside Australia under Division 7 or 8 of the Maritime Powers Act will result in a child leaving Australia permanently within the meaning of subsection 6(1) of the Guardianship of Children Act.

178. This amendment is a result of the creation of new powers to take a child to a place outside Australia under Divisions 7 and 8 of the Maritime Powers Act.

Item 33 Paragraph 8(2)(b)

179. This item inserts –or the Maritime Powers Act 2013|| after –migration law|| in paragraph 8(2)(b) of the Guardianship of Children Act.

180. Current paragraph 2(a) provides that nothing in the Guardianship of Children Act affects the operation of the migration law.

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181. The effect of this amendment is to provide that nothing in the Guardianship of Children Act will affect the operation of the Maritime Powers Act 2013. This reflects the creation in this bill of powers in the Maritime Powers Act which are not intended to be affected by this Act.

Item 34 Paragraph 8(2)(c)

182. This item repeals paragraph 8(2)(c) of the Guardianship of Children Act and substitutes –(c) imposes any obligation on the Minister or another Minister to exercise, or to consider exercising, any power conferred by or under the migration law or the Maritime Powers Act 2013||.

183. Current paragraph 8(2)(c) of the Guardianship of Children Act provides that nothing in that act imposes any obligation on the Minister to exercise, or to consider exercising, any

power conferred on the Minister by or under the migration law.

184. The effect of this amendment is to make clear that the Guardianship of Children Act is not intended to impose an obligation to exercise or consider exercising a power under the Maritime Powers Act, and that that exemption also applies to other ministers.

Item 35 At the end of paragraph 8(3)(d)

185. This item adds –, or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013|| in paragraph 8(3)(2) of the Guardianship of Children Act.

186. Current paragraph 8(3)(d) provides that without limiting subsection 8(2), nothing in the Guardianship of Children Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to the taking of a non-citizen child to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.

187. The effect of this amendment is to include the powers to take a non-citizen child to a place outside Australia under Division 7 or 8 of Part 3 of the Maritime Powers Act in the exemption under paragraph 8(3)(d). Those powers will not be affected by any provision of the Guardianship of Children Act.

Migration Act 1958

Item 36 Subsection 5(1) (paragraph (b) of the definition of transitory person)

188. This item omits the words –or paragraph 72(4)(b) of the Maritime Powers Act 2013||, and substitutes –or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013||. The effect of this item is to clarify the powers under the Maritime Powers Act which are to be included in the definition of transitory person.

Item 37 Paragraph 5AA(2)(ba)

189. This item repeals the paragraph and substitutes –the person entered the migration zone as a result of the exercise of powers under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013; or||. The effect of this item is to clarify the powers under the Maritime Powers Act which are to be included in the definition of entered Australia by sea.

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Item 38 Subparagraph 42(2A)(c)(i)

190. This item omits the words –or 72(4) of the Maritime Powers Act 2013|| and substitutes the words –or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013||. The effect of this item is to clarify the powers under the Maritime Powers Act under which a person may be brought to the migration zone.

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### Part 3—Application

Item 39 Application of amendments of the Maritime Powers Act 2013

191. This item provides that the amendments made by Part 1 of this schedule (the amending Part) apply in relation to the exercise of powers under the Maritime Powers Act after the commencement of the amending Part, even if

the authorisation for the exercise of the powers was given under Division 2 of Part 2 of that Act before that commencement; or

the powers are being exercised in a situation in relation to which powers were (or could have been) exercised under that Act before that commencement

192. The amendment of the Maritime Powers Act made by item 10: new sections 22A and 22B applies in relation to authorisations given after the commencement of the amending Part.

193. The amendments of the Maritime Powers Act made by the amending Part do not, by implication, affect the interpretation of that Act, as in force before the commencement of the amending Part, in relation to the exercise of powers, or the giving of authorisations, under that Act before that commencement.

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### SCHEDULE 2 — Protection visas and other measures

#### Part 1 — Protection visas generally

##### Division 1 — Protection visas

Migration Act 1958

Item 1 Subsection 5(1)

194. This item inserts a new definition for protection visa into subsection 5(1) of the Migration Act. Current subsection 5(1) contains definitions for terms used in the Migration Act.

195. Currently, subsection 36(1) provides that there is a class of visas to be known as protection visas. However, amendments made by items 5 and 7 of Schedule 2 to the Bill repeal current subsection 36(1) and insert new section 35A which provides for protection visas.

196. The new definition of protection visa in subsection 5(1) provides that protection visa has the meaning given by new section 35A of the Migration Act. This definition is a signpost to guide readers as the term –protection visa|| is used throughout the Migration Act.

197. A note is inserted after the new definition of protection visa in subsection 5(1). The note provides that new section 35A covers the following:

permanent protection visas (classified by the Migration Regulations as Protection (Class XA) visas when this definition commenced);

other protection visas formerly provided for by subsection 36(1); temporary protection visas (classified by the Migration Regulations as Temporary Protection (Class XD) visas when this definition commenced); any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

See also section 36 and Subdivision AL of Division 3 of Part 2.

198. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.

199. The effect of this amendment is to define the term –protection visa|| to mean all the protection visas covered by new section 35A, which include the protection visas that can be prescribed by the Migration Regulations and historic classes of protection visas which were formerly provided for by section 36 of the Migration Act. Accordingly, a reference to –protection visa|| under the Migration Act can mean any one of the visas covered in section 35A or under previous s36.

200. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that the definition of protection visa commenced. However, this classification may be changed by the Migration Regulations in future.

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201. The purpose of this amendment is to ensure that –protection visa|| is used as an umbrella term to capture all the protection visas provided for under the Migration Act and the Migration Regulations.

Item 2 At the end of subsection 31(1)

202. This item inserts a note at the end of subsection 31(1) of the Migration Act.

203. Current subsection 31(1) provides that there are to be prescribed classes of visas.

204. The new note to subsection 31(1) provides: see also new subsection 35A(4), which allows additional classes of permanent and temporary visas to be prescribed as protection visas by regulations made for the purposes of subsection 31(1).

205. The new note under subsection 31(1) acts as a signpost to new subsection 35A(4) of the Migration Act. New section 35A will be discussed in item 5 of Schedule 2 to the Bill.

Item 3 Subsection 31(2)

206. This item omits –sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B|| from subsection 31(2) of the Migration Act and substitutes –the following provisions:

section 32 (special category visas);  
 section 33 (special purpose visas);  
 section 34 (absorbed person visas);  
 section 35 (ex-citizen visas);  
 subsection 35A(2) (permanent protection visas);  
 subsection 35A(3) (temporary protection visas);  
 section 37 (bridging visas);  
 section 37A (temporary safe haven visas);  
 section 38 (criminal justice visas);  
 section 38A (enforcement visas);  
 section 38B (maritime crew visas).||

207. The effect of this amendment is to omit reference to section 36 and insert reference to new subsections 35A(2) (permanent protection visas) and 35A(3) (temporary protection visas), which provide for the classes of protection visas made by the Migration Act. The opportunity has also been taken to modernise the drafting style of current subsection 31(2) of the Migration Act and specify, by name, the classes of visas made by the Migration Act.

208. This amendment is consequential to the repeal of subsection 36(1) of the Migration Act in item 7 of Schedule 2 to the Bill. Current subsection 36(1) provides for a class of visas to be known as protection visas.

209. The purpose of this amendment is to make clear that new subsections 35A(2) and 35A(3) are provisions which provide for classes of protection visas made by the Migration Act.

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Item 4 Subsection 31(3)

210. This item amends subsection 31(3) of the Migration Act to omit reference to –36|| and substitute with –35A||.

211. Current subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of subsection 31(3), may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

212. New subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of subsection 31(3), may be a class provided for by section 32, 35A, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

213. This amendment is consequential to the repeal of subsection 36(1) of the Migration Act in item 7 of Schedule 2 to the Bill.

Item 5 After section 35

214. This item inserts new section 35A after section 35 of the Migration Act.

215. The effect of new section 35A is to provide for multiple classes of protection visas that may be either a permanent visa or a temporary visa. New section 35A creates a class of permanent protection visa, a class of temporary protection visa and covers classes of visas prescribed by the Migration Regulations under subsection 31(1) to be protection visas. In addition, new section 35A also covers the protection visas formerly provided

for by subsection 36(1) before its repeal, as a protection visa for the purposes of Migration Act and the Migration Regulations.

216. The purpose of this amendment is to allow for multiple classes of protection visas to be created under the Migration Act and the Migration Regulations and, in particular, to introduce a class of temporary visas known as temporary protection visas. All classes of visas provided for by new section 35A are considered to be a protection visa, within the meaning of the new definition of protection visa inserted into subsection 5(1) of the Migration Act (see item 1 of Schedule 2 to the Bill).
217. New subsection 35A(1) provides that a protection visa is a visa of a class provided for by section 35A.
218. The effect of new subsection 35A(1) is that a visa is a protection visa if it is a visa of a class that is provided for by new subsections 35A(2), 35A(3), 35A(4) or 35A(5). The purpose of new subsection 35A(1) is to make clear that there is now more than one class of protection visas and that these visas can be provided for under the Migration Act and the Migration Regulations.
219. New subsection 35A(2) provides that there is a class of permanent visas to be known as permanent protection visas.
220. A note is inserted after new subsection 35A(2). The new note provides that these visas were classified by the Migration Regulations as Protection (Class XA) visas when this section commenced.

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221. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that new section 35A commenced. However, this classification may be changed by the Migration Regulations in future.
222. New subsection 35A(3) provides that there is a class of temporary visas to be known as temporary protection visas.
223. A note is inserted after new subsection 35A(3). The new note provides that these visas were classified by the Migration Regulations as Temporary Protection (Class XD) visas when this section commenced.
224. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that new section 35A commenced. However, this classification may be changed by the Migration Regulations in future.
225. New subsection 35A(4) provides that regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas.
226. Current subsection 31(1) of the Migration Act allows for the Migration Regulations to prescribe classes of visas. The effect of new subsection 35A(4) is to make clear that if the Migration Regulations prescribe a temporary or permanent visa, as allowed for under subsection 31(1), that visa can be a class of protection visa. The purpose of this amendment is to provide for the flexibility to introduce additional classes of protection visas in the Migration Regulations.
227. New subsection 35A(5) provides that a class of visas that was formerly provided for by subsection 36(1), as subsection 36(1) was in force before the commencement of section 35A, is also a class of protection visas for the purposes of the Migration Act and the Migration Regulations.
228. An example is inserted after new subsection 35A(5). The new example provides that an example of a class of visas for subsection 35A(5) is the class of visas formerly classified by the Migration Regulations as Protection (Class AZ) visas. These visas can no longer be granted.
229. A note is inserted after the example to new subsection 35A(5). The new note provides that new section 35A commenced, and subsection 36(1) was repealed, on the commencement of Part 1 of Schedule 2 to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.
230. The purpose and effect of new subsection 35A(5) is to recognise the classes of protection visas that existed before the commencement of new section 35A as also being protection visas under new section 35A.

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231. New subsection 35A(6) provides that the criteria for a class of protection visas are:

the criteria set out in section 36; and  
any other relevant criteria prescribed by regulation for the purposes of section 31.

232. A note is inserted after new subsection 35A(6). The new note provides to see also Subdivision AL. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.
233. The effect and purpose of new subsection 35A(6) is to make clear that an applicant for a protection visa must satisfy both the criteria set out in section 36 of the Migration Act and any other relevant criteria prescribed by the Migration Regulations, to be eligible for the grant of a protection visa.

Item 6            Section 36 (heading)

234. This item repeals the current heading –Protection visas|| and substitutes the new heading –Protection visas – criteria provided for by this Act||.
235. This amendment is consequential to the repeal of subsection 36(1) in item 7 of Schedule 2 to the Bill. New section 35A provides for protection visas and therefore, the heading of section 36 is amended to reflect that new section 36 provides the criteria for protection visas.

Item 7            Subsection 36(1)

236. This item repeals subsection 36(1) of the Migration Act.
237. This amendment is consequential to the insertion of new section 35A in item 5 of Schedule 2 to the Bill.
- Item 8 Subparagraph 36(2)(b)(ii)
238. This item amends subparagraph 36(2)(b)(ii) of the Migration Act to insert reference to –of the same class as that applied for by the applicant|| after the reference to –protection visa||.
239. Current subparagraph 36(2)(b)(ii) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(a) and holds a protection visa.
240. Current section 5 of the Migration Act provides that one person is a member of the same family unit as another if either is a member of the family unit of the other or each is a member of the family unit of a third person.
241. Current paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

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242. New subparagraph 36(2)(b)(ii) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(a) and holds a protection visa of the same class as that applied for by the applicant.
243. The purpose of this amendment is to ensure that a protection visa applicant, who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(a) and that non-citizen holds a protection visa, will only obtain the same class of protection visa as their family member.

Item 9 At the end of subparagraph 36(2)(c)(ii)

244. This item amends subparagraph 36(2)(c)(ii) of the Migration Act to insert reference to –of the same class as that applied for by the applicant|| at the end of subparagraph 36(2)(c)(ii).
245. Current subparagraph 36(2)(c)(ii) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(aa) and holds a protection visa.
246. Current paragraph 36(2)(aa) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia (other than a non-citizen mentioned in paragraph 36(2)(a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.
247. New paragraph 36(2)(c)(ii) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(aa) and holds a protection visa of the same class as that applied for by the applicant.

248. The purpose of this amendment is to ensure that a protection visa applicant, who is a member of the same family unit as a non-citizen who is mentioned in paragraph 36(2)(aa) and that non-citizen holds a protection visa, will only obtain the same class of protection visa as their family member.

Item 10 Subsection 48A(2) (definition of application for a protection visa)

249. This item omits –includes|| and substitutes –means|| in the definition of \_application for a protection visa' in current subsection 48A(2).
250. The current chapeau in subsection 48A(2) provides that –In this section: application for a protection visa includes:||.
251. Following this amendment, the new chapeau provides that –In this section: application for a protection visa means:||.
252. This amendment clarifies that for the purposes of section 48A of the Migration Act, the new definition of \_application for a protection visa' is exhaustive, rather than inclusive.

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253. In general terms, current section 48A prevents a non-citizen in the migration zone from making a protection visa application in circumstances where he or she has previously had a protection visa application refused while in the migration zone, or previously had a protection visa cancelled while in the migration zone.
254. This amendment complements the amendment made by items 11 and 12 of Schedule 2 to the Bill.

Item 11 Subsection 48A(2) (paragraph (aa) of the definition of application for a protection visa)

255. This item repeals current paragraph 48A(2)(aa) and substitutes new paragraph 48A(2)(aa).
256. Under current paragraph 48A(2)(aa), an application for a protection visa includes an application for a visa that, under the Migration Act or the regulations as in force at any time, is or was a visa of the class known as protection visas.
257. Under new paragraph 48A(2)(aa), an application for a protection visa means an application for a visa of a class provided for by section 35A (protection visas – classes of visas), including (without limitation) an application for a visa of a class formerly provided for by subsection 36(1) that was made before the commencement of new

paragraph 48A(2)(aa).

258. The note under paragraph 48A(2)(aa) provides that visas formerly provided for by subsection 36(1) are provided for by subsection 35A(5). Subsection 36(1) was repealed by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, which also inserted section 35A and paragraph 48A(2)(aa).
259. The note mentions visas formerly provided for by subsection 36(1). That subsection is repealed by item 7 of Schedule 2 to the Bill.
260. The remaining paragraphs in current subsection 48A(2) set out other meanings of application for a protection visa.
261. New paragraph 48A(2)(aa) mentions new section 35A, which is inserted in the Migration Act by item 5 of Schedule 2 to the Bill.
262. The amendment in this item clarifies that for the purposes of section 48A, the term application for a protection visa has the meaning set out in new paragraph 48A(2)(aa) as well as the meanings set out in the other paragraphs in subsection 48A(2), as amended by items 10 and 12 of Schedule 2 to the Bill.

Item 12 Subsection 48A(2) (paragraphs (a) and (b) of the definition of application for a protection visa)

263. This item omits –; and|| from current paragraphs 48A(2)(a) and (b) and substitutes –; or||.
264. This amendment complements the amendment to subsection 48A(2) made by item 10 of Schedule 2 to the Bill. That amendment clarifies that for the purposes of section 51

48A of the Migration Act, the new definition of application for a protection visa is exhaustive, rather than inclusive.

265. Consistent with subsection 48A(2) setting out an exhaustive definition of the term –application for a protection visa||, each paragraph of subsection 48A(2) is amended to be disjunctive.
266. The amendment in this item clarifies that for the purposes of section 48A, an application for a protection visa means each type of application described in each paragraph of subsection 48A(2), as amended by this Bill.

#### Division 2 – Safe haven enterprise visas

##### Migration Act 1958

Item 13 Subsection 5(1) (after paragraph (b) of the note at the end of the definition of protection visa)

267. This item inserts new paragraph (ba) immediately after new paragraph (b) of the note at the end of the definition of protection visa, as inserted by item 1 of Schedule 2 to the Bill, in subsection 5(1) of the Migration Act.
268. This amendment is in addition to the amendments to current subsection 5(1) of the Migration Act made by item 1 of Schedule 2 to the Bill.
269. The purpose and effect of this amendment is to make clear that a safe haven enterprise visa is also a protection visa.

Item 14 After paragraph 31(2)(f)

270. This item inserts new paragraph 31(2)(fa) immediately after new paragraph 31(2)(f), which is inserted by item 3 of Schedule 2 to the Bill.
271. This amendment is in addition to the amendments to current subsection 31(2) of the Migration Act made by item 3 of Schedule 2 to the Bill.
272. The purpose and effect of this amendment is to provide that, in addition to the provisions listed in new subsection 31(2), new subsection 35A(3A) can provide for a class of visas to be known as safe haven enterprise visas. .

Item 15 After paragraph 31(3A)(c)

273. Item 15 inserts new paragraph 31(3A)(ca) after new paragraph 31(3A)(c).
274. Following this amendment new subsection 31(3A) provides that to avoid doubt, subsection 31(3) does not require criteria to be prescribed for a visa or visas including, without limitation, visas of the following classes:

special category visas (see section 32);  
permanent protection visas (see subsection 35A(2));  
temporary protection visas (see subsection 35A(3));  
safe haven enterprise visas (see subsection 35A(3A));

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bridging visas (see section 37);  
temporary safe haven visas (see section 37A);  
maritime crew visas (see section 38B).

275. This item relates to current subsection 31(3) of the Migration Act. That subsection provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of the subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).
276. Current subsection 31(3) will be amended by item 4 of Schedule 2 to the Bill to omit the reference to section 36 and insert a reference to new section 35A. New section 35A provides for permanent protection visas, temporary protection visas, and safe haven enterprise visas.
277. The amendment in this item clarify that the regulations may, but need not, prescribe criteria for the classes of visa covered by subsection 31(3) including the classes

provided for by current sections 32, 37, 37A, 38B, and by new section 35A.

278. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

279. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, and 38B, and new section 35A.

280. Further amendments to new subsection 31(3A) can be found at item 1 of Schedule 3 to the Bill.

Item 16 After subsection 35A(3)

281. This item inserts a new subsection 35A(3A) after new subsection 35A(3), which is inserted by item 5 of Schedule 2 to the Bill.

282. New subsection 35A(3A) provides that there is a class of temporary visas to be known as safe haven enterprise visas.

283. The purpose and effect of this amendment is to provide for a new class of protection visa, provided for by the Migration Act, to be known as safe haven enterprise visas. This visa will be a class of temporary visa.

Item 17 After paragraph 46(5)(c)

284. Item 17 inserts new paragraph 46(5)(ca) after new paragraph 46(5)(c).

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285. Following this amendment new subsection 46(5) provides that to avoid doubt, subsections 46(3) and 46(4) do not require criteria to be prescribed in relation to the validity of visa applications, including, without limitation, applications for visas of the following classes:

special category visas (see section 32);  
permanent protection visas (see subsection 35A(2));  
temporary protection visas (see subsection 35A(3));  
safe haven enterprise visas (see subsection 35A(3A));  
bridging visas (see section 37);  
temporary safe haven visas (see section 37A);  
maritime crew visas (see section 38B).

286. This item relates to current subsections 46(3) and 46(4) of the Migration Act. Current subsection 46(3) provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application. Current subsection 46(4) provides that without limiting current subsection 46(3), the regulations may also prescribe:

the circumstances that must exist for an application for a visa of a specified class to be a valid application; and  
how an application for a visa of a specified class must be made; and  
where an application for a visa of a specified class must be made; and  
where an applicant must be when an application for a visa of a specified class is made.

287. The amendment in this item will clarify that regulations may, but need not, prescribe criteria for the classes of visa covered by current subsections 46(3) and 46(4) including the class provided for by new subsection 35A(3A).

288. The amendment in this item complements the amendments made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

289. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new section 35A.

290. Further amendments to new subsection 46(5) can be found at item 6 of Schedule 3 to the Bill.

Item 18 After paragraph 46AA(1)(c)

291. Item 18 inserts new paragraph 46AA(1)(ca) after new paragraph 46AA(1)(c).

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292. Following this amendment new subsection 46AA(1) provides that the following classes of visas are covered by new section 46AA:

special category visas (see section 32);  
permanent protection visas (see subsection 35A(2));  
temporary protection visas (see subsection 35A(3));  
safe haven enterprise visas (see subsection 35A(3A));  
bridging visas (see section 37);  
temporary safe haven visas (see section 37A);  
maritime crew visas (see section 38B).

293. The purpose of new subsection 46AA(1) is to ensure that new section 46AA applies only to the classes of visas set out in new subsection 46AA(1).

294. Further amendments to new section 46AA can be found at item 7 of Schedule 3 to the Bill.

### Division 3 – Application

#### Item 19 Application of amendments

295. This item provides for the application of amendments to the Migration Act made by Divisions 1 and 2 of Part 1 of Schedule 2 to the Bill.

296. Subitem 19(1) provides that the amendments of the Migration Act made by Division 1 of Part 1 of Schedule 2:

apply in relation to an application for a visa that had not been finally determined immediately before the commencement of Division 1 of Part 1 of Schedule 2; and  
apply in relation to an application for a visa made on or after the commencement of Division 1 of Part 1 of Schedule 2;  
in the case of the amendments of section 48A of that Migration Act made by Division 1 of Part 1 of Schedule 2 – apply in relation to an application for a protection visa mentioned in paragraph 48A(1)(a) or 48A(1)(b), or 48A(1AA)(a) or 48A(1AA)(b), of that Migration Act that was made, or taken to have been made:  
o on or after the commencement of Division 1 of Part 1 of Schedule 2; or  
o at any time before the commencement of Division 1 of Part 1 of Schedule 2 (whether or not the application had been finally determined at that time).

297. The purpose of subitem 19(1) is to provide for the visa applications to which the amendments made by Division 1 of Part 1 of Schedule 2 to the Bill apply.

298. Subitem 19(2) provides that the amendments of the Migration Act made by Division 2 of Part 1 of Schedule 2 apply in relation to an application for a visa made on or after the commencement of Division 2 of Part 1 of Schedule 2.

299. The purpose of subitem 19(2) is to provide for the visa applications to which the amendments made by Division 2 of Part 1 of Schedule 2 to the Bill apply.

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### Part 2 – Visa applications taken to be applications for a different visa

#### Division 1 – Amendments

##### Migration Act 1958

#### Item 20 After section 45

300. This item inserts new section 45AA after section 45 of the Migration Act. The heading for new section 45AA is –Application for one visa taken to be an application for a different visa||.

301. The purpose of new section 45AA is to allow for an application for a visa of a particular class to be ‘converted’ into an application for a visa of a different class. New section 45AA provides for the situations in which:

a conversion regulation can be made to ‘convert’ a visa application; the effects of the conversion regulation; and the consequences of the conversion on the first instalment of visa application charges paid in relation to the pre-conversion application, bridging visas, and any accrued rights of a person.

#### Situation in which conversion regulation can be made

302. New subsection 45AA(1) provides that section 45AA applies if:

a person has made a valid application (a pre-conversion application) for a visa (a pre-conversion visa) of a particular class; and the pre-conversion visa has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application; and since the application was made, one or more of the following events has occurred:  
o the requirements for making a valid application for that class of visa change;  
o the criteria for the grant of that class of visa change;  
o that class of visa ceases to exist; and had the application been made after the event (or events) occurred, because of that event (or those events):  
o the application would not have been valid; or  
o that class of visa could not have been granted to the person.

303. New subsection 45AA(1) sets out the conditions that must be satisfied for new section 45AA of the Migration Act to apply. All the conditions in subsection 45AA(1) must be met before a conversion regulation can be made under new section 45AA.

304. In particular, new paragraph 45AA(1)(b) provides that a pre-condition to the conversion regulation being made is that the visa originally applied for (the pre-conversion visa) has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application. New paragraph 45AA(1)(b) is intended to apply before a decision has been made on the visa

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application and to cover the circumstances that could occur after a visa application has been refused.

305. For example, where the applicant seeks judicial review of a decision in relation to the pre-conversion application, or where the application is not finally determined within the meaning of subsections 5(9) and 5(9A) of the Migration Act, then new paragraph 45AA(1)(b) is intended to apply.

306. The effect of new paragraph 45AA(1)(b) is to ensure that regulations can be made to convert a pre-conversion application so long as the pre-conversion visa has not been

granted to the person.

307. The effect of new paragraph 45AA(1)(c) is to ensure that a conversion regulation can only be made if, since the pre-conversion application was made, one or more of the events described in new paragraph 45AA(1)(c) has occurred.
308. The effect of new paragraph 45AA(1)(d) is to clarify that a conversion regulation can only be made in circumstances where a pre-conversion application, if such an application was to be made after the event (or events) described in new paragraph 45AA(1)(c) occurred, would either not have been valid or the class of visa could not have been granted to the person.
309. For example, an applicant applies for a class of visa on 1 September 2014. On 17 September 2014, the applicant has not been granted that class of visa and the requirements for making a valid application for that class of visa change. If the applicant had made the same visa application on 18 September 2014 then the application would not have been valid (due to the 17 September 2014 changes to the application criteria for that visa class). In this situation, subject to the other conditions in new subsection 45AA(1) being met, a conversion regulation could be made under new section 45AA.
310. New subsection 45AA(2) provides that to avoid doubt, under new subsection 45AA(1) new section 45AA may apply in relation to:

classes of visas, including protection visas and any other classes of visas provided for by the Migration Act or the regulations; and  
classes of applicants, including applicants having a particular status; and  
applicants for a visa who are taken to have applied for the visa by the operation of the Migration Act or the regulations.

311. An example is inserted after new subsection 45AA(2). The example provides that if a non-citizen applies for a visa, and then, before the application is decided, gives birth to a child, in some circumstances the child is taken, by the operation of the regulation 2.08 of the Migration Regulations, to have applied for a visa of the same class at the time the child is born (see regulation 2.08 of the Migration Regulations).
312. New subsection 45AA(2) is intended to clarify the operation of new subsection 45AA(1), which provides for the situation when new section 45AA can apply. The intention is for new subsection 45AA(1) to apply in relation to any classes of visas, to any classes of applicants for a visa, and to those applicants who are taken to have applied for a visa by the operation of the Migration Act or the regulations.

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313. The purpose and effect of new paragraph 45AA(2)(a) is to make clear that new subsection 45AA(1) may apply in relation to any classes of visas provided for by the Migration Act or the regulations. For example, a pre-conversion application and a pre-conversion visa (referred to in new paragraph 45AA(1)(a)) can be a visa of any class, such as a Temporary Business Entry (Class UC) visa, provided for by the Migration Act or the regulations.
314. The purpose and effect of new paragraph 45AA(2)(b) is to make clear that new subsection 45AA(1) may apply in relation to any classes of applicants, including applicants having a particular status. An example of an applicant with a particular status is an unauthorised maritime arrival.
315. The purpose and effect of new paragraph 45AA(2)(c) is to make clear that new subsection 45AA(1) may apply in relation to applicants who are taken to have applied for the pre-conversion visa. The example under paragraph 45AA(2)(c) clarifies the intended the operation of paragraph 45AA(2)(c).
316. The purpose of new subsections 45AA(1) and 45AA(2) is to put beyond doubt that where the circumstances set out in subsection 45AA(1) are met, new section 45AA applies to any classes of visas, to any classes of applicant for a visa, and to those applicants that are taken to have applied for a pre-conversion visa due to the operation of the Migration Act or the regulations.

#### Conversion regulation

317. New subsection 45AA(3) provides that for the purposes of the Migration Act, a regulation (a conversion regulation) may provide that, despite anything else in the Migration Act, the pre-conversion application for the pre-conversion visa:  
  
is taken not to be, and never to have been, a valid application for the pre-conversion visa; and  
is taken to be, and always to have been, a valid application (a converted application) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa.
318. A note is inserted under new subsection 45AA(3). The note provides that new section 45AA may apply in relation to a pre-conversion application made before the commencement of new section 45AA (see the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014). For example, a conversion regulation (made after the commencement of new section 45AA) could have the effect that a pre-conversion application for a particular type of visa made on 1 August 2014 (before that commencement):  
  
is taken not to have been made on 1 August 2014 (or ever); and  
is taken to be, and always to have been, a converted application for another type of visa made on 1 August 2014.
319. The effect of new subsection 45AA(3) is to provide for the effects of the conversion regulation on a pre-conversion application. Specifically, a conversion regulation invalidates the pre-conversion application so that it is taken never to have been made. The pre-conversion application will be taken to always have been a converted

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application. The conversion regulation can be made that converts a pre-conversion application of a specified visa class into a converted application for a different specified visa class.

320. The purpose of this provision is to ensure that a clear power is available in the Migration Act to allow regulations to be made that convert an application for a visa of

a particular class to be an application for a different class of visa.

321. New subsection 45AA(4) provides that without limiting new subsection 45AA(3), a conversion regulation may:

prescribe a class or classes of pre-conversion visas; and  
prescribe a class of applicants for pre-conversion visas; and  
prescribe a time (the conversion time) when the regulation is to start to apply in relation to a pre-conversion application, including different conversion times depending on the occurrence of different events.

322. The effect of new subsection 45AA(4) is to make clear that the conversion regulation may provide for:

the class, or classes, of pre-conversion visas that are being converted; and  
the class of applicants who have applied for that pre-conversion visa; and  
the time, or times, when the conversion regulation starts to apply to convert the pre-conversion application.

323. New subsection 45AA(4) is not intended to limit the breadth of matters that a conversion regulation may prescribe under new subsection 45AA(3).

324. In particular, new paragraph 45AA(4)(c) makes clear that a conversion regulation may prescribe the time from which the conversion regulation starts to apply (the conversion time). The conversion time is the point in time when the conversion regulation converts the pre-conversion application. The intention is that the conversion time may be specified by reference to the occurrence of an event or multiple events.

#### Visa Application charge

325. New subsection 45AA(5) provides that if an amount has been paid as the first instalment of the visa application charge for a pre-conversion application, then, at and after the conversion time in relation to the application:

that payment is taken not to have been paid as the first instalment of the visa application charge for the pre-conversion application; and  
that payment is taken to be payment of the first instalment of the visa application charge for the converted application, even if the first instalment of the visa application charge that would otherwise be payable for the converted application is greater than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application; and  
in a case in which the first instalment of the visa application charge payable for the converted application is less than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application, no refund is payable in respect of the difference only for that reason.

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326. A note is inserted under new subsection 45AA(5). The new note provides: for the visa application charge, see sections 45A, 45B and 45C.

327. The effect of new subsection 45AA(5) is to ensure that, if the first instalment of the visa application charge for the pre-conversion application has been paid by the applicant, then that visa application charge is taken to have been paid for the converted application.

328. If the first instalment of the visa application charge for the pre-conversion application is less than the first instalment of the visa application charge for the converted application, then the amount paid will be taken to be payment for the first instalment of the visa application charge for the converted application. The applicant will not be required to pay the difference between the first instalment of the visa application charge for the pre-conversion application and the converted application.

329. If the first instalment of the visa application charge for the pre-conversion application is greater than the first instalment of the visa application charge for the converted application, the difference between the first instalment of the visa application charge for the pre-conversion application and the converted application will not be refunded to the applicant on the basis of the conversion. However, depending on the applicant's particular circumstances, other grounds for the refund of the first instalment of the visa application charge under the Migration Act and the Migration Regulations may apply.

330. The purpose of this provision is to ensure that, despite any differences in amount, any first instalment of the visa application charge paid for the pre-conversion application is transferred across to be the first instalment of the visa application charge for the converted application.

#### Effect on bridging visas

331. New subsection 45AA(6) provides that for the purposes of the Migration Act, if, immediately before the conversion time for a pre-conversion application, a person held a bridging visa because the pre-conversion application had not been finally determined, then, at and after the conversion time, the bridging visa has effect as if it had been granted because of the converted application.

332. New subsection 45AA(7) provides that for the purposes of the Migration Act, if, immediately before the conversion time for a pre-conversion application, a person had made an application for a bridging visa because of the pre-conversion application, but the bridging visa application had not been finally determined, then, at and after the conversion time:

the bridging visa application is taken to have been applied for because of the converted application; and  
the bridging visa (if granted) has effect as if it were granted because of the converted application.

333. A note is inserted after new subsection 45AA(7). The new note provides that the Migration Act and the regulations would apply to a bridging visa to which new subsection 45AA(6) or 45AA(7) applies, and to when the bridging visa would cease to have effect, in the same way as the Migration Act and the regulations would apply in

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relation to any bridging visa. For example, such a bridging visa would generally cease to be in effect under section 82 of the Migration Act if and when the substantive visa is

granted because of the converted application.

334. The effect and purpose of new subsection 45AA(6) is to ensure that the conversion of the pre-conversion application will not adversely affect the migration status of the applicant who made the pre-conversion application. This amendment is intended to ensure that, despite the conversion occurring, the applicant for the pre-conversion visa will continue to hold the bridging visa granted in association with the pre-conversion application. This is because the bridging visa granted in association with the pre-conversion application will have effect as if it had been granted because of the converted application.
335. The effect and purpose of new subsection 45AA(7) is to ensure that the conversion of the pre-conversion application will not invalidate an application for a bridging visa that was made because of the pre-conversion application and had not been finally determined immediately before the conversion time. A bridging visa application that is made because of the pre-conversion application, but is not finally determined, is taken to be made because of the converted application. If such a bridging visa is granted, it will be taken to have been granted because of the converted application.
336. The relevant provisions in the Migration Act and the Migration Regulations which affect the cessation of a bridging visa will apply normally to a bridging visa covered by new subsections 45AA(6) or 45AA(7). For example, a bridging visa to which new subsection 45AA(6) or 45AA(7) applies will cease upon cancellation, in accordance with current subsection 82(1) of the Migration Act. It is the intention for a bridging visa to which new subsections 45AA(6) or 45AA(7) applies to be subject to the same provisions as a bridging visa to which new subsections 45AA(6) and 45AA(7) do not apply.

Conversion regulation may affect accrued rights etc.

337. New subsection 45AA(8) provides that to avoid doubt:

subsection 12(2) of the Legislative Instruments Act 2003 does not apply in relation to the effect of a conversion regulation (including a conversion regulation enacted by the Parliament); and subsection 7(2) of the Acts Interpretation Act 1901, including that subsection as applied by section 13 of the Legislative Instruments Act 2003, does not apply in relation to the enactment of new section 45AA or the making of a conversion regulation (including a conversion regulation enacted by the Parliament).

338. Current subsection 12(2) of the Legislative Instruments Act 2003 provides that a legislative instrument, or a provision of a legislative instrument, has no effect if, apart from subsection 12(2), it would take effect before the date it is registered and as a result:

the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration would be affected so as to disadvantage that person; or

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Liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.

339. Current subsection 7(2) of the Acts Interpretation Act 1901 provides that if an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:

revive anything not in force or existing at the time at which the repeal or amendment takes effect; or  
affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or  
affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or  
affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the affected Act or part; or  
affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

340. New subsection 45AA(8) has the effect of excluding the operation of subsection 12(2) of the Legislative Instruments Act 2003 and subsection 7(2) of the Acts Interpretation Act 1901. The purpose of this subsection is to ensure that a conversion regulation made under new section 45AA may affect the accrued rights of an applicant and is, nonetheless, not prevented for doing so by subsection 12(2) of the Legislative Instruments Act 2003 and subsection 7(2) of the Acts Interpretation Act 1901.

#### Division 2 – Application

##### Item 21 Application of amendments

341. Item 21 provides that the amendment of the Migration Act made by Division 1 of Part 2 of Schedule 2 to the Bill, to insert new section 45AA of the Migration Act, applies in relation to an application for a pre-conversion visa made before, on or after the commencement of Part 2.

342. The effect and purpose of this item is to ensure that new section 45AA applies in relation to a visa application that is made before, on or after the commencement of Part 2 of Schedule 2 to the Bill.

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#### Part 3 – Deemed visa applications

##### Division 1 – Amendments

###### Migration Act 1958

##### Item 22 At the end of section 48

343. This item inserts new subsection 48(4) in current section 48 of the Migration Act.

344. Current section 48 limits further applications by a person in the migration zone whose visa has been cancelled, or whose application for a visa has been refused, since they last entered Australia.
345. New subsection 48(4) mentions paragraphs 48(1)(b) and 48(1A)(b), as inserted in the Migration Act by Item 1 of Schedule 1 to the Migration Legislation Amendment Act (No. 1) 2014.
346. Under subsection 48(1), a non-citizen in the migration zone who meets the requirements of paragraphs 48(1)(a) and 48(1)(b) may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 or have an application for such a visa made on his or her behalf, but not for a visa of any other class.
347. The requirement in paragraph 48(1)(a) is that the non-citizen does not hold a substantive visa.
348. The requirement in paragraph 48(1)(b) is that the non-citizen is a person who, after last entering Australia:
- was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), and 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas).
349. Under subsection 48(1A), a non-citizen in the migration zone who meets the requirements of paragraphs 48(1A)(a) and 48(1A)(b) may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 or have an application for such a visa made on his or her behalf, but not for a visa of any other class.
350. The requirement in paragraph 48(1A)(a) is that the non-citizen does not hold a substantive visa.
351. The requirement in paragraph 48(1A)(b) is that the non-citizen is a person who, after last entering Australia, was refused a visa (other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B) for which an application had been made on the non-citizen's behalf, whether or not:
- the application has been finally determined; or
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- the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or  
the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor.
352. A person who is affected by section 48 may only apply for a class of visa that is prescribed in regulation 2.12 of the Migration Regulations.
353. New subsection 48(4) provides that in paragraphs 48(1)(b) and 48(1A)(b):
- a reference to an application for a visa made by or on behalf of a non-citizen includes a reference to an application for a visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation; and  
a reference to the cancellation of a visa includes a reference to the cancellation of a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.
354. This amendment clarifies that an application for a visa referred to in subparagraph 48(1)(b)(i) and paragraph 48(1A)(b) includes an application for a visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation.
355. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by item 38 of Schedule 2 to this Bill.
356. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.
357. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused (other than a refusal under current section 501, 501A or 501B), the non-citizen would only be able to apply for a visa in accordance with section 48.
358. This amendment also clarifies that a reference to the cancellation of a visa referred to in subparagraph 48(1)(b)(ii) includes a reference to the cancellation of a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.
359. This amendment puts beyond doubt that section 48 operates to allow a non-citizen to only apply for a visa in accordance with section 48, in circumstances where the previous cancelled visa was a visa that the person was taken to have applied for, or the previous visa refusal was in relation to an application that the person was taken to have made.

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Item 23 After subsection 48A(1C)

360. This item inserts new subsections 48A(1D) and 48A(1E) in current section 48A of the Migration Act.
361. Current section 48A prevents further protection visa applications by a person in the migration zone whose protection visa has been cancelled, or whose application for a

protection visa has been refused.

362. Current subsection 48A(1) is amended by Items 2 and 3 of Schedule 1 to the Migration Legislation Amendment Act (No. 1) 2014. Item 3 inserted subsection 48A(1AA).

363. Current subsection 48A(1) provides that subject to section 48B, a non-citizen who, while in the migration zone, has made:

an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

364. Subsection 48A(1AA) provides that subject to section 48B, if:

an application for a protection visa is made on a non-citizen's behalf while the non-citizen is in the migration zone; and  
the grant of the visa has been refused, whether or not:  
o the application has been finally determined; or  
o the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or  
o the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor;

the non-citizen may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

365. Current subsection 48A(1B) provides that subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

366. In general terms, current subsection 48B allows the Minister to determine that section 48A does not prevent an application for a protection visa within a particular period, if the Minister thinks that it is in the public interest to do so.

367. New subsection 48A(1D) provides that in current paragraphs 48A(1)(a) and 48A(1)(b) and 48A(1AA)(a) and 48A(1AA)(b), a reference to an application for a protection visa made by or on behalf of a non-citizen includes a reference to an application for a

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protection visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation.

368. New subsection 48A(1E) provides that in current subsection 48A(1B), a reference to the cancellation of a protection visa includes a reference to the cancellation of a protection visa in relation to which an application for a protection visa is taken to have been made by the operation of the Migration Act or a regulation.

369. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by Item 38 of Schedule 2 to this Bill.

370. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

371. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused, the non-citizen would be prevented from making a further application for any class of protection visa by section 48A.

372. This amendment puts beyond doubt that section 48A prevents a non-citizen from making a further application for a protection visa, in circumstances where the previous cancelled protection visa was a visa that the person was taken to have applied for, or the previous protection visa refusal was in relation to an application that the person was taken to have made.

373. New subsections 48A(1D) and 48A(1E) do not limit the effect of current subsections 48A(1C) and 48A(2).

374. In general terms, current subsection 48A(1C) sets out a non-exhaustive list of circumstances when current subsections 48A(1) and 48A(1B) apply in relation to a non-citizen.

375. Current subsection 48A(2) is amended by items 10, 11 and 12 of Schedule 2 to the Bill. Following amendment, subsection 48A(2) sets out an exhaustive definition of application for a protection visa.

Item 24 After subsection 501E(1A)

376. This item inserts new subsection 501E(1B) in current section 501E of the Migration Act.

377. Current section 501E prevents applications for certain visas by a person whose visa has been cancelled or whose visa application has been refused in certain circumstances.

378. Current section 501E is amended by Items 4 and 5 of Schedule 1 to the Migration Legislation Amendment Act (No. 1) 2014. Item 5 inserted subsection 501E(1A).

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379. Current subsection 501E(1) provides that a person is not allowed to make an application for a visa, or have an application for a visa made on the person's behalf, at a particular time (the application time) that occurs during a period throughout which the person is in the migration zone if the requirements in current paragraphs 501E(1)(a)

and 501E(1)(b) are met.

380. The requirement in current paragraph 501E(1)(a) is that at an earlier time during that period, the Minister made a decision under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person.

381. The requirement in current paragraph 501E(1)(b) is that the decision mentioned in current paragraph 501E(1)(a) was neither set aside nor revoked before the application time.

382. Current subsection 501E(1A) provides that in relation to the Minister's decision to refuse to grant a visa to the person, as mentioned in current paragraph 501E(1)(a), it does not matter whether:

the application for the visa was made on the person's behalf; or  
the person knew about, or understood the nature of, the application for the visa due to:  
o any mental impairment; or  
o the fact that the person was, at the time the application was made, a minor.

383. Current subsection 501E(2) provides that current subsection 501E(1) does not prevent a person, at the application time, from making an application for a protection visa or a visa specified in the regulations for the purposes of subsection 501E(2).

384. Current regulation 2.12AA of the Migration Regulations specifies the Bridging R (Class WR) visa for the purposes of current paragraph 501E(2)(b).

385. New subsection 501E(1B) provides that in current paragraph 501E(1)(a) and subsection 501E(1A), the reference to a refusal to grant a visa, or to the cancellation of a visa, includes a reference to such a refusal or cancellation in relation to a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.

386. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of the Migration Regulations. New regulation 2.08F is inserted by Item 38 of Schedule 2 to this Bill.

387. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

388. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused under section 501, 501A or 501B, the

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non-citizen would be prevented from making an application for a visa in accordance with current section 501E.

389. This amendment puts beyond doubt that section 501E prevents a non-citizen from making an application for a visa (except in accordance with section 501E), in circumstances where the previous cancelled visa was a visa that the person was taken to have applied for, or the previous visa refusal was in relation to an application that the person was taken to have made.

## Division 2 – Application

### Item 25 Application of amendments

390. The amendments made by Division 1 of Part 3 of Schedule 2 to the Bill apply in relation to an application for a visa that is taken to have been made before, on or after the commencement of Part 3 of Schedule 2 to the Bill.

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## Part 4 – Permanent protection visas and temporary protection visas

### Division 1 – Main amendments

#### Migration Regulations 1994

##### Item 26 Regulation 1.03

391. This item inserts a definition of protection visa into regulation 1.03 of the Migration Regulations. Regulation 1.03 contains definitions for terms used in the Migration Regulations.

392. The new definition of protection visa in regulation 1.03 provides that protection visa has the meaning given by new section 35A of the Migration Act. This definition is a signpost to guide readers as the term "protection visa" is used throughout the Migration Regulations.

393. A note is inserted after the new definition of protection visa in regulation 1.03. The new note provides that new section 35A covers the following:

permanent protection visas (classified by these Migration Regulations as Protection (Class XA) visas) when this definition commenced); and other protection visas formerly provided for by subsection 36(1) of the Migration Act;  
temporary protection visas (classified by these Migration Regulations as Temporary Protection (Class XD) visas when this definition commenced); any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

See also section 36 and Subdivision AL of Division 3 of Part 2 of the Migration Act.

394. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.

395. The new definition of protection visa and the associated note mirrors the definition of

protection visa and the note inserted into the Migration Act by item 1 of Schedule 2 to the Bill.

396. The effect of this amendment is to define the term –protection visa|| to mean all the protection visas covered by new section 35A, including the protection visas that can be prescribed by the Migration Regulations, and historic classes of protection visas which were formerly provided for by subsection 36(1) of the Migration Act. Accordingly, a reference to –protection visa|| in the Migration Regulations can mean any one of the visas covered in section 35A or under previous section 36.
397. The purpose of this amendment is to ensure that –protection visa|| is used as an umbrella term to capture all the protection visas provided for under the Migration Act and the Migration Regulations.

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**Item 27 Subparagraph 1401(2)(a)(i) of Schedule 1**

398. This item repeals subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations.
399. Current subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations provides for the first instalment of visa application charge (payable at the time the application is made) for an application for a Protection (Class XA) visa made by an applicant who is in immigration detention and has not been immigration cleared.
400. This repeal is consequential to the amendments made in item 29 of Schedule 2 to the Bill, which prevent a person who has not been immigration cleared from making a valid application for a Protection (Class XA) visa. Consequently, subparagraph 1401(2)(a)(i) is no longer necessary.

**Item 28 Subparagraph 1401(2)(a)(ii) of Schedule 1**

401. This item repeals subparagraph 1401(2)(a)(ii) of Schedule 1 to the Migration Regulations.
402. Current subparagraph 1401(2)(a)(ii) of Schedule 1 to the Migration Regulations provides for the first instalment of visa application charge (payable at the time the application is made) for an application for a Protection (Class XA) visa for any applicant other than an applicant who is in immigration detention and has not been immigration cleared.
403. This repeal is consequential to the amendments made in item 27 of Schedule 2 to the Bill. The repeal of subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations removes the distinction in visa application charge payable by different cohorts of applicants. Consequently, all applicants will be required to pay the same visa application charge in order to make a valid application for a Protection (Class XA) visa.

**Item 29 At the end of subitem 1401(3) of Schedule 1**

404. This item adds new paragraph 1401(3)(d) to the end of subitem 1401(3) of Schedule 1 to the Migration Regulations.
405. Item 1401 of Schedule 1 to the Migration Regulations provides the requirements for making a valid application for a Protection (Class XA) visa, which is the class of permanent visas provided for by new subsection 35A(2) of the Migration Act.
406. In accordance with new subsection 35A(6) of the Migration Act, as inserted by item 5 of Schedule 2 to the Bill, an applicant for a Protection (Class XA) visa must meet all of the criteria set out in item 1401 to make a valid application for a Protection (Class XA) visa.
407. Subitem 1401(3) sets out the other criteria that must be met by an applicant to make a valid application for a Protection (Class XA) visa. The criteria in subitem 1401(3) are in addition to the criteria contained in subitems 1401(1) and 1401(2).

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408. New paragraph 1401(3)(d) provides that an application by a person for a Protection (Class XA) visa is valid only if the person:

does not hold, and has not ever held, a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; and  
 does not hold, and has not ever held, a Temporary Safe Haven (Class UJ) visa; and  
 does not hold, and has not ever held, a Temporary (Humanitarian Concern) (Class UO) visa; and  
 held a visa that was in effect on the person's last entry into Australia; and  
 is not an unauthorised maritime arrival; and  
 was immigration cleared on the person's last entry into Australia.

409. The effect of new paragraph 1401(3)(d) is that a person can only make a valid application for a Protection (Class XA) visa if they meet the requirements in new paragraph 1401(3)(d) of Schedule 1 to the Migration Regulations.
410. New subparagraph 1401(3)(d)(i) makes clear that a person can only make a valid application for a Protection (Class XA) visa if they do not hold, and have not ever held, a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013.
411. The purpose of this amendment is to account for the Subclass 785 (Temporary Protection) visa, which was a subclass of the Protection (Class XA) visa prior to 2 December 2013. On 9 August 2008, Subclass 785 (Temporary Protection) visas were repealed from the Migration Regulations. The Migration Amendment (Temporary Protection Visas) Regulation 2013 re-introduced Subclass 785 (Temporary Protection) visas on 18 October 2013 as a subclass of the Protection (Class XA) visa. The Migration Amendment (Temporary Protection Visas) Regulation 2013 was disallowed by the Senate on 2 December 2013.
412. The Subclass 785 (Temporary Protection) visa is reintroduced by item 31 of Schedule 2 to the Bill. The new Subclass 785 (Temporary Protection) visa is a subclass of the Temporary Protection (Class XD) visa rather than being a subclass of the Protection (Class XA) visa as it was prior to 2 December 2013.

413. The purpose of new paragraph 1401(3)(d) is to implement the government's intention that an applicant to whom paragraph 1401(3)(d) applies, will not be eligible to make a valid application for a Protection (Class XA) visa.

Item 30 At the end of Schedule 1

414. This item adds new item 1403 at the end of Schedule 1 to the Migration Regulations. The heading for the new Item 1403 is -Temporary Protection (Class XD)||.

415. In accordance with new subsection 35A(3) of the Migration Act, as inserted by item 5 of Schedule 2 to the Bill, temporary protection visas are classified by the Migration Regulations as Temporary Protection (Class XD) visas. New paragraph 35A(6)(b) of the Migration Act allows for criteria for protection visas to be prescribed by regulation for the purposes of section 31 of the Migration Act.

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416. In particular, subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 35A).

417. Item 1403 of Schedule 1 to the Migration Regulations provides the requirements for making a valid application for a Temporary Protection (Class XD) visa. The effect of this amendment is that a person making an application for a Temporary Protection (Class XD) visa will only be able to make a valid application if they meet the requirements in new Item 1403 of Schedule 1.

418. Subitem 1403(1) provides that Form 866 applies to Temporary Protection (Class XD) visas. The effect of this provision is that an application for a Temporary Protection (Class XD) visa must be made using a Form 866 visa application form. An application for a Protection (Class XA) visa must also be made using Form 866.

419. Subitem 1403(2) provides that the visa application charge is payable in two instalments as follows:

first instalment (payable at the time the application is made):  
 for an applicant who is in immigration detention and has not been immigration cleared, the amount is 'nil';  
 for any other applicant, the base application charge is \$35 and the additional applicant charge (whether the applicant is over or under 18 years of age) is 'nil';  
 the second instalment (payable before grant of visa) is nil.

420. A note is inserted after paragraph 1403(2)(a). The new note provides that regulation 2.12C explains the components of the first instalment of visa application charge and specifies the amounts of subsequent temporary application charge and non-internet application charge. Not all of the components may apply to a particular application. Additional applicant charge is paid by an applicant who claims to be a member of the family unit of another applicant and seeks to combine the application with that applicant's application.

421. The effect of this amendment is that an applicant must have paid the required visa application charge for the Temporary Protection (Class XD) visa application to be valid.

422. Subitem 1403(3) provides for other requirements for a valid Temporary Protection (Class XD) visa application as follows:

Application must be made in Australia.  
 Applicant must be in Australia.  
 Application by a person claiming to be a member of the family unit of a person who is an applicant for a Temporary Protection (Class XD) visa may be made at the same time and place as, and combined with, the application by that person.  
 An application by a person for a Temporary Protection (Class XD) visa is valid only if the person:

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- holds, or has ever held, a Temporary Protection (Class XD) visa or a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; or
- holds, or has ever held, a Temporary Safe Haven (Class UJ) visa; or
- holds, or has ever held, a Temporary (Humanitarian Concern) (Class UO) visa; or
- did not hold a visa that was in effect on the person's last entry into Australia; or
- is an unauthorised maritime arrival; or
- was not immigration cleared on the person's last entry into Australia.

423. The criteria in items 1401 and 1403 of Schedule 1 to the Migration Regulations operate so that an applicant who is eligible to apply for a Protection (Class XA) visa will not be eligible to apply for a Temporary Protection (Class XD) visa and vice versa. The purpose is to implement the Government's intention that an applicant to whom new paragraph 1403(3)(d) applies, will not be eligible to make a valid application for a Protection (Class XA) visa. Such an applicant will only be eligible to make a valid application for a Temporary Protection (Class XD) visa.

424. New subitem 1403(4) provides that the relevant subclass for the Temporary Protection (Class XD) visa is 785 (Temporary Protection). The subclass number for this visa is the same as the subclass number for the Subclass 785 (Temporary Protection) visa that was repealed on 9 August 2008, re-introduced by the Migration Amendment (Temporary Protection Visas) Regulation 2013 on 18 October 2013 and then disallowed by the Senate on 2 December 2013. However, as noted above, the new Subclass 785 (Temporary Protection) visa is a visa subclass of the Temporary Protection (Class XD) visa. The Subclass 785 (Temporary Protection) visa that existed on and before 2 December 2013 is a visa subclass of the Protection (Class XA) visa.

Item 31 After Part 773 of Schedule 2

425. This item inserts new Subclass 785 after Part 773 of Schedule 2 to the Migration Regulations. The heading is -Subclass 785 – Temporary Protection||. This item provides for:

the criteria for the grant of the new Subclass 785 (Temporary Protection) visa; the circumstances applicable to grant; when the visa is in effect; and the conditions to be attached to the visa.

#### 785.1 – Interpretation

426. New clause 785.111 provides that for the purposes of Part 785, a person (A) is a member of the same family unit as another person (B) if:

A is a member of B's family unit; or  
 B is a member of A's family unit; or  
 A and B are members of the family unit of a third person.

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#### 785.2 – Primary criteria

427. New clause 785.2 provides for the primary criteria for the grant of a Subclass 785 (Temporary Protection) visa. The new note after new clause 785.2 provides that all applicants must satisfy the primary criteria.
428. The purpose of the new note is to make clear that all applicants seeking to satisfy the criteria for the grant of a Subclass 785 (Temporary Protection) visa must satisfy the primary criteria.
429. The primary criteria for the grant of a Subclass 785 (Temporary Protection) visa largely replicate the primary criteria for the grant of a Subclass 866 (Protection) visa.

#### 785.21 – Criteria to be satisfied at time of application

430. New clause 785.21 provides for the primary criteria to be satisfied at the time of application for the Subclass 785 (Temporary Protection) visa.
431. New subclause 785.211(1) provides that new subclause 785.211(2) or 785.211(3) is satisfied.
432. New subclause 785.211(2) provides that the applicant:

claims that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant; and makes specific claims as to why that criterion is satisfied.

433. The new note after new subclause 785.211(2) provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.
434. New subclause 785.211(3) provides that the applicant claims to be a member of the same family unit as a person:

to whom subclause 785.211(2) applies; and who is an applicant for a Subclass 785 (Temporary Protection) visa.

435. A new note is inserted after new subclause 785.211(3). The note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.

436. The purpose of new clause 785.21 is to provide that, at the time of application, the applicant must claim to be a person, or a member of the same family unit as a person in respect of whom Australia has protection obligations under paragraphs 36(2)(a) or 36(2)(aa) of the Migration Act.

#### 785.22 – Criteria to be satisfied at time of decision

437. New clause 785.22 provides for the primary criteria to be satisfied at the time of decision for a Subclass 785 (Temporary Protection) visa.
438. New subclause 785.221(1) provides that new subclause 785.221(2) or 785.221(3) is satisfied.

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439. New subclause 785.221(2) provides that the Minister is satisfied that a criterion mentioned in paragraphs 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant.
440. A new note is inserted after new subclause 785.221(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.

441. New subclause 785.221(3) provides that the Minister is satisfied that:

the applicant is a member of the same family unit as an applicant mentioned in subclause 785.221(2); and the applicant mentioned in subclause 785.221(2) has been granted a Subclass 785 (Temporary Protection) visa.

442. The new note after subclause 785.221(3) provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.

443. The purpose of new clause 785.221 is to provide that, at the time of decision, the Minister must be satisfied that the applicant is either:

a person in respect of whom Australia has protection obligations under paragraph 36(2)(a) or 36(2)(aa) of the Migration Act; or a member of the same family unit as a person in respect of whom Australia has protection obligations under paragraph 36(2)(a) or 36(2)(aa) of the Migration Act and that person has been granted a Subclass 785 (Temporary Protection) visa.

444. New clause 785.222 provides that the applicant has undergone a medical examination carried out by any of the following (a relevant medical practitioner):

a Medical Officer of the Commonwealth;  
 a medical practitioner approved by the Minister for the purposes of paragraph 785.222(b);  
 a medical practitioner employed by an organisation approved by the Minister for the purposes of paragraph 785.222(c).

445. The purpose of new clause 785.222 is to ensure that an applicant must meet health requirements. The health requirements are the same as those for Subclass 866 (Protection) visas.
446. New subclause 785.223(1) specifies that one of new subclauses 785.223(2) to 785.223(4) must be satisfied.

447. New subclause 785.223(2) provides that the applicant has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia.

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448. New subclause 785.223(3) provides that the applicant is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested the examination mentioned in subclause 785.223(2).

449. New subclause 785.223(4) provides that the applicant is a person:

who is confirmed by a relevant medical practitioner to be pregnant; and  
 who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and  
 who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and  
 who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

450. The purpose of new clause 785.223 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.

451. New subclause 785.224(1) provides that a relevant medical practitioner has considered:
- the results of any tests carried out for the purposes of the medical examination required under clause 785.222; and  
 the radiological report (if any) required under clause 785.223 in respect of the applicant.

452. New subclause 785.224(2) provides that if the relevant medical practitioner:

is not a Medical Officer of the Commonwealth; and  
 considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community;

the relevant medical practitioner has referred any relevant results and reports to a Medical Officer of the Commonwealth.

453. The purpose of new clause 785.224 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.

454. New clause 785.225 provides if a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

455. The purpose of new clause 785.225 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.

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456. New clause 785.226 provides that the applicant:

satisfies public interest criteria 4001 and 4003A; and  
 if the applicant had turned 18 at the time of application – satisfies public interest criterion 4019.

457. Public interest criterion 4001 is a mechanism by which the character test in subsection 501(6) of the Migration Act is taken into account for an applicant.

458. Public interest criterion 4003A requires that the applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.

459. Public interest criterion 4019 requires that the applicant sign a values statement relevant to the visa subclass or, if compelling circumstances exist, the Minister has decided that the applicant is not required to sign a values statement.

460. The purpose of new clause 785.226 is to replicate the public interest criteria that currently apply to the Subclass 866 (Protection) visa.

461. New clause 785.227 provides that the Minister is satisfied that the grant of the visa is in the national interest.

462. The purpose of new clause 785.227 is that the Minister is able to refuse to grant a Subclass 785 (Temporary Protection) visa where the Minister is not satisfied that the grant is in the national interest.

463. New subclause 785.228(1) provides that if the applicant is a child to whom subregulation 2.08(2) applies, subclause 785.228(2) is satisfied.

464. New subclause 785.228(2) provides the Minister is satisfied that:

the applicant is a member of the same family unit as an applicant to whom subclause 785.221(2) applies; and the applicant to whom subclause 785.221(2) applies has been granted a Subclass 785 (Temporary Protection) visa.

465. Two notes are inserted after new clause 785.228. New note 1 provides that subregulation 2.08(2) applies, generally, to a child born to a non-citizen after the non-citizen has applied for a visa but before the application is decided.

466. New note 2 provides that new subclause 785.221(2) applies if the Minister is satisfied that Australia has protection obligations in respect of the applicant as mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act.

467. Current subregulation 2.08(1) provides:

if a non-citizen applies for a visa; and after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to that non-citizen; then

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the child is taken to have applied for a visa of the same class at the time he or she was born; and the child's application is taken to be combined with the non-citizen's application.

468. Current subregulation 2.08(2) provides that despite any provision in Schedule 2 to the Migration Regulations, a child referred to in subregulation 2.08(1):

must satisfy the criteria to be satisfied at time of decision; and at the time of decision, must satisfy a criterion (if any) applicable at the time of application that an applicant must be sponsored, nominated or proposed.

469. The effect of new clause 785.228 is to ensure that a child who is taken to have applied for a Subclass 785 (Temporary Protection) visa due to subregulation 2.08(1) is only eligible for the grant of the visa if they are a member of the same family unit as a person who was granted a Subclass 785 (Temporary Protection) visa on the basis of being a person to whom Australia has protection obligations, as mentioned in paragraph 36(2)(a) and 36(2)(aa) of the Migration Act.

470. The purpose of new clause 785.228 is to ensure that a child is eligible to be granted the same visa that is held by a member of the same family unit.

#### 785.3 – Secondary criteria

471. New clause 785.3 provides for secondary criteria which must be satisfied for the grant of a Subclass 785 (Temporary Protection) visa. The new note to new clause 785.3 provides that all applicants must satisfy the primary criteria.

472. The purpose of the note is to make clear that all applicants seeking to satisfy the criteria for the grant of a Subclass 785 (Temporary Protection) visa must satisfy the primary criteria.

#### 785.4 – Circumstances applicable to grant

473. New clause 785.4 provides for the circumstances applicable to the grant of a Subclass 785 (Temporary Protection) visa.

474. New clause 785.411 provides that the applicant must be in Australia when the visa is granted.

475. The purpose of new clause 785.411 is to make clear that an applicant must be in Australia to be granted a Subclass 785 (Temporary Protection) visa. This requirement is the same as the current requirement for a Subclass 866 (Protection) visa.

#### 785.5 – When visa is in effect

476. New clause 785.5 provides for when the Subclass 785 (Temporary Protection) visa is in effect.

477. New clause 785.511 provides that a temporary visa permitting the holder to remain in Australia until:

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if the holder of the temporary visa (the first visa) makes a valid application for another Subclass 785 (Temporary Protection) visa within 3 years after the grant of the first visa – the day when the application is finally determined or withdrawn; or

in any other case – the earlier of:

- o the end of 3 years from the date of grant of the first visa; and
- o the end of any shorter period, specified by the Minister, from the date of grant of the first visa.

478. The effect of this amendment is that if the Subclass 785 (Temporary Protection) visa holder does not apply for another Subclass 785 (Temporary Protection) visa before the cessation of their temporary visa, then the temporary visa will cease at the earlier of:

the end of 3 years from the date of grant of the first visa; and the end of any shorter period, specified by the Minister, from the date of grant of the first visa.

479. A Subclass 785 (Temporary Protection) visa can be granted for any period, with a maximum period of 3 years.

480. If the person applies for another Subclass 785 (Temporary Protection) visa ('second visa') while they are the holder of a Subclass 785 (Temporary Protection) visa ('first visa'), then the first visa will continue to be in effect until the day the application for the second visa is finally determined or withdrawn.

481. For example, a person is granted a first visa on 17 September 2014, and the Minister has specified for that visa to cease 1 year from the date of grant (i.e. on 17 September 2015). The person makes a valid application for a second visa 10 months after the date

of grant (i.e. on 17 July 2015), while still being the holder of the first visa. The application for the second visa is finally determined on 17 July 2016. Under new clause 785.511, the person's first visa will cease on 17 July 2016.

482. If the person makes an application for a second visa on 1 January 2016, then the first visa will have already ceased on 17 September 2015 because the person did not apply for the second visa before the cessation of the first visa.
483. The purpose of new clause 785.511 is to encourage a holder of a Subclass 785 (Temporary Protection) visa to apply for the second visa before the cessation of the first visa. This will ensure that the first visa will not cease until the day the second visa application is finally determined or withdrawn, and that the person will continue to receive any benefits associated with a Subclass 785 (Temporary Protection) visa. If the person's first visa ceases, then the person would be required to apply for, and be granted, a bridging visa in order to become a lawful non-citizen. The bridging visa may not have the same benefits as a Subclass 785 (Temporary Protection) visa.

#### 785.6 – Conditions

484. New clause 785.6 provides for the conditions to be attached to a Subclass 785 (Temporary Protection) visa.
485. New clause 785.611 provides for conditions 8503 and 8565 to apply.
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486. The effect of new clause 785.611 is that those conditions apply by operation of law to a Subclass 785 (Temporary Protection) visa. If a visa holder does not comply with a condition of the visa, their visa may be cancelled under paragraph 116(1)(b) of the Migration Act.
487. Condition 8503 provides that the visa holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia.
488. A substantive visa is defined in subsection 5(1) of the Migration Act as a visa other than a bridging visa, criminal justice visa, or an enforcement visa.
489. The effect of this condition is that, unless the Minister waives the condition under current subsection 41(2A) of the Migration Act, a person who holds, or who held, a visa with condition 8503 attached cannot make a valid application for a visa (other than a protection visa) while they remain in Australia (see current subsection 46(1A) of the Migration Act).
490. Condition 8503 allows a visa holder to be eligible for the grant of a protection visa. However, a holder of a Temporary Protection (Class XD) visa is only eligible for the grant of a Temporary Protection (Class XD) visa because they cannot validly apply for a Protection (Class XA) visa. In other words, the imposition of condition 8503 on a Subclass 785 (Temporary Protection) visa would not allow the visa holder to have access to all classes of protection visas.

491. The purpose of making condition 8503 a mandatory condition for a Subclass 785 (Temporary Protection) visa is to implement the government's intention that a Subclass 785 (Temporary Protection) visa holder is not able to apply for any substantive visas aside from a protection visa. Specifically, such a person may apply for a Temporary Protection (Class XD) visa.

492. New condition 8565, inserted by item 37 of Schedule 2 to the Bill, provides that the holder must notify Immigration of any change in the holder's residential address within 28 days after the change occurs.

493. The purpose of condition 8565 is to ensure that the Department of Immigration and Border Protection is made aware of any change in address of a Subclass 785 (Temporary Protection) visa holder.

#### Item 32 Clause 866.211 of Schedule 2

494. This item repeals current clause 866.211 of Schedule 2 to the Migration Regulations and substitutes a new clause 866.211 of Schedule 2. Clause 866.211 provides for criteria to be satisfied at time of application.
495. Current subclause 866.211(1) provides that one of the subclauses 866.211(2) to 866.211(5) is satisfied.
496. Current subclause 866.211(2) of Schedule 2 to the Migration Regulations provides that the applicant:

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claims to be a person to whom Australia has protection obligations under the Refugees Convention; and makes specific claims under the Refugees Convention.

497. Current subclause 866.211(3) provides that the applicant claims to be a member of the same family unit as a person who is:

mentioned in subclause 866.211(2); and an applicant for a Protection (Class XA) visa.

498. New subclause 866.211(1) provides that new subclause 866.211(2) or 866.211(3) is satisfied.

499. New subclause 866.211(2) provides that the applicant:

claims that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant; and makes specific claims as to why that criterion is satisfied.

500. A new note is inserted after new subclause 866.211(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act sets out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.

501. The purpose of this amendment is to take the opportunity to update the language used

in subclause 866.211(2) and to reflect the language used in subsection 36(2) of the Migration Act.

502. New subclause 866.211(3) provides that the applicant claims to be a member of the same family unit as a person:

to whom subclause 866.211(2) applies; and  
who is an applicant for a Subclass 866 (Protection) visa.

503. A new note is inserted after new subclause 866.211(3). The new note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.

504. The purpose of this amendment is to substitute the reference to **-Protection (Class XA) visa** with **-Subclass 866 (Protection) visa**. The effect of this amendment is to make clear that only a member of the same family unit as a person who has been granted a Subclass 866 (Protection) visa is eligible for the grant of a Subclass 866 (Protection) visa. The amendments do no substantially alter current clause 866.211 of Schedule 2 to the Migration Regulations.

505. Current subclauses 866.211(4) and 866.211(5) are repealed by this amendment. These subclauses are repealed because the amendment to subclause 866.211(2), to refer to a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act, covers those matters that are included in current subclauses 866.211(4) and 866.211(5).

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**Item 33 Clause 866.221 of Schedule 2**

506. This item repeals current clause 866.221 of Schedule 2 to the Migration Regulations and substitutes new clause 866.221 of Schedule 2. Clause 866.221 provides for criteria to be satisfied at time of decision.

507. Current subclause 866.221(1) provides that one of subclauses 866.221(2) to 866.221(5) is satisfied.

508. Current subclause 866.221(2) provides that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

509. Current subclause 866.221(3) provides that the Minister is satisfied that:

the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause 866.221(2); and  
the applicant mentioned in subclause 866.221(2) has been granted a Protection (Class XA) visa.

510. New subclause 866.221(1) provides that subclause 866.221(2) or 866.221(3) is satisfied.

511. New subclause 866.221(2) provides that the Minister is satisfied that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant.

512. A new note is inserted after new subclause 866.221(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.

513. The purpose of this amendment is to take the opportunity to update the language used in subclause 866.221(2) and to reflect the language used in subsection 36(2) of the Migration Act.

514. New subclause 866.221(3) provides that the Minister is satisfied that:

the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(2); and  
the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.

515. A new note is inserted after new subclause 866.221(3). The new note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.

516. The effect of this amendment is to ensure that only a member of the same family unit as a person who has been granted a Subclass 866 (Protection) visa is eligible for the grant of a Subclass 866 (Protection) visa. The amendments do no substantially alter the effect of current clause 866.221 of Schedule 2 to the Migration Regulations.

517. The purpose of this amendment is to substitute the reference to **-Protection (Class XA) visa** with **-Subclass 866 (Protection) visa**.

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518. Current subclauses 866.221(4) and 866.221(5) are repealed by this amendment. These subclauses are repealed because the amendment to subclause 866.221(2), to refer to a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act, covers those matters that are included in current subclauses 866.221(4) and 866.221(5).

**Item 34 Clause 866.223 of Schedule 2**

519. This item omits **-relevant medical practitioner** from clause 866.223 of Schedule 2 to the Migration Regulations and substitutes **-relevant medical practitioner**.

520. This amendment makes clear that the term **-relevant medical practitioner** has a particular meaning for the purposes of clause 866.223. The meaning of **-relevant medical practitioner** is the same in clause 866.223 and in clause 785.222, as inserted by item 31 of Schedule 2 to the Bill.

**Item 35 Paragraph 866.225(a)**

521. This item omits reference to **- 4002** from paragraph 866.225(a).

522. This amendment is consequential to the amendments made by the Migration Amendment Bill 2013 which inserted subsection 36(1B) into the Migration Act. This was to address the finding of the High Court in the matter of Plaintiff M47/2012 v Director-General of Security & Ors [2012] HCA 46 (Plaintiff M47). In Plaintiff M47,

the High Court held that paragraph 866.225(a) of Part 866 of Schedule 2 to the Migration Regulations is invalid to the extent that it makes public interest criterion 4002 a criterion for the grant of a protection visa.

523. The majority of the High Court in Plaintiff M47 found that the Migration Regulations could not validly prescribe public interest criterion 4002 as a criterion for the grant of a protection visa because doing so was inconsistent with the scheme provided in the Migration Act for the making of a decision to refuse a protection visa relying on Articles 32 and 33(2) of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol. Current subsection 36(1B) of the Migration Act provides that a criterion for the grant of a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979).

Item 36 Clause 866.230 of Schedule 2

524. This item repeals current clause 866.230 of Schedule 2 to the Migration Regulations and substitutes new clause 866.230 of Schedule 2. Clause 866.230 provides for criteria to be satisfied at time of decision.

525. Current subclause 866.230(1) provides that if the applicant is a child mentioned in paragraph 2.08(1)(b), subclause 866.230(2) or 866.230(3) is satisfied.

526. Current subclause 866.230(2) provides both of the following apply:

the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(2);

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the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.

527. Current subclause 866.230(3) provides both of the following apply:

the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(4);  
the applicant mentioned in subclause 866.221(4) has been granted a Subclass 866 (Protection) visa.

528. New subclause 866.230(1) provides if the applicant is a child to whom subregulation 2.08(2) applies, subclause 866.230(2) is satisfied.

529. New subclause 866.230(2) provides the Minister is satisfied that:

the applicant is a member of the same family unit as an applicant to whom subclause 866.221(2) applies; and  
the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.

530. Two notes are inserted after new subclause 866.230(2). New note 1 provides that subregulation 2.08(2) applies, generally, to a child born to a non-citizen after the non-citizen has applied for a visa but before the application is decided.

531. New note 2 provides that subclause 866.221(2) applies if the Minister is satisfied that Australia has protection obligations in respect of the applicant as mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act.

532. Current subregulation 2.08(1) provides:

if a non-citizen applies for a visa; and  
after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to that non-citizen; then  
the child is taken to have applied for a visa of the same class at the time he or she was born; and  
the child's application is taken to be combined with the non-citizen's application.

533. Current subregulation 2.08(2) provides that despite any provision in Schedule 2 to the Migration Regulations, a child referred to in subregulation 2.08(1):

must satisfy the criteria to be satisfied at time of decision; and  
at the time of decision, must satisfy a criterion (if any) applicable at the time of application that an applicant must be sponsored, nominated or proposed.

534. The effect of new clause 866.230 is to ensure that a child who is taken to have applied for a Subclass 866 (Protection) visa due to subregulation 2.08(1) is only eligible for the grant of the visa if they are a member of the same family unit as a person who was granted a Subclass 866 (Protection) visa on the basis of being a person to whom Australia has protection obligations, as mentioned in paragraph 36(2)(a) and 36(2)(aa) of the Migration Act.

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535. The purpose of new clause 866.230 is to ensure that a child is eligible to be granted the same visa that is held by a member of the same family unit.

Item 37 After clause 8564 of Schedule 8

536. This item inserts new condition 8565 after condition 8564 into Schedule 8 to the Migration Regulations.

537. New condition 8565 provides that a visa holder must notify Immigration of any change in the holder's residential address within 28 days after the change occurs.

538. The purpose of new condition 8565 is to require the visa holder to inform the Department of Immigration and Border Protection of any change to their residential address.

Division 2 – Main amendments commencing immediately after Division 1

Migration Regulations 1994

Item 38

After regulation 2.08E

539. This item inserts new regulation 2.08F after regulation 2.08E of the Migration Regulations. The heading for new regulation 2.08F is –Certain applications for Protection (Class XA) visas taken to be applications for Temporary Protection (Class XD) visas॥.

## Conversion regulation

540. New subregulation 2.08F(1) provides that for new section 45AA of the Migration Act, despite anything else in the Migration Act, a valid application (a pre-conversion application) for a Protection (Class XA) visa made before the commencement of regulation 2.08F by an applicant prescribed by subregulation 2.08F(2) is, immediately after regulation 2.08F starts to apply in relation to the application under subsection 2.08F(3):

taken not to be, and never to have been, a valid application for a Protection (Class XA) visa; and  
taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

541. Two notes are inserted after new subregulation 2.08F(1). New note 1 provides: as a result, the Minister is required to make a decision on the pre-conversion application as if it were a valid application for a Temporary Protection (Class XD) visa.

542. New note 2 provides: if the first instalment of the visa application charge for the pre-conversion application had been paid before regulation 2.08F starts to apply, the first instalment of visa application charge for an application for a Temporary Protection (Class XD) visa (if any) is taken to have been paid. See new section 45AA of the Migration Act.

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543. New subregulation 2.08F(1) operates in accordance with new subsection 45AA(3) and new paragraph 45AA(4)(a) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill.

544. New subsection 45AA(3) allows a conversion regulation to provide that the pre-conversion application for the pre-conversion visa is taken not to be, and never to have been a valid application for the pre-conversion visa. Rather the pre-conversion application for the pre-conversion visa is taken to be, and always to have been, a valid application (the converted application) for a visa of a different class (specified by the conversion regulation), made by the applicant for the pre-conversion visa.

545. New paragraph 45AA(4)(a) allows for a conversion regulation to prescribe a class or classes of pre-conversion visas, such as the Protection (Class XA) visa, without limiting the operation of subsection 45AA(3).

546. The effect of new subregulation 2.08F(1) is that a valid application for a Protection (Class XA) visa, made by an applicant prescribed in subregulation 2.08F(2) is, upon conversion, taken not to be, and never to have been, a valid application for a Protection (Class XA) visa. Rather, upon conversion, the application for the Protection (Class XA) visa is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa, made by the applicant prescribed in subregulation 2.08F(2).

547. For example, an application for a Protection (Class XA) visa was made by an applicant prescribed in subregulation 2.08F(2) on 17 September 2014. The conversion regulation starts to apply on 1 October 2014. In such a scenario, the application for the Protection (Class XA) visa is taken to be invalid from 17 September 2014 and instead an application for a Temporary Protection (Class XD) visa is taken to have been, and always to have been, validly made on 17 September 2014. This is the outcome achieved by regulation 2.08F, regardless of the fact that Part 1, Division 1 and Part 4, Division 1 of Schedule 2 to the Bill, which introduce the Temporary Protection (Class XD) visa, were not in effect on 17 September 2014.

548. The purpose and effect of new note 1 after subregulation 2.08F(1) is to make clear that, as a result of the conversion regulation, the Minister must treat the Protection (Class XA) visa application as a Temporary Protection (Class XD) visa application. Accordingly, the Minister must make a decision as if the Protection (Class XA) visa application was, and had always been, a valid application for a Temporary Protection (Class XD) visa.

549. The purpose and effect of new note 2 after subregulation 2.08F(1) is to make clear that if the first instalment of the visa application charge has been paid for the Protection (Class XA) visa application, then upon the conversion regulation starting to apply, that visa application charge is taken to have been paid for an application for a Temporary Protection (Class XD) visa application.

550. The intention of new note 2 is to reiterate the effect of new subsection 45AA(5) of the Migration Act on the first instalment of visa application charges paid in relation to a pre-conversion application in the context of a Protection (Class XA) visa that is ‘converted’ into a Temporary Protection (Class XD) visa.

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## Prescribed applicants

551. New subregulation 2.08F(2) provides that the following are prescribed applicants:

an applicant who holds, or has ever held, any of the following visas:  

- o a Subclass 785 (Temporary Protection) visa granted before 2 December 2013;
- o a Temporary Safe Haven (Class UJ) visa;
- o a Temporary (Humanitarian Concern) (Class UO) visa;

an applicant who did not hold a visa that was in effect on the applicant’s last entry into Australia;  
an applicant who is an unauthorised maritime arrival;  
an applicant who was not immigration cleared on the applicant’s last entry into Australia.

552. Subregulation 2.08F(2) operates in accordance with new paragraph 45AA(4)(b) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill, which allows for a conversion regulation to prescribe a class of applicants for pre-conversion visas to be

covered by the conversion regulation.

553. The purpose of new subregulation 2.08F(2) is to identify the classes of applicants, including applicants having a particular status, for a Protection (Class XA) visa to whom new regulation 2.08F applies. If a person prescribed in new subregulation 2.08F(2) applies for a Protection (Class XA) visa and new regulation 2.08F starts to apply (as outlined in new subregulation 2.08F(3)) then the Protection (Class XA) visa is taken not to be, and never to have been, a valid application. Rather, the Protection (Class XA) visa is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa made by the person prescribed in new subregulation 2.08F(2).

554. Subregulation 2.08F(2) is consistent with and supports the implementation of the government's policy intention that certain applicants for a Protection (Class XA) visa, such as an unauthorised maritime arrival, will not be granted permanent protection in Australia.

When this regulation starts to apply

555. New subregulation 2.08F(3) provides that new regulation 2.08F starts to apply in relation to a pre-conversion application immediately after the occurrence of whichever of the following events is applicable to the application:

if, before the commencement of regulation 2.08F, the Minister had not made a decision in relation to the pre-conversion application under section 65 of the Migration Act – the commencement of regulation 2.08F;  
 in a case in which the Minister had made such a decision before the commencement of regulation 2.08F – one of the following events, if the event occurs on or after the commencement of regulation 2.08F:  
     o the Refugee Review Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 415(2)(c) of the Migration Act;

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o the Administrative Appeals Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 43(1A)(c) of the Administrative Appeals Tribunals Act 1975 (as substituted in relation to an RRT-reviewable decision by section 452 of the Migration Act);  
     o a court quashes a decision of the Minister in relation to the pre-conversion application and orders the Minister to reconsider the application in accordance with the law.

556. New subregulation 2.08F(3) operates in accordance with new paragraph 45AA(4)(c) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill. New paragraph 45AA(4)(c) makes clear that a conversion regulation may prescribe a time when the conversion regulation is to start to apply in relation to the pre-conversion application, including different conversion times depending on the occurrence of different events. The intention behind new paragraph 45AA(4)(c) (as inserted by item 20 of Schedule 2 to the Bill) is that the time when the conversion regulation starts to apply in relation to a pre-conversion application may be specified by reference to the occurrence of an event or events.

557. The effect of new subregulation 2.08F(3) is that if a person prescribed in new subregulation 2.08F(2) applied for a Protection (Class XA) visa and one of the events outlined in new subregulation 2.08F(3) occurs then, immediately after the occurrence of the applicable event to the Protection (Class XA) visa application, new regulation 2.08F starts to apply.

558. The purpose of new subregulation 2.08F(3) is to specify the point in time when regulation 2.08F starts to apply and converts' a Protection (Class XA) visa application to a Temporary Protection (Class XD) visa application.

### Division 3 – Consequential amendments

#### Migration Regulations 1994

Item 39            Regulation 2.06AA

559. This item repeals regulation 2.06AA of the Migration Regulations.

560. Regulation 2.06AA is made for current sections 65A and 91Y of the Migration Act and those sections are being repealed by Schedule 7 to the Bill. The repeal of regulation 2.06AA is consequential to the amendment to repeal sections 65A and 91Y of the Migration Act.

Item 40            Subregulation 2.07AQ(3) (table item 1, column headed –Criterion 2||, paragraph (c))

561. This item omits the word –or|| from between paragraphs (c) and (d) of subregulation 2.07AQ(3) in table item 1, column headed –Criterion 2||.

562. This amendment is consequential to the amendment made by item 41 of Schedule 2 to the Bill. Currently there are four paragraphs in subregulation 2.07AQ(3) table item 1, column headed –Criterion 2|| and item 41 repeals paragraph (d).

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Item 41            Subregulation 2.07AQ(3) (table item 1, column headed –Criterion 2||, paragraph (d))

563. This item repeals paragraph (d) from subregulation 2.07AQ(3) table item 1, column headed –Criterion 2||.

564. Current subregulation 2.07AQ(2) provides that an application for a Resolution of Status (Class CD) visa is taken to have been validly made by a person only if the requirements of subregulation 2.07AQ(3) or Item 1127AA of Schedule 1 to the Migration Regulations have been met.

565. Current subregulation 2.07AQ(3), table item 1, column headed –Criterion 2||, paragraph (d), provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person holds a Subclass 785 (Temporary Protection) visa.

566. New subregulation 2.07AQ(3), table item 1, column headed –Criterion 2|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, or a Subclass 451 (Secondary Movement Relocation (Temporary)) visa or a Subclass 695 (Return Pending) visa.

567. The effect of this amendment is that a person who holds a Subclass 785 (Temporary Protection) visa that is in effect will no longer be eligible to be taken to have made a valid application for a Resolution of Status (Class CD) visa.

568. The purpose of this amendment is to clarify the Government's intention that a holder of a Subclass 785 (Temporary Protection) visa cannot be taken to have validly made an application for a Resolution of Status visa (Class CD).

Item 42 Subregulation 2.07AQ(3) (table item 2, column headed –Criterion 1||)

569. This item omits –Protection (Class XA)|| and substitutes –protection|| in subregulation 2.07AQ(3), table item 2, column headed –Criterion 1||.

570. Current subregulation 2.07AQ(3), table item 2, column headed –Criterion 1|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person makes a valid application for a Protection (Class XA) visa.

571. New subregulation 2.07AQ(3), table item 2, column headed –Criterion 1|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person makes a valid application for a protection visa.

572. The effect of this amendment is to provide an applicant who held, but no longer holds, a visa of a kind mentioned in subregulation 2.07AQ(3) table item 1, column headed –Criterion 2|| with a pathway to the Resolution of Status (Class CD) visa. The amendments provide that if such an applicant makes a valid application for any class of protection visa, then they would meet Criterion 1 in table item 2 of subregulation 2.07AQ(3) for a Resolution of Status (Class CD) visa. Item 1 of Schedule 2 to the Bill discusses the new definition of protection visa in subsection 5(1) of the Migration Act.

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Item 43 Subregulation 2.07AQ(3) (table item 2, column headed –Criterion 2||)

573. This item inserts –or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008|| after –item 1,|| in subregulation 2.07AQ(3), table item 2, column headed –Criterion 2||.

574. Current subregulation 2.07AQ(3), table item 2, column headed –Criterion 2|| provides that the person held, but no longer holds, a visa of a kind mentioned in criterion 2 of item 1, and the visa was not cancelled.

575. New subregulation 2.07AQ(3), table item 2, column headed –Criterion 2|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person held, but no longer holds, a visa of a kind mentioned in criterion 2 of item 1, or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, and the visa was not cancelled.

576. The purpose of this amendment is to allow a former holder of a Subclass 785 (Temporary Protection) visa granted before 9 August 2008 to be eligible to be taken to have applied for a Resolution of Status (Class CD) visa. The Government does not intend to limit those visa holders from being eligible to apply for, and be granted, a Resolution of Status (Class CD) visa.

Item 44 Subregulation 2.07AQ(5)

577. This item omits –Protection (Class XA)|| (wherever occurring) and substitutes –protection|| in subregulation 2.07AQ(5).

578. This amendment is consequential to the amendments in item 42 of Schedule 2 to the Bill.

Item 45 Subregulation 2.07AQ(7)

579. This item, after the reference to –Subclass 785 (Temporary Protection) visa|| inserts reference to –granted before 9 August 2008||.

580. Current subregulation 2.07AQ(7) provides that subregulation 2.07AQ(2) applies whether or not the applicant holds, or held, a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa that is, or was, subject to a condition mentioned in paragraph 41(2)(a) of the Migration Act relating to the making of applications for other visas.

581. New subregulation 2.07AQ(7) provides that subregulation 2.07AQ(2) applies whether or not the applicant holds, or held, a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, that is, or was, subject to a condition mentioned in paragraph 41(2)(a) of the Migration Act relating to the making of applications for other visas.

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582. The purpose of this amendment is to make clear the intention that a person who was granted the Subclass 785 (Temporary Protection) visa after 9 August 2008 cannot be taken to have validly made an application for a Resolution of Status (Class CD) visa.

Item 46 Subregulation 2.43(3) (paragraph (i) of the definition of relevant visa)

583. This item repeals paragraph 2.43(3)(i) and substitutes new paragraph 2.43(3)(i) into the definition of relevant visa for the purposes of regulation 2.43. Regulation 2.43 provides for the grounds for cancellation of visa for the purposes of paragraph 116(1)(g) of the Migration Act.

584. Paragraph 116(1)(g) of the Migration Act generally provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa

applies to the holder. Regulation 2.43 generally prescribes the grounds for cancelling a visa for the purposes of paragraph 116(1)(g) of the Migration Act.

585. One of the prescribed grounds for cancelling a visa in subparagraph 2.43(1)(a)(ii) is that the Foreign Minister has personally determined that, in the case of a relevant visa – the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.

586. In regulation 2.43, relevant visa means a visa listed in subregulation 2.43(3).

587. Current paragraph 2.43(i) provides that relevant visa means a Subclass 785 (Temporary Protection) visa.

588. New paragraph 2.43(i) provides that a relevant visa means a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013.

589. The purpose of this amendment is to make clear that any Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013, is included in the list of relevant visas for the purposes of subparagraph 2.43(1)(a)(ii) of the Migration Regulations.

Item 47 Subitem 1127AA(3) of Schedule 1 (table item 1, column headed –Criterion 1||, paragraph (c))

590. This item omits the word –or|| from between paragraphs (c) and (d) of subitem 1127AA(3) of Schedule 1 to the Migration Regulations in table item 1, column headed –Criterion 1||.

591. This amendment is consequential to the amendment made by item 48 of Schedule 2 to the Bill. Currently there are four paragraphs in subitem 1127AA(3) of Schedule 1 in table item 1, column headed –Criterion 1|| and this item repeals paragraph (d).

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Item 48 Subitem 1127AA(3) of Schedule 1 (table item 1, column headed –Criterion 1||, paragraph (d))

592. This item repeals paragraph (d) in subitem 1127AA(3) of Schedule 1 to the Migration Regulations, table item 1, column headed –Criterion 1||.

593. Item 1127AA sets out some of the circumstances in which a person is taken to have made a valid application for a Resolution of Status (Class CD) visa. Currently, paragraph (d) of subitem 1127AA(3), table item 1, column headed –Criterion 1|| provides that a person is taken to have made a valid application for a Resolution of Status (Class CD) visa where the person holds a Subclass 785 (Temporary Protection) visa.

594. New subitem 1127AA(3), table item 1, column headed –Criterion 1|| provides that an applicant meets the requirements of –Criterion 1|| if the applicant holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, or a Subclass 451 (Secondary Movement Relocation (Temporary)) visa or a Subclass 695 (Return Pending) visa.

595. The effect of this amendment is that a person who holds a Subclass 785 (Temporary Protection) visa will no longer be eligible to make a valid application for a Resolution of Status (Class CD) visa.

596. The purpose of this amendment is to clarify the Government's intention that a person who holds a Subclass 785 (Temporary Protection) visa cannot make a valid application for a Resolution of Status (Class CD) visa.

Item 49 Subitem 1127AA(3) of Schedule 1 (table item 2, column headed –Criterion 1||)

597. This item inserts –or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008|| after –item 1|| in subitem 1127AA(3), table item 2, column headed –Criterion 1||.

598. Current subitem 1127AA(3), table item 2, column headed –Criterion 1|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the applicant held, but no longer holds, a visa of a kind mentioned in criterion 1 of item 1, and the visa was not cancelled.

599. New subitem 1127AA(3), table item 2, column headed –Criterion 1|| provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the applicant held, but no longer holds, a visa of a kind mentioned in criterion 1 of item 1, or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, and the visa was not cancelled.

600. The purpose of this amendment is to allow a former holder of a Subclass 785 (Temporary Protection) visa granted before 9 August 2008 to be eligible to make a valid application for a Resolution of Status (Class CD) visa. The Government does not intend to limit those visa holders from being eligible to apply for, and be granted, a Resolution of Status (Class CD) visa.

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Item 50 Subparagraphs 1302(3)(bb)(i) and (ii) of Schedule 1

601. This item inserts the reference –, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013|| after the reference to –visa||.

602. Item 1302 sets out some of the circumstances in which a person is taken to have made a valid application for a Bridging B (Class WB) visa. Current paragraph 1302(3)(bb) provides that an applicant for a Bridging B (Class WB) visa must not be:

the holder of a Subclass 785 (Temporary Protection) visa; or  
a person whose last substantive visa was a Subclass 785 (Temporary Protection) visa.

603. New paragraph 1302(3)(bb) provides that an applicant for a Bridging B (Class WB) visa must not be:

the holder of a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013; or  
a person whose last substantive visa was a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013.

604. The purpose of this amendment is to make clear that the holder of any Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013, cannot be taken to have made a valid application for a Bridging B (Class WB) visa.

Item 51 Paragraphs 773.213(2)(zf) and (zfa) of Schedule 2

605. This item repeals paragraphs 773.213(2)(zf) and (zfa) of Schedule 2 to the Migration Regulations and substitutes new paragraph 773.213(2)(zf), which provides for the classes of visa referred to in sub-subparagraph 773.213(1)(d)(i)(B) of Schedule 2 to the Migration Regulations to include protection visas (including Protection (Class AZ) visas, see new subsection 35AA(5) of the Migration Act).

606. Clause 773.2 provides for the primary criteria that all applicants for a Subclass 773 (Border) visa must meet. Subparagraph 773.213(1)(d)(i)(B) relevantly provides that the applicant is a person who is a dependent child of the holder of a visa of a class set out in subclause 773.213(2) who arrives in Australia in the care of a person who is an Australia citizen or the holder of a visa. This amendment provides that subclause 773.213(2) is amended to repeal the reference to Protection (Class AZ) and Protection (Class XA) are repealed and replaced with a reference to protection visas generally. This amendment is consequential to the amendments made by item 5 of Schedule 2 to the Bill to insert new section 35A which provides for protection visas generally.

Item 52 Amendments of listed provisions – protection visas

607. This item makes minor amendments to the Migration Regulations that are consequential to the amendments made by item 5 of Schedule 2 to the Bill to insert new section 35A which provides for protection visas.

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608. The following table items omit reference to –Protection (Class XA)|| and substitute with reference to –protection||:

table item 1 amends regulation 1.03 (paragraph (a) of the definition of relative);  
table item 2 amends paragraph 1.05A(2)(d);  
table item 3 amends paragraph 2.04(2)(a);  
table item 5 amends regulation 2.20;  
table item 6 amends paragraphs 4.31A;  
table item 7 amends subregulation 4.33(1);  
table item 8 amends paragraph 010.211(4)(b) of Schedule 2;  
table item 9 amends paragraphs 010.611 of Schedule 2;  
table item 10 amends paragraphs 020.611 of Schedule 2;  
table item 11 amends paragraph 030.612(a) of Schedule 2 to omit –Protection (Class XA)|| and substitute –protection||;  
table item 12 amends paragraph 050.212(8)(c) of Schedule 2;  
table item 13 amends paragraph 050.613A(1)(a) of Schedule 2;  
table item 14 amends paragraph 050.614(1)(a) of Schedule 2; and  
table item 15 amends paragraph 051.611A(1)(a) of Schedule 2.

609. Table item 4 amends paragraph 2.12(1)(c) to omit –Protection (Class XA)|| and substitute –protection visas||.

Division 4 – Amendments relating to application

Migration Regulations 1994

Item 53 At the end of Schedule 13

610. This item adds new Part 50 – Amendments made by the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 at the end of Schedule 13 to the Migration Regulations.

611. New regulation 5000 of Part 50 of Schedule 13 to the Migration Regulations provides that the amendments of these Migration Regulations made by Division 1 and 3 of Part 4 of Schedule 2 to the Migration Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 apply in relation to:

a visa application made on or after the commencement of Division 1 of Part 4 of Schedule 2; and  
a visa application that is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa by the operation of paragraph 2.08F(1)(b) of these Migration Regulations (as inserted by Division 2 of Part 4 of Schedule 2).

612. This item adds a note after new paragraph 5000(b). The new note provides that new regulation 2.08F applies, by its own terms, in relation to some protection visa applications made before the commencement of Part 4. The new note refers to new subregulation 2.08F(1), which has the effect of applying to applications for a Protection (Class XA) visa that were made before the commencement of new regulation 2.08F.

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613. Schedule 13 to the Migration Regulations makes transitional arrangements in relation to amendments to the Migration Regulations. For visa applications made on or after the commencement of Division 1 of Part 4 of Schedule 2, the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply in relation to such a visa application.

614. For a visa application that is taken to be a valid application for a Temporary Protection (Class XD) visa by operation of new regulation 2.08F, the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply to such an application. New regulation 2.08F applies in relation to some protection visa applications made before the commencement of these amendments. The intention is that the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply to an application for a visa captured by new regulation 2.08F (i.e. an application for a

Protection (Class XA) visa that is, as a result of regulation 2.08F, taken to be an application for a Temporary Protection (Class XD) visa.

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## SCHEDULE 3 – Act-based visas

## Part 1 – Amendment of the Migration Act 1958

## Division 1 – Amendments

## Migration Act 1958

## Item 1 After subsection 31(3)

615. This item inserts new subsection 31(3A).

616. This item provides that to avoid doubt, subsection 31(3) does not require criteria to be prescribed for a visa or visas including, without limitation, visas of the following classes:

special category visas (see section 32);  
 permanent protection visas (see subsection 35A(2));  
 temporary protection visas (see subsection 35A(3));  
 bridging visas (see section 37);  
 temporary safe haven visas (see section 37A);  
 maritime crew visas (see section 38B).

617. Note 1 to new subsection 31(3A) provides that an application for any of these visas is invalid if criteria relating to both the application and the grant of the visa have not been prescribed (see new subsection 46AA(2)).

618. Note 2 to new subsection 31(3A) provides that if criteria are prescribed by the regulations for any of these visas, the visa cannot be granted unless any criteria prescribed by the Migration Act, as well as any prescribed by regulation, are satisfied (see new subsection 46AA(4)).

619. This item refers to current subsection 31(3) of the Migration Act. That subsection provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of the subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

620. Current subsection 31(3) will be amended by item 4 of Schedule 2 to the Bill to omit the reference to section 36 and insert a reference to new section 35A. New section 35A provides for permanent protection visas and for temporary protection visas.

621. The amendment in this item clarifies that the regulations may, but need not, prescribe criteria for the classes of visa covered by current subsection 31(3) including the classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).

622. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for

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each of the visa classes mentioned in new subsection 31(3A), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

623. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, and 38B, and new subsections 35A(2) and 35A(3).

## Item 2 Before subsection 46(1)

624. This item inserts the subheading –Validity – general|| before current subsection 46(1).

625. This amendment is technical in nature. It clarifies that current subsections 46(1), 46(1A) and 46(2) deal with general matters relating to making valid visa applications.

626. The amendment in this item complements the amendment made by item 3 of Schedule 3 to the Bill. That amendment repeals current paragraph 46(1)(d) and inserts new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1), which increases the size of current section 46. The inclusion of the new subheading is intended to make current section 46 easier to read.

## Item 3 Paragraph 46(1)(d)

627. This item repeals current paragraph 46(1)(d) and substitutes new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1).

628. Currently, subsection 46(1) provides that, subject to subsections 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if:

it is for a visa of a class specified in the application; and  
 it satisfies the criteria and requirements prescribed under this section; and  
 subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and  
 any fees payable in respect of it under the regulations have been paid; and  
 it is not prevented by section 48 (visa refused or cancelled earlier), section 48A (protection visa), section 91E (CPA and safe third countries), section 91K (temporary safe haven visa), section 91P (non-citizens with access to protection from third countries), section 161 (criminal justice), section 164D (enforcement visa), section 195 (detainees) or section 501E (visa refused or cancelled on character grounds).

629. Current paragraph 46(1)(d) lists the sections which prevent or invalidate an application for a visa under the Migration Act. The opportunity is taken in the amendment in this

item to modernise and clarify the drafting of current paragraph 46(1)(d) by splitting it into two paragraphs, one that deals with provisions that prevent the making of a valid application (new paragraph 46(1)(d)) and one that deals with provisions that make applications invalid (new paragraph 46(1)(e)). This item also lists four additional

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provisions (three current provisions and new section 46AA) that make visa applications invalid.

630. In addition to the requirements in current subsection 46(1), new paragraph 46(1)(d) provides that subject to subsections 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if it is not prevented by any provision of the Migration Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of the Migration Act:

section 48 (visa refused or cancelled earlier);  
 section 48A (protection visa refused or cancelled earlier);  
 section 161 (criminal justice visa holders);  
 section 164D (enforcement visa holders);  
 section 195 (detainee applying out of time);  
 section 501E (earlier refusal or cancellation on character grounds).

631. New paragraph 46(1)(d) lists the sections already listed in current paragraph 46(1)(d) that prevent an application for a visa. New paragraph 46(1)(d) no longer lists provisions that make an application invalid, because those provisions are now listed in new paragraph 46(1)(e).

632. The descriptions of each section listed in new paragraph 46(1)(d) are amended to more clearly explain the matters that each section deals with.

633. For example, in current paragraph 46(1)(d), section 195 is described using the term -(detainees)||, whereas in new paragraph 46(1)(d) section 195 is described using the phrase -(detainee applying out of time)||.

634. The new descriptions are not intended to alter the effect of the sections listed in subsection 46(1).

635. The opportunity is also taken to modernise the drafting of subsection 46(1) to provide that new paragraphs 46(1)(d) and 46(1)(e) are non-exhaustive lists and provide for further grounds for prevention or invalidity of applications without the necessity for subsection 46(1) to be amended to list the relevant specific provisions. This is provided for by inserting -any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act|| into both new paragraphs 46(1)(d) and 46(1)(e) of the Migration Act.

636. In addition to the application validity requirements set out in current subsection 46(1), new paragraph 46(1)(e) provides that subject to section 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if it is not invalid under any provision of the Migration Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of the Migration Act:

section 46AA (visa applications, and the grant of visas, for some Act-based visas);  
 section 46A (visa applications by unauthorised maritime arrivals);  
 section 46B (visa applications by transitory persons);  
 section 91E or 91G (CPA and safe third countries);

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section 91K (temporary safe haven visas);  
 section 91P (non-citizens with access to protection from third countries).

637. New paragraph 46(1)(e) mentions new section 46AA of the Migration Act. That section is inserted in the Migration Act by item 7. New section 46AA will prevent non-citizens from applying directly under the Migration Act for one of the visa classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).

638. New paragraph 46(1)(e) mentions current sections 46A and 46B of the Migration Act.

639. Current section 46A deals with visa applications by unauthorised maritime arrivals. Current subsection 46A(1) provides that an application for a visa is not a valid application if it is made by an unauthorised maritime arrival who:

is in Australia; and  
 is an unlawful non-citizen.

640. Current subsection 46A(2) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection 46A(1) does not apply to an application by the unauthorised maritime arrival for a visa of a class specified in the determination.

641. The remaining subsections in current section 46A deal with other matters, including that the power in current subsection 46A(2) may only be exercised by the Minister personally, and that the Minister does not have a duty to consider whether to exercise the power under current subsection 46A(2).

642. This amendment does not alter the effect of current section 46A.

643. Current section 46B deals with visa applications by transitory persons. Current subsection 46B(1) provides that an application for a visa is not a valid application if it is made by a transitory person who:

is in Australia; and  
 is an unlawful non-citizen.

644. Current subsection 46B(2) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection 46B(1) does not apply to an application by the person for a visa of a class specified in the determination.

645. The remaining subsections in current section 46B deal with other matters, including that the power in current subsection 46B(2) may only be exercised by the Minister personally, and that the Minister does not have a duty to consider whether to exercise

the power under current subsection 46B(2).

646. This amendment does not alter the effect of current section 46B.

647. New paragraph 46(1)(e) mentions current section 91G of the Migration Act.

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648. In general terms, current section 91G deals with valid visa applications made during a transitional period that begins at a cut off day and ends immediately before a regulation that prescribes a country as a safe third country takes effect. If current section 91G applies to a non-citizen and the non-citizen had not been immigration cleared at the time of making the application, any visa application made by the non-citizen during the transitional period ceases to be a valid application when the regulation takes effect. If current section 91G applies to a non-citizen and the non-citizen had been immigration cleared at the time of making the application, any protection visa application made by the non-citizen during the transitional period ceases to be a valid application when the regulation takes effect.

649. This amendment does not alter the effect of current section 91G.

650. New paragraph 46(1)(e) mentions current sections 91E, 91K and 91P of the Migration Act.

651. Sections 91E, 91K and 91P were originally listed in current paragraph 46(1)(d) but are moved to new paragraph 46(1)(e) because they are provisions that make visa applications invalid rather than provisions that prevent valid visa applications as is now dealt with by new paragraph 46(1)(d). This amendment does not alter the effect of current sections 91E, 91K and 91P.

Item 4 Before subsection 46(2A)

652. This item inserts the heading –Provision of personal identifiers|| before current subsection 46(2A).

653. This amendment is technical in nature. It clarifies that current subsections 46(2A), 46(2AA), 46(2AB), 46(2AC), 46(2B) and 46(2C) deal with the provision of personal identifiers with visa applications.

654. The amendment in this item complements the amendment made by item 3 of Schedule 3 to the Bill. That amendment inserts new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1), which increases the size of current section 46. The inclusion of the new subheading is intended to make current section 46 easier to read.

Item 5 Before subsection 46(3)

655. This item inserts the heading –Prescribed criteria for validity|| before current subsection 46(3).

656. This amendment is technical in nature. It clarifies that current subsections 46(3) and 46(4), and new subsection 46(5) deal with the prescribed criteria for making valid visa applications.

Item 6 At the end of section 46

657. This item adds new subsection 46(5).

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658. New subsection 46(5) provides that to avoid doubt, subsections 46(3) and 46(4) do not require criteria to be prescribed in relation to the validity of visa applications including, without limitation, applications for visas of the following classes:

special category visas (see section 32);  
permanent protection visas (see subsection 35A(2));  
temporary protection visas (see subsection 35A(3));  
bridging visas (see section 37);  
temporary safe haven visas (see section 37A);  
maritime crew visas (see section 38B).

659. This item refers to current subsections 46(3) and 46(4) of the Migration Act. Current subsection 46(3) provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application. Current subsection 46(4) provides that without limiting current subsection 46(3), the regulations may also prescribe:

the circumstances that must exist for an application for a visa of a specified class to be a valid application; and  
how an application for a visa of a specified class must be made; and  
where an application for a visa of a specified class must be made; and  
where an applicant must be when an application for a visa of a specified class is made.

660. The amendment in this item clarifies that regulations may, but need not, prescribe criteria for the classes of visa covered by current subsections 46(3) and 46(4) including the classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).

661. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

662. The amendments at item 7 prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).

Item 7 After section 46

663. This item inserts new section 46AA.

664. New subsection 46AA(1) provides that the following classes of visas are covered by new section 46AA:

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special category visas (see section 32);  
 permanent protection visas (see subsection 35A(2));  
 temporary protection visas (see subsection 35A(3));  
 bridging visas (see section 37);  
 temporary safe haven visas (see section 37A);  
 maritime crew visas (see section 38B).

665. The purpose of new subsection 46AA(1) is to ensure that new section 46AA applies only to the classes of visas set out in new subsection 46AA(1).

666. New subsection 46AA(2) provides that an application for a visa of any of the classes covered by new section 46AA is invalid if, when the application is made, both of the following conditions are satisfied:

there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be a valid application;  
 there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be granted.

667. The note for new subsection 46AA(2) provides that new subsection 46AA(2) does not apply if regulations are in effect prescribing criteria mentioned in new paragraph 46AA(2)(a) or 46AA(2)(b) (or both) for a visa.

668. The effect of new subsection 46AA(2) is that, for each of the visa classes mentioned in new subsection 46AA(1), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa.

669. The purpose of this amendment is to ensure that non-citizens cannot make a valid application for one of the visa classes mentioned in new subsection 46AA(1), in circumstances where regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa.

670. This item clarifies that for each of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3), the criteria in regulations made under the Migration Act are inextricably linked to the visa provided for by the Migration Act.

671. New subsection 46AA(3) provides that the criteria mentioned in new subsection 46AA(2) do not include prescribed criteria that apply generally to visa applications or the granting of visas.

672. The example for new subsection 46AA(3) provides that the criteria mentioned in new subsection 46AA(2) do not include the criteria set out in current regulation 2.07 of the Migration Regulations (application for a visa – general).

673. The effect of new subsection 46AA(3) is that criteria in regulations made under the Migration Act that apply generally to visa applications or to the granting of visas are not considered to be criteria for the purposes of new subsection 46AA(2).

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674. An example of such a criterion is current regulation 2.07 of the Migration Regulations. That regulation prescribes general matters relating to making an application for a visa including, but not limited to, the visa classes mentioned in new subsection 46AA(1). Because current regulation 2.07 also applies to visas other than the visa classes mentioned in new subsection 46AA(1), its existence would not cause new subsection 46AA(2) not to apply to an application.

675. New subsection 46AA(4) provides that if regulations are in effect prescribing criteria mentioned in new paragraph 46AA(2)(a) or 46AA(2)(b) (or both) for a visa covered by this section:

an application for the visa is invalid unless the application satisfies both:  
 o any applicable criteria under the Migration Act that relate to applications for visas of that class; and  
 o any applicable criteria prescribed by regulation that relate to applications for visas of that class; and

the visa must not be granted unless the application satisfies both:  
 o any applicable criteria under the Migration Act that relate to the grant of visas of that class; and  
 o any applicable criteria prescribed by regulation that relate to the grant of visas of that class.

676. The note for new subsection 46AA(4) provides that for visa applications generally, see current section 46 of the Migration Act. For the grant of a visa generally, see current section 65 of the Migration Act.

677. The effect of new subsection 46AA(4) is that, for each of the visa classes mentioned in new subsection 46AA(1), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

678. The purpose of this amendment is to ensure that for each of the visa classes mentioned in new subsection 46AA(1), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, non-citizens cannot apply for, or be granted, any of those visas without satisfying the criteria prescribed in the regulations as well as any criteria set out in the Migration Act.

679. New section 46AA creates a link between the classes of visa that are provided for by the Migration Act for which criteria can be prescribed in the Migration Regulations, and the criteria prescribed in the Migration Regulations for those classes of visa. The amendments do not affect the classes of visa that are provided for by the Migration Act for which criteria cannot be prescribed in the Migration Regulations.

## Division 2 - Application

## Item 8 Application of amendments

680. The amendments made by Division 1 of Part 1 of Schedule 3 to the Bill apply in relation to an application for a visa made on or after the commencement of the amendments.

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## Part 2 - Amendment of the Migration Regulations 1994

## Migration Regulations 1994

## Item 9 Regulation 2.01 (heading)

681. This item repeals the heading of current regulation 2.01 and substitutes a new heading and a new subheading.
682. The current heading is -Classes of visas (Act, s31)||. The new heading is -Classes of visas||, and the new subheading, which appears immediately under the new heading, is -Classes of visas prescribed by section 31 of the Act||.
683. This amendment is technical in nature, and complements the amendment made by item 12 of Schedule 3 to the Bill. It clarifies that current paragraph 2.01(a) deals with matters relating to applications for classes of visas prescribed by current section 31 of the Migration Act. The inclusion of the new subheading is intended to make regulation 2.01 easier to read.

## Item 10 Regulation 2.01

684. This item amends current regulation 2.01 to insert -(1)|| before -For||.
685. This amendment is technical in nature. It is consequential to the insertion of new subregulation 2.01(2) in current regulation 2.01. It causes current paragraphs 2.01(a) and 2.01(b) to become new paragraphs 2.01(1)(a) and 2.01(1)(b).

## Item 11 Paragraph 2.01(a)

686. This item amends current paragraph 2.01(a) by omitting -created by the Act|| and substituting -identified by an item in the table in subregulation (2)||.
687. Following this amendment, new paragraph 2.01(1)(a) provides that for the purposes of current section 31 of the Migration Act, the prescribed classes of visas are such classes (other than those identified by an item in the table in new subregulation 2.01(2)) as are set out in the respective items in Schedule 1 to the Migration Regulations.
688. Current subsection 31(1) of the Migration Act provides that there are to be prescribed classes of visas. Under current subsection 5(1) of the Migration Act, prescribed means prescribed by the regulations.
689. The effect of the amendment is that new paragraph 2.01(1)(a) prescribes the classes of visas set out in the respective items of Schedule 1 to the Migration Regulations, other than the classes of visas identified in an item in the table in new subregulation 2.01(2).
690. New paragraph 2.01(1)(a) does not prescribe the classes of visas identified in an item in the table because those visa classes are provided for by the provisions of the Migration Act mentioned in new subsection 46AA(1).

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## Item 12 Regulation 2.01 (note)

691. This item repeals the current note. The current note explains that for the classes created by the Migration Act, see sections 32 to 38B.
692. This amendment is consequential to the amendment that inserts new subregulation 2.01(2). New subregulation 2.01(2) contains a table that sets out the classes of visas provided for by the Migration Act, so the current note is unnecessary.
693. As well as repealing the current note after current regulation 2.01, this item inserts a new subheading which reads -Classes of visas provided for by the Act||.
694. This amendment is technical in nature, and complements the amendment that inserts new subregulation 2.01(2). This amendment clarifies that new subregulation 2.01(2) deals with matters relating to the classes of visas provided for by the Migration Act.
695. New subregulation 2.01(2) provides that a class of visas provided for by the Migration Act that is identified by an item in the table in new subregulation 2.01(2) is classified under the Migration Regulations, by Class and Subclass, as indicated in the item.
696. Table item 1 identifies special category visas as a class of visa provided for by section 32 of the Migration Act. The classification by Class under the Migration Regulations is -Special Category (Temporary) (Class TY)||. The classification of the Subclass under the Migration Regulations is -Subclass 444 (Special Category)||.
697. Table item 2 identifies permanent protection visas as a class of visa provided for by new subsection 35A(2) of the Migration Act. The classification of the Class under the Migration Regulations is -Protection (Class XA)||. The classification of the Subclass under the Migration Regulations is -Subclass 866 (Protection)||.
698. Table item 3 identifies temporary protection visas as a class of visa provided for by new subsection 35A(3) of the Migration Act. The classification of the Class under the Migration Regulations is -Temporary Protection (Class XD)||. The classification of the Subclass under the Migration Regulations is -Subclass 785 (Temporary Protection)||.
699. Table items 4, 5, 6, 7, 8, 9, 10, 11 and 12 identify bridging visas as a class of visa provided for by section 37 of the Migration Act. The classifications of the Classes under the Migration Regulations are, respectively:

Bridging Visa A (Class WA)

Bridging Visa B (Class WB)  
 Bridging Visa C (Class WC)  
 Bridging Visa D (Class WD) (table items 7 and 8)  
 Bridging Visa E (Class WE) (table items 9 and 10)  
 Bridging Visa F (Class WF)  
 Bridging Visa R (Class WR)

700. The classifications of the Subclasses under the Migration Regulations are, respectively:

Subclass 010 (Bridging A)	106
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Subclass 020 (Bridging B)  
 Subclass 030 (Bridging C)  
 Subclass 040 (Bridging (Prospective Applicant))  
 Subclass 041 (Bridging (Non-applicant))  
 Subclass 050 (Bridging (General))  
 Subclass 051 (Bridging (Protection Visa Applicant))  
 Subclass 060 (Bridging F)  
 Subclass 070 (Bridging (Removal Pending))

701. Table item 13 identifies temporary safe haven visas as a class of visa provided for by section 37A of the Migration Act. The classification of the Class under the Migration Regulations is –Temporary Safe Haven (Class UJ)||. The classification of the Subclass under the Migration Regulations is –Subclass 449 (Humanitarian Stay (Temporary))||.

702. Table item 14 identifies maritime crew visas as a class of visa provided for by section 38B of the Migration Act. The classification of the Class under the Migration Regulations is –Maritime Crew (Temporary) (Class ZM)||. The classification of the Subclass under the Migration Regulations is –Subclass 988 (Maritime Crew)||.

703. The table clarifies how each class of visa that is provided for by the Migration Act and identified in the table is classified, by visa Class and Subclass, in the Migration Regulations.

704. The first note for the table provides that new subsection 35A(4) of the Migration Act provides that additional classes of permanent and temporary visas may be prescribed as protection visas for the purposes of section 31.

705. The purpose of this note is to make the reader aware that new subsection 35A(4) of the Migration Act provides for additional classes of permanent and temporary visas, and that those additional classes may be prescribed as protection visas for the purposes of section 31 of the Migration Act.

706. New section 35A will be inserted by item 5 of Schedule 2. New section 35A provides for permanent protection visas and temporary protection visas, and allows the Migration Regulations to prescribe additional classes of permanent and temporary visas as protection visas.

707. The second note for the table provides that for table items 4 to 12, section 37 of the Migration Act provides that there are classes of temporary visas, to be known as bridging visas.

708. The purpose of this note is to make the reader aware of the effect of section 37 of the Migration Act.

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#### SCHEDULE 4 – Amendments relating to fast track assessment process

##### Part 1 – Fast track assessment process

###### Migration Act 1958

###### Item 1 Subsection 5(1)

709. This item inserts new defined terms excluded fast track review applicant, fast track applicant, fast track decision, fast track reviewable decision, fast track review applicant and Immigration Assessment Authority into subsection 5(1) of Part 1 of the Migration Act.

710. The new defined term excluded fast track review applicant means a fast track applicant:

who, in the opinion of the Minister:

- o is covered by section 91C or 91N; or
- o has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or
- o has made a claim for protection in a country other than Australia, that was refused by that country; or
- o has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or
- o makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application; or
- o without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a).

711. The purpose of this amendment is to specify which fast track decisions made in respect of excluded fast track review applicants cannot be referred to the Immigration Assessment Authority (the IAA) by the Minister under new section 473CA of new Part

7AA inserted by item 21 below. In addition, excluded fast track review applicants would not be entitled to apply for review to the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) under Part 5 or Part 7 of the Migration Act.

712. The intention is to exclude fast track decisions from merits review for those fast track applicants who, after an assessment of their protection claims, are determined to have put forward disingenuous information in support of their application or have access to

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protection elsewhere. This measure is also aimed at discouraging the making of non-genuine, unmeritorious claims for protection as a means of delaying an applicant's departure from Australia. It is the Government's position that such cases warrant being channelled towards a direct immigration outcome rather than access merits review in order to delay the finalisation of their cases and prolong their stay in Australia.

713. Subparagraph (a)(i) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister is covered by section 91C or 91N. Section 91C deals with non-citizens who are covered by the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees or those in relation for whom there is a safe third country. Section 91N deals with non-citizens who have a right to re-enter and reside in another third country.

714. This provision captures those fast track applicants who hold nationality or a right to enter and reside in a third country and therefore, can access protection elsewhere. It is the Government's position that such persons do not warrant access to review because Australia's protection framework should be dedicated towards identifying and granting protection to asylum seekers who have no alternative country which they can claim protection from and safely reside in.

715. Subparagraph (a)(ii) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn.

716. This provision captures those fast track applicants who have previously made a valid protection visa application in Australia which was refused or withdrawn and have subsequently re-entered and been refused protection as a fast track applicant. It is the Government's position that such persons have already accessed and been refused protection under Australia's framework and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases.

717. Subparagraph (a)(iii) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has made a claim for protection in a country other than Australia, that was refused by that country.

718. This provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases.

719. Subparagraph (a)(iv) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees (UNHCR) in that country.

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720. This provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country by the UNHCR and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases.

721. Subparagraph (a)(v) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with his or her application.

722. This provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia's asylum process in an attempt to avoid removal. It is the Government's position that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.

723. Subparagraph (a)(vi) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application.

724. This provision captures those fast track applicants who have used a bogus document in an attempt to support any part of their protection visa application and where, after being confronted regarding the authenticity of the document, do not have a reasonable explanation for having done so. The Government considers it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time when those documents may have facilitated the asylum seeker's safe passage until such a time as they could claim protection at the first available opportunity. To continue to rely on them is considered purposefully misleading. The intention is to encourage applicants to comply with requirements and assist with providing authentic documents and evidence which support their protection claims.

725. Paragraph (b) of this definition further provides that an excluded fast track review

applicant is a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a).

726. This provision captures a fast track applicant, or a fast track applicant who is included in a class of persons, who are specified by the legislative instrument in new paragraph 5(1AA)(a) which is inserted by item 2 below. New paragraph 5(1AA)(b) will provide that the Minister may make a legislative instrument for the purposes of paragraph (1)(b) of the definition of excluded fast track applicant in subsection 5(1). The intention is to exclude from merits review other persons who do not fall within the definition of paragraph (a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to

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protection elsewhere. Any persons brought within the definition of excluded fast track applicant would still need to be fast track applicants as defined below.

727. The new defined term fast track applicant means:

- a person:
- o who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012; and
- o to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and
- o who has made a valid application for a protection visa in accordance with the determination; or

a person who is, or who is included in a class of persons who are, specified by legislative instrument made under new paragraph 5(1AA)(b).

728. The note to the new defined term fast track applicant further states that some unauthorised maritime arrivals born in Australia on or after 13 August 2012 may not be fast track applicants even if paragraph (a) applies: see subsection (1AC).

729. The purpose of this amendment is to set out the criteria for fast track applicants who will be subject to the fast track assessment process. The Government believes the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community – eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives. The Government's intention is to include non-citizens who arrived in Australia unauthorised, circumventing regular, lawful migration channels in this cohort.

730. Subparagraph (a)(i) of this definition provides that a fast track applicant means a person who is an unauthorised maritime arrival (UMA) and who entered Australia on or after 13 August 2012. The term UMA is defined in section 5AA of the Migration Act. Non-citizens who entered Australia by sea, and became an unlawful non-citizen because of that entry, on or after 13 August 2012 would be subject to the fast track assessment process.

731. Subparagraph (a)(ii) and (a)(iii) of this definition provides that a fast track applicant means a person who, in addition to subparagraph 5(1)(a)(i), the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by that person for a protection visa and who has made a valid application for a protection visa in accordance with the determination. Currently, while UMAs are in Australia and are unlawful non-citizens, they are prevented from making a valid application for a visa under subsection 46A(1) unless the Minister determined by written notice under subsection 46A(2) that he or she thinks it is in the public interest to allow them to apply for a visa. The intention is that only those UMAs who entered Australia on or after 13 August 2012 and who have made a valid protection

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visa application in accordance with a determination made by the Minister would be subject to the fast track assessment process.

732. Paragraph (b) of this definition further provides that a fast track applicant includes a person who is, or which is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(b).

733. This provision covers a person who is, or which is included in a class of persons, who are specified by the legislative instrument in new paragraph 5(1AA)(b) which is inserted by item 2 below. New paragraph 5(1AA)(b) will provide that the Minister may make a legislative instrument for the purposes of paragraph (b) of the definition of fast track applicant in subsection 5(1). The intention is to include in the fast track assessment process, other persons who are not specified in paragraph (a) of the definition of fast track applicant within this definition. Any persons brought within the definition of fast track applicant will either be an excluded fast track review applicant or a fast track review applicant.

734. Where a fast track applicant is also determined to be an excluded fast track review applicant under paragraph 5(1AA)(a), that person would not have access to any form of review. A person who is determined to be a fast track applicant under a legislative instrument made in new paragraph 5(1AA)(b) would also be a fast track review applicant. A fast track reviewable decision made in respect of a fast track review applicant would be referred to the IAA under new Part 7AA inserted by item 21 below.

735. The note provides there may be some unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but will not meet the definition of fast track applicant because of new subsection 5(1AC). New subsection 5(1AC) further provides that a person will not fulfil the requirements of paragraph (a) of the definition of fast track applicant only because they were born in Australia on or after 13 August 2012 and are the child of an unauthorised maritime arrival who entered Australia before 13 August 2012.

736. The purpose of the combined effect of the note and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or

after 13 August 2012 be processed under the Fast Track Assessment process.

737. The new defined term fast track decision means a decision to refuse to grant a protection visa to a fast track applicant, other than a decision to refuse to grant such a visa:

because the Minister or a delegate of the Minister is not satisfied that the applicant passes the character test under section 501; or

relying on:

- o subsection 5H(2); or
- o subsection 36(1B) or (1C) of the Migration Act; or

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- o paragraph 36(2C)(a) or 36(2C)(b) of the Migration Act.

738. The purpose of this amendment is to define certain decisions made in respect of fast track applicants as fast track decisions. Fast track decisions broadly cover a decision to refuse to grant a protection visa to a fast track applicant. Paragraph (b) will carve out from this definition, decisions to refuse to grant protection visas to an applicant on character and security related grounds. Decisions which fall within these exceptions cannot be fast track decisions even if they are made in respect of a fast track applicant. It is intended that these types of decisions continue to have access to review in accordance with section 500 of the Migration Act noting that some decisions, including some decisions made by the Minister personally, are not subject to any form of review.

739. Fast track decisions made in respect of fast track review applicants are fast track reviewable decisions. Both the terms fast track review applicants and fast track reviewable decisions are defined below. Fast track reviewable decisions must be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below. These fast track review applicants would not be entitled to apply for review under Part 5 or Part 7 of the Migration Act to the MRT or the RRT in respect of their fast track reviewable decision. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or IAA under Part 5, Part 7 or Part 7AA.

740. The note to the new defined term fast track decision provides that some decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of fast track decision are reviewable by the Administrative Appeals Tribunal in accordance with section 500.

741. The new defined term fast track reviewable decision has the meaning given by section 473BB.

742. This definition will refer the reader to new section 473BB inserted by item 21 below for the definition of fast track reviewable decision.

743. The new defined term fast track review applicant means a fast track applicant who is not an excluded fast track review applicant.

744. This definition provides that fast track review applicants are fast track applicants who are not excluded fast track review applicants. The intention is for all fast track applicants who are not captured by the definition of excluded fast track review applicant to be eligible for review in relation to fast track decisions made in respect of them. Fast track decisions made in respect of fast track review applicants are to be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below. Fast track review applicants would not be entitled to apply for review under Part 5 or Part 7 of the Migration Act to the MRT or the RRT in respect of their fast track reviewable decision.

745. The new defined term Immigration Assessment Authority means the Authority established by section 473JA.

746. This definition refers the reader to new section 473JA inserted by item 21 below which establishes the Immigration Assessment Authority.

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747. The new definition of referred applicant has the meaning given by section 473BB.

748. This definition refers the reader to new section 473BB inserted by item 21 below which inserts a definition of referred applicant.

Item 2 After subsection 5(1)

749. This item inserts new subsection 5(1AA) after subsection 5(1) of Part 1 of the Migration Act.

750. New subsection 5(1AA) provides that the Minister may make a legislative instrument for the purposes of the following provisions:

paragraph (b) of the definition of excluded fast track review applicant in subsection 5(1);

paragraph (b) of the definition of fast track applicant in subsection 5(1).

751. New subsection 5(1AB) provides that a legislative instrument made under subsection 5(1AA) may apply, adopt or incorporate, with or without modification, the provisions of any other legislative instrument, whether or not the other legislative instrument is disallowable, as in force at a particular time or as in force from time to time.

752. The purpose of this amendment is to provide the Minister with the flexibility and ability to include other cohorts in paragraph (b) of the definition of excluded fast track review applicant and fast track applicant by way of legislative instruments.

753. Only fast track decisions made in respect of fast track review applicants can be referred to the IAA under new section 473CA. The definition of fast track applicant inserted by item 1 above only captures UMA who entered Australia on or after 13 August 2012 that made a valid application for a protection visa. Where it is determined that certain other persons should also be subject to the fast track assessment process, including certain other unauthorised arrivals, new subsection 5(1AA) would provide the Minister

with the ability to bring these persons into the fast track process by way of legislative instrument.

754. As an example, the instrument could be used to specify unauthorised air arrivals. An unauthorised air arrival does not have a visa that is in effect when they enter Australia or has had their visa cancelled in immigration clearance. While some of these persons may have arrived in Australia by lawful means, they may have been refused entry at Australian airports or ports for reasons including that they are found not to intend to abide by the visa conditions (for example, where the reason for the grant of the visa no longer exists) or on the basis of document fraud.

755. All fast track applicants are either excluded fast track review applicants or fast track review applicants. Where it is determined that certain fast track decisions in relation to certain fast track applicants (who are specified in an instrument made under paragraph 5(1AA)(a)) should not have access to any form of review, new paragraph 5(1AA)(b) will also allow the Minister to include those persons in the definition of excluded fast track review applicant in that legislative instrument.

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756. The intention is to exclude from merits review other fast track applicants who do not fall within the definition of paragraph 5(1)(a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to protection elsewhere.

757. As an example, this instrument could be used to specify those fast track applicants who had previously arrived in Australia, but were not exempted from the statutory bar in subsection 46A(1) as they did not make claims that *prima facie* engaged Australia's protection obligations, and who subsequently departed or were removed from Australia only to re-enter Australia and be refused protection as a fast track applicant.

758. As this instrument would be made under Part 1 of the Migration Act, it would be exempt from disallowance under item 26 of the table in subsection 44(2) of the Legislative Instruments Act 2003. These instruments would be revised frequently to ensure that only those persons who should be subject to the fast track assessment process are put through that process.

759. The purpose of subsection 5(1AB) is to overcome any potential issues under subsection 14(2) of the Legislative Instruments Act 2003 and not prevent an instrument created under new subsection 5(1AA) from referring to any instrument, whether it is a disallowable or non-disallowable instrument, that is in force at a particular time or as in force from time to time.

760. Subsection 5(1AC) provides that a person is not a fast track applicant only because of paragraph (a) of the definition of fast track applicant in subsection (1) if:

the person is born in Australia on or after 13 August 2012; and

the person is the child of an unauthorised maritime arrival who entered Australia before 13 August 2012.

761. The purpose of the combined effect of the note at the definition of fast track applicant and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or after 13 August 2012 be processed under the Fast Track Assessment process.

.Item 3 Subsection 5(9)

762. This item omits the word *-either||* from subsection 5(9) of Part 1 of the Migration Act.

763. This amendment is consequential to the amendment made by item 4 below. Currently there are only two paragraphs in subsection 5(9) of the Migration Act. Item 4 inserts new paragraph (c) into subsection 5(9) of the Migration Act.

Item 4 At the end of subsection 5(9)

764. This item adds new paragraph 5(9)(c) at the end of subsection 5(9) of Part 1 of the Migration Act.

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765. Currently, subsection 5(9) provides that for the purposes of the Migration Act, an application under this Act is finally determined when either:

a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7; or

a decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

766. Part 5 of the Migration Act relates to review of decisions by the MRT. Part 7 of the Migration Act relates to review of protection visa decision by the RRT.

767. New paragraph 5(9)(c) provides that for the purposes of the Migration Act, an application under this Act is finally determined when in relation to an application for a protection visa by an excluded fast track review applicant – a decision has been made in respect of the application.

768. The purpose of this amendment is to clarify that a decision in relation to an application for a protection visa by an excluded fast track review applicant is finally determined when a decision has been made in respect of the application. As excluded fast track review applicants are not eligible for review under Part 5, 7 or new Part 7AA, a fast track decision made in respect of them is finally determined for the purposes of the Migration Act.

Item 5 Subsection 5(9A)

769. This item omits the words *-Part 5 and 7||* in subsection 5(9A) of Part 1 of the Migration Act, and substitutes the words *-Part 5, 7 or 7AA||*

770. Subsection 5(9A) provides that, without limiting subsection 5(9), if a review of a decision that has been made in respect of an application under this Act is instituted under Part 5 or Part 7 as prescribed, the application is finally determined when a decision on the review in respect of the application is taken to have been made as provided by any of the following provisions:

- subsection 368(2) (MRT written decisions);
- subsection 368D(1) (MRT oral decisions);
- subsection 430(2) (RRT written decisions);
- subsection 430D(1) (RRT oral decisions).

771. Subsection 5(9A) refers directly to provisions under which the MRT and the RRT are taken to have made a decision. Subsection 5(9A) provides these decisions are taken to be finally determined for the purposes of this Act.

772. The purpose of this amendment, in conjunction with the amendment made by item 6 below, is to clarify that a decision made by the IAA under new subsection 473EA(2)

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inserted by item 21 below, is finally determined when a decision on the review in respect of the application is taken to have been made.

**Item 6 At the end of subsection 5(9A)**

773. This item adds new paragraph 5(9A)(e) at the end of subsection 5(9A) of Part 1 of the Migration Act.

774. Subsection 5(9A) refers directly to provisions under which the MRT and the RRT are taken to have made a decision. Subsection 5(9A) provides these decisions are taken to be finally determined for the purposes of this Act.

775. New paragraph 5(9A)(e), in conjunction with the amendment made by item 5 above provides that without limiting subsection 5(9), if a review of a decision has been instituted under 7AA of this Act, the application is finally determined when a decision on the review in respect of the application is taken to have been made under subsection 473EA(2) (IAA decisions).

776. The purpose of this amendment, in conjunction with the amendment made by item 5 above, is to clarify that a decision made under new subsection 473EA(2) inserted by item 21 below, is finally determined when a decision on the review in respect of the application is taken to have been made.

**Item 7 At the end of subsection 5(9B)**

777. This item adds new paragraph 5(9B)(c) at the end of subsection 5(9B) of Part 1 of the Migration Act.

778. Subsection 5(9B) provides that subsection 5(9A) does not apply in relation to the following decisions:

- a decision of the MRT under paragraph 349(2)(c);
- a decision of the RRT under paragraph 415(2)(c).

779. The note to subsection 5(9B) states that the decisions listed in subsection 5(9B) are for the remission of some matters by the relevant Tribunal. These exceptions from the decisions listed in new subsection 5(9A) are necessary because an application is not intended to be finally determined if it is remitted by the MRT or the RRT to the Minister or delegate for further consideration.

780. New paragraph 5(9B)(c) provides that subsection 5(9A) does not apply in relation to a decision of the IAA under paragraph 473CC(2)(b).

781. The purpose of this amendment is to clarify that an application is not intended to be finally determined if it is remitted by the IAA to the Minister or delegate for further consideration.

**Item 8 Subsection 5(9B) (note)**

782. This item omits the word *-Tribunal* and substitutes the words *-review body* in the note to subsection 5(9B) of Part 1 of the Migration Act.

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783. The note to subsection 5(9B) states that the decisions listed in subsection 5(9B) are for the remission of some matters by the relevant Tribunal.

784. The new note to subsection 5(9B) will provide that decisions listed in subsection 5(9B) are for the remission of some matters by the relevant review body.

785. This amendment is consequential to the amendment made by item 7 above. As the IAA is not a Tribunal, the term review body has been used in the note to capture the MRT, the RRT and the IAA.

**Item 9 Paragraph 57(1)(a)**

786. This item repeals current paragraph 57(1)(a) and substitutes new paragraph 57(1)(a) in Division 3 of Part 2 of the Migration Act.

787. Current paragraph 57(1)(a) provides that in this section, relevant information means information (other than non-disclosable information) that the Minister considers would be the reason, or part of the reason, for refusing to grant a visa.

788. Section 57 of the Migration Act is part of the Code of Procedure in Subdivision AB of Division 3 of Part 2 of the Migration Act for dealing fairly, efficiently and quickly with visa applications. Subdivision AB of Part 2 of the Migration Act sets out procedures for dealing with valid visa applications before a decision is made. Subsection 57(2) provides that certain *-relevant information* received by the Minister must be provided to a visa applicant for comment.

789. New paragraph 57(1)(a) provides that in this section, relevant information means information that the Minister considers would be the reason, or part of the reason:

- for refusing to grant a visa; or
- for deciding that the applicant is an excluded fast track review applicant.

790. The purpose of this amendment is to set out the obligation for the Minister to put information to an applicant that is adverse and would be the reason, or part of the reason for deciding that that applicant is an excluded fast track review applicant and to provide the visa applicant with an opportunity to comment on any such information. It codifies the procedural fairness (natural justice) requirements in relation to adverse information when determining a visa applicant is an excluded fast track review applicant.

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Item 10 At the end of subsection 57(1)

791. This item adds a new note at the end of subsection 57(1) in Division 3 of Part 2 of the Migration Act.

792. The new note provides that excluded fast track review applicant is defined in subsection 5(1).

793. The purpose of this amendment is to refer the reader to the definition of excluded fast track review applicant in subsection 5(1) of the Migration Act.

Item 11 Paragraph 57(3)(b)

794. This item repeals current paragraph 57(3)(b) and substitutes new paragraph 57(3)(b).

795. Section 57 of the Migration Act is part of the Code of Procedure in Subdivision AB of Division 3 of Part 2 of the Migration Act for dealing fairly, efficiently and quickly with visa applications. Subdivision AB of Part 2 of the Migration Act sets out procedures for dealing with valid visa applications before a decision is made. Current subsection 57(3) provides that section 57 does not apply in relation to an application for a visa unless:

- the visa can be granted when the applicant is in the migration zone; and
- this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.

796. New paragraph 57(3)(b), together with current paragraph 57(3)(a) provides that section 57 does not apply in relation to an application for a visa unless:

- the visa can be granted when the applicant is in the migration zone; and
- this Act provides, under Part 5 or 7, for an application for review of a decision to refuse a grant the visa; or
- the applicant is a fast track applicant.

797. The purpose of this amendment is to clarify that the obligation in subsection 57(2) applies if an applicant is a fast track applicant and is applying for a visa that can be granted when the applicant is in the migration zone.

798. The note under paragraph 57(3)(b) provides that some applicants for protection visas are fast track applicants. The term is defined in subsection 5(1).

799. The purpose of this note is to refer the reader to subsection 5(1) for the definition of fast track applicant.

Item 12 Subsection 65(1) (note)

800. This item omits the reference to -Note|| after subsection 65(1) in Division 3 of Part 2 of the Migration Act and substitutes with -Note 1||.

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801. This amendment is consequential to the amendment made by item 13 below which adds Note 2 at the end of subsection 65(1).

Item 13 At the end of subsection 65(1)

802. This item adds -Note 2|| at the end of subsection 65(1) in Division 3 of Part 2 of the Migration Act.

803. Subsection 65(1) is the power in which the Minister makes a decision to grant a visa or refuse to grant a visa.

804. New note 2 provides that decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the IAA: see Part 7AA.

805. The purpose of this amendment is to refer the reader to Part 7AA of the Migration Act which deals with the fast track review process for certain protection visa decisions in respect of fast track review applicants. Part 7AA is inserted by item 21below.

Item 14 At the end of subsection 66(2)

806. This item adds new paragraph 66(2)(e) and 66(2)(f) at the end of subsection 66(2) in Division 3 of Part 2 of the Migration Act.

807. Currently subsection 66(2) provides that notification of a decision to refuse an application for a visa must:

- if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa – specify that criterion; and

- if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa – specify that provision; and

unless subsection 66(3) applies to the application – give written reasons (other than non-disclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and

- if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500 – state:
- o that the decision can be reviewed; and
  - o the time in which the application for review may be made; and
  - o who can apply for the review; and
  - o where the application for review can be made.

808. New paragraph 66(2)(e) and 66(2)(f) provides that notification of a decision to refuse an application for a visa must:

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in the case of a fast track reviewable decision – state that the decision has been referred for review under Part 7AA and that it is not subject to review under Part 5 or Part 7; and

in the case of a fast track decision that is not a fast track reviewable decision – state that the decision is not subject to review under Part 5, 7 or 7AA.

809. The purpose of this amendment is to clarify that when the Minister makes a decision to refuse to grant a visa to a fast track applicant, the notification to the applicant must specify that:

in the case of a fast track reviewable decision, the applicant's decision has been referred to the IAA for review and they are not entitled to apply for review before the MRT and RRT; and

in the case of a fast track decision that is not a fast track reviewable decision, the applicant is not entitled to review before the MRT, RRT or the IAA.

810. The effect of this amendment is to ensure that fast track applicants are notified about what, if any, review pathways are available to them if the Minister has made a decision to refuse to grant their visa.

Item 15        Section 275 (at the end of the definition of review authority)

811. This item adds new paragraph (c) in the definition of review authority in section 275 in Division 1 of Part 3 of the Migration Act.

812. Section 275 defines certain terms for the purposes of Part 3.                              Part 3 deals with migration agents and immigration assistance.

813. Currently, review authority means:

the Migration Review Tribunal; or  
the Refugee Review Tribunal.

814. New paragraph (c) will include the IAA in the definition of review authority.

815. The purpose of this amendment is to include the IAA in the definition of review authority for the purposes of Part 3 of the Migration Act.

Item 16        At the end of subsection 338(1)

816. This item adds new paragraph 338(1)(d) at the end of subsection 338(1) in Division 2 of Part 5 of the Migration Act.

817. Currently subsection 338(1) provides that a decision is an MRT-reviewable decision if this section so provides, unless:

the Minister has issued a conclusive certificate under section 339 in relation to the decision; or

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the decision is an RRT-reviewable decision; or  
the decision is to refuse to grant, or to cancel, a temporary safe haven visa.

818. New paragraph 338(1)(d) provides that a decision is an MRT-reviewable decision if this section so provides, unless the decision is a fast track decision.

819. The purpose of this amendment is to provide that a fast track decision cannot be reviewed by the MRT. Fast track decisions made in respect of fast track review applicants will be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 19 below. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or the IAA.

Item 17        At the end of subsection 411(2)

820. This item adds new paragraph 411(2)(c) at the end of subsection 411(2) in Division 2 of Part 7 of the Migration Act.

821. Currently subsection 411(2) provides that the following decisions are not RRT-reviewable decisions:

decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made;

decisions in relation to which the Minister has issued a conclusive certificate under subsection 411(3).

822. New paragraph 411(2)(c) provides that the following decisions are not RRT-reviewable decisions: fast track decisions.

823. The purpose of this amendment is to provide that a fast track decision cannot be reviewed by the RRT. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or the IAA. Fast track decisions made in respect of fast track review applicants will be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below.

Item 18 At the end of subsection 460(2)

824. This item adds a new note at the end of subsection 460(2) in Division 9 of Part 7 of the Migration Act.

825. Subsection 460(2) provides that the Principal Member is responsible for:

monitoring the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable; and

allocating the work of the Tribunal among the members (including himself or herself) in accordance with guidelines under subsection 460(3).

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826. The new note at the end of subsection 460(2) provides that the Principal Member is also responsible for the overall operation and administration of the IAA under Part 7AA.

827. The purpose of this amendment is to clarify that the Principal Member of the RRT is also responsible for the overall operation and administration of the IAA in addition to the functions outlined in paragraph 460(2)(a) and 460(2)(b).

Item 19 At the end of section 470

828. This item adds the words –and the Principal Member’s powers under Part 7AA|| at the end of section 470 in Division 9 of Part 7 of the Migration Act.

829. Current section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member’s powers under this Act other than the power under section 443 to refer decisions to the AAT.

830. New section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member’s powers under this Act other than the power under section 443 to refer decisions to the AAT and the Principal Member’s powers under Part 7AA.

831. The purpose of this amendment is to prevent the Principal Member from delegating his or her powers under Part 7AA to a member of the RRT. New subsection 473JF(1) in Division 8 of Part 7AA inserted by item 21 below will provide that the Principal Member may delegate, in writing, all or any of the Principal Member’s powers or functions under Part 7AA to the Senior Reviewer of the IAA.

832. The effect of this amendment and new section 473JF is to confer power on the Principal Member to delegate his or her functions under Part 7AA to only the Senior Reviewer of the IAA.

Item 20 Paragraph 473A(a)

833. This item repeals current paragraph 473A(a) and substitutes new paragraph 473A(a) in Part 7A of the Migration Act.

834. Current paragraph 473A(a) and 473A(b) provide that for the purposes of the Public Service Act 1999:

the Principal Member of the RRT and the persons mentioned in subsection 407(4) and 472(4) together constitute a Statutory Agency; and

the Principal Member of the RRT is the Head of that Statutory Agency.

835. The purpose of this provision is to provide that the Principal Member of the RRT together with the Registrar, Deputy Registrar and other officers of the MRT and RRT (including the persons who are made available to the IAA), and reviewers of the IAA together constitute a Statutory Agency for the purposes of the Public Service Act 1999. The Principal Member of the RRT is the Head of that Statutory Agency.

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836. Both the MRT and RRT comprise members (appointed by the Governor-General under the Migration Act for fixed terms) and tribunal officers (appointed under the Migration Act and employed under the Public Service Act 1999). Currently, all members and staff are cross-appointed to both the MRT and the RRT and the Principal Member of the MRT and the RRT is the same person.

837. New paragraph 473A(a) together with current paragraph 473A(b) provides that the following persons constitute a Statutory Agency:

the Principal Member of the RRT;

the persons mentioned in subsection 407(4) (officers of the MRT);

the persons mentioned in subsection 472(4), including the persons who are made available to the IAA under subsection 473JE(2) (officers of the RRT);

the persons mentioned in subsection 473JE(1) (Reviewers of the IAA); and

the Principal Member of the RRT is the Head of that Statutory Agency.

838. New subsection 473JA(1) inserted by item 21 below provides that the IAA is established within the RRT. New subsection 473JE(1) inserted by item 21 below will provide that the Senior Reviewer and the other Reviewers of the IAA are to be persons engaged under the Public Service Act 1999. New subsection 473JE(2) will provide that the Principal Member must make available persons employed in the RRT to assist the IAA in the performance of its administrative functions.

839. The purpose of this amendment is to clarify that the Principal Member of the RRT, officers of the MRT and RRT together with the Reviewers of the IAA constitute a

Statutory Agency for the purposes of the Public Service Act 1999.

Item 21      After Part 7A

840. This item inserts new Part 7AA after Part 7A of the Migration Act. The heading of this new Part is –Fast track review process in relation to certain protection visa decisions||.

Part 7AA – Fast track review process in relation to certain protection visa decisions

841. This Part establishes a new framework to deal with review of decisions to refuse protection visas that are referred by the Minister to the IAA under new section 473CA. These decisions are referred to as fast track reviewable decisions.

Division 1 – Introduction

842. This Division provides for a simplified outline of new Part 7AA and definitions for the purposes of Part 7AA. This Division also provides the power for the Minister to determine, by way of legislative instrument, that certain fast track decisions made in respect of an excluded fast track review applicant are to be reviewed under Part 7AA, and provides the Minister with the ability to issue conclusive certificates in relation to a fast track decision if he or she believes it would be contrary to the national interest for the decision to be changed or reviewed.

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Section 473BA Simplified outline of this Part

843. New section 473BA creates a simplified outline of new Part 7AA. The simplified outline provides:

A limited form of review of fast track decisions to refuse protection visas to some applicants, including unauthorised maritime arrivals who entered Australia on or after 13 August 2012.

Fast track decisions made in relation to some applicants are excluded from the fast track review process. These applicants are known as excluded fast track review applicants.

Fast track review applicants and excluded fast track review applicants are collectively known as fast track applicants.

Fast track reviewable decisions must be referred by the Minister to the IAA as soon as reasonably practicable after the decision is made. A person cannot make an application for review directly to the Authority.

Decisions to refuse to grant protection visas to fast track applicants are generally not reviewable by any other Tribunal under this Act, although some decisions are reviewable by the Administrative Appeals Tribunal.

The IAA consists of the Principal Member of the Refugee Review Tribunal, the Senior Reviewer and other Reviewers. The Principal Member is responsible for the overall administration and operation of the IAA. The Reviewers are appointed by the Minister.

In reviewing fast track reviewable decisions, the Authority is required to pursue the objective of providing a mechanism of limited review that is efficient and quick.

The IAA does not hold hearings and is required to review decisions on the papers that are provided to it when decisions are referred to it. However, in exceptional circumstances the Authority may consider new material and may invite referred applicants to provide, or comment on, new information at an interview or in writing.

The IAA may affirm a referred decision or may remit the decision for reconsideration in accordance with directions.

The Authority may give directions restricting the disclosure of information. There are also specific requirements for the giving and receiving of documents.

844. The purpose of this amendment is to guide the reader on the key aspects of new Part 7AA which deals with the fast track review process in relation to certain protection visa decisions.

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Section 473BB      Definitions

845. New section 473BB inserts new defined terms fast track reviewable decision, new information, Principal Member, referred applicant, Reviewer, review material and Senior Reviewer for the purposes of new Part 7AA of the Migration Act.

846. The new defined term fast track reviewable decision means:

a fast track decision in relation to a fast track review applicant; or

a fast track decision determined under section 473BC;

but does not include a fast track decision in relation to which the Minister has issued a conclusive certificate under section 473BD.

847. The note following this defined term provides that fast track decisions are decisions (subject to some exceptions) to refuse to grant protection visas to certain applicants, known as fast track applicants. Some specified fast track applicants are known as excluded fast track review applicants; all others are known as fast track review applicants. The highlighted terms are defined in subsection 5(1).

848. The purpose of this amendment is to identify which fast track decisions made in respect of fast track applicants must be referred to the IAA by the Minister under new section 473CA. No fast track review applicants will be entitled to apply for review to the MRT and RRT under Part 5 or Part 7 of the Migration Act in relation to fast track decisions.

849. The new defined term new information has meaning given by subsection 473DC(1).
850. Subsection 473DC(1) provides that new information is any document or information (new information) that was not before the Minister when the Minister made the decision under section 65 and the Authority considers may be relevant. The purpose of this amendment is to refer the reader to subsection 473DC(1) for the meaning of new information.
851. The new defined term Principal Member means the Principal Member of the RRT.
852. The purpose of this amendment is to clarify that a reference to the Principal Member in new Part 7AA is a reference to the Principal Member of the RRT. New subsection 473JB(1) provides that the Principal Member is responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies.
853. The new defined term referred applicant means an applicant for a protection visa in respect of whom a fast track reviewable decision is referred under section 473CA.
854. The purpose of this amendment is to identify all persons who will be referred to the IAA under section 473CA. Section 473CA provides the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made. As such, this defined term will capture:

fast track decisions made in respect of a fast track review applicants;  
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any fast track decisions made in respect of excluded fast track review applicants that the Minister determines under section 473BC should be reviewed under Part 7AA by way of legislative instrument.

855. The new defined term Reviewer means a Reviewer engaged in accordance with Division 8, and includes the Senior Reviewer.
856. The purpose of this amendment is to clarify that a reference to a Reviewer is a reference to a Reviewer engaged in accordance with Division 8. Division 8 deals with the establishment of the IAA.
857. The new defined term review material has the meaning given by section 473CB.
858. The purpose of this amendment is to clarify references to review material is in Part 7AA. Section 473CB outlines the material that the Secretary must give to the IAA in respect of each fast track reviewable decision referred to the IAA under section 473CA. The items listed in subsection 473CB(1) are collectively known as review material.
859. The new term Senior Reviewer means the Senior Reviewer appointed under section 473JC.
860. The purpose of this amendment is to clarify that a reference to the Senior Reviewer is a reference to the Senior Reviewer appointed under section 473JC. Subsection 473JC(1) provides that the Principal Member must, by written instrument, appoint an SES employee to be the Senior Reviewer. Subsection 473JB(2) provides that the Senior Reviewer is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member.

Section 473BC – Minister may determine that certain decisions are to be reviewed under this Part

861. New section 473BC provides that the Minister may, by legislative instrument, determine that a specified fast track decision, or a specified class of fast track decisions in relation to an excluded fast track review applicant, should be reviewed under this Part.
862. Note 1 to section 473BC provides that an excluded fast track review applicant and fast track decision are defined in subsection 5(1).
863. Note 2 to section 473BC provides that, if the Minister makes a determination, the fast track decision is a fast track reviewable decision (see paragraph (b) of the definition of fast track reviewable decision in section 473BB).
864. The purpose of this amendment is to provide the Minister with the flexibility and ability to determine that certain fast track decisions made in respect of excluded fast track review applicants are to be reviewed by the IAA.
865. It is anticipated that this mechanism would be used where certain excluded fast track review applicants are considered vulnerable and are provided with additional support. This would be outlined by departmental policy and procedures.

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866. All fast track applicants are either excluded fast track review applicants or fast track review applicants. Where the Minister is of the view that a fast track decision or decisions made in respect of an excluded fast track review applicant or applicants warrant review by the IAA, the Minister will be able to determine that these decisions should be reviewed under new Part 7AA.
867. The purpose of note 1 is to refer the reader to the definition of excluded fast track review applicant and fast track decision in subsection 5(1). The purpose of note 2 is to clarify that the effect of a determination under new section 473BC is that these fast track decisions become fast track reviewable decisions. Under section 473CA, the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made.

Section 473BD – Minister may issue conclusive certificate in relation to certain decisions

868. New section 473BD provides that the Minister may issue a conclusive certificate in relation to a fast track decision if the Minister believes that:

it would be contrary to the national interest to change the decision; or  
it would be contrary to the national interest for the decision to be reviewed.

869. The note to new section 473BD provides that if the Minister issues a conclusive

certificate, the fast track decision is not a fast track reviewable decision (see definition of fast track reviewable decision in section 473BB).

870. The purpose of this amendment is to exempt certain fast track decisions from review by the IAA under Part 7AA where the Minister has issued a conclusive certificate in relation to that decision.
871. New section 473BD aligns with current subsection 411(3) which provides the Minister with the ability to issue a conclusive certificate in relation to a decision which would normally be reviewable by the RRT. Similar to the RRT framework, the Minister would generally only issue a conclusive certificate in relation to a decision on the grounds that changing the decision or reviewing the decision could result in a prejudice to Australia's security, defence, international relations or where a review would require the IAA to consider Cabinet or Cabinet committee documents.

#### Division 2 – Referral of fast track reviewable decisions to Immigration Assessment Authority

##### Section 473CA – Referral of fast track reviewable decisions

872. New section 473CA provides that the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made.
873. The purpose of this amendment is to require the Minister to refer fast track reviewable decisions to the IAA as soon as reasonably practicable after the decision is made. As a referred applicant cannot themselves apply for IAA review, new section 473CA will require the Minister to refer the decision to the IAA as soon as reasonably practicable after the decision is made under section 65 of the Migration Act.

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##### Section 473CB – Material to be provided to Immigration Assessment Authority

874. New subsection 473CB provides that the Secretary must give to the IAA the following material (review material) in respect of each fast track reviewable decision referred to the Authority under section 473CA:

a statement that:

- o sets out the findings of fact made by the person who made the decision; and
- o refers to the evidence on which those findings were based; and
- o gives reasons for the decision;

material provided by the referred applicant to the person making the decision before the decision was made;

any other material that is in the Secretary's possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;

the following details:

- o the last address for service provided to the Minister by the referred applicant for the purposes of receiving documents;
- o the last residential or business address provided to the Minister by the referred applicant for the purposes of receiving documents;
- o the last fax number, email address or other electronic address provided to the Minister by the referred applicant for the purposes of receiving documents;
- o if the address or fax number mentioned in subparagraph (i), (ii) or (iii) has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister is no longer correct – such an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred to the Authority;
- o if the referred applicant is a minor – the last address or fax number of a kind mentioned in subparagraph (i), (ii), (iii) or (iv) (if any) for a carer of the minor.

875. New subsection 473CB(2) provides that the Secretary must give the review material to the IAA at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority.

876. The purpose of this amendment is to require the Secretary of the Department to give to the IAA relevant documents, material and details (collectively known as review material) that the IAA will need to conduct review. This is because applicants will not apply for review to the IAA and therefore will not be required to provide certain documents, material and details to the IAA in conjunction with their review. Review

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material will include a copy of the notification that was sent to the fast track applicant in relation to the fast track decision.

877. As the IAA will be required to notify the applicant directly of the review outcome, paragraph 473CB(1)(d) will also require the Secretary to provide the IAA details of the referred applicant's address and contact details (including electronic addresses) as provided by the referred applicant to the Minister.

878. When referring a decision to the IAA, the Secretary must also give the review material to the IAA at the same time as, or as soon as reasonably practicable after, that decision is referred.

##### Section 473CC – Review of decision

879. New subsection 473CC(1) provides that the IAA must review a fast track reviewable decision referred to the Authority under section 473CA.

880. New subsection 473CC(2) provides that the IAA may:

affirm the fast track reviewable decision; or  
remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.

881. The purpose of this amendment is to require the IAA to review a decision referred to it by the Minister under section 473CA and set out what it can do in relation to the fast track reviewable decision.
882. Subsection 473CC(2) provides that the IAA may either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.
883. The power to affirm a fast track reviewable decision will permit the IAA to decide that the Minister's fast track decision should not be changed. The effect of this is that the Minister's decision under section 65 remains in force.
884. The power to remit a fast track decision will permit the IAA to decide that the Minister's decision should be reconsidered. The effect of this is that the Minister is required to reconsider the application having regard to any permissible directions or recommendations made by the IAA. The power to remit a fast track decision with directions or recommendations will permit the IAA to review the substantive matters which must be satisfied before the visa application can be approved and, if these are decided in favour of the applicant, to then remit the case back to the Department to consider the more procedural criteria, which would not be appropriate for the IAA to deal with.

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#### Division 3 – Conduct of review

##### Subdivision A – Natural justice requirements

###### Section 473DA – Exhaustive statement of natural justice hearing rule

885. New subsection 473DA(1) provides that this Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule as they apply to the IAA.
886. The purpose of this amendment is to make clear that sections 473GA, 473GB and Division 3 of Part 7AA of the Migration Act are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. Division 3 sets out how the IAA should conduct its review and outlines how the IAA is to review decisions on the papers and provides limits on the consideration of new information for the purposes of making a decision in relation to a fast track reviewable decision. Section 473GA and 473GB deal with the disclosure of confidential information to and by the IAA.
887. New subsection 473DA(2) provides that to avoid doubt, nothing in this Part requires the IAA to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.
888. The purpose of this provision is to put beyond doubt that the IAA is not required to give a referred applicant any material that was before the Minister for comment. This is because under subsection 57(2) of the Migration Act and in relation to their fast track decision, an applicant would have already been provided an opportunity to comment on relevant information that the Minister considered was the reason, or part of the reason for refusing to grant a visa.

##### Subdivision B – Review on the papers

###### Section 473DB – Immigration Assessment Authority to review decisions on the papers

889. New subsection 473DB(1) provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:
  - without accepting or requesting new information; and
  - without interviewing the referred applicant.
890. New subsection 473DB(2) provides that subject to this Part, the IAA may make a decision on a fast track reviewable decision at any time after the decision has been referred to the Authority.
891. The purpose of this amendment is to describe what the limited merits review function of the IAA entails. The intention is for the IAA to review a fast track reviewable decision by only considering the review material provided to the Authority by the Secretary of the Department. The IAA is not required to accept or request new information or interview the referred applicant. This is however subject to Subdivision C – Additional information which sets out the limited circumstances in which the IAA

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- may consider new information for the purposes of making a decision in relation to a fast track reviewable decision.
892. New section 473FA provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick. As such, new subsection 473DB(2) puts beyond doubt that the IAA may make a decision any time after the decision has been referred to the Authority. This will enable the IAA to conduct limited review of fast track reviewable decisions on the papers as soon as these decisions have been referred to it by the Minister without accepting or requesting new information or interviewing the referred applicant.

893. The complete package of reforms proposed in this Bill intend to place an emphasis on all fast track applicants to articulate their protection claims in a legitimate and authentic way at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no further requirement to consider new information in a case involving a fast track review applicant. A fast track review applicant has had ample opportunities to present their claims and supporting evidence to justify their request to international protection throughout the decision-making process and before a primary decision is made on their application.

894. It is also proposed to amend the Migration Regulations 1994 to bring into effect a Code of Procedure with regard to the natural justice obligations and respective timeframes that will apply to reviews conducted by the IAA. By allowing the IAA to complete its limited review role in an efficient and effective manner, this new review body will deliver the Government's policy outcome of improving the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensure timely progress of their cases towards a final and accurate determination regarding their immigration status.

895. The note to subsection 473DB(2) provides that some decisions to refuse to grant a protection visa to fast track applicants are not reviewable by the IAA (see paragraphs (a) and (b) of the definition of fast track decision in subsection 5(1)).

896. The purpose of this note is to refer the reader to the definition of fast track decision and clarify that certain decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of fast track decision are subject to review, if any, in accordance with section 500. These decisions are not reviewable by the MRT, RRT or the IAA.

#### Subdivision C – Additional information

##### Section 473DC – Getting new information

897. New subsection 473DC(1) provides that subject to this Part, the IAA may, in relation to a fast track decision, get any documents or information (new information) that:

were not before the Minister when the Minister made the decision under section 65; and

the Authority considers may be relevant.

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898. New subsection 473DC(2) provides that the IAA does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.

899. New subsection 473DC(3) provides that without limiting subsection (1), the IAA may invite a person, orally or in writing, to give new information:

in writing; or

at an interview, whether conducted in person, by telephone or in any other way.

900. The purpose of this amendment is to provide the IAA with the discretionary ability to get new information that it considers may be relevant. This amendment will also provide the IAA with the discretion to invite, orally or in writing, a person to give new information.

901. New information is defined as documents or information that were not before the Minister when the Minister made the decision under section 65 and information that the Authority considers may be relevant. Section 473CB lists the material to be provided to the IAA by the Secretary. By its definition, new information would not capture review material as defined by section 473CB. This is because generally review material would have been before the Minister before the Minister made the decision to either grant a visa or refuse to grant a visa under section 65 of the Migration Act.

902. New subsection 473DB(1) provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

without accepting or requesting new information; and

without interviewing the referred applicant.

903. While section 473DB provides that the IAA is to conduct limited review by considering the review material provided to it by the Minister, there may be rare instances where on reviewing the review material, the IAA identifies the need to obtain new information that may be relevant to the fast track decision under review. For example, this could include a situation in which the IAA is alerted to a sudden and highly significant change of conditions in the referred applicant's country of origin since the decision under section 65 was made. Accordingly, new subsection 473DC(1) would have the effect of providing the IAA with the discretionary ability to get that new information.

904. The effect of new subsection 473DC(2) is to put beyond doubt that the power for the IAA to get, request or accept, any new information is completely discretionary under all circumstances and the IAA is under no duty to do so even if requested by a referred applicant.

905. New subsection 473DC(3) provides the IAA with the discretionary ability to invite, orally or in writing, a person to give new information. This will provide the IAA with the flexibility to contact a person in the most appropriate way to give new information in the most suitable way. The IAA will be able to ask for a person to give new

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information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online). The intention is for the IAA to quickly and flexibly get new information that it may consider relevant in accordance with its objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

906. Section 473DC only gives the IAA the discretionary ability to get new information that it may consider relevant to a fast track decision. Under section 473DD, the IAA cannot consider that new information for the purposes of making a decision in relation to a fast track reviewable decision unless the test in section 473DD is met.

##### Section 473DD – Considering new information in exceptional circumstances

907. New section 473DD provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless:

the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information was not, and could not have been, provided to the Minister before the Minister made the decision under section 65.

908. New section 473DD specifies the test that must be met in order for the IAA to consider any new information for the purposes of making a decision in relation to a fast track reviewable decision. New information is defined in subsection 473DC(1) as documents or information that were not before the Minister before the Minister made the decision under section 65 and the IAA considers may be relevant.

909. The purpose of this amendment is to set out the test that must be met in order for the IAA to consider new information. If the test in new section 473DD is met, the IAA will be able to consider new information that is not review material for the purposes of remitting a fast track reviewable decision with prescribed directions. However, it is acknowledged that there could also be rare situations where the IAA may consider new information under section 473DD for the purposes of affirming a fast track reviewable decision where the test is met.

910. This amendment is to operate in concert with new sections 473DC and 473FA. New section 473DB provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

without accepting or requesting new information; and

without interviewing the referred applicant.

911. In addition, new section 473FA provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick.

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912. Paragraph 473DD(a) provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless the Authority is satisfied that there are exceptional circumstances to justify considering the new information.

913. This component of the test would apply to instances where:

the IAA sought new information at its discretion including where it got new information under new subsection 473DC(1) that it considered relevant; and/or

a referred applicant provided new information to the IAA of their own volition.

914. Under this component of the test, the IAA would not be able to consider any new information in relation to making a decision fast track reviewable decision unless the Authority was satisfied that there are exceptional circumstances to justify considering the new information. Exceptional circumstances has not been defined and will provide a reviewer of the IAA with discretion to ascertain what he or she thinks are exceptional dependent on the characteristics of each fast track reviewable decision. It will be a matter for the IAA to develop guidelines to assist in the interpretation of this phrase, which has been deliberately left undefined as circumstances will differ from case to case.

915. Examples of exceptional circumstances that may justify the consideration of new information may include, but are not limited to:

a material change in the referred applicant's circumstances which occurred after the Minister made the section 65 decision including a factual event, such as significant and rapidly deteriorating conditions emerging in the referred applicant's country of claimed protection, for example, a change in the political or security landscape; or

credible personal information that was not previously known has emerged which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed persecution.

916. Examples of circumstances that would not justify the consideration of new information may include, but are not limited to:

information which was available to the applicant at the primary stage and was not presented for unsatisfactory reasons;

a general misunderstanding or lack of awareness of Australia's processes and procedures; or

a change in personal circumstances within the control of the applicant.

917. Paragraph 473DD(b) provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless, in addition to paragraph 473DD(a), the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority

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by the referred applicant, the new information was not, and could not have been, provided to the Minister before the Minister made the decision under section 65.

918. Where an applicant provides or seeks to provide the IAA with new information of their own volition, they would also have to satisfy the component of the test outlined in paragraph 473DD(b) in addition to the component in paragraph 473DD(a).

919. The purpose of imposing an additional component where a referred applicant gives or seeks to give new information to the IAA is to reinforce the policy position that fast track applicants must be forthcoming with all of their claims and provide all available information to the Minister before a fast track decision is made under section 65 of the Migration Act.

920. The complete package of reforms proposed in this Bill place an emphasis on all fast track applicants articulating their protection claims accurately and in full at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no requirement to consider new information in a case involving a fast track review applicant. A fast track review applicant has had ample opportunity to present their claims and supporting evidence to justify their claim for international protection throughout the decision-making process and before a primary decision is made on their application.

Section 473DE – Certain new information must be given to referred applicant

921. New subsection 473DE(1) provides that the IAA must, in relation to a fast track reviewable decision:

give to the referred applicant particulars of any new information, but only if the new information:

- o has been, or is to be, considered by the Authority under section 473DD; and
- o would be the reason, or part of the reason, for affirming the fast track reviewable decision; and

explain to the referred applicant why the new information is relevant to the review; and

invite the referred applicant, orally or in writing, to give comments on the new information:

- o in writing; or
- o at an interview, whether conducted in person, by telephone or in any other way.

922. New subsection 473DE(2) provides that the Authority may give the particulars mentioned in paragraph 473DE(1)(a) in the way that the Authority thinks appropriate in the circumstances.

923. New subsection 473DE(3) provides subsection 473DE(1) does not apply to new information that:

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is not specifically about the referred applicant and is just about a class of person of which the referred applicant is a member; or

is non-disclosable information; or

is prescribed by regulation for the purposes of this paragraph.

924. The note to new section 473DE provides that under subsection 473DA(2) the IAA is not required to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.

925. The purpose of this amendment is to set out the obligation for the IAA to put new information to a referred applicant that is adverse to them, and to provide the referred applicant with an opportunity to comment on any such new information. This obligation applies to new information considered under section 473DD that would be the reason, or part of the reason, for affirming the fast track reviewable decision. It codifies the procedural fairness (natural justice) requirements in relation to adverse new information.

926. The obligation under subsection 473DE(1) only applies to new information. New information is defined in subsection 473DC(1) as information and documents that were not before the Minister when the Minister made the decision under section 65 and the IAA considers may be relevant. The obligation under subsection 473DE(1) does not apply to anything other than new information including review material. This is because the Minister would have put certain adverse information to an applicant under section 57 of the Migration Act in relation to information that was before the Minister when the Minister made the decision under section 65. This is made clear by the note.

927. Paragraph 473DE(1)(c) requires the IAA to invite, orally or in writing, the referred applicant, to give comments on the new information. While under paragraph 473DE(1)(c), the IAA must invite a referred person to give comments, the IAA will still have the flexibility to contact a person in the most appropriate way to comment on the new information in the most suitable way. The IAA will be able to ask for a person to comment on adverse new information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online).

928. Subsection 473DE(3) provides exceptions to the obligation for the IAA to put certain adverse new information to a referred applicant.

929. Under paragraph 473DE(3)(a), the obligation under subsection 473DE(1) does not apply to information that is not specifically about the referred applicant and is just about a class of persons of which the referred applicant is a member as this would capture country information.

930. Under paragraph 473DE(3)(b), the obligation under subsection 473DE(1) does not apply to non-disclosable information.

931. Non-disclosable information is defined in subsection 5(1) of the Migration Act and means information or matter:

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whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:

- o prejudice the security, defence or international relations of Australia; or
- o involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet; or

whose disclosure would, in the Minister's opinion, be contrary to the public

interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or

whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

932. New paragraph 473DE(3)(c) creates a regulation-making power for the Governor-General to prescribe certain types of new information in the Migration Regulations 1994. This prescribed information would not be subject to the obligation in subsection 473DE(1).

Section 473DF – Invitation to give new information or comments in writing or at interview

933. New subsection 473DF(1) provides that this section applies if a referred applicant is:

invited under section 473DC to give new information in writing or at interview; or  
invited under section 473DE to give comments on new information in writing or at an interview.

934. New subsection 473DF(2) provides that the information or comments are to be given within a period that is prescribed by regulation and specified in the invitation.

935. New subsection 473DF(3) provides that the IAA may determine the manner in which, and the place at which, an interview is to be conducted.

936. New subsection 473DF(4) provides that if the referred applicant does not give the new information or comments in accordance with the invitation, the IAA may make a decision on the review:

without taking any further action to get the information or the referred applicant's comments on the information; or  
without taking any further action to allow or enable the referred applicant to take part in a further interview.

937. The purpose of this amendment is to outline the procedures to be followed where the IAA invites a referred applicant to give new information or to give comments on new information in writing or at interview. It is intended that the same procedures are to be followed whether the IAA requests relevant information where it is seeking to determine whether exceptional circumstances might exist in a case or alternatively,

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where the IAA has already considered new information in a case which may form part of the IAA's proposed finding to affirm the Minister's primary decision and the IAA needs to put that information to a referred applicant for comment.

938. Subsection 473DF(2) is a regulation-making power. It is intended that amendments would be made to the Migration Regulations 1994 to prescribe periods within which information or comments are to be given and specified in an invitation made pursuant to section 473DC or section 473DE. It is intended that the prescribed timeframes would, where appropriate, mirror those which will apply to the primary assessment process for fast track applicants.

939. Subsection 473DF(3) gives the IAA flexibility to determine and appropriate time and place in which an interview is to be conducted, if an interview is to be conducted. The time and place in which an interview would be conducted would be dependent on the specific circumstances of the referred applicant.

940. Subsection 473DF(4) makes clear that if a referred applicant does not give new information or comments in accordance with an invitation, the IAA may make a decision on the review without taking any further action.

941. It is the Government's position that such procedures will allow the IAA to be accessible to fast track review applicants by assisting them to provide to the IAA, when requested, relevant, accurate and detailed information pertaining to their protection claims in a medium that best suits their communication abilities and which ultimately, will assist the fast track review applicant to receive a timely and accurate outcome in their case. The intention is for the IAA to pursue an objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

#### Division 4 – Decisions of Immigration Assessment Authority

##### Section 473EA – Immigration Assessment Authority's decision and written statement

###### Written statement of decision

942. New subsection 473EA(1) provides that if the IAA makes a decision on a review under this Part, the Authority must make a written statement that:

sets out the decision of the Authority on the review; and  
sets out the reasons for the decision; and  
records the day and time the statement is made.

943. The purpose of this amendment is to require the IAA to make a written statement for a decision on review under new Part 7AA.

###### How and when written decisions are taken to be made

944. New subsection 473EA(2) provides that a decision on a review is taken to have made:

by the making of the written statement; and

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on the day, and at the time, the written statement is made.

945. The purpose of this amendment is to clarify when, and how, a decision on review under Part 7AA is taken to have been made by the IAA.

946. New subsection 473EA(3) provides that the IAA has no power to vary or revoke a decision to which subsection (2) applies after the day and time the written statement is made.
947. The purpose of this amendment is to clarify that once the IAA makes a written statement in relation to a decision on review under Part 7AA, the IAA cannot consider the matter further.

Return of documents etc.

948. New subsection 473EA(4) provides that after the IAA makes the written statement, the Authority must:

return to the Secretary any document that the Secretary has provided in relation to the review; and

give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

949. The purpose of this amendment is to clarify that after the written statement is made, the IAA must return certain specified documents to the Secretary of the Department.

Validity etc. not affected by procedural irregularities

950. New subsection 473EA(4) provides that the validity of a decision on a review, and the operation of subsection (3), are not affected by:

a failure to record, under paragraph 473EA(1)(c), the day and time when the written statement was made; or

a failure to comply with subsection 473EA(4).

951. The purpose of this amendment is to clarify that while failure to comply with paragraph (1)(c) and subsection (4) will amount to a procedural irregularity, the decision on a review under Part 7AA itself will not be invalidated. That is, a decision of the IAA remains valid even if the relevant day and time are not recorded on the written statement, and if the required documents are not returned to the Secretary as required.

#### Section 473EB – Notification of Immigration Assessment's Authority's decision

952. New subsection 473EB(1) provides that the IAA must notify the referred applicant of a decision on review by giving the referred applicant a copy of the written statement prepared under subsection 473EA(1). The copy must be given to the applicant:

within 14 days after the day on which the decision is taken to have been made; and

by one of the methods specified in section 473HB.

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953. The purpose of this amendment is to require the IAA to give a copy of the written statement to the referred applicant by one of the methods specified in section 473HB of the Migration Act within 14 days. That is, by handing it to the recipient, or to another person apparently at least 16 years old and living or working at the last residential or business address provided by the recipient in connection with the review. Alternatively the IAA can give the document to the recipient by prepaid post or other prepaid means, by fax, e-mail or other electronic means, to the last contact details of the recipient provided to the IAA in connection with the review. Depending on the method used, a statement –given|| within 14 days may or may not also be received within that time. There are requirements provided by subsection 473HB(2) if the recipient is a minor.

954. New subsection 473EB(2) provides that a copy of the statement must also be given to the Secretary:

within 14 days after the day on which the decision is taken to have been made; and

by one of the methods specified in section 473HC.

955. The purpose of this amendment is to require the IAA to give a copy of the written statement to the Secretary by one of the methods specified in section 473HC within 14 days. That is, by handing it to the Secretary or an authorised officer or by post or other means or by fax, e-mail or other electronic means, to the last contact details notified to the IAA in writing by the Secretary for the purpose of review applications. Depending on the method used, a statement –given|| within 14 days may or may not also be received within that time.

956. New subsection 473EB(3) provides that a failure to comply with this section in relation to a decision on a review does not affect the validity of the decision.

957. The purpose of this amendment is to clarify that although a failure to comply with subsection 473EB(1) and (2) will mean that referred applicant and Secretary will not be validly notified, the decision itself will not be invalid.

#### Section 473EC – Certain decisions of the Immigration Assessment Authority to be published

958. New subsection 473EC(1) provides that subject to subsection 473EC(2), and to any direction under section 473GD, the IAA may publish any statements prepared under subsection 473EA(1) that the Principal Member thinks are of particular interest.

959. New subsection 473EC(2) provides that the IAA must not publish any statement which may identify a referred applicant or any relative or other dependent of a referred applicant.

960. The note to new section 473EC provides that section 5G may be relevant for determining relationships for the purposes of subsection 473EC(2).

961. The purpose of this amendment is to provide a discretionary power for the IAA to publish decisions that the Principal Member thinks are of particular interest. It is intended that decisions which are regarded as of particular interest are decisions that provide information or insight into:

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the jurisdiction of the IAA;  
 the procedures for the conduct of reviews;  
 how the IAA interprets and applies the law and policy.

962. However, the published version of a decision statement must not contain any information which may identify the referred applicant or any relative or other dependent of the applicant.
963. The note to subsection 473EC refers the reader to section 5G of the Migration Act which provides clarity on relationships and family members.

#### Division 5 – Exercise of powers and functions by Immigration Assessment Authority

##### Section 473FA – How Immigration Assessment Authority is to exercise its functions

964. New subsection 473FA(1) provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick.
965. The note to new subsection 473FA(1) provides that under section 473DB the IAA is generally required to undertake a review on the papers.
966. New subsection 473FA(2) provides that the IAA, in reviewing a decision is not bound by technicalities, legal forms or rules of evidence.
967. The purpose of this amendment is to outline how the IAA is to exercise its functions. When conducting a review of a fast track reviewable decision, the IAA is to keep in mind its overall functions of providing an efficient and quick limited review.
968. The note to new subsection 473FA(1) refers the reader to new section 473DB which describes what the limited merits review function of the IAA entails. The IAA is to conduct limited review of fast track reviewable decisions on the papers as soon as decisions have been referred to it by the Minister without accepting or requesting new information or interviewing the referred applicant. While the IAA is not bound by the rules of evidence, it is subject to the exhaustive statement of the natural justice hearing rule in section 473DA and the relevant codified requirements of procedural fairness.

##### Section 473FB – Practice directions

969. New subsection 473FB(1) provides that the Principal Member may, in writing, issue directions, not inconsistent with this Act or the regulations as to:

the operations of the IAA; and  
 the conduct of reviews by the Authority.

970. New subsection 473FB(2) provides that without limiting subsection (1), the directions may:

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relate to the application of efficient processing practices in the conduct of reviews by the IAA; or

set out procedures to be followed by persons giving new information to the Authority in writing or at interview.

971. New subsection 473FB(3) provides that a member of the IAA must, as far as practicable, comply with the directions. However, non-compliance with any direction does not mean that the Authority's decision on a review is an invalid decision.
972. New subsection 473FB(4) provides that if the IAA deals with a review of a decision in a way that complies with the directions, the Authority is not required to take any other action in dealing with the review.
973. New subsection 473FB(5) provides that the IAA is not required to accept new information or documents from a person, or to hear or continue to hear a person appearing before it, if the person fails to comply with a relevant direction that applies to the person.
974. The purpose of this provision is to confer on the Principal Member the power to issue practice directions that give guidance on processing practices relating to the conduct of reviews. Practice directions may also set out procedures to be followed by a person giving new information to the Authority. Subsection 473FB(2) is not intended to be an exhaustive list of the matters to which directions may relate. The IAA should, as far as practicable, comply with a direction issued by the Principal Member but non-compliance with any direction will not mean that the IAA's decision on a review is an invalid decision.

##### Section 473FC – Guidance Decisions

975. New subsection 473FC(1) provides that the Principal Member may, in writing, direct that a decision (the guidance decision) of the Refugee Review Tribunal or the IAA specified in the direction is to be complied with by the Authority in reaching a decision on a review of a fast track reviewable decision of a kind specified in the direction.
976. New subsection 473FC(2) provides that in reaching a decision on a review of a decision of that kind, the Authority must comply with the guidance decision unless the Authority is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.
977. New subsection 473FC(3) provides that non-compliance by the Authority with a guidance decision does not mean that the Authority's decision on a review is an invalid decision.
978. Guidance decisions would be issued by the Principal Member of the RRT in relation to identifiable common issues in matters before the Authority. As the RRT also conducts review of protection visa decisions, the Principal Member may direct, where appropriate that guidance decisions of the RRT is to be complied with by the Authority to ensure consistency. The purpose of this provision is therefore 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.

979. Guidance decisions are not intended to go to the conduct of the review, but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases, for example guidance on the particular risks and circumstances in a particular country on a particular date. In conducting review, the IAA must comply with the guidance decisions unless the IAA is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances in the relevant guidance decision. However, if a reviewer fails to comply with a guidance decision in making a decision, it will not invalidate that decision.

980. Guidance decisions are intended to promote consistency in decision making in matters. Consistency has long been recognised as an issue for all merits review tribunals, but is particularly apparent when a tribunal is dealing with large numbers of cases that *prima facie* raise the same factual claims. Using guidance decisions will help to avoid a situation where applicants with similar circumstances get different outcomes. They will provide factual precedents not legal precedents to aid consistency in decision making.

981. The power of the Principal Member of the RRT to issue guidance decisions is not an exercise of judicial power. Only the courts stipulated in section 71 of the Constitution can exercise the judicial power of the Commonwealth.<sup>1</sup> A person or body which is part of the executive government, such as the Principal Member of the RRT, cannot exercise the judicial power of the Commonwealth. As such, section 473FC will involve the exercise of legislative power by the Principal Member.

982. The guidance decision is an exercise of legislative power, but is not subject to disallowance under the Legislative Instruments Act 2003 (LIA). Section 7 of the LIA provides for instruments declared not to be legislative instruments. Paragraph 7(1)(a) of the LIA provides that an instrument is not a legislative instrument for the purposes of the LIA if it is included in the table in section 7. Item 24 of that table relevantly provides that instruments that are prescribed by the regulations for the purposes of this table are not legislative instruments.

983. Regulation 7 of the Legislative Instruments Regulations 2004 (LIR) provides that for item 24 of the table in subsection 7(1) of the LIA, and subject to section 6 and 7 of the LIA, instruments mentioned in Schedule 1 of the LIR are prescribed. Item 6 of Part 1 of Schedule 1 provides that a practice direction made by a court or tribunal are not legislative instruments. As such the direction of a Principal Member in relation to a guidance decision is not an instrument for the purposes of the LIA and is not subject to disallowance.

#### Division 6 – Disclosure of information

##### Section 473GA – Restrictions on disclosure of certain information etc.

984. New subsection 473GA(1) provides that despite anything else in this Act, the Secretary must not give to the IAA a document, or information, if the Minister certifies, under subsection (2), that the disclosure of any matter contained in the document, or the disclosure of the information would be contrary to the public interest:

<sup>1</sup>

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.

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because it would prejudice the security, defence or international relations of Australia; or

because it would involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

985. New subsection 473GA(2) provides that the Minister may issue a written certificate for the purposes of subsection (1).

986. The purpose of this provision is to clarify that the Secretary must not give the IAA a document or information, if the Minister has certified its disclosure would prejudice the security, defence or international relations of Australia, or would disclose Cabinet or Cabinet committee deliberations or decisions.

##### Section 473GB – Immigration Assessment Authority's discretion in relation to disclosure of certain information etc.

987. New subsection 473GB(1) provides that this section applies to a document or information if:

the Minister has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 473GA(1)(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or

the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

988. New subsection 473GB(2) provides that if, in compliance with a requirement of or under this Act, the Secretary gives to the IAA a document or information to which this section applies, the Secretary:

must notify the Authority in writing that this section applies in relation to the document or information; and

may give the Authority any written advice that the Secretary thinks relevant about the significance of the document or information.

989. New subsection 473GB(3) provides that if the IAA is given a document or information and is notified that this section applies in relation to it, the Authority:

may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and

may, if the Authority thinks it is appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the referred applicant.

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990. New subsection 473GB(4) provides that if the IAA discloses any matter to the referred applicant under subsection (3), the Authority must give a direction under section 473GD in relation to the information.

991. New subsection 473GB(5) provides that the Minister may issue a written certificate for the purposes of subsection 473GB(1).

992. The purpose of this amendment is to enable the IAA at its discretion to rely on certain information or documents and to disclose certain information to a referred applicant on the condition that the referred applicant does not contravene the conditions attached to its disclosure. Where the IAA has been so notified, it may rely on the document or information and may disclose to the applicant any matter contained in the document or the information where it thinks it appropriate to do so having regard to any written advice given by the Secretary.

993. This provision deals with a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest (on the basis that material in the document or information could form the basis of a claim for Crown privilege, other than for a reason set out in section 473GA) or the document, or information in the document, or the information, was given in confidence. Where the Secretary gives information or a document to the IAA, the Secretary shall notify the IAA in writing that the section applies and may give the IAA written advice that the Secretary thinks relevant about the significance of the document or information.

994. In exercising the discretion to disclose, the IAA should consider the advice of the Secretary about the significance of the information or document. It is intended that the IAA may rely on such documents or information in making its decision without breaching the rules of natural justice if the referred applicant is not advised of that document or information. It is also intended that if the IAA chooses to release the document or information in full knowledge of the Secretary's advice, it should be responsible for the release.

#### Section 473GC – Disclosure of confidential information

995. New subsection 473GC(1) provides that this section applies to a person who is or has been:

- a Reviewer; or
- a person acting as a Reviewer; or
- a person mentioned in subsection 473JE(2) who is assisting the Authority; or
- a person providing interpreting services in connection with a review by the Authority.

996. New subsection 473GC(2) provides that this section applies to information or a document if the information or document concerns a person and is obtained by a person to whom this section applies in the course of performing functions or duties or exercising powers under this Act.

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997. New subsection 473GC(3) provides that a person to whom this section applies must not:

- make a record of any information to which this section applies; or
- divulge or communicate to any person any information to which this section applies;
- unless the record is made or the information is divulged or communicated:
  - for the purposes of this Act; or
  - for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under this Act.

998. The relevant penalty is imprisonment for 2 years.

999. New subsection 473GC(4) provides that subsection 473GC(3) applies to the divulging or communication of information whether directly or indirectly.

1000. New subsection 473GC(5) provides that a person to whom this section applies must not be required to produce any document, or to divulge or communicate any information, to which this section applies to or in:

- a court; or
- a tribunal; or
- a House of the Parliament of the Commonwealth, of a State or of a Territory; or
- a committee of a House, or the Houses, of the Parliament of the Commonwealth, of a State or of a Territory; or
- any other authority or person having power to require the production of documents or the answering of questions;

except where it is necessary to do so for the purposes of carrying into effect the provisions of this Act.

1001. New subsection 473GC(6) provides that nothing in this section affects a right that a person has under the Freedom of Information Act 1982.

1002. New subsection 473GC(7) provides that for the purposes of this section, a person who is providing interpreting services in connection with a review by the Authority is taken

to be performing a function under this Act.

1003. New subsection 473GC(8) provides that in this section produce includes permit access to.

1004. The purpose of this amendment is to prohibit the use of information or a document in the course of a person performing his/her duties or functions or exercising a power under the Migration Act other than for a purpose of the Migration Act or in the course

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of performing that duty or function. It applies to past and present Reviewers of the IAA and to persons providing support services to the IAA.

1005. This amendment also prevents such a person from being compelled to produce a document or divulge or communicate to any court, any information to which this section applies. This also includes any House of Parliament or a committee of a House of Parliament, tribunal or authority possessing the power to compel a person to do such things. This section is subject to the Freedom of Information Act 1982 in that a person is entitled to personal information under that Act.

Section 473GD – Immigration Assessment Authority may restrict publication or disclosure of certain matters

1006. New subsection 473GD(1) provides that if the Principal Member is satisfied, in relation to a review, that it is in the public interest that:

any information given to the IAA; or

the contents of any document produced to the Authority;

should not be published or otherwise disclosed, or should not be published or otherwise disclosed except in a particular manner and to particular persons, the Principal Member may give a written direction accordingly.

1007. New subsection 473GD(2) provides that the direction under subsection (1):

must be in writing; and

must be notified in a way that the Principal Member considers appropriate.

1008. New subsection 473GD(3) provides that if the Principal Member has given a direction under subsection 473GD(1) in relation to the publication of any information or of the contents of a document, the direction does not:

excuse the IAA from its obligations under section 473EA; or

prevent a person from communicating to another person a matter contained in the evidence, information or document, if the first-mentioned person has knowledge of the matter otherwise than because of the evidence or the information having been given or the document having been produced to the Authority.

1009. New subsection 473GD(4) provides that a person must not contravene a direction given by the Principal Member under subsection 473GD(1) that is applicable to the person.

1010. The relevant penalty is imprisonment for 2 years.

1011. The purpose of this amendment is allow the Principal Member of the IAA to direct that any information given to the IAA or the contents of any document produced to the IAA shall not be published or otherwise disclosed where the Principal Member is satisfied that this would be in the public interest. The Principal Member may also, in the public interest, impose restrictions on publication or disclosure and direct that the publication is to be in a specific manner and to particular persons. Subsection (3) provides that

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this does not affect the IAA's obligations to make a written statement under section 473EA. In addition, subsection (3) does not prevent a person who has knowledge of the matter from other sources from disclosing that information. The penalty for a person contravening a direction applicable to them under new section 473GD is 2 years imprisonment.

Division 7 – Giving and receiving review documents etc.

Section 473HA – Giving documents by Immigration Assessment Authority where no requirement to do so by section 473HB or 473HC method

1012. New subsection 473HA(1) provides that if:

a provision of this Act or the regulations requires or permits the IAA to give a document to a person; and

the provision does not state that the document must be given:

o by one of the methods specified in section 473HB or 473HC; or

o by a method prescribed for the purposes of giving documents to a person in immigration detention;

the Authority may give the document to the person by any method that it considers appropriate (which may be one of the methods mentioned in subpagraph (b)(i) or (ii) of this section).

1013. The note to new subsection 473HA(1) provides that under section 473HG a referred applicant may give the IAA the name of an authorised recipient who is to receive documents on the referred applicant's behalf.

1014. The purpose of this amendment is to authorise the IAA to use any method that it considers to be appropriate in order to give a document to a person in circumstances where the method for giving the document has not been specified by the Migration Act or the Migration Regulations. This new section does not prevent the IAA from opting to use one of the methods specified in new section 473HB or 473HC, or which may have been prescribed by the Migration Regulations.

1015. While only certain documents (notices, invitations, or written statements) are required to be given by one of the methods specified in section 473HB or 473HC, other documents might be given in these ways and, if they are, the provisions of new sections 473HD and 473HE may be invoked to determine the time when the document is taken to have been received.
1016. Subsection 473HA(2) provides that if a person is a minor, the IAA may give a document to an individual who is at least 18 years of age if the Authority reasonably believes that:

The individual has day-to-day care and responsibility for the minor; or  
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The individual works in or for an organisation that has day-to-day care and responsibility for the minor and the individual's duties, whether alone or jointly with another person, involve care and responsibility for the minor.

1017. Subsection 473HA(3) provides that if the IAA gives a document to an individual, as mentioned in subsection (2), the Authority is taken to have given the document to the minor. However, this does not prevent the Authority giving the minor a copy of the document.

Section 473HB – Methods by which Immigration Assessment Authority gives documents to a person other than the Secretary

#### Coverage of section

1018. New subsection 473HB(1) provides that for the purposes of provisions of this Part or the regulations that:
- require or permit the IAA to give a document to a person (the recipient); and  
state that the Authority must do so by one of the methods specified in this section;  
the methods are as follows.
1019. New subsection 473HB(2) provides that if the recipient is a minor, the IAA may use the methods mentioned in subsections (5) and (6) to dispatch or transmit, as the case may be, a document to an individual (a carer of the minor):
- who is at least 18 years of age; and  
who the IAA reasonably believes:
- o has day to day care and responsibility for the minor; or
  - o works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.

1020. The note to new subsection 473HB(2) provides that if the IAA gives an individual a document by the method mentioned in subsection 473HB(5) or 473HB(6), the individual is taken to have received the document at the time specified in section 473HD in respect of that method.

#### Giving by hand

1021. New subsection 473HB(3) provides that one method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2) handing the document to the recipient.

Handing to a person at last residential or business address  
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1022. New subsection 473HB(4) provides that another method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2), handing the document to another person who:
- is at the last residential or business address of the recipient provided to the IAA in connection with the review; and  
appears to live there (in the case of a residential address) or work there (in the case of a business address); and  
appears to be at least 16 years of age.

#### Dispatch by prepaid post or by other prepaid means

1023. New subsection 473HB(5) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2) dating the document, and then dispatching it:
- within 3 working days (in the place of dispatch) of the date of the document; and  
by prepaid post or by other prepaid means; and  
to:
- o the last address for service of the recipient provided to the IAA in connection with the review; or
  - o the last residential or business address of the recipient provided to the IAA in connection with the review; or
  - o if the recipient is a minor – the last address for a carer of the minor provided to the Authority.

#### Transmission by fax, email or other electronic means

1024. New subsection 473HB(6) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), transmitting the document by:

fax; or

email; or

other electronic means;

to:

the last fax number, email address or other electronic address, as the case may be, of the recipient provided to the Authority; or

if the recipient is a minor – the last fax number, email address or other electronic address, as the case may be, for a carer of the minor that is provided to the Authority .

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#### Documents given to a carer

1025. New subsection 473HB(7) provides that if the IAA gives a document to a carer of a minor, the Authority is taken to have given the document to the minor. However, this does not prevent the Authority giving the minor a copy of the document.

1026. The purpose of new section 473HB is to specify alternative methods that control the ways in which the IAA is authorised to give documents to any person (other than the Secretary) for the purposes of Part 7AA of the Migration Act (dealing with Fast Track review by the IAA of certain protection visa decisions) or the Migration Regulations. One of these methods must be used whenever a provision of Part 7AA or the Migration Regulations requires the document to be given in conformity with this section. However, the IAA is left free to determine which method to use in any given case.

1027. These methods are intended to operate independently. For example, the IAA is authorised to use the most recent fax number even though it might have been given an even more recent e-mail address.

1028. A person authorised in writing by the Senior Reviewer may also give documents. This will enable the IAA to authorise, for example, process servers to give documents.

#### Section 473HC – Methods by which Immigration Assessment Authority gives documents to the Secretary

##### Coverage of section

1029. New subsection 473HC(1) provides that for the purposes of provisions of this Part or the regulations that:

require or permit the IAA to give a document to the Secretary; and

state that the Authority must do so by one of the methods specified in this section;

the methods are as follows.

##### Giving by hand

1030. New subsection 473HC(2) provides that one method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2), handing the document to the Secretary or to an authorised officer.

##### Dispatch by prepaid post or by other means

1031. New subsection 473HC(3) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), dating the document, and then dispatching it:

within 3 working days (in the place of dispatch) of the date of the document; and

by post or other means; and

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to an address, notified to the IAA in writing by the Secretary, to which such documents can be dispatched.

##### Transmission by fax, email or other electronic means

1032. New subsection 473HC(4) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), transmitting the document by:

fax; or

email; or

other electronic means;

to the last fax number, email address or other electronic address notified to the Authority in writing by the Secretary for the purpose.

1033. The purpose of new section 473HC is to specify alternative methods that control the ways in which the IAA is authorised to give documents to the Secretary for the purposes of Part 7AA of the Migration Act (dealing with Fast Track review by the IAA of certain protection visa decisions) or the Migration Regulations.

1034. One of these methods must be used whenever a provision of Part 7AA or the Migration Regulations requires the document to be given in conformity with this section. However, the IAA is left free to determine which method to use in any given case.

1035. These methods are the same as those for the giving of document to a person (new section 473HB refers), except that there is no need for a separate provision dealing with giving documents to a person at the Secretary's notified address.

#### Section 473HD – When a person other than the Secretary is taken to have received a document from the Immigration Assessment Authority

1036. New subsection 473HD(1) provides that this section applies if the IAA gives a document to a person other than the Secretary by one of the methods specified in section 473HB (including in a case covered by section 473HA).

## Giving by hand

1037. New subsection 473HD(2) provides that if the IAA gives a document to a person by the method in subsection 473HB(3) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

## Handing to a person at last residential or business address

1038. New subsection 473HD(3) provides that if the IAA gives a document to a person by the method in subsection 473HB(4) (which involves handing the document to another person at a residential address or business address), the person is taken to have received the document when it is handed to the other person.

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## Dispatch by prepaid post or by other prepaid means

1039. New subsection 473HD(4) provides that if the IAA gives a document to a person by the method in subsection 473HB(5) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document 7 working days (in the place of that address) after that date of the document.

## Transmission by fax, email or other electronic means

1040. New subsection 473HD(5) provides that if the IAA gives a document to a person by the method in subsection 473HB(6) (which involves transmitting the document by fax, email or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.

1041. New subsection 473HD(6) provides that subsection 473HD(5) applies despite sections 14, 14A and 14B of the Electronic Transactions Act 1999.

## Document not given effectively

1042. New subsection 473HD(7) provides if:

the IAA purports to give a document to a person in accordance with a method specified in section 473HB (including a case covered by section 473HA) but makes an error in doing so; and

the person nonetheless receives the document or a copy of it;

then the person is taken to have received the document at the times mentioned in this section as if the Authority had given the document to the person without making an error in doing so, unless the person can show that he or she received it at a later time, in which case, the person is taken to have received it at that time.

1043. New section 473HD provides the rules for determining the time when a person is taken to have received a document if the document was given in accordance with one of the methods in section 473HB, irrespective of whether the person has in fact received the document.

1044. The rules will apply if the IAA uses one of the methods specified in new section 473HB, even where it was not required to do so by the legislation. New subsection 473HD(6) provides that subsection 473HD(5) applies despite sections 14, 14A and 14B of the Electronic Transactions Act 1999 (ET Act). The effect of this provision is to dis-apply the provisions of the ET Act that affect deemed receipt of documents in favour of the deemed receipt provision in 473HD(5), as this is more certain than relying on sections 14, 14A and 14B of the ET Act to determine deemed receipt. In general terms, sections 14, 14A and 14B of the ET Act provide for the time of dispatch, time of receipt and place of dispatch and place of receipt of electronically transmitted documents that are determined by reference to variable factors such as when the electronic communication leaves or enters an information system. This might never be known by the originator of the communication. There is a need in the migration context for time of receipt of documents to be easily determinable and with certainty for the purposes of establishing, for example, the date on which a person's bridging visa will

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cease to be in effect following notification of a decision of the IAA. Given this, it is preferable to expressly provide for deemed receipt and not rely on the default provisions of the ET Act.

## Section 473HE – When the Secretary is taken to have received a document from the Immigration Assessment Authority

1045. New subsection 473HE(1) provides that this section applies if the IAA gives a document to the Secretary by one the methods specified in section 473HC (including in a case covered by section 473HA).

## Giving by hand

1046. New subsection 473HE(2) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(2) (which involves handing the document to the Secretary or to an authorised officer), the Secretary is taken to have received the document when it is handed to the Secretary or to the authorised officer.

## Dispatch by post or by other means

1047. New subsection 473HE(3) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(3) (which involves dispatching the document by post or by other means), the Secretary is taken to have received the document 7 working days (in the place of that address) after that date of the document.

## Transmission by fax, email or other electronic means

1048. New subsection 473HE(4) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(4) (which involves transmitting the document by fax, email or other electronic means), the Secretary is taken to have received the document at the end of the day on which the document is transmitted.

1049. New subsection 473HE(5) provides that subsection 473HE(4) applies despite sections

14, 14A and 14B of the ET Act.

1050. The purpose of this amendment is to provide three rules for determining the time when the Secretary is taken to have received a document from the IAA. The rules will apply if the IAA uses one of the methods specified in new section 473HC, even where it is not required to do so by the legislation. The rules are the same as those for determining the time when a document is taken to have been received by a person other than the Secretary (new section 473HD), except that there is no need for a separate provision dealing with giving documents to a person at the Secretary's notified address.

1051. New subsection 473HE(5) provides that subsection 473HE(4) applies despite sections 14, 14A and 14B of the ET Act, for the same reasons noted above.

#### Section 473HF – Giving of documents etc. to the Immigration Assessment Authority

1052. New subsection 473HF(1) provides that if, in relation to the review of a fast track reviewable decision, a person is required or permitted to give a document or thing to the IAA, the person must do so:

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by a method set out in the directions under section 473FB; or

if the regulations set out a method for doing so – by that method.

1053. New subsection 473HF(2) provides that directions under section 473FB may make provision for a person to give a copy of a document, rather than the document itself, to the IAA.

1054. The purpose of new section 473HF is to provide the ways in which a person must give documents to the IAA. Two methods are specified, namely:

by following a method set out in directions that have been given under section 473FB (relating to directions given by the Principal member of the RRT); or

if the Migration Regulations set out a method for doing so – by that method.

#### Section 473HG – Authorised recipient

1055. New subsection 473HG(1) provides that if:

a fast track reviewable decision in respect of a referred applicant is referred for review; and

the referred applicant gives the IAA written notice of the name and address of another person (the authorised recipient) authorised by the referred applicant to receive documents in connection with the review;

the Authority must give the authorised recipient, instead of the referred applicant, any document that it otherwise have given to the referred applicant.

1056. The note to new subsection 473HG(1) provides that if the IAA gives a person a document by a method specified in section 473HB, the person is taken to have received the document at the time specified in section 473HD in respect of that method.

1057. The purpose of this amendment is to authorise the referred applicant to notify the IAA in writing that the referred applicant has authorised another person (the authorised recipient) to receive documents in connection with the review. In these cases, the IAA must give such documents to the authorised recipient.

1058. Under this provision, the authorised recipient is only authorised to receive documents in connection with the review and not to do anything else on behalf of the referred applicant (other than update an address as provided for in new subsection 473HG(4)). For example, the authorised recipient cannot unilaterally withdraw their authorisation to receive documents on behalf of the applicant for review. It is the referred applicant who must make arrangements for this to occur.

1059. New subsection 473HG(2) provides that if the IAA gives a document to the authorised recipient, the Authority is taken to have given the document to the referred applicant. However, this does not prevent the Authority giving the referred applicant a copy of the document.

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1060. The purpose of this amendment is to clarify that the IAA discharges its obligation to give a document to the applicant if it gives the document to the authorised recipient.

1061. New subsection 473HG(3) provides that subject to subsection 473HG(4), the referred applicant may vary or withdraw the notice under paragraph 473HG(1)(b) at any time, but must not (unless the regulations provide otherwise) vary the notice so that any more than one person becomes the referred applicant's authorised recipient.

1062. The purpose of this amendment is to permit the referred applicant to vary or withdraw the authorisation but prevent the referred applicant from varying the notice of authorisation given under new paragraph 473HG(1)(b) in such a way that the person has more than one authorised recipient at the same time.

1063. New subsection 473HG(4) provides that in addition to the referred applicant being able to vary the notice under paragraph 473HG(1)(b) by varying the address of the authorised recipient, that recipient may also vary that notice by varying that address.

1064. The purpose of this amendment is to ensure that an authorised recipient who is authorised in a notice to receive documents on behalf of the applicant in connection with the review is able to unilaterally vary the address given for the authorised recipient in the notice. This is to avoid the IAA being legally required to send correspondence to an outdated address merely because it was the authorised recipient, rather than the applicant, who had notified of the change in address. This amendment, in conjunction with subsection 473HG(1) (which authorises the authorised recipient to only receive documents) also have the effect of ensuring that the authorised recipient is not able to unilaterally vary or withdraw the notice of authorisation given under paragraph 473HG(1)(b) (other than to vary the authorised recipient's address). This ensures that the authorised recipient cannot abandon their role as the referred applicant's authorised recipient without the knowledge and to the detriment of the referred applicant through unilateral variation or withdrawal of the notice given under

paragraph 473HG(1).

1065. New subsection 473HG(5) provides that section 473HG does not apply to the IAA giving documents to, or communicating with, the referred applicant when the referred applicant is appearing at an interview with the Authority.
1066. The purpose of this amendment is to remove a possible source of confusion by providing that new section 473HG does not apply to the giving of documents or communicating directly with the referred applicant when the referred applicant is appearing before the IAA.

#### Division 8 – The Immigration Assessment Authority

##### Section 473JA – The Immigration Assessment Authority

1067. New subsection 473JA(1) provides that the IAA is established within the RRT.
1068. New subsection 473JA(2) provides that the Authority consists of the following persons:

the Principal Member;

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the Senior Reviewer and other Reviewers.

1069. Subsection 473JA(3) provides that the Principal Member, the Senior Reviewer and the other Reviewers are to exercise the powers, and perform the functions, of the Authority under this Part.
1070. The purpose of this amendment is to establish the IAA within the RRT and outline the persons of whom it consists.

1071. The decision to establish the IAA within an existing agency is consistent with the recommendations of the National Commission of Audit. The Audit noted that the need for independent decision making does not alone justify the establishment of a stand-alone operational body. The IAA is to have distinctive branding and quarantined powers, but to be supported within the RRT.

##### Section 473JB – Administrative arrangements

1072. New subsection 473JB(1) provides that the Principal Member is responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies.
1073. The purpose of this amendment is to provide that the head of the IAA is the Principal Member of the IAA and to provide him or her with certain powers.
1074. New subsection 473JB(2) provides that the Senior Reviewer is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member.
1075. The purpose of this amendment is to provide that the Senior Reviewer is to be responsible for the day-to-day operations of the IAA, subject to the directions and policies determined by the Principal Member of the RRT.

##### Section 473JC – Appointment of Senior Reviewer

1076. New subsection 473JC(1) provides that the Principal Member must, by written instrument, appoint an SES employee to be the Senior Reviewer.
1077. New subsection 473JC(2) provides that before appointing a person as the Senior Reviewer, the Principal Member must consult the Minister.
1078. The purpose of this amendment is to provide the Principal Member of the RRT with the power to appoint a Senior Reviewer in consultation with the Minister. A reference to a written instrument is not intended to be an instrument made under the Legislative Instruments Act 2003.
1079. It is intended that the Senior Reviewer would report directly to the Principal Member. The Principal Member will only be able to appoint a Senior Reviewer if that person is engaged under the Public Service Act 1999 which is required under subsection 473JE(1).

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##### Section 473JD – Acting Senior Reviewer

1080. New subsection 473JD(1) provides that the Principal Member may appoint a person to act as the Senior Reviewer:
- during a vacancy in the office of Senior Reviewer, whether or not an appointment has previously been made to that office; or
- during any period, or during all periods, when the Senior Reviewer is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office of Senior Reviewer.
1081. The purpose of this provision is to provide the Principal Member of the RRT with the power to appoint an Acting Senior Reviewer.

##### Section 473JE – Staff

1082. New subsection 473JE(1) provides that the Senior Reviewer and the other Reviewers are to be persons engaged under the Public Service Act 1999.
1083. The purpose of this amendment is to clarify that Reviewers of the IAA, including the Senior Reviewer are to be persons engaged under the Public Service Act 1999. While the MRT and RRT comprise members who are appointed by the Governor-General under the Migration Act for fixed terms, given the limited –on the papers|| review function of the IAA, it was considered appropriate for Reviewers of the IAA to be persons engaged under the Public Service Act 1999. This Act governs the establishment, operation and employment of Reviewers of the IAA. Accordingly, all Reviewers will be subject to the APS Values set out in section 10 of the Public Service

Act 1999.

1084. New subsection 473JE(2) provides that the Principal Member must make available officers of the RRT to assist the Authority in the performance of its administrative functions.
1085. The purpose of this amendment is to require the Principal Member of the RRT to make corporate and support staff available for the IAA's purposes. These persons will be made available from the existing Tribunal Office as defined by subsection 473(2).
1086. New paragraph 473A(a) as amended by item 20 above, in conjunction with paragraph 473A(b) will clarify that the Principal Member of the RRT, officers of the MRT and RRT together with the Reviewers of the IAA constitute a Statutory Agency and that the Principal Member of the Refugee Review Tribunal is the Head of that Statutory Agency. Reviewers of the IAA and the persons who are made available to the Authority under subsection 473JE(2) are to form part of the Statutory Agency known as the ~~MRT-RRT~~.

## Section 473JF – Delegation by Principal Member

1087. New subsection 473JF(1) provides that the Principal Member may delegate, in writing, all or any of the Principal Member's powers or functions under Part 7AA to the Senior Reviewer.

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1088. New subsection 473JF(2) provides that in exercising a power under a delegation, the Senior Reviewer must comply with any written directions of the Principal Member.

1089. The purpose of this amendment is to confer power on the Principal Member to delegate his or her functions under Part 7AA to the Senior Reviewer of the IAA. The Principal Member's powers under Part 7AA can only be delegated to the Senior Reviewer. This is made clear by the amendments to section 470 made by item 19 above.

1090. New section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member's powers under this Act other than the power under section 443 to refer decisions to the AAT and the Principal Member's powers under Part 7AA.

1091. In exercising a power under a delegation, the Senior Reviewer is required to comply with any written directions of the Principal Member.

## Item 22 Subsection 476(4) (at the end of the definition of primary decision)

1092. This item adds new paragraph 476(4)(c) at the end of the definition of primary decision in subsection 476(4) in Division 2 of Part 8 of the Migration Act.

1093. Section 476 deals with the jurisdiction of the Federal Circuit Court. Current subsection 476(4) provides that in this section, primary decision means a privative clause decision or purported privative clause decision:

that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or

that would have been so reviewable if an application for such review had been made within a specified period.

1094. New paragraph 476(4)(c) will provide that, in this section, primary decision means a privative clause decision or purported privative clause decision:

that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).

1095. The purpose of this amendment is to capture decisions that have or may be referred for review under new Part 7AA in the definition of primary decision. Under subsection 476(2), the Federal Circuit Court has no jurisdiction in relation to a primary decision.

## Item 23 Subsection 477(3) (after paragraph (c) of the definition of date of the migration decision)

1096. This item inserts new paragraph 477(3)(ca) after paragraph 477(3)(c) in Division 2 of Part 8 of the Migration Act.

1097. Section 477 deals with time limits on applications to the Federal Circuit Court. Current subsection 477(3) provides that date of the migration decision means:

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in the case of a migration decision made under subsection 43(1) of the Administrative Appeals Tribunal Act 1975 – the date of the written decision under that subsection ; or

in the case of a written migration decision made by the MRT or the RRT – the date of the written statement under subsection 368(1) or 430(1); or

in the case of an oral migration decision made by the MRT or RRT– the date of the oral decision; or

in any other case – the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate.

1098. New paragraph 477(3)(ca) provides that date of the migration decision means in the case of a migration decision made by the IAA – the date of the written statement under subsection 473EA(1).

1099. Subsection 477(1) provides that an application to the Federal Circuit Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

1100. The purpose of this amendment is to clarify that an application to the Federal Circuit Court for a remedy in respect of a fast track reviewable decision must be made 35 days after the IAA made a written statement under new subsection 473EA(2).

## Item 24 Paragraphs 478(a) and 479(a)

1101. This item inserts a new paragraph (aa) after paragraph 478(a) and 479(a) of Division 2 of Part 8 of the Migration Act.
1102. Section 478 deals with persons who may make an application to the Federal Circuit Court or the Federal Court. Section 479 deals with a party to a review of a migration decision resulting from an application to the Federal Circuit Court or the Federal Court.
1103. Current paragraph 478(a) provides that an application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 5 or 7 or section 500 – the applicant in the review by the relevant Tribunal.
1104. Current paragraph 479(a) provides that the parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 5 or 7 or section 500 – the applicant in the review by the relevant tribunal.
1105. New paragraph 478(aa) provides that an application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 7AA – the referred applicant in the review by the IAA.

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1106. New paragraph 479(aa) provides that the parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 7AA – the referred applicant in the review by the IAA.
1107. The purpose of this amendment is to ensure the Minister's ability, or where appropriate the secretary's, to make an application on behalf of, and be a party to, judicial review proceedings dealing with migration decisions made on review under new Part 7AA and that a party can be the referred applicant in the review.
- Item 25 Subsection 486D(5) (definition of tribunal decision)
1108. This item repeals the definition of tribunal decision in subsection 486D(5) of Part 8A of the Migration Act and substitutes a new definition of tribunal decision.
1109. Currently the term tribunal decision means a privative clause decision, or purported privative clause decision, made on review by a Tribunal under Part 5 or 7 or section 500.
1110. The new definition of the term tribunal decision means a privative clause decision, or purported privative clause decision, made on review:

by a Tribunal under Part 5 or 7 or section 500; or  
 by the IAA under Part 7AA.

1111. The purpose of this amendment is to capture a decision made by the IAA under Part 7A in the definition of tribunal decision.
1112. Section 486D broadly provides that a person must not commence a proceeding in the Federal Circuit Court, Federal Court or High Court in relation to a tribunal decision unless the person discloses to the court, when commencing the proceeding, any judicial review proceeding brought by the person in any court in relation to that decision.
1113. The effect of this provision is that when commencing a proceeding, a person must disclose to a court, any judicial review proceedings brought by that person in relation to the tribunal decision, which also includes a decision by the IAA under Part 7AA.

## Item 26 At the end of subsection 500(1)

1114. This item adds a note at the end of new subsection 500(1) in Part 9 of the Migration Act.
1115. The new note provides that decisions to refuse to grant a protection visa to fast track applicants are generally not reviewable by the Administrative Appeals Tribunal. However, some decisions of this kind are reviewable by that Tribunal, in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of fast track decision in subsection 5(1).
1116. The purpose of this amendment is to refer the reader to the definition of fast track decision and clarify that some decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of fast track decision

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are reviewable by the Administrative Appeals Tribunal in accordance with section 500. These decisions are not reviewable by the IAA.

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## Part 2 -- Application

## Item 27 Application of amendments

1117. This item provides that the amendments made by Part 1 of Schedule 4 to the Bill apply in relation to an application for a protection visa made by a fast track applicant on or after the commencement of Schedule 4.

## Item 28 Application of fast track review process in relation to decisions based on complementary protection

1118. Subitem 28(1) provides that a decision made, before the day Part 1 of Schedule 4 to the Bill commences, to refuse to grant a protection visa is not a fast track reviewable decision to the extent that:

the decision was made relying on paragraph 36(2)(aa) or 36(2)(c) of the Migration Act;  
 and

the application for the visa is not finally determined before the day that Part 1 of Schedule 4 to the Bill commences; and those paragraphs are repealed before the application is finally determined.

1119. The note under subitem 28(1) provides that for when an application is finally determined, see subsection 5(9) and 5(9A) of the Migration Act.
1120. Subitem 28(2) provides that subitem 28(1) does not prevent a decision to refuse to grant a protection visa from being a fast track reviewable decision to the extent that the decision was made relying on another provision in the Migration Act.

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#### SCHEDULE 5 – Clarifying Australia's international law obligations

##### Part 1 – Removal of unlawful non-citizens

###### Division 1 – Amendments commencing on the day after Royal Assent

###### Migration Act 1958

###### Item 1 Subsection 5(1)

1121. This item inserts two new defined terms into subsection 5(1) of the Migration Act.

1122. The new defined term Convention Against Torture means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984.

1123. The note to the new defined term Convention Against Torture provides that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is in Australian Treaty Series 1989 No. 21 ([1989] ATS 21) and could in 2014 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

1124. This definition is consequential to the insertion of the new definition of non-refoulement obligations.

1125. The new defined term non-refoulement obligations provides that the definition includes, but is not limited to:

non-refoulement obligations that may arise because Australia is a party to:  
 o the Refugees Convention; or  
 o the Covenant; or  
 o the Convention Against Torture; and  
 any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a) of the definition of non-refoulement obligations.

1126. The new defined term non-refoulement obligations is consequential to the amendment in item 2 below. The new defined term non-refoulement obligations is defined in a non-exhaustive manner and is intended to be read broadly to include current and future non-refoulement obligations outside the Refugees Convention, the Covenant and the Convention Against Torture. For example, it is also intended to include non-refoulement obligations about the death penalty, which arise in relation to Article 6 of the Covenant for countries which are also a party to its Second Optional Protocol aiming at the abolition of the death penalty.

1127. Subsection 5(1) of the Migration Act defines Covenant to mean the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the Australian Human Rights Commission Act 1986.

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###### Item 2 Before section 198

1128. This item inserts new section 197C before current section 198 of the Migration Act.

1129. New subsection 197C(1) provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

1130. New subsection 197C(2) provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

1131. In general terms, section 198 currently provides for the circumstances in which an unlawful non-citizen is subject to mandatory removal from Australia as soon as reasonably practicable.

1132. The effect of new section 197C is to make it clear that in order to exercise the removal powers under section 198 of the Migration Act an officer is not bound to consider whether or not a person who is subject to removal engages Australia's non-refoulement obligations before removing that person.

1133. In recent years judicial review of protection visa refusal decisions has led to a number of broad and unintended interpretations of Australia's protection obligations under the Refugees Convention and other international treaties. There has been a trend of jurisprudence favouring an approach whereby the provisions of the Migration Act are construed in light of a presumed legislative intention for the Migration Act as a whole to facilitate Australia's compliance with its obligations under the Refugees Convention.

1134. In Plaintiff M61/2010E v Commonwealth of Australia & Ors/Plaintiff M69 of 2010 v Commonwealth of Australian & Ors [2010] HCA 42, the High Court in a unanimous joint judgement said at [27]:

... read as a whole, the Migration Act contains an elaborate and interconnected set of statutory provisions directed to the purpose of responding to the international obligation which Australia has undertaken in the Refugees Convention and Refugees Protocol.

1135. In Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32, the

majority of the High Court further found that the removal power under section 198 of the Migration Act was to be read in light of, and subject to, the obligations in the Refugees Convention. In the recent decision of Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 the Full Court of the Federal Court found this principle was extended to the non-refoulement obligations under the Covenant and the Convention Against Torture. These decisions have had a significant impact on the Government's ability to remove unlawful non-citizens from Australia under section 198 of the Migration Act.

1136. Prior to this recent jurisprudence, section 198 of the Migration Act created an obligation to remove unlawful non-citizens in the circumstances prescribed in section 198 and this duty was not constrained by reference to Australia's international

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obligations (for example, the Full Court of the Federal Court decision in M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 131). This was because it was understood that Australia's international obligations had already been considered during separate processes prior to removal, for example when considering the persons application for a protection visa or when the Minister was considering the use of his or her personal powers.

1137. In general terms, the amendments in this item are intended to restore the situation to that arising prior to the jurisprudence noted above by making it clear that the removal powers are separate from, unrelated and completely independent of, any provisions in the Migration Act which might be interpreted as implementing Australia's non-refoulement obligations.

1138. These amendments seek to provide clarity about the interpretation and implementation of Australia's non-refoulement obligations and to ensure that the Parliament is able to control how Australia's non-refoulement obligations will be implemented domestically. This amendment seeks to achieve this objective by inserting clear statutory provisions that remove any perceived connection between the removal powers in section 198 and the assessment of Australia's non-refoulement obligations.

1139. The amendments in this item are therefore intended to provide that decisions such as Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 are no longer 'good law' for the purposes of removal from Australia of unlawful non-citizens under section 198 of the Migration Act.

1140. The amendments are intended to put it beyond doubt that the purpose of section 198 is not to respond to international protection obligations, but to provide officers with the duty to remove unlawful non-citizens from Australia in the circumstances as set out in section 198 of the Migration Act.

1141. This means that the duty to remove in section 198 of the Migration Act arises irrespective of whether or not there has been an assessment, according to law or procedural fairness, of Australia's non-refoulement obligations in respect of the non-citizen.

1142. Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. For example, Australia's non-refoulement obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.

1143. The Minister's personal power under subsection 46A(2) provides that the Minister may determine that an unauthorised maritime arrival may make a valid visa application if the Minister thinks that it is in the public interest to do so. The Minister's lifting of the visa application bar may enable non-refoulement obligations to be considered in an appropriate visa application process.

1144. The Minister's personal power under section 195A provides that the Minister has a non-compellable power to grant a visa to a person who is in immigration detention where the Minister thinks that it is in the public interest to do so. In the exercise of this power the Minister is not bound by the provisions of the Migration Act or Migration

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Regulations governing application and grant requirements. The Minister has the flexibility to grant any visa that is appropriate to that individual's circumstances. In these circumstances, if the Minister thinks that it is in the public interest to do so, the Minister may grant a visa to a person to ensure that the person is not removed in breach of Australia's non-refoulement obligations.

1145. The Minister's personal power under section 417 provides that the Minister has power to substitute a decision more favourable to the applicant than the decision of the Refugee Review Tribunal in relation to a reviewable decision. In these circumstances, the Minister may, if the Minister thinks that it is in the public interest to do so, grant a visa to a person who has had a visa decision affirmed by the Tribunal to ensure the person is not removed in breach of Australia's non-refoulement obligations.

1146. The above mechanisms enable non-refoulement obligations to be addressed before a person becomes ready for removal. At the removal stage, an officer will not be bound to check whether or not the Minister has considered exercising his or her personal powers when assessing if a person is subject to removal under section 198 of the Migration Act. If an unlawful non-citizen satisfies one of the conditions specified in section 198, the officer must remove the unlawful non-citizen as soon as reasonably practicable and it is not open to the non-citizen to challenge their removal on the basis that there has been no assessment of protection obligations according to law or procedural fairness.

#### Division 2 – Amendments if this Act commences after the Migration Amendment (Protection and Other Measures) Act 2014

##### Item 3 Subsection 6A(4)

1147. This item repeals subsection 6A(4) and substitutes a new subsection 6A(4) into the Migration Act if this Act commences after the Migration Amendment (Protection and Other Measures) Act 2014.

1148. The Migration Amendment (Protection and Other Measures) Bill 2014 provides for new subsection 6A(4) to be inserted into the Migration Act. New subsection 6A(4) of the Migration Amendment (Protection and Other Measures) Bill 2014 provides that in

new section 6A protection obligations means any obligations that may arise because Australia is a party to:

the Covenant; or  
the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984.

1149. Item 1 of Division 1 of Part 1 of Schedule 5 of this Bill inserts a definition of Convention Against Torture into the Migration Act. If the amendments in the Migration Amendment (Protection and Other Measures) Act 2014 commence before the amendments in Part 1 of Schedule 5 to the Bill, an amendment to new subsection 6A(4) of the Migration Act will be required to recognise the new definition of Convention Against Torture. This item provides for this amendment.

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#### Part 2 – Amendments commencing on Proclamation

##### Migration Act 1958

###### Item 4 Subsection 5(1)

1150. This item inserts the new defined terms refugee and well-founded fear of persecution respectively into subsection 5(1) of Part 1 of the Migration Act 1958 (the Migration Act).

1151. The new defined term refugee has the meaning given by section 5H, inserted by item 7 of Schedule 5 to the Bill below.

1152. The new defined term well-founded fear of persecution has the meaning given by section 5J, inserted by item 7 of Schedule 5 to the Bill below.

1153. The new defined terms refugee and well-founded fear of persecution provide the basis for the new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention.

###### Item 5 Paragraph 5A(3)(f)

1154. This item repeals current paragraph 5A(3)(f) of Part 1 of the Migration Act and substitutes new paragraph 5A(3)(f).

1155. Current paragraph 5A(3)(f) provides that a purpose of obtaining personal identifiers is to improve the procedures for determining the claims for protection under the Refugees Convention as amended by the Refugees Protocol.

1156. New paragraph 5A(3)(f) provides that a purpose of obtaining personal identifiers is to improve the procedures for determining claims from people seeking protection as refugees.

1157. This amendment replaces the reference in current paragraph 5A(3)(f) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1158. The purpose of this amendment is to ensure that the purpose of obtaining personal identifiers, provided in current paragraph 5A(3)(f) will apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

###### Item 6 Subparagraph 5A(3)(j)(ii)

1159. This item repeals current subparagraph 5A(3)(j)(ii) of Part 1 of the Migration Act and substitutes new subparagraph 5A(3)(j)(ii)

1160. Current subparagraph 5A(3)(j)(ii) provides that a purpose of obtaining personal identifiers is to ascertain whether an unauthorised maritime arrival who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

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1161. New subparagraph 5A(3)(j)(ii) provides that a purpose of obtaining personal identifiers is to ascertain whether an unauthorised maritime arrival who makes a claim for protection as a refugee; or

1162. This amendment replaces the reference in current subparagraph 5A(3)(j)(ii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1163. The purpose of this amendment is to ensure that the purpose of obtaining personal identifiers for unauthorised maritime arrivals, provided in current subparagraph 5A(3)(j)(ii) will apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

###### Item 7 After section 5G

1164. This item inserts new sections 5H, 5J, 5K, 5L and 5M after section 5G in Part 1 of the Migration Act.

1165. The purpose of this item is to set out the criteria to be satisfied in order to meet the new definition of a refugee and the grounds which either exclude a person from meeting that definition or, where the person satisfies the definition of a refugee, renders the person ineligible for the grant of a protection visa. The new statutory framework relating to refugees provides the Government's interpretation of terms and concepts, derived from the Refugees Convention, as they apply in Australia and in the Migration Act and the regulations.

1166. New subsection 5H(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person in Australia, the person is a refugee if the person:

in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or  
in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

1167. New subsection 5H(1) is intended to codify Article 1A(2) of the Refugees Convention, as interpreted in Australian case law, into Part 1 of the Migration Act. Article 1A(2), also referred to as the inclusion clause, provides the positive criteria for gaining the benefits afforded to refugees under the Refugees Convention.
1168. Consistent with Article 1A(2) of the Refugees Convention, new subsection 5H(1) is divided into two paragraphs to reflect the different criteria on the basis of the nationality status of the person. New paragraph 5H(1)(a) provides the criteria for a person with a nationality and new paragraph 5H(1)(b) provides the criteria for a person without a nationality, such as a stateless person.
1169. The note to new subsection 5H(1) provides that for the meaning of well-founded fear of persecution, see section 5J. The definition of well-founded fear of persecution

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provided in new section 5J supports the definition of refugee in new subsection 5H(1). Read together, new subsection 5H(1) and new sections 5J, 5K and 5L are intended to codify Article 1A(2) of the Refugees Convention and provide the inclusion criteria for determining who is a refugee under the Migration Act.

1170. A person who satisfies the definition of refugee in new subsection 5H(1) may be eligible for the grant of a protection visa on the basis of section 36(2)(a), provided that the person is not captured by new subsection 5H(2) or any other provision in the Migration Act or the regulations that renders them ineligible for the grant of a protection visa.
1171. New subsection 5H(2) provides that subsection 5H(1) does not apply if the Minister has serious reasons for considering that:
- the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
  - the person committed a serious non-political crime before entering Australia; or
  - the person has been guilty of acts contrary to the purposes and principles of the United Nations.
1172. New subsection 5H(2) is intended to codify Article 1F of the Refugees Convention into Part 1 of the Migration Act for the purposes of the statutory definition of a refugee. Article 1F, also referred to as an exclusion clause, indicates circumstances where a refugee is not to gain benefits that would otherwise be afforded under the Refugees Convention.
1173. New paragraphs 5H(2)(a), 5H(2)(b) and 5H(2)(c) codify Articles 1F(a), 1F(b) and 1F(c) of the Refugees Convention respectively. Consistent with the Refugees Convention, the threshold for a person to satisfy the paragraphs in new subsection 5H(2) is that the Minister has serious reasons for considering the person is captured by the subsection. ‘Serious reasons for considering’ is not intended to be equated with a level of satisfaction ‘beyond reasonable doubt’ or ‘on the balance of probabilities’ but requires strong evidence. New subsection 5H(2) is intended to be interpreted consistently with the existing Australian case law in regards to Article 1F of the Refugees Convention.
1174. A person who is captured by new subsection 5H(2) of the Act will not satisfy the definition of a refugee for the purposes of the new statutory framework relating to refugees. This will be the case, irrespective of whether the person satisfies the criteria in new subsection 5H(1).
1175. A person who does not satisfy the criteria for a refugee in new subsection 5H(1) will not be eligible for the grant of a protection visa on the basis of section 36(2)(a).
1176. New subsection 5J(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person in Australia, the person has a well-founded fear of persecution if:
- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and
  - 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

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the real chance of persecution relates to all areas of a receiving country.

1177. This subsection provides the circumstances that must be satisfied for a person to be found to have a well-founded fear of persecution, which is an element of the definition of refugee, inserted in new section 5H.
1178. New paragraph 5J(1)(a) provides that a necessary element of the well-founded fear of persecution is that the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. This paragraph codifies the reasons for protection as a refugee provided in Article 1A(2) of the Refugees Convention.
1179. New paragraph 5J(1)(b) provides that a necessary element of the well-founded fear of persecution is that 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 5J(1)(a).
1180. New paragraph 5J(1)(b) clarifies that the risk threshold for assessing Australia’s obligations in respect of a refugee under new section 5H is that there is a real chance of persecution for one or more of the reasons listed in paragraph 5J(1)(a) if the person returned to the receiving country. This is in line with the High Court’s decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62 where it was held that the fear of persecution is well-founded, if there is a real chance that the person will be persecuted if he or she returns to the receiving country. This is the same threshold that is currently being applied by decision makers in assessing claims under the Refugees Convention.
1181. New paragraph 5J(1)(c) provides that a necessary element of the well-founded fear of persecution is that the real chance of persecution relates to all areas of a receiving country. This amendment codifies 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. In such cases, the person who could relocate to a safe part of the receiving country upon return would be found not to have a well-founded fear of persecution for the purposes of the new statutory framework relating

to refugees. In considering whether a person can relocate to another area, a decision maker will still be required to take into account whether the person can safely and legally access the area upon returning to the receiving country

1182. Although the 'internal relocation' principle is not explicitly provided for in the Refugees Convention, in the decision of *SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18 (SZATV)*, the High Court has held that the text of the Refugees Convention supports the internal relocation principle and is part of Australian law. The High Court has further found that if it is reasonable for an asylum seeker to relocate to another part of their country of nationality, then their fear of persecution is not well-founded and they will not meet the definition of a refugee in the Refugees Convention. Australia has applied the 'internal relocation' principle consistent with this interpretation.

1183. While the Government will continue to adopt the internal relocation principle in the new statutory framework relating to refugees, it is the Government's intention that the

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principle will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person. The Government considers that in interpreting the 'reasonableness' element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation. For example, as a result of cases such as *SZATV* and *Randhawa v MILGEA (1994) 52 FCR 437*, when assessing internal relocation options, decision makers are now required to consider aspects such a potential diminishment in quality of life or financial hardship which may result from the relocation. As such aspects fall short of the type of harm which amounts to persecution, the Government considers these to be irrelevant to the assessment of a well-founded fear of persecution. For these reasons, it is the Government's intention that new paragraph 5J(1)(c) not be read down by reference to such notions of 'reasonableness'.

1184. The note to new subsection 5J(1) provides that for membership of a particular social group, see sections 5K and 5L. Read together, new sections 5K and 5L provide the definition for particular social group for the purposes of new paragraph 5J(1)(a). New section 5K and 5L are inserted by this item and are explained below.

1185. New subsection 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 a receiving country:
- an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State;
  - adequate and effective protection measures provided by a source other than the relevant State.

1186. New subsection 5J(2) codifies the principle of 'effective State protection' which provides the standard of effective State or non-State protection within the receiving country that is required in order to make a determination of whether a person has a well-founded fear of persecution in that country. New paragraphs 5J(2)(a) and 5J(2)(b) clarify that for the purposes of new subsection 5J(2), protection may be afforded by States or non-State actors.

1187. In cases where the person could avoid the risk of persecution by availing himself or herself of protection from a State or non-State actor, the person would be found not to have a well-founded fear of persecution. The principle would not apply where protection was available from the State or non-State actor in the receiving country but the person is unable or unwilling to seek that protection because of a well-founded fear of persecution.

1188. It is the Government's intention to codify the 'effective State protection' principle consistent with current case law. In *Minister for Immigration and Multicultural Affairs v S152/2003 (2004) 222 CLR* the High Court held that the relevant standard of State protection required under the Refugees Convention is one of 'reasonable protection'. The High Court further held that reasonable protection requires no more than that the State take reasonable measures to protect the lives and safety of their citizens, and those measures would include an 'appropriate criminal law, a reasonably effective and impartial police force and judicial system'. This interpretation of effective protection measures provided by a State is codified in new paragraph 5J(2)(a).

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1189. New paragraph 5J(2)(b) provides that a person does not have a well-founded fear of persecution where adequate and effective protection measures are provided by a source other than the relevant State. This paragraph is consistent with relevant case law on effective State protection provided in the receiving country from non-State actors. In *Siaw v Minister for Immigration and Multicultural Affairs [2001] FCA 953*, it was reasoned that there was no difference between cases where adequate protection was provided by:
- government forces alone; or
  - a combination of government forces and friendly forces; or
  - forces from a neighbouring country or ally; or
  - mercenaries (alone or paid to assist government forces); or
  - UN forces invited to assist government forces.

New paragraph 5J(2)(b) is intended to be read consistently with this reasoning.

1190. New subsection 5J(3) provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
- conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - conceal an innate or immutable characteristic of the person.

1191. The effect of new subsection 5J(3) is that a person who could avoid a real chance of persecution by taking reasonable steps to modify his or her behaviour, would be found not to have a well-founded fear of persecution. This is provided that the modification of behaviour required to avoid the persecution does not conflict with a characteristic that is fundamental to the person's identity or conscience or conceal an innate or immutable characteristic of the person. The reference in new paragraph 5J(3)(a) to 'conscience' is intended to encompass aspects such as religion, political opinion and moral beliefs. A modification in behaviour which is contrary to any aspect of

'conscience' will not necessarily indicate that the person could not take reasonable steps to avoid a real chance of persecution. Only a modification of behaviour that is fundamental to the person's conscience will be relevant for the purposes of new paragraph 5J(3)(a).

1192. For example, a person who faces persecution only for evangelising in public about his or her religion might be found not to have a well-founded fear of persecution because he or she could avoid the persecution by not continuing to evangelise. However, despite new subsection 5J(3), the same person would be assessed as having a well-founded fear of persecution if evangelism was a fundamental part of the person's religion and therefore fundamental to their conscience.

1193. The reference in new paragraph 5J(3)(b) to an 'innate' characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics could include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5J(3)(b) to an 'immutable' characteristic is intended to encompass a shared common background that cannot be changed. This could be an attribute which the person has acquired at some stage of his

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or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking. For example, a person who faces persecution only for their history as a prostitute could not avoid that persecution by ceasing prostitution work in the future. New subsection 5J(3) would therefore not preclude a finding of a well-founded fear of persecution in respect of such a person.

1194. In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71* (S395), the High Court held that an assessment under the Refugees Convention does not extend to what a person could or should do if they were returned to their country of origin, but what they would do. New subsection 5J(3) is intended to clarify that any assessment of whether a person has a well-founded fear of persecution is to take into account not only what a person would do to avoid a real chance of persecution upon returning to a receiving country, but also what reasonable steps they could objectively take to avoid the persecution. As new subsection 5J(3) imports a consideration of 'reasonable steps' and is qualified by new paragraphs 5J(3)(a) and 5J(3)(b), the Government considers that new subsection 5J(3) is not inconsistent with the principles enunciated by the majority in the High Court's finding in S395.

1195. New subsection 5J(4) provides that if a person fears persecution for one or more of the reasons mentioned in paragraph 5J(1)(a):  
 that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and  
 the persecution must involve serious harm to the person; and  
 the persecution must involve systematic and discriminatory conduct.

1196. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(1), which provides part of the definition of persecution, to new subsection 5J(4) in Part 1 of the Migration Act.

1197. Current subsection 91R(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:  
 that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and  
 the persecution involves serious harm to the person; and  
 the persecution involves systematic and discriminatory conduct.

1198. It is intended that the requirements in current subsection 91R(1) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of well-founded fear of persecution in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(1). Any difference in text between current subsection 91R(1) and new subsection 5J(4) is to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1199. This amendment makes clear that the definition of persecution forms part of the definition of well-founded fear of persecution in new section 5J and the new statutory

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framework relating to refugees.

1200. New subsection 5J(5) provides that without limiting what is serious harm for the purposes of paragraph 5J(4)(b), the following are instances of serious harm for the purposes of that paragraph:  
 a threat to the person's life or liberty;  
 significant physical harassment of the person;  
 significant physical ill-treatment of the person;  
 significant economic hardship that threatens the person's capacity to subsist;  
 denial of access to basic services, where the denial threatens the person's capacity to subsist;  
 denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

1201. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(2), which provides part of the definition of persecution, to new subsection 5J(5) in Part 1 of the Migration Act.

1202. Current subsection 91R(2) provides that without limiting what is serious harm for the purposes of paragraph 91R(1)(b), the following are instances of serious harm for the purposes of that paragraph:  
 a threat to the person's life or liberty;  
 significant physical harassment of the person;  
 significant physical ill-treatment of the person;  
 significant economic hardship that threatens the person's capacity to subsist;  
 denial of access to basic services, where the denial threatens the person's capacity to subsist;  
 denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

1203. It is intended that the requirements in current subsection 91R(2) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of well-founded fear of persecution in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(2). Any difference in text between current subsection 91R(2) and new subsection 5J(5) is to ensure the new provision does not contain grammatical error in the new statutory framework.

1204. This amendment makes clear that the definition of persecution forms part of the definition of well-founded fear of persecution in new section 5J and the new statutory framework relating to refugees.

1205. New subsection 5J(6) provides that in determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph 5J(1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

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1206. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(3), which provides part of the definition of persecution, to new subsection 5J(6) in Part 1 of the Migration Act.

1207. Current subsection 91R(3) provides that for the purposes of the application of the Migration Act and the regulations to a particular person:

in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

1208. It is intended that the requirements in current subsection 91R(3) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of well-founded fear of persecution in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(3). Any difference in text between current subsection 91R(3) and new subsection 5J(6) is to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1209. This amendment makes clear that the definition of persecution forms part of the definition of well-founded fear of persecution in new section 5J and the new statutory framework relating to refugees.

1210. New section 5K provides that for the purposes of the application of the Migration Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a) and

disregard any fear of persecution, or any persecution, that:

- o the first person has ever experienced; or
- o any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph 5J(a) had never existed.

1211. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current section 91S, which provides additional considerations in assessing the well-founded fear of persecution of a person for reason of membership of a particular social group that consists of the person's family, to new section 5K in Part 1 of the Migration Act.

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1212. Current section 91S provides that for the purposes of the application of the Migration Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:

disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and

disregard any fear of persecution, or any persecution, that:

- o the first person has ever experienced; or
- o any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph 5J(a) had never existed.

1213. It is intended that the requirements in current section 91S form part of the new statutory framework relating to refugees. This amendment is therefore not intended to change the meaning of current section 91S. Any changes in text between current section 91S and new section 5K are to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1214. This amendment makes clear that additional considerations relevant to assessing the well-founded fear of persecution of a person for reason of membership of a particular social group that consists of the person's family apply in the new statutory framework relating to refugees.

1215. The note to new section 5K provides that section 5G may be relevant for determining family relationships for the purposes of this section. Section 5G provides a non-exhaustive list of relationships which are recognised in the Act to indicate members of a person's family or relatives of the person. The Government recognises that the

family is the natural and fundamental group unit of society and acknowledges that the family unit forms a particular social group.

1216. New section 5L seeks to clarify and limit the definition of membership of a particular social group which is one of the grounds for a well-founded fear of persecution set out in new paragraph 5J(1)(a). . New section 5L is intended to provide additional legislative guidance to decision makers to determine what constitutes a particular social group other than the person's family. The new section applies the test formulated by the High Court in the case of Applicant S v Minister for Immigration and Multicultural Affairs[2004] HCA 25 (Applicant S): -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 the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A ... a group that fulfills the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'.|| Australia's current application of the Refugees Convention with respect to the Convention reason of

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membership of a particular social group is consistent with the High Court's reasoning in Applicant S.

1217. The current approach, combined with minimal legislative guidance on what constitutes a particular social group, has resulted in a broad interpretation of the term being taken by the High Court in Applicant S. This has resulted in an interpretation of the term 'particular social group' that is broad and complex for decision makers to apply consistently. For this reason, new section 5L also incorporates an additional requirement for 'membership of a particular social group' that the defining characteristic of the particular social group must be a characteristic that is either innate or immutable or so fundamental to the member's identity or conscience, the member should not be forced to renounce it. This is provided in new paragraph 5L(1)(b) inserted by this item and explained below. New section 5L 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. The additional consideration provided in new paragraph 5L(1)(b) draws from the approach taken in other jurisdictions including Canada, the United States of America, New Zealand and the European Union.

1218. New subsection 5L(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:
- 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.

1219. The reference to a characteristic that is -shared by each member of the group|| in new paragraph 5L(1)(a) intends to codify the requirement from the High Court's decision in Applicant S of a -characteristic or attribute common to all members of the group||.

1220. New paragraph 5L(1)(b) provides as a requirement for 'membership of a particular social group' that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member's identity or conscience, the member should not be forced to renounce it. The reference in new subparagraph 5L(1)(b)(i) to an -innate|| characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5L(1)(b)(i) to an -immutable|| characteristic is intended to encompass attributes of the person which are not capable of change. This could be an attribute which the person has acquired at some stage of his or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking.

1221. New paragraph 5L(1)(c) provides as a requirement for 'membership of a particular social group' that the person shares, or is perceived as sharing, the characteristic. The purpose of this paragraph is to ensure that the person either possesses or could be

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imputed with the relevant characteristic required to be a member of the particular social group. This is consistent with Australia's current application of the Refugees Convention with respect to assessing whether a Convention reason of race, religion, nationality, membership of a particular social group or political opinion is engaged. In this respect, the Government's position is that a Convention reason may be imputed rather than actual if the persecutor is motivated by a belief that a person possesses an attribute relevant to a Convention reason – even when in reality the person does not possess that attribute.

1222. New paragraph 5L(1)(d) provides as a requirement for 'membership of a particular social group' that the characteristic distinguishes the group from society. This paragraph intends to codify the requirement articulated in the High Court's decision in Applicant S that the relevant characteristic or attribute must distinguish the group from society at large. As a result, a group will not be a particular social group, for the purposes of the new statutory framework relating to refugees if it is not capable of being perceived or recognised in social terms.

1223. New subsection 5L(2) provides that for the purposes of subparagraph 5L(1)(b)(i), a well-founded fear of persecution is taken not to be an innate or immutable characteristic. This subsection intends to codify the requirement articulated in the High Court's decision in Applicant S that the characteristic or attribute common to all members of the group cannot be the shared fear of persecution.

1224. The note to new section 5L provides that for the meaning of well-founded fear of persecution, see section 5J. New section 5J is inserted by this item and is explained above.

1225. New section 5M provides that for the purposes of the application of the Migration Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:

a serious Australian offence; or  
a serious foreign offence.

1226. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current section 91U, which provides the meaning of particularly serious crime, to new section 5M in Part 1 of the Migration Act.
1227. Current section 91U provides that for the purposes of the application of the Migration Act and the regulations to a particular person, Article 33(2) of the Refugees Convention as amended by the Refugees Protocol has effect as if a reference in that Article to a particularly serious crime included a reference to a crime that consists of the commission of:
- a serious Australian offence; or  
a serious foreign offence.
1228. It is intended that the requirements in current section 91U form part of the new statutory framework relating to refugees. This amendment is therefore not intended to change the meaning of current section 91U. Any difference in text between current section 91U and new section 5M is to ensure the new provision does not contain

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grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1229. This amendment makes clear that the meaning of particularly serious crime applies in the new statutory framework relating to refugees.

Item 8            Paragraph 36(1A)(a)

1230. This item repeals current paragraph 36(1A)(a) and substitutes new paragraph 36(1A)(a) in Division 3 of Part 2 of the Migration Act.

1231. Current paragraph 36(1A)(a) provides that an applicant for a protection visa must satisfy the criterion in subsection 36(1B).

1232. New paragraph 36(1A)(a) provides that an applicant for a protection visa must satisfy both of the criteria in subsections 36(1B) and 36(1C).

1233. The purpose of this amendment is to give effect to new subsection 36(1C) as a criterion for the grant of a protection visa. New subsection 36(1C) is explained in item 9 of Schedule 5 to the Bill below.

Item 9            After subsection 36(1B)

1234. This item inserts new subsection 36(1C). New subsection 36(1C) provides that a criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:
- is a danger to Australia's security; or  
having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

1235. New subsection 36(1C) is therefore a criterion that excludes a refugee from the grant of a protection visa.

1236. New subsection 36(1C) is intended to codify Article 33(2) of the Refugees Convention which provides for an exception to the principle of non-refoulement in Article 33(1) of the Refugees Convention. As such, a person who is captured by new subsection 36(1C) will not engage Australia's non-refoulement obligations under the Refugees Convention or for the purposes of the new statutory framework relating to refugees.

1237. A person who is captured by new subsection 36(1C) will not be eligible for the grant of a protection visa.

1238. The note to new subsection 36(1C) provides that for paragraph 36(1C)(b), see section 5M.

1239. New section 5M which provides a definition of 'particularly serious crime' for the purposes of new paragraph 36(1C)(b) is explained in item 7 of Schedule 5 to the Bill above.

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Item 10           Paragraph 36(2)(a)

1240. This item omits 'under the Refugees Convention as amended by the Refugees Protocol' and substitutes 'because the person is a refugee' in paragraph 36(2)(a) of Subdivision A of Division 3 of Part 2 of the Migration Act.

1241. Current paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

1242. New paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.

1243. The purpose of this amendment is to replace the reference to the Refugees Convention in current paragraph 36(2)(a) with a reference to the new statutory framework relating to refugees. Provided that a person is not otherwise prevented from being granted a protection visa, a person who satisfies the definition of a refugee provided in the new statutory framework will be eligible for a protection visa under paragraph 36(2)(a).

Item 11           Subsection 48A(2) (after paragraph (aa) of the definition of application for a protection visa)

1244. This item inserts new paragraph 48A(2)(aaa) in Division 3 of Part 2 of the Migration Act. New paragraph 48A(2)(aaa) provides that in this section, application for a protection visa includes:
- an application for a visa, a criterion for which is that the applicant is a non-citizen who is a refugee; or

1245. The purpose of this amendment is to ensure that the application bar in current

subsection 48A will apply in respect of a person who has been refused the grant of a protection visa on the basis of protection as a refugee for the purposes of new section 5H.

1246. This item does not repeal current paragraph 48A(2)(b). Current paragraph 48A(2)(b) provides that in this section, application for a protection visa includes:  
an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and

1247. The new statutory framework relating to refugees will mean that a person will not be able to apply for protection as a refugee directly under the Refugees Convention, as described in current paragraph 48A(2)(b). However, current paragraph 48A(2)(b) will be retained to ensure that a person is barred from making a further application for a protection visa, for the purposes of section 48A, if the person previously made an application for a protection visa as defined in current paragraph 48A(2)(b) and was refused the grant of the protection visa.

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1248. The retention of current paragraph 48A(2)(b) is therefore to capture a historical cohort of people who would be prevented from making a further application for a protection visa for the purposes of section 48A.

Item 12        Sections 91R to 91U

1249. This item repeals current sections 91R to 91U of Subdivision AL of Part 2 of Division 3 of the Migration Act.

1250. This item, together with item 4 of Schedule 5 to the Bill above, has the effect of moving current sections 91R to 91U to Part 1 of the Migration Act and co-locating them with other provisions in the new statutory framework relating to refugees.

1251. Each of the sections repealed in this item are inserted in Subdivision AL of Part 2 of Division 3 of the Migration Act. The amendment to and insertion of the sections in this item is explained in item 7 of Schedule 5 to the Bill above.

Item 13        Subsection 228B(2)

1252. This item omits all the words after –the non-citizen|| and substitutes –because the non-citizen is or may be a refugee, or for any other reason|| in subsection 228B(2) of Subdivision A of Division 12 under Part 2 of the Migration Act.

1253. Current subsection 228B(2) provides that to avoid doubt, a reference in subsection 228B(1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen:  
under the Refugees Convention as amended by the Refugees Protocol; or  
for any other reason.

1254. New subsection 228B(2) provides that to avoid doubt, a reference in subsection 228B(1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen because the non-citizen is or may be a refugee, or for any other reason.

1255. This amendment replaces the reference in current subsection 228B(2) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1256. The purpose of this amendment is to ensure that the circumstances in which a non-citizen has no lawful right to come to Australia, for the purposes of section 228B, will apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

Item 14        Subparagraphs 336F(3)(a)(ii), (4)(a)(ii) and (5)(c)(i)

1257. This item omits –under the Refugees Convention as amended by the Refugees Protocol|| in subparagraphs 336F(3)(a)(ii), 336F(4)(a)(ii) and 336F(5)(c)(i) of Division 3 of Part 4A of the Migration Act and substitutes the words –as a refugee||.

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1258. Current subparagraph 336F(3)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:  
the person to whom the identifying information relates is:  
o an unauthorised maritime arrival who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

1259. New subparagraph 336F(3)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:  
the person to whom the identifying information relates is:  
o an unauthorised maritime arrival who makes a claim for protection as a refugee; or

1260. This amendment replaces the reference in current subparagraph 336F(3)(a)(ii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1261. Current subparagraph 336F(4)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:  
the person to whom the identifying information relates is:  
o an unauthorised maritime arrival who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

1262. New subparagraph 336F(4)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:  
the person to whom the identifying information relates is:  
o an unauthorised maritime arrival who makes a claim for protection as a refugee; or

1263. This amendment replaces the reference in current subparagraph 336F(4)(a)(ii) to the

Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1264. Current subparagraph 336F(5)(c)(i) provides that however, if:  
the person is an unauthorised maritime arrival:  
o who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; and
1265. New subparagraph 336F(5)(c)(i) provides that however, if:  
the person is an unauthorised maritime arrival:  
o who makes a claim for protection as a refugee; and
1266. This amendment replaces the reference in current subparagraph 336F(5)(c)(i) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

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1267. The amendments made by this item are intended to ensure that the current rules regarding the disclosure of identifying information to foreign countries, for the purposes of section 336F, will continue to apply to unauthorised maritime arrivals seeking protection as a refugee under the new statutory framework relating to refugees.

Item 15 Subparagraph 336F(5)(c)(ii)

1268. This item omits –under the Refugees Convention as amended by the Refugees Protocol|| in subparagraph 336F(5)(c)(ii) of Division 3 of Part 4A of the Migration Act.

1269. Current subparagraph 336F(5)(c)(ii) provides that however, if:  
the person is an unauthorised maritime arrival:  
o who, following assessment of his or her claim, is found not to be a person in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

1270. New subparagraph 336F(5)(c)(ii) provides that however, if:  
the person is an unauthorised maritime arrival:  
o who, following assessment of his or her claim, is found not to be a person in respect of whom Australia has protection obligations; or

1271. This amendment removes the reference in current subparagraph 336F(5)(c)(ii) to the Refugees Convention, consistent with Part 2 of Schedule 5 to the Bill. This reference to the Refugees Convention is not replaced with a reference to the new statutory framework relating to refugees, however, an unauthorised maritime arrival seeking protection under that framework will be covered by this subparagraph. An unauthorised maritime arrival seeking protection under complementary protection, as provided for in subsection 36(2)(aa) will be captured, in this respect, by subparagraph 336F(5)(ca)(ii).

1272. Upon commencement of this Schedule, a person can only engage Australia's protection obligations, for the purposes of new section 5H as a refugee, or under complementary protection. The reference in new subparagraph 336F(5)(c)(ii) is, for this reason, a reference to protection obligations as a refugee for the purposes of the new statutory framework relating to refugees.

1273. The purpose of this amendment is to ensure that the current rules regarding the disclosure of identifying information to foreign countries for the purposes of current section 336F of Division 3 of Part 4A of the Migration Act, will continue to apply to unauthorised maritime arrivals seeking protection as a refugee under the new statutory framework relating to refugees.

Item 16 Subparagraph 502(1)(a)(iii)

1274. This item repeals current subparagraph 502(1)(a)(iii) and substitutes new subparagraph 502(1)(a)(iii) in Part 9 of the Migration Act.

1275. Current subparagraph 502(1)(a)(iii) provides that if the Minister, acting personally, intends to make a decision:

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to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32, or 33(2);

1276. New subparagraph 502(1)(a)(iii) provides that if the Minister, acting personally, intends to make a decision:  
to refuse under section 65 to grant a protection visa, relying on subsection 5H(2) or 36(1C);

1277. This amendment replaces the reference in current subparagraph 502(1)(a)(iii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1278. The purpose of this amendment is to ensure that the circumstances in which the Minister may decide in the national interest that certain persons are to be excluded persons for the purposes of current section 502 in Part 9 of the Migration Act will continue to apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

1279. This item also makes amendments to make the new subparagraph consistent with the equivalent amendments in the Migration Amendment (Character and General Visa Cancellation) Bill 2014. In this respect, this item inserts a reference to current section 65 to clarify the authority of the exercise of the power under this subparagraph and removes the reference to the cancellation of a protection visa.

Item 17 Paragraph 503(1)(c)

1280. This item repeals current paragraph 503(1)(c) and substitutes new paragraph 503(1)(c) in Part 9 of the Migration Act.

1281. Current paragraph 503(1)(c) provides that a person in relation to whom a decision has been made:  
to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Articles 1F, 32 or 33(2);
1282. New paragraph 503(1)(c) provides that a person in relation to whom a decision has been made:  
to refuse under section 65 to grant a protection visa relying on subsection 5H(2) or 36(1C);
1283. This amendment replaces the reference in current paragraph 503(1)(c) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1284. The purpose of this amendment is to ensure that the circumstances under which certain persons are excluded from Australia for the purposes of current section 503 of Part 9 of

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the Migration Act will continue to apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

1285. This item also makes amendments to make the new paragraph with the equivalent amendments in the Migration Amendment (Character and General Visa Cancellation) Bill 2014. In this respect, this item inserts a reference to current section 65 to clarify the authority of the exercise of the power under this subparagraph and removes the reference to the cancellation of a protection visa.

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### Part 3 – Contingent amendments

#### Division 1 – Amendments if this Act commences before the Migration Amendment (Protection and Other Measures) Act 2014

##### Migration Act 1958

###### Item 18 Subsection 5(1) (definition of receiving country)

1286. This item repeals the current definition of receiving country under subsection 5(1) of Part 1 of the Migration Act and substitutes a new definition of receiving country.

1287. The current definition of receiving country under subsection 5(1) provides that receiving country in relation to a non-citizen, means:  
a country of which the non-citizen is a national; or  
if the non-citizen has no country of nationality – the country of which the non-citizen is an habitual resident;

to be determined solely by reference to the law of the relevant country.

1288. The new definition of receiving country in subsection 5(1) provides that receiving country in relation to a non-citizen, means:  
a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or  
if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

1289. The new definition of receiving country is intended to apply in the definition of well-founded fear of persecution provided by new section 5J inserted by item 7 of Part 2 of Schedule 5 to the Bill. This item is therefore necessary if Part 2 of Schedule 5 to the Bill commences before the Migration Amendment (Protection and Other Measures) Bill 2014 (Protection and Other Measures Bill).

1290. The purpose of this amendment is to ensure that the new definition of receiving country inserted by Part 1, Schedule 2 of the Protection and Other Measures Bill will apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

#### Division 2 – Amendments if this Act commences before the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014

##### Migration Act 1958

###### Item 19 Subparagraph 411(1)(c)(i) and (ii)

1291. This item repeals current subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) and substitutes new subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) respectively.

1292. Current subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) provide that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

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a decision to refuse to grant a protection visa, other than a decision that was made relying on:  
o one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or  
o subsection 36(1B); or

1293. Paragraph 411(1)(c) proposed in the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014 (Regaining Control Bill) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:  
a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention);

1294. New subparagraph 411(1)(c)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:  
a decision to refuse to grant a protection visa, other than a decision that was made relying on:  
o subsection 5H(2), or 36(1B) or 36(1C)

1295. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed

paragraph 411(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1296. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.
1297. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

Item 20 Subparagraph 411(1)(d)(i)

1298. This item repeals current subparagraph 411(1)(d)(i) and substitutes new subparagraph 411(1)(d)(i) in Division 2 of Part 7 of the Migration Act.

1299. Current subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa, other than a decision that was made because of:
  - o one or more of Articles 1F, 32 or 33(2) of the Refugees convention; or

1300. Paragraph 411(1)(d) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

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1301. New subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa, other than a decision that was made because of:
  - o subsection 5H(2) or 36(1C); or

1302. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(d) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1303. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1304. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

Item 21 Subparagraph 500(1)(c)(i)

1305. This item repeals current subparagraph 500(1)(c)(i) and substitutes new subparagraph 500(1)(c)(i) in Part 9 of the Migration Act.

1306. Current subparagraph 500(1)(c)(i) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
  - o one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

1307. Paragraph 500(1)(c) proposed in the Regaining Control Bill provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;

1308. New subparagraph 500(1)(c)(i) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
  - o subsection 5H(2) or 36(1C); or

1309. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

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specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1310. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1311. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

Item 22 Subparagraph 500(4)(c)(i)

1312. This item repeals current subparagraph 500(4)(c)(i) and substitutes new subparagraph 500(4)(c)(i) in Part 9 of the Migration Act.

1313. Current subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying

on:

- o one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

1314. Paragraph 500(4)(c) proposed in the Regaining Control Bill provides that the following decisions are not reviewable under Part 5 or Part 7:  
 a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;

1315. New subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:  
 a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:  
 o subsection 5H(2) or 36(1C); or

1316. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(4)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1317. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1318. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

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**Division 3 – Amendments if this Act commences after the Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Act 2014**

**Migration Act 1958**

**Item 23 Subsection 5(1) (definition of receiving country)**

1319. This item repeals the current definition of receiving country under subsection 5(1) of Part 1 of the Migration Act and substitutes a new definition of receiving country.

1320. The current definition of receiving country under subsection 5(1) provides that receiving country in relation to a non-citizen, means:  
 a country of which the non-citizen is a national; or  
 if the non-citizen has no country of nationality – the country of which the non-citizen is an habitual resident;

to be determined solely by reference to the law of the relevant country.

1321. The Regaining Control Bill proposes to repeal the definition of receiving country from subsection 5(1) of Part 1 of the Migration Act.

1322. The new definition of receiving country in subsection 5(1) provides that receiving country in relation to a non-citizen, means:  
 a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or  
 if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

1323. The new definition of receiving country is intended to apply in the definition of well-founded fear of persecution provided by new section 5J inserted by item 7 of Part 2 of Schedule 5 to the Bill. This item is therefore necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

1324. The purpose of this amendment is to ensure that the new definition of receiving country will apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

**Item 24 Paragraph 411(1)(c)**

1325. This item omits –relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or|| and substitutes –relying on: subsection 5H(2), or 36(1B) or (1C);|| in paragraph 411(1)(c) of Division 2 of Part 7 of the Migration Act.

1326. Current paragraph 411(1)(c) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:  
 a decision to refuse to grant a protection visa, other than a decision that was made relying on:  
 o one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or

o subsection 36(1B); or

1327. Paragraph 411(1)(c) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:  
 a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention);

1328. New paragraph 411(1)(c) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:  
 a decision to refuse to grant a protection visa, other than a decision that was made relying on:  
 o subsection 5H(2), or 36(1B) or 36(1C)

1329. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1330. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.
1331. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

## Item 25 Subparagraph 411(1)(d)(i)

1332. This item repeals current subparagraph 411(1)(d)(i) and substitutes new subparagraph 411(1)(d)(i) in Division 2 of Part 7 of the Migration Act.

1333. Current subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa, other than a decision that was made because of:
    - o one or more of Articles 1F, 32 or 33(2) of the Refugees convention; or

1334. Paragraph 411(1)(d) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

1335. New subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa, other than a decision that was made because of:
    - o subsection 5H(2) or 36(1C); or

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1336. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(d) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1337. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

1338. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

## Item 26 Paragraph 500(1)(c) and 500(4)(c)

1339. This item repeals current paragraphs 500(1)(c) and 500(4)(c) and substitutes new paragraphs 500(1)(c) and 500(4)(c) in Part 9 of the Migration Act.

1340. Current paragraph 500(1)(c) provides that applications may be made to the Administrative Appeals Tribunal for review of a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
- o one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
  - o paragraph 36(2C)(a) or 36(2C)(b) of the Migration Act;

1341. Paragraph 500(1)(c) proposed in Regaining Control Bill provides that Applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;

1342. New paragraph 500(1)(c) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, that was made relying on subsection 5H(2) or 36(1C)

1343. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1344. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

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1345. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

1346. Current paragraph 500(4)(c) provides that the following decisions are not reviewable under Part 5 or 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
    - o one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);
    - o paragraph 36(2C)(a) or paragraph 36(2C)(b) of the Migration Act

1347. Paragraph 500(4)(c) proposed in the Regaining Control Bill provides that the following decisions are not reviewable under Part 5 or Part 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;

1348. New subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:  
 a decision to refuse to grant a protection visa, or to cancel a protection visa, that was made relying on subsection 5H(2) or 36(1C);
1349. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(4)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1350. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.
1351. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a refugee under the new statutory framework relating to refugees.

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## Part 4 -- Application and transitional provisions

## Item 27 Application – Part 1

1352. This item provides that the amendments made by Part 1 of Schedule 5 apply in relation to the removal of an unlawful non-citizen on or after the day this item commences.

## Item 28 Application – Parts 2 and 3

1353. This item provides that the amendments made by Parts 2 and 3 of this Schedule 5 apply in relation to an application for a protection visa that is made on or after the day this item commences.

## Item 29 References to Amended Provisions

1354. This item provides that if a regulation or other instrument made under the Migration Act contains a reference to a provision of the Migration Act listed in column 2 of the following table in relation to an item, the reference in the regulation or other instrument is to be construed as a reference to the provision of the Migration Act listed in column 3 of the item:

References to amended provisions of the Migration Act 1958		
Column 1	Column 2	Column 3
Item	Old reference	New reference
1	section 91R	subsection 5J(4), (5) and (6)
2	section 91S	section 5K
3	section 91U	section 5M

The purpose of this provision is to ensure that relocating current sections 91R, 91S and 91U into Part 1 of the Migration Act does not have the unintended consequence of affecting regulations or other instruments.

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## SCHEDULE 6 – Unauthorised maritime arrivals and transitory persons: newborn children

## Part 1 – Amendments

## Migration Act 1958

## Item 1 Subsection 5(1) (at the end of the definition of transitory person)

1355. This item adds new paragraphs (d) and (e) at the end of the definition of transitory person in subsection 5(1) of the Migration Act.

1356. The definition of transitory person in subsection 5(1) currently provides that transitory person means:

a person who was taken to another country under repealed section 198A; or  
 a person who was taken to a regional processing country under section 198AD; or  
 a person who was taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act, or paragraph 72(4)(b) of the Maritime Powers Act; or  
 a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:  
 o was transferred to the ship HMAS Manoora from the ship Aceng or the ship MV Tampa; and  
 o was then taken by HMAS Manoora to another country; and  
 o disembarked in that other country.

1357. New paragraph (d) extends the definition of transitory person to include:

the child of a transitory person mentioned in paragraph (aa) or (b), if:  
 o the child was born in a regional processing country to which the parent was taken as mentioned in the relevant paragraph; and  
 o the child was not an Australian citizen at the time of birth.

1358. New paragraph (e) extends the definition of transitory person to include:

the child of a transitory person mentioned in paragraph (aa) or (b), if:

- o the child was born in the migration zone; and
- o the child was not an Australian citizen at the time of birth,

1359. Item 1 inserts three notes after new paragraph (e) of the definition of transitory person. Note 1 provides that for the meaning of who is a child, see section 5CA of the Migration Act. Note 2 provides that a transitory person who entered Australia by sea

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before being taken to a place outside Australia may also be an unauthorised maritime arrival, see section 5AA of the Migration Act. This provides that the overlap between an unauthorised maritime arrival and a transitory person is fully intended. Note 3 indicates that paragraphs (d) and (e) apply no matter when the child was born, whether before, on or after the commencement of those paragraphs. The note also says to see the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

1360. Paragraph (aa) of the definition of transitory person provides transitory person means a person who was taken to a regional processing country under section 198AD.

1361. Paragraph (b) of the definition of transitory person provides that transitory person means a person who was taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act, or paragraph 72(4)(b) of the Maritime Powers Act.

1362. The effect of new paragraph (d) is to make it clear that if a transitory person was taken to a regional processing country under section 198AD or taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act or paragraph 72(4)(b) of the Maritime Powers Act, a child of this transitory person born in a regional processing country to which the parent was taken will also be a transitory person if the child was not an Australian citizen at the time of birth.

1363. This amendment is to ensure that a child of a transitory person is also a transitory person. This will 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.

1364. The effect of new paragraph (e) is to make it clear that if a transitory person was taken to a regional processing country under section 198AD or taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act or paragraph 72(4)(b) of the Maritime Powers Act, a child of this transitory person born in the migration zone will also be a transitory person if the child was not an Australian citizen at the time of birth.

1365. This amendment is to ensure that a child of a transitory person is also a transitory person. This will 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.

**Item 2 After subsection 5AA(1)**

1366. This item inserts new subsections 5AA(1A) and 5AA(1AA) after subsection 5AA(1) of the Migration Act.

1367. Subsection 5AA(1) currently provides that for the purposes of the Migration Act, a person is an unauthorised maritime arrival if:

the person entered Australia by sea;

- o at an excised offshore place at any time after the excision time for that place;
- or

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- o at any other place at any time on or after the commencement of section 5AA;
- and

the person became an unlawful non-citizen because of that entry; and

the person is not an excluded maritime arrival.

1368. Subsection 5AA(2) currently provides that a person entered Australia by sea if:

the person entered the migration zone except on an aircraft that landed in the migration zone; or

the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the Maritime Powers Act) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or

the person entered the migration zone as a result of being on a vessel detained under section 69 of the Maritime Powers Act and being dealt with under paragraph 72(4)(a) of that Act; or

the person entered the migration zone after being rescued at sea.

1369. Subsection 5AA(3) currently provides that a person is an excluded maritime arrival if the person:

is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

is included in a prescribed class of persons.

1370. New subsection 5AA(1A) provides that for the purposes of the Migration Act, a person is also an unauthorised maritime arrival if:

the person is born in the migration zone; and

a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection 5AA(1) (no matter where that parent is at the time of the birth); and

the person is not an Australian citizen at the time of his or her birth.

1371. The item inserts five notes after new subsection 5AA(1A).

1372. Note 1 provides that for who is a parent, see the definition in subsection 5(1) and section 5CA of the Migration Act.

1373. Note 2 provides that a parent of the person may be an unauthorised maritime arrival even if the parent holds, or has held, a visa.

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1374. Note 3 provides that a person to whom subsection 5AA(1A) applies is an unauthorised maritime arrival even if the person is taken to have been granted a visa because of section 78 (which deals with the birth in Australia of non-citizens).

1375. Note 4 provides that when a person is an Australian citizen at the time of his or her birth, see section 12 of the Australian Citizenship Act 2007.

1376. Note 5 provides that subsection 5AA(1A) applies even if the person was born before the commencement of the subsection. See the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

1377. Section 12 of the Australian Citizenship Act 2007 provides that:

a person born in Australia is an Australian citizen if and only if:

- o a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born; or
- o the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born;

however, a person is not an Australian citizen under this section if, at the time the person is born:

- o a parent of the person is an enemy alien; and
- o the place of the birth is under occupation by the enemy;

unless, at that time, the other parent of the person:

- o is an Australian citizen or a permanent resident; and
- o is not an enemy alien.

1378. The effect of new subsection 5AA(1A) is to put it beyond doubt that a person born in the migration zone, who is not an Australian citizen at the time of birth, and who at the time of birth has at least one parent who is an unauthorised maritime arrival because of subsection 5AA(1) will also be an unauthorised maritime arrival at the time of their birth. This will ensure all members of the family are treated in the same way, where possible.

1379. New subsection 5AA(1AA) provides that a person is also an unauthorised maritime arrival if:

the person is born in a regional processing country;

a parent of the person is, at the time of the person's birth, an unauthorised maritime arrival because of subsection 5AA(1) (no matter where that parent is at the time of the birth);

the person is not an Australian citizen at the time of his or her birth

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1380. Three notes are inserted after new section 5AA(1AA). Note 1 provides that a parent of the person may be an unauthorised maritime arrival even if the parent holds, or has held, a visa. Note 2 provides that the Migration Act may apply as mentioned in subsection 5AA(1AA) even if either or both parents of the person holds a visa, or is an Australian citizen or a citizen of the regional processing country, at the time of the person's birth. Note 3 provides that subsection 5AA(1AA) applies even if the person was born before the commencement of the subsection. See the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

1381. The effect of new subsection 5AA(1AA) is to put it beyond doubt that a person born in a regional processing country who is not an Australian citizen at the time of birth, and who at the time of birth has at least one parent who is an unauthorised maritime arrival because of subsection 5AA(1) (no matter where that parent is at the time of birth) will also be an unauthorised maritime arrival at the time of their birth. This will ensure that, whenever possible, all members of a family unit are treated in the same way.

1382. The amendments to sections 5 and 5AA of the Migration Act are generally intended to ensure that a child who comes within the amended definitions of unauthorised maritime arrival or transitory person in the Migration Act will be subject to the same rules and processes as other unauthorised maritime arrivals and transitory persons, including those set out in sections 46A, 189, 198AD, 494AA and the regional processing framework in Subdivision B of Division 8 of Part 2 of the Migration Act generally. If these children were not clearly subject to the same rules and processes as their unauthorised maritime arrival parents or transitory person parents, this inconsistency would undermine the objectives of the regional processing framework, both in terms of the inapplicability of these rules and processes to the relevant children and the difficulty that would arise in applying these rules and processes to their unauthorised maritime arrival parents or transitory person parents when they did not also apply to the relevant children.

1383. This item inserts a note at the end of section 5AA to provide that an unauthorised maritime arrival who has been taken to a place outside Australia may also be a transitory person see the definition of transitory person in subsection 5(1) of the Migration Act.

Item 4 Before subsection 198(1)

1384. Item 4 inserts before subsection 198(1) the new heading Removal on request. This is the first of three new headings intended to improve the accessibility of the Migration Act.

Item 5 Before subsection 198(1A)

1385. Item 5 inserts before subsection 198(1A) the new heading Removal of transitory person brought to Australia for a temporary purpose.

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Item 6 At the end of subsection 198(1A)

1386. Item 6 adds a note at the end of subsection 198(1A) that provides that some unlawful non-citizens are transitory persons. Section 198B provides for transitory persons to be brought to Australia for a temporary purpose. See the definition of transitory person in subsection 5(1) of the Migration Act.

Item 7 After subsection 198(1A)

1387. This item inserts new subsections 198(1B) and 198(1C) after subsection 198(1A) of the Migration Act. Item 7 also inserts before subsection 198(2) the heading Removal of unlawful non-citizens in other circumstances.

1388. Subsection 198(1) of the Migration Act currently provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

1389. New subsection 198(1B) provides that new subsection 198(1C) applies if:

an unlawful non-citizen who is not an unauthorised maritime arrival has been brought to Australia under section 198B for a temporary purpose; and

the non-citizen gives birth to a child while the non-citizen is in Australia; and

the child is a transitory person within the meaning of new paragraph (e) of the definition of transitory person in subsection 5(1) of the Migration Act.

1390. New subsection 198(1C) provides that an officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

1391. Subsection 198B(1) of the Migration Act provides that an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia.

1392. The purpose of new subsections 198(1B) and (1C) is to make it clear that a child born in Australia to an unlawful non-citizen who is not an unauthorised maritime arrival and has been brought to Australia for a temporary purpose is a transitory person and must be removed from Australia, along with their parent. It is desirable that both the child and parent in such a situation be subject to the same removal power.

Item 8 After subsection 198AD(2)

1393. This item inserts new subsection 198AD(2A) after subsection 198AD(2) of the Migration Act.

1394. Subsection 198AD(1) currently provides that subject to sections 198AE, 198AF and 198AG, section 198AD applies to an unauthorised maritime arrival who is detained under section 189 of the Migration Act. A note following subsection 198AD(1) states that for when section 198AD applies to a transitory person, see section 198AH.

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1395. Subsection 198AD(2) currently provides that an officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

1396. With changes to the definition of unauthorised maritime arrival in item 2 of Schedule 6 to the Bill, if a child is born in Australia to a parent who is an unauthorised maritime arrival, in general terms the child and the parent are both unauthorised maritime arrivals and so both the parent and child must be taken from Australia to a regional processing country under section 198AD of the Migration Act.

1397. New subsection 198AD(2A) provides that subsection 198AD(2) does not apply in relation to a person who is an unauthorised maritime arrival only because of subsection 5AA(1A) or 5AA(1AA) if the person's parent mentioned in the relevant subsection entered Australia before 13 August 2012.

1398. Item 8 also inserts two notes after new subsection 198AD(2A). Note 1 provides that under subsection 5AA(1A) or 5AA(1AA) a person born in Australia or in a regional processing country may be an unauthorised maritime arrival in some circumstances. Note 2 provides that section 198AD does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012.

1399. New subsection 198AD(2A) provides that a child cannot be transferred to a regional processing country if their parent cannot also be transferred because the parent entered Australia prior to 13 August 2012 (the date regional processing commenced under the Migration Act). This provision operates to prevent the arbitrary separation of family groups, due only to the operation of the Migration Act, and contrary to government policy.

Item 9 Subsection 198AH(1)

1400. This item repeals current subsection 198AH(1) of the Migration Act and inserts new

subsections 198AH(1), 198AH(1A) and 198AH(1B).

1401. Current subsection 198AH(1) provides that section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a transitory person if, and only if:

the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

the person is detained under section 189; and

the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

1402. New subsection 198AH(1) provides that section 198AD applies, subject to section 198AE, 198AF and 198AG, to a transitory person, if and only if, the person is covered by subsections 198AH(1A) or 198AH(1B).

1403. New subsection 198AH(1A) provides that a transitory person is covered by this subsection if:

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the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and

the person is detained under section 189; and

the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

1404. New subsection 198AH(1A) provides that section 198AD will apply, subject to sections 198AE, 198AF and 198AG, to a transitory person in the same circumstances as current subsection 198AH(1).

1405. New subsection 198AH(1B) provides that a transitory person (a transitory child) is covered by this subsection if:

a transitory person covered by subsection 198AH(1A) gives birth to the transitory child while in Australia; and

the transitory child is detained under section 189; and

the transitory child is a transitory person because of new paragraph (e) of the definition of transitory person in subsection 5(1)

1406. New subsection 198AH(1B) provides for section 198AD to apply, subject to sections 198AE, 198AF and 198AG, to a person who is a transitory person within the meaning of paragraph (e) of the definition of transitory person in subsection 5(1) who has been detained under section 189, where their parent is covered by subsection 198AH(1A).

1407. The purpose of new subsection 198AH(1B) is to make it clear that a child born in Australia to a transitory person who has been brought to Australia for a temporary purpose must be taken to a regional processing country, along with their parent. It is desirable that both the child and parent in such a situation be subject to the same removal power.

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## Part 2 – Application of amendments

### Item 10 Definitions

1408. This item inserts three definitions for the purposes of Part 2 of Schedule 6 to the Bill, namely:

applicable matter has the meaning given by item 11 (retrospective application of Part 1 amendments);

commencement day means the day this Schedule commences; and

Part 1 amendments means the amendments of the Migration Act made by Part 1 of this Schedule.

### Item 11 Retrospective application of Part 1 amendments

1409. This item provides that the Part 1 amendments apply on or after the commencement day, and are taken to have applied before the commencement day, subject to Part 2, in relation to each of the following matters (an applicable matter):

the entry of a person into Australia at any time, whether before, on or after commencement day (or that entry as it is taken to have occurred on birth under section 10 of the Migration Act);

the status of a person as an unauthorised maritime arrival or a transitory person, at any time;

o whether before, on or after commencement day; and

o whether the person is born before, on or after the commencement day;

the status of a person as an unlawful non-citizen at any time, whether before, on or after commencement day;

the detention of a person at any time, whether before, on or after commencement day, and the performance or exercise of a function, duty or power in relation to such detention;

the performance or exercise of a function, duty or power in relation to a person under Division 8 of Part 2 of the Migration Act at any time, whether before, on or after commencement day;

an application for a visa by a person made at any time, whether before, on or after commencement day, including the performance or exercise of a function, duty or power in relation to such an application.

1410. The intention of applying the amendments retrospectively is to ensure that a child of a parent, who is an unauthorised maritime arrival and/or transitory person as the case may be, will be taken to have had the same status as their unauthorised maritime arrival and or/ transitory person parent so that there is no doubt that, prior to the

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commencement day, treatment of these children is consistent with the status of their parents was valid.

1411. There are two notes inserted at the end of item 11. Note 1 provides that Part 1 amendments provide for a person to be an unauthorised maritime arrival or a transitory person, in some circumstances, if a parent of the person is an unauthorised maritime arrival or a transitory person for the purposes of the Migration Act. Note 2 provides that Division 8 of Part 2 of the Migration Act provides for:

the removal of unlawful non-citizens from Australia to a place outside Australia (Subdivision A); and

the taking of unauthorised maritime arrivals from Australia to a regional processing country (Subdivision B); and

transitory persons to be brought to Australia from a place outside Australia (Subdivision C).

Item 12 Applications under the Migration Act 1958 that are finally determined

1412. This item ensures that the Part 1 amendments do not apply, and are not taken to have applied, in relation to an application under the Migration Act concerning (or consisting of) an applicable matter if the application was finally determined, within the meaning of the Migration Act, before the commencement day.

1413. Currently, subsection 5(9) of the Migration Act provides that for the purposes of the Migration Act, an application under this Act is finally determined when either:

a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7; or

a decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

1414. Part 5 of the Migration Act relates to review of decisions by the MRT. Part 7 of the Migration Act relates to review of protection visa decisions by the RRT.

1415. This item applies so that applicable matters that are finally determined are not re-opened after the commencement of the amendments in the Bill. A matter is finally determined when a decision is made and is no longer subject to review or the period within which such a review could be instituted has ended without a review having been instituted as prescribed under Part 5 or 7 of the Migration Act.

Item 13 Retrospective application of section 46A (visa applications by unauthorised maritime arrivals)

1416. Subitem 13(1) provides that the item applies if the operation of item 11 (retrospective application of Part 1 amendments) results in a person being taken to have been an unauthorised maritime arrival at a particular time.

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1417. Subitem 13(2) provides that subsection 46A(1) of the Migration Act is taken to have applied in relation to the person at that time despite the fact that the person was a lawful non-citizen at that time, if the person was a lawful non-citizen only because he or she held one or more of the following visas:

a bridging visa;

a temporary safe haven visa;

a temporary (humanitarian concern) visa;

a temporary protection visa granted before 2 December 2013.

1418. A note is inserted under subitem 13(2). The note provides that subsection 46A(1) of the Migration Act prevents visa applications by unauthorised maritime arrivals in Australia who are unlawful non-citizens, unless the Minister makes a declaration under subsection 46A(2).

1419. The effect of subitem 13(2) is that despite subsection 46A(1) applying only to an application for a visa made by an unauthorised maritime arrival who is in Australia and is an unlawful non-citizen, subsection 46A(1) will also be taken to have applied to an application for a visa by a person who is taken to be an unauthorised maritime arrival as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill if the person was only a lawful non-citizen because he or she held one or more of the following visas:

a bridging visa;

a temporary safe haven visa;

a temporary (humanitarian concern) visa;

a temporary protection visa granted before 2 December 2013.

1420. The purpose of this amendment is to ensure that, in relation to persons who are unauthorised maritime arrivals as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill, any visa applications they made or make prior to the commencement day are taken to have been made invalidly, because these persons were subject to subsection 46A(1) at the time of their application. This is necessary because subsection 46A(1) does not extend to lawful non-citizens and unauthorised maritime arrivals may hold or have held the visas specified in this subitem. Without subitem 13(2), therefore, the visa applications of persons who are unauthorised maritime arrivals as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill and

who hold or have held the visas specified in subitem 13(2) at the time of their application would be valid, contrary to Government policy.

1421. Subitem 13(3) provides that subsection 46A(1) of the Migration Act does not apply in relation to an application for a visa by the person (the child) if:

the application is made at any time, whether before, on or after the commencement day; and

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the Minister has made a determination under subsection 46A(2) of the Migration Act in relation to an application by a parent of the child, made before the commencement day, for the same kind of visa.

1422. Subsection 46A(2) of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an unauthorised maritime arrival, determine that subsection 46A(1) of the Migration Act does not apply to an application for a visa by an unauthorised maritime arrival for a visa of the class specified in the determination.

1423. This subitem ensures that, in relation to a visa application that has been validly made because a determination made under subsection 46A(2) has been made in relation to the applicant, the application of any child of the applicant is not invalidated on the commencement of Schedule 6. Whenever possible, it is desirable for members of the same family unit to have a consistent status.

- Item 14      Retrospective application of section 46B (visa applications by transitory persons)

1424. Subitem 14(1) provides that the item applies if the operation of item 11 (retrospective application of Part 1 amendments) results in a person being taken to have been a transitory person at a particular time.

1425. Subitem 14(2) provides that subsection 46B(1) of the Migration Act is taken to have applied in relation to the person at that time despite the fact that the person was a lawful non-citizen at that time, if the person was a lawful non-citizen only because he or she held one or more of the following visas:

a bridging visa;  
a temporary safe haven visa;  
a temporary (humanitarian concern) visa;  
a temporary protection visa granted before 2 December 2013.

1426. A note is inserted under subitem 14(2). The note provides that subsection 46B(1) of the Migration Act prevents visa applications by transitory persons in Australia who are unlawful non-citizens, unless the Minister makes a declaration under subsection 46B(2). The application of two bars that prevent applications for visas to such persons is intentional.

1427. The effect of subitem 14(2) is that despite subsection 46B(1) applying only to an application for a visa made by a transitory person who is in Australia and an unlawful non-citizen, subsection 46B(1) will also apply to an application for a visa by a person who is taken to be a transitory person as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill if the person was only a lawful non-citizen because he or she held one or more of the following:

a bridging visa;  
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a temporary safe haven visa;  
a temporary (humanitarian concern) visa;  
a temporary protection visa granted before 2 December 2013.

1428. The purpose of this amendment is to ensure that, in relation to persons who are transitory persons as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill, any visa applications they made or make prior to the commencement day are taken to have been made invalidly, because these persons were subject to section 46B(1) at the time of their application. This is necessary because section 46B(1) does not extend to lawful non-citizens and transitory persons may hold or have held the visas specified in this subitem. Without subitem 14(2), therefore, the visa applications of persons who are transitory persons as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill and who hold or have held the visas specified in subitem 14(2) at the time of their application would be valid, contrary to Government policy.

1429. Subitem 14(2) also ensures that, at any point in time, the restrictions on applying for visas in sections 46A and 46B operated consistently, so that a person may not seek to claim that only one of these provisions applied to the person, and not the other. The application of two bars that prevent applications for visas to such persons is intentional.

1430. Subitem 14(3) provides that subsection 46B(1) of the Migration Act does not apply in relation to an application for a visa by the person (the child) if:

the application is made at any time, whether before, on or after the commencement day ; and

the Minister has made a determination under subsection 46B(2) of the Migration Act in relation to an application by a parent of the child, made before the commencement day, for the same kind of visa.

1431. Subsection 46B(2) of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection 46B(1) of the Migration Act does not apply to an application for a visa by a transitory person for a visa of the class specified in the determination.

1432. This subitem ensures that, in relation to a visa application that has been validly made

because a determination made under subsection 46B(2) has been made in relation to the applicant, the application of any child of the applicant is not invalidated on the commencement of Schedule 6 to the Bill. Whenever possible, it is desirable for members of the same family unit to have a consistent status.

Item 15 Prospective application for some matters

1433. Subitem 15(1) provides that the amendments in Part 1 apply on and after the commencement day in relation to any matter apart from an applicable matter (for applicable matters, see item 11).

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1434. Subitem 15(2) provides that for the purposes of the application of the Part 1 amendments on and after the commencement day under subitem 15(1):

a person may be an unauthorised maritime arrival because of subsection 5AA(1A) or 5AA(1AA) no matter when the person was born, whether before, on or after the commencement day; and  
a person may be a transitory person because of paragraph (d) or (e) of the definition of transitory person in subsection 5(1) no matter when the person was born, whether before, on or after the commencement day.

1435. Subitem 15(3) provides that the Part 1 amendments apply on and after the commencement day in relation to the status of a person as an unauthorised maritime arrival for the purposes of section 336F of the Migration Act. A note is inserted after subitem 15(3) that provides that section 336F of the Migration Act deals with the disclosure of information to some foreign countries and to some bodies.

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SCHEDULE 7 – Caseload management

Part 1 – Amendments

Migration Act 1958

Item 1 Subsection 65(1)

1436. This item omits –After considering|| and substitutes –Subject to sections 84 and 86, after considering|| in subsection 65(1) in Subdivision AC of Division 3 of Part 2 of the Migration Act.

1437. Currently, subsection 65(1) provides that, after considering a valid application for a visa, the Minister, if satisfied that:

the health criteria for it (if any) have been satisfied; and  
the other criteria for it prescribed by the Migration Act or the regulations have been satisfied; and  
the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of the Migration Act or any other law of the Commonwealth; and  
any amount of visa application charge payable in relation to the application has been paid;  
is to grant the visa or if not so satisfied, is to refuse to grant the visa.

1438. Current section 84 provides a power for the Minister, by notice in the Gazette, to suspend the processing of applications for visas of a specified class until a day specified in that notice.

1439. Current section 85 provides that the Minister may, by notice in the Gazette, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.

1440. Section 86 currently provides that the effect of a limit under section 85 is that if:

there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and  
the number of visas of the class or classes granted in the year reaches that maximum number;  
no more visas of the class or classes may be granted in the year.

1441. This effect of this amendment is that the requirement in subsection 65(1) for the Minister to grant or refuse to grant a visa after considering a valid application does not apply where that application is affected by the:

suspended processing of visa applications under section 84; or  
operation of section 86, where no more visas of a class or classes may be granted in the financial year.

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Item 2 Subsection 65(1) (before the note)

1442. This item inserts –Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number|| in subsection 65(1) of Subdivision AC of Division 3 of Part 2 of the Migration Act.

1443. This is a consequential amendment. Item 1 of Schedule 7 to the Bill inserted a reference to sections 84 and 86 in subsection 65(1). This note provides an explanation of sections 84 and 86.

Item 3 Subsection 65(1) (note)

1444. This item removes the word –Note|| and replaces it with –Note 2|| in subsection 65(1) of Subdivision AC of Division 3 of Part 2 of the Migration Act.

1445. This is a consequential amendment as a result of the insertion of new note 1 by item 2 of Schedule 7 to the Bill.

## Item 4 Section 65A

1446. This item repeals section 65A of Subdivision AC of Division 3 of Part 2 of the Migration Act.
1447. Subsection 65A(1) currently provides that if an application for a protection visa was validly made under section 46, or was remitted by any court or tribunal to the Minister for reconsideration, then the Minister must make a decision under section 65 within 90 days. This requirement starts on the day on which the application for the protection visa was made or remitted, or in the circumstances prescribed by the regulations, the day prescribed by the regulations.
1448. Current subsection 65A(2) provides that failure to comply with this section does not affect the validity of a decision made under section 65 on an application for a protection visa.
1449. In Plaintiff S297/2013 v MIBP [2014] HCA 24 a majority of the High Court interpreted the time limit created by current section 65A for processing protection visas as conflicting with the section 85 power to limit the number of visas that may be granted in a specified financial year. The Court resolved that conflict by finding that section 85 did not apply to protection visas.
1450. The purpose of repealing section 65A is to resolve the conflict identified between section 65A and section 85. Section 85 will now allow the minister to limit the maximum number of protection visas to be granted in a financial year.
1451. The amendment is also made as the initial policy intention for introducing a 90 day processing requirement to support flexible, fair and timely resolution of a protection visa application is no longer an effective mechanism to achieve this outcome. Ministerial directions have been put in place regarding the order of consideration for 212

processing of protection visa applications which achieve a more effective and responsive approach to processing different caseloads.

## Item 5 Subsection 84(1)

1452. This item omits the words ~~-notice in the Gazette~~ and substitutes ~~-legislative instrument~~ in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
1453. Subsection 84(1) currently provides that the Minister may, by notice in the Gazette, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84. Item 6 to Schedule 7 to the Bill amends subsection 84(1).
1454. The purpose of this amendment is to prevent the amendment of section 84 in Item 6 of Schedule 7 to the Bill resulting in an unintended new requirement for notices under section 84 to be published in the Gazette.
1455. Currently subsection 56(1) of the Legislative Instruments Act 2003 (Legislative Instruments Act) applies to subsection 84(1) of the Migration Act such that registration in the Federal Register of Legislative Instruments satisfies the requirement for publication in the Gazette of a notice made under subsection 84(1).
1456. An amendment to subsection 84 that still required notice in the Gazette would fall within the requirements of subsection 56(2) of the Legislative Instruments Act with the result that the notice would need to be published in the Gazette in addition to being registered in the Federal Register of Legislative Instruments. This amendment avoids that result by replacing the gazettal requirement with determination by legislative instrument. The result is that notice of a determination under subsection 84(1) is satisfied, as it was prior to this amendment, by registration in the Federal Register of Legislative Instruments.

## Item 6 Subsection 84(1)

1457. This item inserts ~~-(including protection visas)~~ after ~~-visas~~ in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
1458. Subsection 84(1) currently provides that the Minister may, by notice in the Gazette, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84.
1459. The purpose of this amendment is to make clear that the power of the Minister to suspend processing of visa applications under subsection 84(1) applies to protection visas.

## Item 7 Subsection 84(1)

1460. This item omits the phrase ~~-the notice~~ and substitutes ~~-the determination~~ in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
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1461. Subsection 84(1) currently provides that the Minister may, by notice in the Gazette, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84.
1462. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words ~~-notice in the Gazette~~ with ~~-legislative instrument~~. As a consequence of that amendment the phrase ~~-the notice~~ in subsection 84(1) is replaced with ~~-the determination~~.

## Item 8 Subsection 84(2)

1463. This item omits ~~-Where a notice under subsection (1) is published in the Gazette~~ and substitutes ~~-On and after the commencement of an instrument made under subsection (1)~~ in subsection 84(2) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
1464. Currently, subsection 84(2) provides that where a notice under subsection 84(1) is published in the Gazette, no act is to be done in relation to any application for a visa of the class concerned until the resumption day. Current subsection 84(1) provides that the resumption day is the day specified in the notice under subsection 84(1) when the

stop on dealing with applications for visas of a specified class ends.

1465. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words –notice in the Gazette|| with –legislative instrument||. As a consequence of that amendment subsection 84(2) is amended to refer to an instrument rather than publication in the Gazette.

Item 9 Subsection 84(3)

1466. This item omits –A notice|| and substitutes –A determination|| in subsection 84(3) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1467. Currently subsection 84(3) provides that a notice under section 84 does not have any effect in relation to an application for a visa made by a person on the ground that he or she is the spouse, de facto partner or dependent child of:

an Australian citizen; or  
the holder of a permanent visa that is in effect; or  
a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law.

1468. Item 5 of Schedule 7 to the Bill amends subsection 84(3) to replace the words –notice in the Gazette|| with –legislative instrument||. As a consequence of that amendment the phrase –A notice|| in subsection 84(3) is replaced with –A determination||.

Item 10 Subsection 84(4)

1469. This item removes –notice|| and replaces it with –determination|| in subsection 84(4) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1470. Currently subsection 84(4) provides that nothing in section 84 prevents an act being done to implement a decision to grant or to refuse to grant a visa if the decision had been made before the date of the notice concerned.

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1471. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words –notice in the Gazette|| with –legislative instrument||. As a consequence of that amendment the phrase –A notice|| in subsection 84(4) is replaced with –A determination||.

Item 11 Section 85

1472. This item omits –notice in the Gazette|| and substitutes –legislative instrument|| in section 85 of Subdivision AH of Division 3 of Part 2 of the Migration Act.

1473. Current section 85 provides that the Minister may, by notice in the Gazette, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.

1474. The purpose of this amendment is to prevent the amendment of section 85 in Item 12 of Schedule 7 to the Bill resulting in an unintended new requirement for notices under section 85 to be published in the Gazette.

1475. Currently subsection 56(1) of the Legislative Instruments Act applies to section 85 of the Migration Act such that registration in the Federal Register of Legislative Instruments satisfies the requirement for publication in the Gazette of a notice made under section 85.

1476. An amendments to section 85 that still required notice in the Gazette would fall within subsection 56(2) of the Legislative Instruments Act with the result that notice would need to be published in the Gazette in addition to being registered in the Federal Register of Legislative Instruments. This amendment avoids that result by replacing the gazettal requirement with determination by legislative instrument. The result is that notice of a determination under section 85 is satisfied, as it was prior to this amendment, by registration in the Federal Register of Legislative Instruments.

Item 12 Paragraphs 85(a) and (b)

1477. This item inserts –(including protection visas)|| after –visas|| in paragraphs 85(a) and 85(b) of Subdivision AH of Division 3 of Part 2 of the Migration Act.

1478. Current section 85 provides that the Minister may, by notice in the Gazette, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.

1479. The purpose of this amendment is to make it clear that the power of the Minister to place a limit on the maximum number of visas of a specified class or visas of specified classes under section 85 applies to protection visas.

Item 13 Section 91Y

1480. This item repeals section 91Y of Subdivision AL of Division 3 of Part 2 of the Migration Act.

1481. Section 91Y includes provisions regarding the Secretary's obligation to report to the Minister regarding applications for a protection visa. Section 91Y provides that the Secretary must give periodic reports to the Minister, that the Secretary must give additional reports to the Minister as required and provides for information that must be,

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must not be, and may be included in the report. Section 91Y also requires that the reports are tabled in Parliament.

1482. Subsection 91Y(5) specifically provides that a report under section 91Y relating to a reporting period must include information about each application for a protection visa that an applicant has validly made under section 46 or a court or tribunal has remitted to the Minister for reconsideration and for which:

the Minister has made a decision under section 65 during the reporting period, but has not made the decision within the decision period; or

the Minister has not made a decision under section 65 before or during the reporting period, and the decision period has ended (whether before or during

the reporting period).

1483. Subsection 91Y(10) specifically provides that for 91Y the decision period for an application for a protection visa means the period of 90 days starting on:

the day on which the application for the protection visa was made or remitted as mentioned in subsection 91Y(5); or  
in the circumstances prescribed by the regulations – the day prescribed by the regulations.

1484. Subsection 91Y(9) also provides that the Minister is to table in each House of the Parliament a copy of a report under section 91Y within 15 sitting days of that House after the day on which the Minister receives the report from the Secretary.

1485. Section 91Y operates to provide a reporting mechanism for the requirement of current subsection 65A(1).

1486. Current subsection 65A(1) provides that if an application for a protection visa was validly made under section 46, or was remitted by any court or tribunal to the Minister for reconsideration, then the Minister must make a decision under section 65 within 90 days. This requirement starts on the day on which the application for the protection visa was made or remitted, or in the circumstances prescribed by the regulations, the day prescribed by the regulations.

1487. Item 4 of Schedule 7 to the Bill repeals section 65A. The purpose of current section 91Y of providing a reporting mechanism for the requirements of current subsection 65A(1) is no longer required and as a consequence section 91Y is repealed.

Item 14            Section 414A

1488. This item repeals section 414A of Division 2 of Part 7 of the Migration Act.

1489. Currently subsection 414A(1) requires that if an application for review of a Refugee Review Tribunal (RRT) reviewable decision was:

validly made under section 412; or  
was remitted by any court to the RRT for reconsideration;

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then the RRT must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.

1490. Currently subsection 414A(2) provides that failure to comply with this section does not affect the validity of a decision made under section 415 on an application for review of an RRT-reviewable decision.

1491. Current section 414A was inserted into the Migration Act together with current section 65A by the Migration and Ombudsman Legislation Amendment Act 2005. It created a time limit on the review of decisions by the Refugee Review Tribunal that complements the time limit on the Minister to make a decision under section 65 created in current section 65A.

1492. Item 4 of Schedule 7 to the Bill repeals section 65A. As a consequence the related current section 414A is also repealed.

Item 15            Section 440A

1493. This item repeals Section 440A of Division 7 of Part 7 of the Migration Act.

1494. Section 440A includes provisions regarding the Principal Member's obligation to report to the Minister regarding applications for a review of an RRT-reviewable decision. Section 440A provides that the Principal Member of the Refugee Review Tribunal must give periodic reports to the Minister, that the Principal Member must give additional reports to the Minister as required, provides for information that must be, must not be, and may be included in the report. Section 440A also requires that reports be tabled in Parliament.

1495. Subsection 440A(5) specifically provides that a report under section 440A relating to a reporting period must include information about each application for a review of an RRT-reviewable decision that an applicant has validly made under section 412 or a court or tribunal has remitted to the RRT for reconsideration and for which:

the RRT has reviewed the decision under section 414 and has recorded its decision under section 430 during the reporting period, but has not made the decision within the decision period; or

the RRT has not reviewed the decisions under section 414 and has not recorded its decision under section 430 before or during the reporting period, and the decision period has ended (whether before or during the reporting period).

1496. Subsection 440A(10) specifically provides that for 440A the decision period for an application for a protection visa means the period of 90 days starting on the day on which the Secretary has given to the Registrar the documents required to be given by subsections 418(2) and 418(3).

1497. Subsection 440A(9) also provides that the Minister is to table in each House of the Parliament a copy of a report under section 440A within 15 sitting days of that House after the day on which the Minister receives the report from the Principal Member.

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1498. Section 440A operates to provide a reporting mechanism for the requirement of current subsection 414A(1).

1499. Currently subsection 414A(1) requires that if an application for review of a Refugee Review Tribunal (RRT) reviewable decision was:

validly made under section 412; or  
was remitted by any court to the RRT for reconsideration;

then the RRT must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.

1500. Item 14 of Schedule 7 to the Bill repeals section 414A. The purpose of current section 440A of providing a reporting mechanism for the requirements of current subsection 414A(1) is therefore no longer required and as a consequence section 440A is repealed.

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## Part 2 – Application and savings

### Item 16 Application of amendments

1501. Subitem 16(1) provides that the amendments of sections 65, 84 and 85 of the Migration Act made by Part 1 of Schedule 7 apply in relation to an application for a visa:

made on or after the commencement of that Part; or  
made before the commencement of that Part but not finally determined as at the commencement of that Part.

1502. Subitem 16(2) provides that the repeal of section 65A of the Migration Act made by Part 1 of Schedule 7 to the Bill applies in relation to an application for a protection visa:

made on or after the commencement of that Part; or  
made before the commencement of that Part but not finally determined as at the commencement of that Part.

1503. Subitem 16(3) provides that the repeals of sections 91Y and 440A of the Migration Act made by Part 1 of Schedule 7 to the Bill apply in relation to reporting periods commencing on or after the commencement of that Part.

1504. Subitem 16(4) provides that the repeal of section 414A of the Migration Act made by Part 1 of Schedule 7 applies in relation to an application for a review:

made on or after the commencement of that Part; or  
made before the commencement of that Part but not finally determined as at the commencement of that Part.

### Item 17 Saving provision – notices in Gazette

1505. Subitem 17(1) provides that a notice in force under subsection 84(1) of the Migration Act immediately before the commencement of Part 1 of Schedule 7 to the Bill continues in force after that commencement as if the amendments of section 84 of the Migration Act made by that Part had not been made.

1506. Subitem 17(2) provides that a notice in force under section 85 of the Migration Act immediately before the commencement of Part 1 of Schedule 7 to the Bill continues in force after that commencement as if the amendments of section 85 of the Migration Act made by that Part had not been made.

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## Attachment A

### Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

## Overview of the Bill

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) amends the Migration Act 1958 (the Migration Act), the Migration Regulations 1994 (the Migration Regulations); the Maritime Powers Act 2013 (the Maritime Powers Act), the Immigration (Guardianship of Children) Act 1946 (IGOC Act) and the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) to support the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore.

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.

The Bill fundamentally changes Australia's approach to managing asylum seekers by:

- clarifying and strengthening Australia's maritime enforcement framework to provide greater clarity to the ongoing conduct of border security and maritime enforcement operations;

- allowing only temporary protection to those who engage Australia's non-refoulement obligations and who arrived in Australia illegally;

- creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently;

- deterring the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia;

- supporting a more timely removal from Australia of those who do not engage Australia's protection obligations; and

codifying in the Migration Act Australia's interpretation of its protection obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention).

Specifically, the Bill amends the Maritime Powers Act to:

Clarify the powers provided by sections 69 and 72 to move vessels and persons, and related provisions;

Explicitly provide the Minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72 to ensure that government has appropriate oversight;

Ensure that maritime powers may be exercised between Australia and another country, provided the Minister administering the Act has determined this should be the case;

Provide that the rules of natural justice do not apply to a range of powers in the Act, including the powers to authorise the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons;

Ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;

Clarify for the purposes of sections 69 and 72 that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons;

Clarify that for the purposes of sections 69 and 72 a -place|| is not limited to another country or a place in another country;

Clarify the time during which a vessel or person may be dealt with under sections 69, 71 and 72;

Clarify that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and that there is no implication to be drawn from the Migration Act, including particularly from the existence of the regional processing provisions;

Provide an explicit power exempting certain vessels involved in maritime enforcement operations from the application of the Marine Safety (Domestic Commercial Vessel) National Law, the Navigation Act 2012 and the Shipping Registration Act 1981;

Make a number of minor consequential and clarification amendments to the Maritime Powers Act, Migration Act, and the Immigration (Guardianship of Children) Act 1946; and

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Ensure that decisions relating to operational matters cannot be inappropriately subjected to the provisions of the Legislative Instruments Act 2003 or the Administrative Decisions (Judicial Review) Act 1977.

Specifically, the Bill amends the Migration Act to:

introduce Temporary Protection visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;

create a new visa class to be known as Safe Haven Enterprise Visa (SHEV);

explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;

clarify that the application bars in sections 48, 48A and 501E of the Migration Act also apply in relation to persons in the migration zone who have been refused a visa or held a visa that was cancelled, in circumstances where the refused application or the application in relation to which the cancelled visa was granted earlier was an application that was taken to have been made by the person;

allow for multiple classes of protection visas;

include a definition of protection visas;

create an express link between certain classes of visas that are provided for under the Migration Act (including Permanent Protection visas and Temporary Protection visas) and the criteria prescribed in the Migration Regulations in relation to those visas;

create a new fast track assessment process and remove access to the Refugee Review Tribunal (RRT) for fast track applicants, who are defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa; and other cohorts specified by legislative instrument;

require the Minister to refer fast track reviewable decisions to the Immigration Assessment Authority (the IAA) which will conduct a limited merits review on the papers and either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;

create discretionary powers for the IAA to get new information and permit the IAA to consider new information only in exceptional circumstances;

provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents and disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;

establish the IAA within the RRT, and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration and specify delegation

powers and employment arrangements to apply to the Senior Reviewer and Reviewers of the IAA;

clarify the availability of the removal powers independent of assessments of Australia's non-refoulement obligations;

remove most references to the Refugees Convention from the Migration Act and replace them with a new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention;

clarify, with retrospective effect, that children born to unauthorised maritime arrivals under the Migration Act either in Australia or in a regional processing country are also UMAs for the purposes of the Migration Act;

clarify, with retrospective effect, that children born to transitory persons either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act;

ensure that children born in Australia to a parent who is a transitory person can also be taken to a regional processing country;

clarify, with retrospective effect, that any visa application of the child of a UMA or transitory person is invalid, unless the Minister has allowed the application, or the application of that child's parent, to be made; and

restore the Government's ability to place a statutory limit on the number of protection visas granted in a programme year including repealing of section 65A and section 414A of the Migration Act which require applications for protection visas to be decided in 90 days as well as the associated reporting requirements in section 91Y and 440A, and provide that the requirement for the Minister in section 65 to grant or refuse to grant a visa is subject to sections 84 and 85.

#### Human rights implications – key obligations relevant to all measures in the Bill

##### Non- refoulement

Australia has obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) not to return a person to a country in certain circumstances. The Government is of the view that provided Australia's international obligations are satisfied, the Government can decide how it processes claims. The ICCPR or CAT does not specify how this should occur. Australia's implementation of the below obligations are further complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Act to grant a visa.

##### Article 3 of the CAT states:

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

Non- refoulement obligations also arise, by implication, in relation to Articles 6 and 7 of the ICCPR.

##### Article 6 of the ICCPR states:

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

##### Article 7 of the ICCPR states:

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

The Bill makes several changes to the framework for assessing protection claims; it does not, however, affect the substance of Australia's adherence to its non- refoulement obligations. Any persons found to engage Australia's non- refoulement obligations will not be removed in breach of those obligations. The form of administrative arrangements in place to support Australia meeting its non- refoulement obligations is a matter for the Government.

##### Best interests of the child

##### Article 3 of the Convention on the Rights of the Child (CRC) states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Government is committed to acting in accordance with Article 3 of the CRC. In developing the policies reflected in this Bill, the Government has treated the best interests of the child as a primary consideration. However, it is Government policy to discourage unauthorised arrivals from taking potentially life threatening avenues to achieve resettlement for their families in Australia and this, as well as the integrity of the onshore protection programme, are also primary considerations which may outweigh the best interests of the child in relation to a particular measure.

In addition, the Government has policies and procedures to give effect to the obligation to treat the best interests of a child as a primary consideration in individual cases and is committed to acting in a manner consistent with the CRC.

##### Schedule 1 - Amendments to the Maritime Powers Act

##### Overview

Maritime powers are used to respond to a range of threats, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal

ecosystems from environmental damage and countering people smuggling. The amendments to the Maritime Powers Act will strengthen the foundation of maritime enforcement in each of these contexts. Amendment to the Migration Act and Immigration (Guardianship of Children) Act are simply to clarify references to powers to move vessels and people, and update references which were not updated upon commencement of the Maritime Powers Act.

#### Human Rights Implications

To the extent that this Bill makes amendments to the Maritime Powers Act which are technical in nature, the amendments do not engage human rights as those amendments do not materially alter the Maritime Powers Act. For engagement with human rights in the pre-amendment Maritime Powers Act, please see the explanatory memorandum to the Maritime Powers Bill 2012, which included a comprehensive statement of compatibility with human rights.

The following assessment relates to amendments which substantively change the operation of the provisions of the Maritime Powers Act. For the purposes of this statement, it is assumed that in some circumstances the relevant rights may be engaged outside Australian territory. The extent to which some or all of the rights assessed below are engaged will vary according to the circumstances in question.

The Bill engages the following human rights:

#### Non-refoulement obligations

The non-refoulement obligations under the CAT and the ICCPR, as set out in the overview to this Statement, prohibit the arbitrary deprivation of life, the application of the death penalty and torture and other cruel, inhuman or degrading treatment or punishment. Item 19 inserts new Division 8A, which provides in new section 75A that a decision under certain powers cannot be invalidated on the basis of a failure to consider, a failure to properly consider, or a failure to comply with Australia's international obligations when exercising a power under sections 69, 71, 72 and 74 and new sections 69A, 72A, 75D, 75F, 75G or 75H.

Specifically:

section 69 provides that a maritime officer may detain a vessel and take it to a place, which may be outside Australia;

section 71 provides that persons may be placed or kept on the vessel;

section 72 provides for the detention and movement of people, including to a place outside Australia;

section 74 provides that maritime officers must act safely when placing or keeping persons in places;

new section 69A clarifies the periods during which a vessel may be detained;

new section 72A clarifies the periods during which a person may be detained;

the new Ministerial powers provided by:

- o new section 75D, provides a power for the Minister to determine that maritime powers may be exercised between countries in certain circumstances;
- o new section 75F, provides a power for the Minister to give directions about the exercise of powers under sections 69, 71, and 72 and new sections 69A

and 72A, and new section 75G which requires compliance with directions under new section 75F; and

- o new section 75H, provides a power for the Minister to exclude certain vessels from the operation of certain shipping legislation.

Only exercises of power under sections 69 and 72, along with new sections 69A 72A and 75F, are capable of giving rise to engagement with nonrefoulement obligations.

While on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's non-refoulement obligations, the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers. It is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government.

#### Prohibition on torture and cruel, inhuman or degrading treatment or punishment

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 7 of the ICCPR, as well as the CAT. Further, Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

As noted in the statement of compatibility for the Maritime Powers Bill, section 95 codifies the prohibition on cruel, inhuman or degrading treatment or punishment in the maritime context. It states that persons arrested, detained or otherwise held must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment.|| This Bill does not change section 95; as such, this Bill is compatible with Australia's human rights obligations to prohibit torture and cruel, inhuman or degrading treatment or punishment in the same way the Maritime Powers Act is.

#### Right to security of the person and freedom from arbitrary detention

Article 9 of the ICCPR provides that

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his

arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

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4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

This Bill does not alter the provisions in the Maritime Powers Act relating to arrest. This Bill may, in certain circumstances, provide for a longer period of detention under 72(4) than was allowed under the original Maritime Powers Act.

Subsection 97(1) of the original Maritime Powers Act provides that –if a person is detained and taken to another place under subsection 72(4) (persons on detained vessels and aircraft), the detention ends at that place.|| In certain circumstances new section 72A provides for detention to continue beyond the reaching of the place to which the person is to be taken, including in new paragraph 72A(1)(d) –for any period reasonably required to make and effect arrangements relating to the release of the person.|| Section 69A merely clarifies the existing periods during which a vessel may be detained, on which the powers under section 71 and subsections 72(2) and 72(3) are based. In circumstances where the power in 72(4) is used to take a person to a place in the migration zone, this is unlikely to have any effect, although there are circumstances where disembarkation at Christmas Island has been significantly delayed so as to ensure a safe disembarkation once bad weather has passed. Where the power in 72(4) is used to take a person to a place outside Australia, the period provided for in new section 72A(1)(d) could be used for a variety of operational measures, including waiting for weather suitable for a release. Under the original Maritime Powers Act the persons detained would have been automatically released from detention under 72(4) upon arrival at the place to which they were being taken; this would have little practical effect if there was not, for example, another vessel for them to be released onto.

Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, ‘arbitrary’ means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

In most cases these more clearly-defined time periods would have been covered by the existing detention provisions. To the extent that 72A is an expansion of the detention power under the Act, it is restricted both by purpose and the provision that the time be –reasonable||, and covers a time when release would not otherwise have been possible in reality. As such it is reasonable and proportionate to the goal of protecting Australia’s borders in the same way as the original provision and therefore compatible with Article 9(1).

With respect to Article 9(4), while new sections 75A and 75B and the exemption under the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) for ministerial decisions limit the bases on which courts may invalidate decisions made and actions taken under certain maritime powers, as noted above these do not materially alter the degree to which the Government understands these matters would be justiciable by reference to the Maritime Powers Act. International law was not intended to be a relevant consideration for the purposes of the Maritime Powers Act; if it was, Parliament would have provided as such explicitly. Equally, natural justice was not intended to be provided beyond the limited extent provided for explicitly in that Act. Decisions will continue to be taken by the executive government in accordance with Australia’s human rights obligations.

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The exclusion of review under the ADJR Act is limited to circumstances in which, in the Government’s view, review by lower courts and on broader grounds would be inappropriate in respect of complex and highly sensitive operational matters. People who are affected by these measures will still have a judicial pathway through the constitutional writs and as such will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4).

#### Schedule 2 and 3 – Protection visas and Other Measures, Act based visas

##### Overview of the legislative amendments

These schedules reintroduce TPVs, make a number of amendments necessary to support the introduction of TPVs, and introduce two new visas.

The reintroduction of Temporary Protection visas is a key element of the Government’s border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

Unauthorised Maritime Arrivals (UMAs) and Unauthorised Air Arrivals (UAA) who are found to engage Australia’s non-refoulement obligations will be granted a Temporary Protection Visa for a period of up to three years at one time. A reassessment will be required to determine if an individual is eligible for a further Temporary Protection visa.

A new visa to be known as a Safe Haven Enterprise Visa (SHEV) will be created. Amendments to the Migration Regulations 1994 prescribing the requirements for this visa will follow this introduction and a statement of compatibility will be provided with those Regulation amendments.

##### Application for one visa taken to be an application for another visa

The Migration Act will be amended to provide the authority for regulations to be made that deem an application for a visa to be an application for a different visa if one of more of the specified events occurs, so that had the application been made after the event (or the events) occurred, the application would either have been invalid, or a visa of that type could not have been granted.

The new framework is not protection visa specific and may be used in the future for transitioning other visa applications as well in response to changing Government visa policies and priorities.

A key element of the Government's border protection strategy is to not grant permanent protection visas to protection claimants who arrived in Australia illegally, including as unauthorised maritime arrivals. The Government considers that where such a person is found to engage Australia's protection obligations, it is appropriate for them to instead be granted a temporary visa such as a Temporary Protection visa.

The amendments will thus create the framework that enables unauthorised maritime and other illegal arrivals who have already made a valid application for a protection visa to be transitioned to and processed under a temporary visa arrangement, as if they have made a valid application for a Temporary Protection visa instead.

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In addition, the Bill will make amendments to the Migration Regulations (under the new authority conferred as a result of the amendment to the Migration Act) so that protection visa applications made by prescribed classes of applicants before the commencement of the Bill will, when prescribed circumstances exist, be taken not to be, and to never have been, a valid application for a protection visa; and will be taken to be, and to have always been, a valid application for a Temporary Protection visa.

These amendments to the Migration Act and the Migration Regulations engage the non-refoulement obligations in Articles 6 and 7 of the ICCPR and Article 3 of CAT, as set out in the overview to the whole Bill.

The amendments to the Migration Act creating the authority to make regulations deeming an application for a visa to be an application for a different visa, and the amendments to the Migration Regulations inserting the regulations to deem protection visa applications made by prescribed classes of applicants to be applications for Temporary Protection visa, are compatible with these obligations.

The amendments do not result in the return or removal of persons who are found to engage Australia's protection obligations in contravention of its non-refoulement obligations as implied or articulated in these international instruments. The position of this Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.

Sections 48, 48A and 501E also apply to refused applications that were taken to be made and cancelled visas which were granted because of applications that were taken to be made

Sections 48, 48A and 501E of the Act limit or prohibit the making of further visa applications ('application bars') by non-citizens in the migration zone who, since they last entered Australia, have been refused a visa or have had their visa cancelled.

Amendments will be made to the Act to clarify and put it beyond doubt that the application bars will also apply in circumstances where the refused application was taken to have been made by the non-citizen under a provision of the Act or the Regulations, and where the cancelled visa was granted because of an application that the non-citizen was taken to have made.

An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by item 38 of Schedule 2 to this Bill.

Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

Under this amendment, if a non-citizen who is taken to have made an application for a Temporary Protection (Class XD) visa is refused that visa, the relevant application bar, in this case section 48A, will apply to the non-citizen to prohibit the non-citizen from making another Protection visa application (whether for Protection (Class XA) visa or Temporary

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Protection (Class XD) visa, or some other protection visa provided for by section 35A, which is inserted by Schedule 2 of this Bill.

This amendment potentially engages the human rights and freedoms protected under ICCPR and CAT, particularly Articles 6 and 7 of the ICCPR and Article 3 of CAT, as set out in the overview to this Statement, in so far as the amendment to section 48A (which prohibits the making of further Protection visa application) is concerned.

If an unauthorised maritime arrivals is taken to have made an application for a Temporary Protection (Class XD) visa because of the amendment to the Act inserting section 45AA and the amendment to the Regulations inserting regulation 2.08F that enable their Protection (Class XA) visa application to be deemed an application for a Temporary Protection (Class XD) visa instead, and that deemed Temporary Protection (Class XD) visa application is refused because the unauthorised maritime arrival is assessed as not engaging Australia's protection obligations, then it is appropriate and reasonable for the prohibition on further protection visa applications in section 48A to apply to the unauthorised maritime arrival, even if the unauthorised maritime arrival is taken to have made, but did not actually make, the application for a Temporary Protection (Class XD) visa.

There is no material difference between the criteria for a Protection (Class XA) visa (in relation to which an application was actually made) and the criteria for a Temporary Protection (Class XD) visa (in relation to which an application is taken to be made). Applying section 48A to an unauthorised maritime arrival who has been found not to engage non-refoulement obligations in the deemed Temporary Protection (Class XD) visa application would ensure the refused unauthorised maritime arrival cannot make unmeritorious repeat protection visa applications.

However, as is the case with all persons who are subject to a bar on further protection visa applications, persons affected by the amendments can have that bar lifted by the Minister if he or she thinks it is in the public interest to allow the person to make another application. This allows new claims that have arisen since the cancellation or refusal to be considered, and for any non-refoulement obligations to be assessed that have not already been assessed.

On this basis, the amendments are considered to be compatible with human rights.

Introduction of s35A to allow for multiple classes of temporary and permanent visas

In order to ensure that the Migration Act clearly allows for multiple classes of protection visas, and that said protection visas may be temporary or permanent, new s35A has been inserted. The provision specifies that protection visas may be temporary, and lists the Temporary Protection visa as one such class. It also makes it clear that protection visa requirements exist in both s36 and in regulations.

#### Amendments to section 5 to include a definition of protection visas

To further support the introduction of Temporary Protection visas in a separate class to Permanent Protection visas, an amendment is also being pursued to s5 of the Act to include a definition of a Protection visa. This is a technical amendment, and will ensure any reference to 'protection visas' in both the Act and Migration Regulations include Permanent Protection visas and Temporary Protection visas.

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#### Human Rights Implications

##### Family Sponsorship

###### Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

###### Article 23 of the ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Refugees granted Temporary Protection visas will not be eligible to sponsor family members to migrate to Australia.

As refugees are unable to return to their country of origin for fear of persecution, if family reunification is not available there is the potential that some Temporary Protection visa holders may remain separated from their family for years until they are either deemed not to engage Australia's protection obligations and removed from Australia or choose to return home.

Temporary Protection visa holders will be able to voluntarily depart and return to their family and country of origin or any other country they have permission to enter at any time, and may particularly wish to do so where circumstances in their country of origin have changed.

There is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Further, these rights can be subject to proportionate and reasonable limitations which are aimed at legitimate objectives. In the case of these measures, these objectives include maintaining the integrity of the migration system and the national interest.

A UMA or UAA becomes separated from their family when they choose to travel to Australia without their family, Australia has not caused that separation, and it is therefore not an interference with the family within the meaning of Article 17. To the extent that Article 23 may be limited, Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing UMAs from making the dangerous journey to Australia by boat. The TPV Regulations were designed as part of a suite of measures, which includes the Regional Resettlement Arrangements (RRA), to act as a deterrent for people making the dangerous journey by boat to Australia. TPVs mean that if someone comes by boat to Australia they are not able to sponsor their family, and the RRA means that if someone comes by boat to Australia after 19 July 2013 they are not processed or settled within Australia. These two policies work in conjunction to provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means will not result in the reunification of their family should they choose to travel separately. The measures further the legitimate aim of encouraging people to arrive in Australia via regular means, such as by obtaining a permanent visa under Australia's Refugee and Humanitarian Programme for persons outside Australia, which

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allows family groups to migrate together. Therefore, the amendments are consistent with the rights contained under Articles 17 and 23 of the ICCPR.

##### Rights of the Child

###### Article 10 of the CRC states:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 3 of the CRC requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, other considerations may also be primary considerations including:

seeking to prevent anyone, including minors, from taking potentially life threatening measures to achieve resettlement for their families in Australia;

maintaining the integrity of Australia's borders and national security;

maintaining the integrity of Australia's migration system;

protection of the national interest; and  
encouraging regular migration.

While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in their best interests to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The reintroduction of Temporary Protection visas seeks to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interest, is also a primary consideration. Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that these amendments are consistent with Article 3 of the CRC.

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Article 10 of the CRC requires that applications for family reunification made by minors or their parents are treated in a positive, humane and expeditious manner. However, Article 10 does not amount to a right to family reunification. The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited by the introduction of Temporary Protection visas, Australia considers that these limitations are necessary, reasonable and proportionate to achieve a legitimate aim.

#### Non-discrimination

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, not all treatment that differs among individuals or groups on any of the grounds mentioned in article 26 will amount to prohibited discrimination. The UN Human Rights Committee has recognised that –not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant||.

The UN Human Rights Committee has recognised in the ICCPR context that –The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment|| (CCPR General Comment 15, 11 April 1986). Unlike permanent visa holders, all temporary visa holders (not just TPV holders) are not able to sponsor family members for residence in Australia. To the extent that the regulations result in differential treatment between permanent protection visa holders and temporary protection visa holders in being unable to sponsor family members for reunification purposes, this treatment is based on reasonable and objective criteria. The criteria being applied is whether or not the individual entered Australia illegally, or applied to come to Australia via lawful means and is aimed at a legitimate purpose, that is the need to maintain the integrity of Australia's migration system and encouraging the use of regular migration pathways to enter Australia.

#### Permission to Travel

Article 12 of the ICCPR states:

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1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Since 3 June 2013, all persons granted a permanent protection visa must seek permission before travelling to their home country as otherwise their visa is liable for cancellation. TPVs cease automatically if the holder departs Australia. This means that a holder of a Temporary Protection visa will not be able to re-enter Australia if they depart. This raises issues relating to freedom of movement under Article 12 of the ICCPR, in particular the right to leave any country (article 12(2)).

The inability of a Temporary Protection visa holder to re-enter Australia is not a prohibition on departing Australia, although it may discourage Temporary Protection holders from choosing to depart. This restriction on re-entry is designed to maintain the integrity of Australia's borders, encourage regular migration and discourage dangerous voyages by boat. The potential discouraging effect of restricting travel is considered to be reasonable in the circumstances and proportionate to Australia's legitimate aim of offering protection to genuine refugees and those fearing significant harm, while also protecting the integrity of the protection visa regime. The inability to re-enter Australia is not exclusive to Temporary Protection visa holders, several other temporary visas do not allow re-entry to Australia after departure.

The amendment is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those

limitations are reasonable, necessary and proportionate.

#### Right to social security/right to an adequate standard of living

TPV holders have permission to work. For those who are unable to work, current legislative arrangements allow TPV holders to be eligible for Special Benefit and Family Tax Benefit. There are also a range of ancillary payments that are available, depending on individual circumstances. Noting that individual TPV holders will not qualify for all the benefits and payments listed below:

- Double Orphan Pension
- Parental Leave Pay (Work test requirements)
- Dad and Partner Pay (Work test requirements)
- Rent Assistance
- Education Entry Payment

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- Clean Energy Supplement
- Single Income Family Supplement
- Pharmaceutical Allowance
- Health Care Card
- Pensioner Concession Card
- Low Income Health Care Card
- Pension Supplement
- Remote Area Allowance
- Telephone Allowance
- Family Tax Benefit A & B
- Child Care Benefit

TPV holders also have access under existing arrangements to Medicare.

In addition, TPV holders are entitled to full employment services support. This is commensurate with support provided to permanent residents and citizens in similar circumstances. While not eligible for Settlement Services, TPV holders released from immigration detention are assisted to transition into the community through the Community Assistance Support programme, while those already in the community on BVEs are linked to mainstream services by Asylum Seeker Assistance Scheme providers.

Together, these support services and benefits are intended to ensure that TPV holders in need are able to access a similar level of services and support as permanent visa holders and members of the Australian community more broadly.

Anyone accessing Special Benefit, regardless of whether they are a permanent resident or the holder of a TPV, is required to meet mandatory activity testing requirements (unless exempt) as required under the Social Security legislation. TPV holders are, however exempt from activity testing for the first 13 weeks. This is to allow time to settle into the community and commence supporting themselves.

#### Right to education

Article 13 of the ICESCR outlines those obligations to which Australia is bound as a State Party to the Covenant (subject to permissible limitations in accordance with article 4).

In Australia, school-age children – usually between 5 and 17 years old – must go to school.

The children of TPV holders are able to access school education through public schools and through non-government schools.

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The policy on access to public schools for those UMA granted TPVs are set by state and territory government education departments. This includes any related fees. If granted a TPV, the education and payment arrangements would be an issue for state/territory governments, in consultation with the Commonwealth Department of Education and the Council of Australian Governments on the broader education funding arrangements. In the interim, arrangements have been made directly with the Department of Immigration and Border Protection and most of the state and territory education authorities to fund and enrol the children of TPV holders.

TPV holders accessing non-government schools and are funded via existing funding arrangements agreed between Commonwealth and State/Territory education authorities administered by the Commonwealth Department of Education.

DIBP will be assisting those families already living in the community (under community detention arrangements or on bridging visas) to continue to attend their local school. Service providers will also assist to enrol those children who are granted a TPV from detention.

#### Right to work

There are no conditions or work restrictions placed on TPV holders. TPV holders are able to freely participate in the labour market whilst they remain lawfully in Australia.

#### Right to health

Article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and requires steps to be taken to achieve the full realisation of this right.

The Government notes that TPVs offer some certainty in that a person will be able to remain in Australia for three years and if they are still found to engage Australia's protection obligations they will be eligible to be granted a further Temporary Protection visa. In addition, TPV holders are entitled to access to Medicare and Australia's public health system to the same extent as permanent Protection visa holders.

#### Applying for certain visas under the Act

The Bill also makes amendments to expressly create a link between certain classes of visa that are provided for under the Act that allow criteria to be prescribed in the Regulations (Act based visas) and the criteria prescribed in the Regulations in relation to those classes of visa. These amendments do not affect the classes of visas that are provided for in the Act but for which criteria cannot be prescribed in the Regulations.

The Act based visas for which criteria may be prescribed by the Regulations are the classes of visa provided for by sections 32 (Special Category visas), 37 (Bridging visas), 37A (Temporary Safe Haven visas), 38B (Maritime Crew visas) and section 35A (Permanent Protection visas, Temporary Protection visas and Safe Haven Enterprise visas) of the Migration Act.

The amendments make it clear that where there are no prescribed criteria in the Regulations:

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relating to the requirements that must be satisfied in order to make a valid application for the Act based visa; and

relating to the criteria that must be satisfied by the applicant in order to be granted the particular class of Act based visa

then an application for the grant of the Act based visa is invalid.

The amendments also make it clear that if there are regulations in effect that prescribe the requirements for making a valid application, or prescribe the criteria that must be met in order for the visa to be granted, then an application will not be valid unless the application in fact meets all the prescribed requirements in the Regulations, and a visa must not be granted unless the applicant satisfies the criteria prescribed in the Regulations, as well as any other criteria provided for in the Act.

The amendments will clarify that for each of the Act based visas, the Regulations may, but need not, prescribe criteria which relate to making a valid application for the visa and being granted the visa.

The purpose of the amendments is to put it beyond doubt that criteria prescribed in the Regulations are an essential and integral element to the application and processing of Act based visas.

The amendments ensure that in the absence of any prescribed criteria in the Regulations relating to application requirements, a person cannot make a valid application for an Act based visa by simply, for example, requesting the visa orally or writing on a piece of paper that they want the visa. The amendments also ensure that if there are prescribed criteria in the Regulations for the grant of the Act based visa, that the applicant must satisfy all the prescribed criteria in addition to those that are provided for by the Act to be granted the visa.

These amendments do not engage any human rights. These amendments are technical in nature. They merely clarify and put beyond doubt the position as it exists currently. That is, that in order for a person to apply for and be granted an Act based visa, the person must satisfy the requirements for making a valid application as prescribed in the Regulations and the criteria prescribed in the Regulations for the grant of the particular Act based visa (in addition to any criteria already provided for under the Act). The amendments also clarify that if there are no prescribed regulations, then a valid application for the relevant Act based visa cannot be made.

#### Schedule 4 – Fast Track Applicants and Excluded Fast Track Review Applicants

The Government's purpose in establishing the Fast Track assessment process is two-fold: it will enhance the integrity of Australia's protection status determination framework, including by introducing specific measures for responding to unfounded claims for asylum. In addition, it will introduce a new review body for certain cohorts of visa applicants to improve the efficiency and cost effectiveness of merits review for those cohorts. These measures are specifically aimed at addressing the backlog of Unauthorised Maritime Arrivals (UMAs) who entered Australia on or after 13 August 2012 and ensuring their cases progress towards timely immigration outcomes. The Government believes the more efficiently and effectively a case can be resolved, the better outcomes it can deliver for both the applicant and those who support them in the Australian community.

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Item 1 of Schedule 4 to the Bill inserts a new defined term fast track applicant in subsection 5(1) of the Act. Broadly, fast track applicant means a UMA who 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.

To provide flexibility to include other cohorts who may be made subject to the Fast Track assessment process in the future, a new legislative-making power will provide the Minister with the ability to specify a person or class of persons to fall within the definition of a "fast track applicant" by way of legislative instrument, for example, unauthorised air arrivals. An unauthorised air arrival does not have a visa that is in effect when they enter Australia or has had their visa cancelled in immigration clearance. While some of these persons may have arrived in Australia by lawful means, they may have been refused entry at Australian airports or ports for reasons including that they are found not to intend to abide by the visa conditions (for example, where the reason for the grant of the visa no longer exists) or on the basis of document fraud.

Item 1 of Schedule 4 to the Bill inserts a new defined term fast track decision in subsection 5(1) of the Act. Broadly, a fast track decision is defined as a decision to refuse the grant of a protection visa to a fast track applicant on grounds other than decisions relying on subsection 5H(2) of the definition of a refugee; or subsections 36(1B) or (1C), paragraph 36(2C)(a) or (b) or section 501 of the Act. Protection visa decisions that have been refused by delegates on character grounds will continue to be reviewable by the Administrative Appeals Tribunal (AAT) as appropriate.

After a fast track decision has been made in respect of a fast track applicant, they will either become an excluded fast track review applicant or a fast track review applicant as defined by subsection 5(1) of the Bill. Persons defined as excluded fast track review applicants would not be referred for review to the Immigration Assessment Authority (IAA) by the Minister under new section 473CA.

This differentiated approach to review acknowledges the diverse range of claims and unique characteristics brought forward by asylum seekers. This approach forms part of the Government's broader package of measures in this Bill aimed at encouraging an orderly and well managed humanitarian programme through upholding the integrity of Australia's protection status determination processes. It is the Government's policy that if fast track applicants present baseless or unmeritorious claims, or have protection elsewhere, their cases warrant being accelerated towards an immigration outcome rather than accessing merits review in order to delay the finalisation of their cases and prolong their stay in Australia.

Broadly, the definition of an excluded fast track review applicant will capture those fast track applicants whose protection claims have been refused and where, based on the nature of the protection claims and evidence presented, the Minister (or delegate) is of the opinion that the fast track applicant:

is covered by section 91C or 91N of the Act: this provision captures those fast track applicants who hold nationality or a right to enter and reside in a third country and therefore, can access protection elsewhere. It is the Government's position that such persons should not have access to review because Australia's protection framework should be dedicated towards identifying and granting protection to asylum seekers who have no alternative country in which they can receive protection.

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previously entered Australia and made a claim for protection relying on a criterion in s36(2) in an application that was refused or withdrawn; this provision captures those fast track applicants who have previously made a valid protection visa application in Australia which was refused or withdrawn, have departed Australia and subsequently re-entered and been refused protection as a fast track applicant. It is the Government's position that such persons have already accessed and been refused protection under Australia's framework numerous times and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases. Furthermore, while some excluded fast track review applicants may have new protection claims which have emerged since being refused protection, such claims will still receive a full assessment under Australia's primary assessment, thus ensuring Australia can meet any non-refoulement obligations towards those who may require its protection.

made a claim for protection in a country other than Australia, if such a claim was refused by that country; this provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused and where merits review will unnecessarily delay the finalisation of their cases.

made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees (UNHCR) in that country; this provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country by the UNHCR and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused and where merits review will unnecessarily delay the finalisation of their cases.

makes a manifestly unfounded claim for protection; this provision captures those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (including where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to mislead or abuse Australia's asylum process in an attempt to avoid removal. Consistent with the UNHCR's policy on accelerated procedures for manifestly unfounded applications for refugee status or asylum, it is the Government's position that such fast track applicants should not have access to merits review because their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.

without a reasonable explanation, provides a bogus document to the Department in support of their application; this provision captures those fast track applicants who have purported to use a bogus document in an attempt to support of any part of their protection visa application and where, after being confronted regarding the

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authenticity of the document, continue to rely upon it or to produce further bogus documents without a reasonable explanation. In accordance with the UNHCR's policy on accelerated procedures for manifestly unfounded applications for refugee status or asylum, the Government considers it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time in which they facilitate the asylum seeker's safe passage to claim protection at the first available opportunity. This measure is intended to encourage asylum seekers to comply with requirements and assist with providing authentic documents and evidence which supports their protection claims.

To provide flexibility to extend this definition to other cohorts, a new legislative-instrument making power in paragraph (b) of the definition will provide the Minister with the ability to specify a person or class of persons to fall within the definition of an 'excluded fast track review applicant'.

In addition, new section 473BB inserted by item 21 of Schedule 4 to the Bill will provide the Minister with the flexibility and ability to determine via a legislative instrument that certain fast track decisions made in respect of excluded fast track review applicants are to be reviewed by the Immigration Assessment Authority. This will provide certain cohorts who might ordinarily be captured by the definition of an excluded fast track review applicant access to review under Part 7AA, for example those protection visa applicants who are eligible for the Primary Application Information Service (PAIS).

These measures are consistent with Australia's non-refoulement obligations under the ICCPR and the CAT as those obligations are set out in the overview of this statement.

All fast track applicants, like other non-citizens seeking Australia's protection, will have their protection claims fully assessed. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of non-refoulement obligations. It will be open to all fast track applicants to seek assistance with their application by making private arrangements with a Registered Migration Agent. On 31 March 2014 the Government announced the removal of access to the Immigration Advice and Application Assistance Scheme (IAAAS) from all illegal arrivals. The Government will however, provide application support, through PAIS service providers, to those considered most vulnerable including unaccompanied minors.

Moreover, they will have the opportunity to articulate their claims in a full and confidential interview with a specially trained Onshore Protection decision-maker and in the presence of a Registered Migration Agent where engaged. An independent observer is present during the interview process for unaccompanied minors to ensure the minor's physical and emotional wellbeing is respected.

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

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As unlawful arrivals, many fast track applicants will not be lawfully in the territory and hence this obligation will not apply to them. The majority of fast track applicants will access review by the IAA and all fast track applicants, whether lawfully or unlawfully in the territory, will remain able to access judicial review which satisfies the obligation in Article 13 to have review by a competent authority.

It is relevant to note that the Refugees Convention does not prescribe procedures to be adopted by States in the processing of protection claims. 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, access to necessary facilities such as a competent interpreter to submit their case and being permitted to remain in the country pending a decision on their initial request to the competent authority.

The UNHCR's policy on manifestly unfounded applications for asylum supports national procedures for determining refugee status that may, as part of those processes, include accelerated procedures for manifestly unfounded applications for asylum. In particular, it considers the channelling of manifestly unfounded applications through accelerated processes appropriate where certain procedural safeguards have been afforded to those applicants subject to the accelerated processes. Such procedural safeguards include applicants receiving preliminary counselling in the appropriate language and assisted to submit a written statement and being given a full personal interview by a fully qualified official.

It is the Government's position that there are sufficient procedural safeguards in place for ensuring all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent assessment process while ensuring priority is given to identifying applications that present legitimate claims and in turn, asylum seekers who require Australia's protection.

The introduction of a different process for dealing with unfounded claims will not curtail a fast track applicant's ability to seek protection, nor their ability to access judicial review. Rather, these measures will place an emphasis on the importance for all fast track applicants to fully and truthfully articulate all of their protection claims at the earliest possible opportunity, as this may influence whether or not their case is reviewed by the IAA if they are refused.

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

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discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The measures in this Bill are aimed at addressing the backlog of UMA's who entered Australia on or after 13 August 2012 and provide rights of review that are different to those afforded to lawful non-citizens who are refused protection onshore. It is the Government's view that UMA's with unmeritorious claims are often encouraged by private contacts to pursue vexatious merits review to prolong their stay. The length of time a person remains in Australia is relevant to a people smuggler's message. As such, while these measures may be said to engage Articles 2(1) and 26 by facilitating different review rights for certain fast track applicants, they are both reasonable and proportionate in achieving their aim, that is, 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.

Limited Review by the Immigration Assessment Authority

One key aspect of the Fast Track assessment process will be the establishment of a new review body, the Immigration Assessment Authority (the IAA). Its objective will be to

conduct an automatic and limited form of review for fast track reviewable decisions. New section 473FA provides that the Immigration Assessment Authority, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick. The IAA will support the broader objective of the Fast Track assessment process by improving on the efficiency and cost effectiveness of merits review for certain cohorts of refused visa applicants in Australia and prevent the abuse of process by applicants.

To support this objective, new subsection 473CA provides that the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made. In addition, section 473CB will require the Secretary of the Department to give to the IAA relevant documents, material and details that the IAA will need to conduct review. These materials are collectively known as review material.

New section 473DB of the Bill provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

without accepting or requesting new information; and  
without interviewing the referred applicant.

The purpose of this provision is to stipulate that the default function of the IAA is to conduct a limited form of review, referred to as an on the papers' review, by only considering the review material provided to the Authority by the Secretary of the Department, which is the material that is available to the primary decision-maker. The IAA is not required to accept or request new information or interview the referred applicant.

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The effect of section 473DB is to clarify that an on the papers' review will require the IAA to undertake a reconsideration of the review material to determine if a more preferable interpretation should be taken on the previous information. In doing so, section 473CC of the Bill will give the IAA the power to either affirm the previous fast track reviewable decision or remit the decision to the Department for reconsideration with directions regarding the IAA's new findings.

It is also proposed to amend the Migration Regulations 1994 to prescribe the timeframes that will apply to reviews conducted by the IAA. By allowing the IAA to complete its limited review role in an efficient and effective manner, this new review body will deliver the Government's policy outcome of improving on the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensuring timely progress of these cases towards a final and accurate determination of immigration status.

#### Exception to the IAA's limited review function

Should new information arise after the fast track applicant has received their primary decision and in keeping with the broader context of this model of limited review, new section 473DC will allow the IAA to consider new information beyond the review material, for the purposes of making a decision in relation to a fast track reviewable decision. This means that any such new information or claims can be fully assessed. This power can only be used where the IAA finds at its discretion that exceptional circumstances exist in a case which justify the consideration of the new information. This mechanism in turn, extends the scope of the IAA's default limited review function. Determining whether or not exceptional circumstances exist rests entirely with the IAA.

Section 473DC in the Bill provides that the IAA must not consider any new information unless it is satisfied that there are exceptional circumstances which justify considering the new information and the fast track review applicant has demonstrated that the new information was not and could not have been provided to the Minister before the Minister made the decision under section 65.

Neither the Bill, nor policy guidance exhaustively lists the range of exceptional circumstances which an IAA reviewer might identify when deciding whether to exercise his or her discretion in a case. The Government intends the IAA to have a broad discretion to assess all possible issues that might have arisen in a case while upholding the high threshold of exceptional circumstances. Exceptional circumstances should only be recognised if a fast track review applicant's circumstances may now cause them to engage Australia's protection obligations.

As such, it is the Government's expectation that the types of exceptional circumstances the IAA will identify in review cases would generally fall into one of three broad categories of events that have arisen in a fast track review applicant's case after the section 65 decision has taken place:

circumstances where significant and rapidly deteriorating conditions have emerged in the fast track review applicant's country of claimed persecution, for example, a change in the political or security landscape;

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circumstances where new credible personal information has arisen and was not previously known and available which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed protection; or

circumstances where there has been a change in the interpretation or application of relevant provisions in the Act after the fast track applicant's section 65 decision which apply to a fast track review applicant's case.

Section 473DBA provides the IAA with the discretionary ability to get new information that it considers may be relevant and provides the IAA with the discretion to invite, orally or in writing a person to give new information. The IAA will be able to ask a person to give new information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online). Section 473DE provides for the IAA to make a decision of the review if the referred applicant does not give the new information or comments in accordance with the invitation. The intention is for the IAA to quickly and flexibly get new information that it may consider relevant in accordance with its objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

Under section 473DC, the IAA cannot consider that new information for the purposes of making a decision in relation to a fast track reviewable decision unless the -exceptional

circumstances|| test in section 473DC is met.

It will be open to the IAA to use these powers to request relevant information where it is seeking to determine whether exceptional circumstances might exist in a case and it may consider the fast track review applicant to be found to engage Australia's protection or in support of a remittal affirming the Minister's decision.

Such procedures will allow the IAA to be more accessible to fast track review applicants by assisting them to provide to the IAA, when requested, with relevant, accurate and detailed information pertaining to their protection claims in a medium that best suits their communication abilities and which ultimately, will assist the fast track review applicant towards receiving a timely and accurate outcome in their case.

Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The Executive Committee of the UNHCR has expressed the view that processes for determining refugee status should satisfy basic requirements including, where an asylum

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seeker has been found not to engage Australia's protection obligations, the ability to seek a reconsideration of the decision to the same or a different authority and either to an administrative or judicial body, which is largely similar to the obligation in Article 13 of the ICCPR, as set out earlier. In expressing its views, the Executive Committee did not advocate the manner which reconsideration should take but rather, that access to review is consistent with the requirements of States' broader legal systems.

The Government also notes that much of Article 14(1) of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to immigration proceedings. Where appropriate, however, the Government seeks to provide comparable arrangements for reviews involving administrative decisions that impact a person's rights, liberties or obligations.

Different models of merits review have evolved in Australia in relation to the review of administrative decisions. Models span from those that deliver a *'re-hearing'*, that is, a review that decides a case based on circumstances at the time of the review through to models that deliver a *'reconsideration'* by reviewing what the original decision maker decided and with reference to what was placed before the original decision maker. The Government notes that the key concept common to these models is that a review implements a process for determining whether the decision under review is the correct or preferable one.

It is the Government's view that it is consistent with its international obligations to implement a model of merits review that is efficient, cost effective and ensures a reconsideration of a fast track review applicant's circumstances.

The complete package of reforms proposed in this Bill place an emphasis on all fast track applicants fully and truthfully articulating their protection claims at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no requirement to consider new information in a case involving a fast track review applicant, other than in exceptional circumstances. A fast track review applicant has had ample opportunity to present their claims and supporting evidence to justify their request for international protection throughout the decision-making process and before a primary decision is made on their application.

In addition, should new information later emerge which demonstrates that a fast track review applicant was impeded by their vulnerabilities to present their claims fully at the primary stage, it will be open to the IAA to obtain information or identify whether exceptional circumstances exist suggesting the fast track review applicant engages Australia's protection. Therefore, while the primary function of the IAA will be to conduct a limited form of review, measures in the Bill will allow the IAA to consider new information in only exceptional circumstances and in a manner which ensures protection obligations are identified, without compromising the general principle that all relevant information should be provided at the earliest opportunity.

The Government acknowledges that in addressing the backlog of UMA's who entered on or after 13 August 2012 and ensuring they are progressed towards timely immigration outcomes, fast track review applicants will be afforded a different form of review to lawful non-citizens who are refused protection onshore. It is the Government's view that it is reasonable and proportionate to implement a model of merits review that is efficient, quick, cost effective and upholds the overall integrity of Australia's protection status determination

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process as well as being competent, independent and impartial, consistently with Article 14(1).

Governance arrangements to establish the IAA as an independent office within the RRT

In accordance with the National Commission of Audit recommendations to curb unnecessary proliferation of government bodies, the Immigration Assessment Authority (IAA) is to be established as an office within the Refugee Review Tribunal (RRT). Accordingly, the IAA will be independent from the Department of Immigration and Border Protection.

The head of the IAA is to be the Principal Member of the RRT, who under new subsection 473JB(1) will be responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies. New subsection 473JB(2) will provide that the Senior Reviewer of the IAA is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member. As such, the Senior Reviewer would be responsible for the day-to-day operations of the IAA. All reviewers, including the Senior Reviewer will be engaged under the Public Service Act 1999.

To ensure consistency with practices proposed for the RRT where appropriate, new measures

outlined in this Bill will require IAA reviewers to consider the application of Practice Directions and Guidance Decisions issued by the Principal Member in the conduct of reviews before them, which will be similar to requirements for members of the RRT.

Practice Directions will allow for consistency in decision making to be enhanced by the Principal Member of the RRT who will have the power to issue directions regarding the operations of the IAA and the conduct of its review. Similar to jurisdictions such as the United Kingdom and Canada, the Principal Member will also have the power to issue guidance decisions on matters of policy and country information.

These measures help establish the IAA as a competent, independent and impartial review body, consistently with Article 14(1) to the extent that it may apply. 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 assessment process. The applicability of Practice Directions and Guidance Decisions will promote the conduct of reviews in a consistent manner and encourage a consistent application of protection law and policy as it applies across various caseloads and both the jurisdictions of the RRT and the newly established IAA. This will help ensure consistent decision-making practices which will assist the full consideration of protection claims.

The Government has announced that from 1 July 2015, the RRT (along with IAA) will be amalgamated together with the AAT and Social Security Appeals Tribunal to form a single merits review tribunal.

#### Schedule 5 – Clarifying Australia's international law obligations

##### Clarifying the availability of the removal power

In general terms, section 198 currently provides for the circumstances in which an unlawful non-citizen is subject to mandatory removal from Australia as soon as reasonably practicable.

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New subsection 197C(1) provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

New subsection 197C(2) provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

The purpose of this amendment is to make clear that the removal power is available where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Act and is not constrained by assessments of Australia's non-refoulement obligations. The clarification is required so that the Government can effect the rapid return of failed asylum seekers or other non-citizens who do not hold a visa that allows them to remain in Australia and whose protection claims have already been assessed.

Older court authority, for example, in the case of M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 131), was that the duty to remove was not to be constrained by consideration of non-refoulement obligations as it was presumed that that consideration had taken place. A number of more recent authorities, including the Full Federal Court case of Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33, have indicated that the removal power was unavailable where an assessment of those obligations had not occurred in accordance with the law. In making the amendments the Government is not creating any new obligations or seeking to avoid obligations, rather it seeks to make an existing measure work as originally intended.

Whilst on its face the measure may appear to be inconsistent with non-refoulement obligations under the CAT and the ICCPR, as set out in the overview to this Statement, anyone who is found through visa or ministerial intervention processes to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. There are a number of personal non-compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government. This consideration is separate from the duty established by the removal power.

##### Creating a statutory framework relating to refugees

##### Overview of the measure

These provisions amend the Migration Act 1958 to create a new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention. The amendments set out the Government's intended interpretation of a number of Refugees Convention-related concepts within domestic law when more than one may be valid in international law, and where judicial interpretation of specific provisions has not been consistent with the Government's intended interpretations.

Non-refoulement and freedom from torture or cruel, inhuman or degrading treatment or punishment

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The amendments do not substantively alter the rights and interests of persons whom these obligations would affect as their claims will be assessed in light of all of Australia's non-refoulement obligations. In some instances, harm that engages non-refoulement obligations under the CAT and/or ICCPR, as set out in the overview to this Statement, may also engage the non-refoulement obligation under the Refugees Convention and so the new codification may partially affect consideration of those claims in relation to determining whether a person is a refugee. However, claims that do not fall within refugee-related concepts will also be specifically assessed by reference to the separate tests that reflect the CAT and ICCPR non-refoulement obligations. Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.

##### Best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states:

In all actions concerning children, whether undertaken by public or private social

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Government is committed to acting in accordance with Article 3 of the CRC. Policies and procedures give effect to this commitment. The assessment of protection claims made by, or on behalf of, children will continue to be made in an age-sensitive way that recognises the limitations and vulnerabilities of children in order to ensure that all non-refoulement obligations are fully assessed.

#### Modifying behaviour to avoid persecution

According to articles 18 and 19 of the ICCPR, everyone shall have the right to freedom of thought, conscience and religion, and the freedom to hold opinions. However, it is possible to limit certain rights as long as it is reasonable, proportionate and adapted to achieve a legitimate objective. For instance, the right to religious belief is an absolute right, however, the right to exercise one's belief can be limited, by prescription of law, where it can be demonstrated that the limitation is reasonable and proportionate, and is necessary to protect public safety, order, health, morals, or the rights and freedoms of others.

New section 5H(3) provides:

A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
- (b) conceal an innate or immutable characteristic of the person.

The provision is therefore specifically intended not to limit the rights protected by Articles 18 and 19 as it is intended that a person could not be required to modify his or her behaviour where it relates to the person's religion, political opinion or moral beliefs if such characteristics are fundamental to the person's identity or conscience or are innate or immutable. While this will be assessed by decision-makers on a case-by-case basis, any

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modification would also be limited to what is reasonable in the person's individual circumstances.

Although the conduct in question would take place outside Australia's jurisdiction, the intention is for the provision to be broadly consistent with these rights to ensure that individuals are not denied refugee status where they fear persecution for exercising such rights in the receiving country.

This measure engages human rights and is compatible with those rights.

#### Schedule 6 – Children of Unauthorised Maritime Arrivals

Section 5AA will be amended to clarify that children born to an unauthorised maritime arrival parent, both in Australia and in a regional processing country, also fall within the definition of *'unauthorised maritime arrival'*. The purpose of this amendment is to ensure that, consistent with their parents, these children will be liable for offshore processing and unable to make a valid application for a visa in Australia where their parents are unable to do so. The amendments will have retrospective effect, to clarify that all children born to an unauthorised maritime arrival or transitory person were unable to make valid applications for visas and were liable for offshore processing where this is the case for their parents.

The amendments will also give retrospective application to section 46A of the Act, as that section is proposed to be amended by the Migration Amendment (Protection and Other Measures) Bill 2014. This measure will ensure that the retrospective application of the definition of unauthorised maritime arrival will also apply to children who held temporary visas to clarify that such children were also unable to make valid applications for visas. Consequential amendments to the definition of *'transitory person'* in the Act are also being made to ensure that the children of unauthorised maritime arrivals born in a regional processing country can be brought to Australia for a temporary purpose.

#### Family unity and best interests of the child

These amendments clarify that the child of one unauthorised maritime arrival (UMA) parent is also a UMA. The effect of this is to clarify that such children are liable for transfer to a regional processing country for offshore processing and are not able to make valid applications for visas in Australia where their parents are unable to do so.

Article 17 of the ICCPR states that:

No one shall be subjected to arbitrary or unlawful interference with his...family...

Article 23 of the ICCPR states that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Clarifying that children have a status which is consistent with that of their parents will reduce the number of scenarios in which issues of family separation may arise as in most cases both parents are also UMAs.

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The amendments will clarify that a child will be a UMA if one of their parents is a UMA and the other parent is not a UMA. However, if the other parent is an Australian citizen or a permanent resident of Australia, the child will continue to acquire Australian citizenship by birth in Australia and will be unaffected by these amendments. In addition, if the other parent holds another type of visa, the child will also hold that visa and will only be liable for transfer to a regional processing country if that visa ceases. The child will also be subject to any bar on further visa applications once that visa ceases, or, if the child holds one of the listed or prescribed visa types, the bar will apply to prevent applications for other visas.

Consistent with current policy and practice, where possible, family units will not be separated by Australia and consideration will be given to family unity and to the best interests of the child on a case-by-case basis to ensure that the obligations in Articles 17 and 23 of the

ICCPR and Article 3 of the CRC are met.

Right to acquire a nationality

Article 24 of the ICCPR states that:

Every child has the right to acquire a nationality.

A stateless child's status as a UMA does not alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country.

Non-discrimination

Article 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount...

The amendments do not discriminate in respect of whether a child's mother or father is a UMA.

#### Schedule 7 –Caseload management provisions

##### Overview of the measure

Following the recent High Court decision in Plaintiff S297 of 2013 and Plaintiff M150 of 2013, there is a need to amend the Migration Act 1958 (the Act) to enable the Minister for Immigration and Citizenship to place a statutory cap on the number of protection visas granted in a programme year in order to ensure that the onshore component of the Humanitarian programme is appropriately managed.

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This amendment will remove provisions within the Act relating to the -90 day rule|| which has been in effect since 12 December 2005. The current amendment will remove both the 90 day time limit for deciding a protection visa application before the Department of Immigration and Border Protection and the RRT (sections 65A and 414A respectively), and the associated reporting requirements (sections 91Y and 440A respectively) that oblige the Minister to table a report in Parliament giving reasons explaining why decisions were not made within the prescribed period. While the initial policy intent for introducing this requirement was to support flexible, fair and timely resolution of protection visa applications, it is no longer an effective mechanism to achieve this outcome and as such the Government had planned to repeal these sections prior to the recent decision in the High Court. Ministerial directions have been put in place regarding the order of consideration for processing of protection visa applications which achieve a more effective and responsive approach to different caseloads, without generating resource-intensive reporting.

It is also proposed to amend the Act to put beyond doubt that the visas of the class provided for by section 35A, i.e. protection visas, are a class of visa that may be capped (limit on visas provided in s85) by the Minister. Section 84 of the Act also provides that the Minister may, by notice in the Gazette, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. As section 84 also provides a power for suspending the processing of visa applications, it is also proposed to amend the Act to put beyond doubt that the visas of the class provided for by section 35A (protection visas) may be a specified class for which the Minister may suspend processing.

##### Human rights implications

These amendments will bring the management of the protection visa programme into line with other visa classes to ensure an orderly and well managed migration programme is maintained. Nearly all visa classes are liable for capping. Capping decisions are based on reasonable objective criteria that are proportionate to the legitimate aim of ensuring the integrity of program or orderly processing. Should the Minister choose to use the amended provisions and place a limit on the number of protection visas that can be granted, there will be no effect on Australia's non-refoulement obligations. Persons claiming protection will not be returned while awaiting processing or visa grant. Processing will continue and visa grant will resume at a later date in accordance with the terms of the capping determination.

Should the Minister decide to cap the onshore component of the Humanitarian programme it may be argued that these amendments could result in protracted detention of protection visa applicants and therefore may engage Article 9 of the ICCPR which prohibits unlawful or arbitrary detention. The Act requires people who are not Australian citizens and do not hold a valid visa to be detained unless they are given permission to remain in Australia by being granted a visa. Continuing detention is predicated on consideration of potential risks to the Australian community, including national security, health and character risks, non-processing of claims and these amendments have no bearing or influence on the ability of the Government to grant visas or for applicants to be present in the community while processing occurs. While a section 85 cap is in place, processing of applications continues on applications. Where relevant, the Minister can consider alternative ways to release someone from detention if they are found to engage Australia's protection obligations but cannot be granted a protection visa because of a cap. For example, a bridging visa could be granted. These amendments are therefore consistent with the prohibition on unlawful and arbitrary detention in Article 9 of the ICCPR.

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##### Conclusion

This Bill and Regulation amendments are compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

## **Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 – Second Reading Speech**

I rise to oppose the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and to stand with the Labor Party, a party ...

I rise to oppose the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and to stand with the Labor Party, a party which certainly represents humanity, dignity of self-worth and compassion. I would like to start by acknowledging that this is an incredibly significant piece of legislation. If we go into the depth of it, we can see very clearly that it does incredible damage not just to the value of humanity but also to Australia's international reputation as a country which signed the refugee convention 50 or more years ago now. The bill is complex in its nature but it will also leave a legacy for this government that will not in any way leave it in a good stead. That is why Labor does not accept this bill.

There is much in this bill which, in effect, is a legislative response to actions of the judiciary—some of which is still occurring and the courts ought to be allowed to do their work—and some of it demonstrates very clearly this government's dismissive attitude to its international obligations. There is a stark difference between the Labor Party and the coalition and it can be seen very clearly in the nature of this bill—that is, the Labor Party like people and we want to help people. No matter what their background, we feel we should treat our fellow human beings as we would have them treat us. We are better than this, but it seems this government is not. It seems this government does not like people or at least it has forgotten people. As it basks in its own self-described glories about stopping the boats and saving lives at sea, the adults and children who fled their homes and countries because they thought they were going to be killed, or that they were endangering their children's lives, spend an average of 413 days behind barbed wire. Some of those people have lost their sanity in all of that time. Some have lost their lives. Most of the children have lost their childhood.

There are two young Iranian men who we know very clearly have died as a result of their detention in PNG. Hamid Khazaei was declared brain dead in September following a severe infection to his cut foot, when his life support was turned off. How did someone in Australia's care die from a cut foot? Reza Barati was beaten to death by a mob comprising camp guards and PNG local residents who had broken into the centre. Again, how did someone in Australia's care get killed by a mob? It seems to save the lives of refugees this government is prepared to destroy them, but this government is also prepared to ignore international law in order to destroy the hopes of people who asked for its help.

A self-evident truth over the course of Australian political history has been the conservatives' fear of engaging fully in the international community. Australia had to wait in fact until Gough Whitlam introduced us to the world and the world to Australia. The election of the Whitlam government was a turning point in Australia's international outlook and, perhaps most importantly for our global standing, Gough Whitlam engaged deeply with the United Nations. The Whitlam government brought a new emphasis to the United Nations processes and engaged with that organisation more deeply than previous governments. It was under the Whitlam government that Labor first made contributions to United Nations funds to support education and other development programs in Africa and signed a range of significant multilateral treaties, conventions and covenants, a number of which have been left unsigned or unratified by the Australian government for many years.

There are some 130 of them, including the Convention relating to the Status of Stateless Persons of 1954, the 1961 Convention on the Reduction of Statelessness, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination and the 1967 Protocol Relating to the Status of Refugees. Curiously, the Whitlam government was not responsible for the signing of the 1951 Convention relating to the Status of Refugees, defining who is a refugee, their rights and their legal obligations as states. That was an achievement of the Menzies government in 1954. As I have noted above, in 1973 Gough Whitlam's government was responsible for appending Australia's signature to the 1967 Protocol Relating to the Status of Refugees, which of course removed geographical and temporal restrictions to the convention. It is primarily the refugee convention approved by Menzies which this government now seeks to comprehensively reject in this bill. This bill contains a brazen attempt to walk away from this government's responsibilities under that convention. I want to make clear for the Senate the convention's description of a refugee. I quote:

... 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Clearly, this has been too much responsibility for this Abbott government—too much pressure to be humane for this Abbott government; therefore, unable to cope with the basic need to be compassionate, the Abbott government is attempting to wipe the refugee convention out of Australia's mind. I would like to add, as Senator Ludlam highlighted, that Australia is very much a successful multicultural nation. It is a multicultural nation built on migrants and its first people. Many of those migrants are refugees and they have contributed greatly to this nation over decades upon decades, and they will continue to, and that includes the refugees who have come to settle in Australia in recent times. We should note that and note the fact that this is a bill that is trying to destroy the future of those refugees in this nation—refugees who, under the convention signed by Menzies, were able to rebuild their lives. Why? Because this bill deletes references to the refugee convention from the Migration Act, the primary domestic act with which Australia engages—or did engage—with the refugee convention. This bill replaces those references with a new independent and self-contained statutory framework setting out Australia's own interpretation of its protection obligations under the refugee convention. In any event, by well established, accepted and respected principles of international law, this government has no right to self-interpret the scope of its international treaty obligations. It simply does not.

According to Jane McAdam, Professor of Law and Director of the Andrew and Renata Kaldor Centre for International Refugee Law at UNSW:

Basic rules of treaty interpretation state that a treaty must be interpreted in good faith, and in accordance with the ordinary meaning to be given to its terms in their context, and in the light of the treaty's object and purpose. Furthermore, asserting that a treaty obligation is inconsistent with domestic law is no excuse for breaching it.

What follows are some comments, by no means all, from the UNHCR's submission to this bill, setting out very clearly its concerns:

UNHCR is concerned that the proposed amendments to the Migration Act would narrow the personal scope of the refugee definition, and lead to a restrictive application of rights to Convention refugees.

The proposed amendments specify that a person does not have a well-founded fear of persecution if reasonable steps could be taken to modify his or her behaviour so as to avoid a well-founded fear of persecution, unless a modification would conflict with a characteristic that is fundamental to the person's identity or conscience; or conceal an innate or immutable characteristic of the person.

The UNHCR recommended the deletion of those proposed amendments, as they are fundamentally at odds with the purpose of the refugee convention. Let me repeat that: fundamentally at odds with the purpose of the refugee convention—a convention signed and ratified by Australia for over 50 years, first signed by Sir Robert Menzies himself. It is fundamentally at odds, the UNHCR has highlighted. Why? Because:

... a person cannot be denied refugee status based on a requirement that he or she can change or conceal his or her identity, opinions or characteristics in order to avoid persecution.

The fact that this bill is putting forward that a person should change his or her identity, opinions or characteristics in order to avoid persecution is in itself a bizarre piece of legislation to put forward for people wishing to seek asylum in this country—as the UNHCR states, and I completely agree, is fundamentally at odds with the purpose of the refugee convention. Further:

UNHCR is not aware of any other Contracting State to the 1951 Convention which has removed Article 1D from being a basis for determining the refugee status of Palestinian refugees.

As such, 'UNHCR recommends that Australia gives effect to its international obligations to Palestinian refugees by codifying, in full, Article 1D of the 1951 Convention in the Migration Act 1958'—agreed to and signed by Sir Robert Menzies and the Liberal and National parties. The UNHCR also recommended the deletion of the parts of the proposed amendments on temporary protection visas which require convention refugees to re-establish their continuing need for international refugee protection. No distinction should be made on the basis of mode of arrival in respect of rights. All refugees are entitled to the 1951 convention rights agreed to and signed by Sir Robert Menzies—someone very familiar to those in the coalition government.

The UNHCR also recommended the deletion of the proposed amendments which operate to limit the entitlement of a convention refugee to the rights and obligations specified in articles 2 to 34 of the 1951 convention agreed to and signed by Sir Robert Menzies. I have noted for the Senate just some of the many problems—indeed downright contradictions—that the UNHCR has identified in this bill with our refugee convention.

In the brief time I have left I would like to focus on children, because I know that this bill has a focus on children. No-one does that better than UNICEF, who have outlined very clearly what these proposed changes to the migration law mean for children, how they would widen the immigration minister's powers, how they would marginalise our international law, which I have just outlined, and how they would wind back the ability of Australian courts to scrutinise the government's treatment of asylum seekers. In their joint submission with the Human Rights Law Centre, Save the Children, Plan, the Human Rights Council of Australia and Children's Rights International, they outlined the grave human rights risks posed by this bill. They said very clearly that, under the proposed changes, children born in Australia would be classified as unauthorised maritime arrivals if one of their parents is a UMA, leaving those children subject to mandatory detention and transfer to Nauru. These children will be born right here in Australia, in Australian hospitals, yet they will be treated as if they arrived on a boat. Not only does that defy logic; it is incredibly cruel and again is a clear breach of international law.

These changes would render children stateless and deprive them of access to health care, education and their fundamental rights. UNICEF's submission clearly outlines further that, as I just highlighted, the bill would remove references to the refugee convention from the Migration Act and replace them with the government's own very watered-down interpretation, which I have gone through. The refugee convention is the cornerstone of international refugee protection and has now been signed by some 145 countries. The government should therefore not just unilaterally redefine it to suit its own purposes. That is what it is doing. It is out on its own, outside the 145 countries it joins in ratifying and signing the convention, trying to unilaterally define it for its own political purposes. I thank UNICEF, the Human Rights Law Centre, the Refugee Council, Save the Children, Plan and all of those organisations. Many of them have written to me; many of them I have met. They are at the coalface. They know a lot more than we in this place know about the real effects that this bill would have on children, on parents and on future refugees that seek asylum in this country.

This is a wealthy country. We have the capacity to take a humane approach to refugees in this country. That is what we have been known for for decades upon decades. Why now do we have to bear this government making us this most embarrassing and humiliating country, a country to be ashamed of in its approach to the treatment of people seeking asylum and their children, whether they come on a boat, whether they come in any way, shape or form; they are coming because they are fleeing persecution and they need our support. This is no way to treat them. This appalling piece of legislation completely guts them of any hope of being able to settle and rebuild their lives in this very rich country that we all take for granted and benefit from every day. That is why Labor will not support this bill. That is why we see very clearly that this bill does nothing to support the values that we stand for—the values of humanity and compassion.

I simply cannot understand why a government would do this to so many people that need our support and help and, on top of that, breach our obligations under the refugee convention, take the refugee convention out of the Migration Act. The long legacy that started under Sir Robert Menzies with the signing of this refugee convention was continued by great leaders such as Gough Whitlam, with all the conventions we signed under his short leadership, only now to have it all undone. One hundred and forty-five countries have ratified this convention, and here we stand, out on our own, as this inhumane, rich nation putting up the walls, saying: 'We are not a country of compassion. We are not going to care for refugees. We are going to be fierce and tough and hard.' What kind of message does that send? That is why Labor will not support this bill. It is an appalling piece of legislation.

## **Immigration concerns**

<http://www.examiner.com.au/story/2709613/immigration-concerns/> December 11, 2014

I WISH to express my concern over the proposed Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

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The proposed bill would see a re-introduction of temporary protection visas, ignore components of the refugee convention and give unprecedented power to the Immigration Minister Scott Morrison.

Regardless of what economic state our country is in, acting inhumanely and ignoring our privileged position to offer protection to refugees and asylum seekers, is not an acceptable action.

I do not wish to attack our political leaders, but for them (and the local community) to please consider the devastating effect the proposed Bill would have on people's lives.

## **ALHR – Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Bill incompatible with Australia's international human rights obligations**

<http://alhr.org.au/alhr-finds-migration-maritime-powers-resolving-asylum-legacy-caseload-bill-incompatible-australias-international-human-rights-obligations/> December 11, 2014

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

In a submission to the Senate Legal and Constitutional Affairs Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (attached below), ALHR has found aspects of the Bill incompatible with Australia's international human rights obligations.

At a time when, more than ever, people require the protection of other States from the persecutory actions of their own and the increasing barbarity of non-state actors, ALHR believes that this Bill represents a low water-mark in Australia's standing as a nation which takes human rights obligations seriously and which heeds the call to protect and assist those in need.

## **Liberty Victoria Statement following the passing of the Migration and Maritime Powers Legislation Amendment**

**(Resolving the Asylum Legacy Caseload) Bill 2014**

[http://www.libertyvictoria.org/migration\\_and\\_maritime\\_powers\\_bill2014](http://www.libertyvictoria.org/migration_and_maritime_powers_bill2014) December 11, 2014

Liberty Victoria Statement following the passing of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

Last week, Australia's Parliament passed legislation intended to sideline international law, natural justice and judicial oversight from the determination of asylum claims.

Liberty Victoria condemns that legislation, and the appalling tactics used to secure its passage through the Senate.

Over 100 children will be released from immigration detention following the passing of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Their release is welcomed. Yet as Daniel Webb of the Human Rights Law Centre (and a member of Liberty Victoria's Policy Committee) has noted, the Immigration Minister:

... quite literally made these children the hostages of his political agenda. Their rights and liberty in no way hinged on a principled assessment of the necessity for their detention. Their freedom didn't depend on any assessment of their wellbeing or of the harm being caused by their incarceration. Their futures had absolutely nothing to do with any consideration of their human rights.

Their fate hinged entirely on the Senate paying [the Minister's] asking price – the passage of his Migration Bill.

The scope and content of that Bill, now law, is frightening. Julian Burnside AO QC (also a member of Liberty Victoria's Policy Committee) has observed:

Under Morrison's amendments, the principle of natural justice is removed, the supervisory role of the courts is removed, references to the convention in the migration act are removed. The minister now has the power to send a person to any country he chooses, even if that may involve a breach of our international obligations.

The Government wanted the power to return asylum seekers to a country where their life or freedom would be at risk. Parliament has given it to them. It did so despite warnings from the Parliamentary Joint Committee on Human Rights and the United Nations Committee against Torture that such power breaches Australia's human rights obligations.

Rights designed to protect asylum seekers – mostly refugees who have fled from unutterable circumstances – continue to be stripped away as Australia abandons its international obligations.

There are many other troubling aspects about the Bill.

As 2014 draws to a close, legislation such as this reminds us why it is as important as ever to stand up for equality, to stand up for fairness and to stand up for liberty.

The Refugee Action Collective (Vic) has organised the following event:

Details of the rally are available online.

I hope that all who can attend do so.

**New migration Bill will allow breach of international law and sideline courts**

<http://www.unicef.org.au/Media/Media-Releases/2014-11.-November/New-migration-Bill-will-allow-breach-of-internatio.aspx> December 11, 2014

New migration Bill will allow ... calling for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 not ...

UNICEF Australia has joined an Australian coalition of human rights organisations and experts calling for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 not to pass. With the Human Rights Law Centre, UNICEF Australia has said the Bill attempts to remove Australia's international obligations; reduce the powers of our courts to uphold human rights; and, give extensive discretionary control to the Minister for Immigration. UNICEF Australia Chief Executive Officer Norman Gillespie said among the risks in the Bill was authorisation to lock babies born in Australia in mandatory detention on Nauru. "The Bill put forward by Immigration Minister Scott Morrison seeks to classify children born in Australia as 'unauthorised maritime arrivals' if one of their parents is labelled such, leaving those children subject to mandatory detention and transfer to Nauru," Dr Gillespie said. Dr Gillespie said this inherently arbitrary and inhumane process for dealing with newborn children threatened to render these babies as stateless and cut their access to health care, legal protection and longer term, education and even job opportunities. "Statelessness has profound, negative effects on children's identity and their development and creates greater risks of experiencing labour exploitation, sexual exploitation, trafficking, poverty and discrimination," he said. Dr Gillespie added there was an irony in the fact Australia would seek to breach so many articles of the UN Convention on the Rights of the Child at the exact same time the rest of the world was celebrating a 25-year milestone of child rights. "While the rest of the world celebrates the gains made for children over the past 25 years of the 1989 Children's Convention, here at home we are willing to take retrograde steps for children who sought our protection." Experts from the Human Rights Law Centre, UNICEF Australia, Save the Children, Plan, the Human Rights Council of Australia and Children's Rights International have said the Bill, introduced into Parliament by Immigration Minister Scott Morrison on 25 September, fails to meet Australia's international obligations and risks the lives of men, women and children fleeing terror and persecution. Dr Gillespie said UNICEF Australia was calling for the Bill not to be passed. Kate Moore 02 8917 3244 / 0407 150 771 UNICEF Australia Tim O'Connor 02 8917 3247 / 0435 206 273

What do you think? Have your say by leaving a comment below.

**Law Council representatives appear before Senate Legal and Constitutional Affairs Committee on proposed Migration Bill**

<http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/428-migration-amendment-bill> December 11, 2014

... on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill ... Migration Law Committee. The Bill: ...

News from the Law Council of Australia

The Law Council recently appeared before the Senate Legal and Constitutional Affairs Legislation Committee following its written submission on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill). The Law Council was represented by Mr Shane Prince of the NSW Bar Association's Human Rights Committee (the NSW Bar was a principal contributor to the Law Council's submission) and Ms Carina Ford of the Law Council's Migration Law Committee.

The Bill: significantly expands Executive powers in relation to maritime powers exercised under the Maritime Powers Act 2013 (Cth); reintroduces temporary protection visas (TPVs) and creates a new protection visa – the safe haven enterprise visa; introduces a fast track system for processing

protection visa applications – this process excludes certain applicants at the outset and only provides limited access to a diluted form of merits review; retreats from and re-characterises Australia's international obligations, including by removing references to the Convention relating to the Status of Refugees in the Migration Act 1958 (Cth); codifies that babies born to unauthorised maritime arrivals are also unauthorised maritime arrivals under the Migration Act; and provides that the Minister can place a cap on the number of protection visas that he or she may issue.

The Law Council's written submission was based on its newly approved Asylum Seeker Policy. In its submission, the Law Council noted its support for efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas. It considered that certainty of the legal framework for the determination protection claims is urgently needed, especially for the 'legacy caseload'. However, it considered that the Bill's proposed amendments depart from the accepted standards of protection for asylum seekers in international and domestic law, key rule of law principles, and procedural fairness guarantees.

At the hearing, the Law Council stated that the Bill was an overreach and was unnecessary to achieve the stated objective of resolving the 'legacy caseload' of approximately 30,000 asylum seekers (whose applications for protection status are yet to be processed). In particular, the Law Council considered that the most concerning features of this Bill were: the proposed expansion of Executive power, with little or no merits review and only limited judicial review available; the retrospectivity of certain provisions; and its proposed retreat from Australia's international obligations. It noted that several of these changes potentially conflict with what the Law Council considers to be Australia's chief international obligation with respect to asylum seekers – the obligation of non-refoulement, which prohibits states from returning refugees to countries where his or her life or freedoms are threatened.

The Law Council also highlighted the need for legal advice and assistance for protection visa applicants, echoing its previous calls for the reinstatement of the Immigration Advice and Application Assistance Scheme, which was defunded earlier in the year. It noted that the provisions of the Bill would combine with other complex changes in legislation, including proposals to place the burden of demonstrating claims on the applicant. Without independent legal advice, the Law Council emphasised that asylum seekers would be left without help to make significant legal applications, while Immigration officials would be left to make decisions on poorly prepared and incomplete applications.

The Law Council argued that there would be a surge in the number of applications made to the High Court for judicial review, owing to the exclusion of certain applicants from the truncated 'fast track' primary assessment process, the limited forms of review available to applicants who are not excluded from the fast track process and the lack of free legal advice to assist asylum seekers to lodge their protection claims in what is an inherently complex system.

The Law Council ultimately opposed the passage of the Bill, but recommended several amendments if it were to be passed. These included that if TPVs are to be reintroduced, they should only constitute a form of 'bridging visa' while people await the determination of their claim, rather than the final outcome once an individual has been found to engage the protection obligations. It also recommended that excluded fast track review applicants have access to the Refugee Review Tribunal, or at the very least, access to an independent merits review system and that free independent legal advice is provided for fast tracked applicants.

## Australian Churches Refugee Taskforce – Opposing Regressive Changes to Australian Migration Law

<http://www.australianchurchesrefugeetaskforce.com.au/category/campaigns/opposing-changes-to-australian-migration-law/> December 11, 2014

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

Misha Coleman, Senator Sarah Hanson-Young and Senator John Madigan: Briefing to Senators re the dangers of supporting the forthcoming Resolving the Asylum Legacy Caseload Bill 2014.

The Australian Churches Refugee Taskforce is an initiative supported by the National Council of Churches in Australia, and the Steering Committee is comprised of 22 leaders[1] from nine Christian churches and three ecumenical bodies. The Taskforce has a further 513 Christian entities who are network members. The Taskforce has prepared a submission to the Senate inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014[2].

We are writing to ask you to ensure that you are briefed about what we believe are deeply troubling impacts of the Bill if it is passed in its current form, including:

- the Minister for Immigration and Border Protection will be permitted to circumvent the law by superseding rulings of the High Court. He/she will also be permitted to make decisions for asylum seekers even if our international legal obligations have not been considered. This gives one individual an unprecedented and unregulated amount of power;
- any children who have been born in Australia, but whose parents arrived by boat, will be condemned to a life of statelessness. Children who are stateless are often denied the right to go to school, the right to ever work legally, and the right to possess a passport – they have no country to call home and will live their lives in constant limbo;
- we do not want to see any asylum seekers die at sea, however in the two years after Temporary Protection Visas (TPVs) were last used, we saw more women and children risk their lives attempting to reach Australia by boat. They did this because they knew that TPVs meant they would never see their families again (the detail of what happened last time is overleaf). The proposed reintroduction of TPVs under this Bill will have the same impact;
- the Bill will give the aforementioned Minister unprecedented and unchecked power to act in a unilateral manner when it comes to determining the fate of asylum seekers. One of these powers will be the ability to issue directions to our naval forces to tow boats to countries that do not have any existing agreements with Australia, which will damage our relationship with countries in the region;
- we know that asylum seekers who have been sent back to their country of origin (refouled) have subsequently been detained, tortured and in some cases murdered. Under this Bill, the Australian Government would be responsible for many more asylum seekers sent back to serious harm or death.

The Taskforce rejects this legislation in its entirety. If it is passed, we recommend that it be amended to contain provisions addressing the following:

1. Access to protection visas for those awarded a TPV or SHEV (Safe Haven Enterprise Visa) after a period of no more than three years;
  2. Removal of the fast-track processing system;
  3. Inclusion of family reunion and travel rights (including re-entry) for TPV holders;
  4. Funding to ensure that the mutual obligations attached to the SHEV are adequately supported. This should include provision for liaisons in regional communities to work with local churches and community groups to ensure the full social and economic participation of relocated refugees.
- Temporary Protection Visas (TPVs) were introduced in October 1999. This resulted in a jump in the overall number of asylum seekers arriving by boat from November 1999 – October 2001.
- The most significant change was in the type of people who engaged people smugglers. The red and green bars above show the dramatic jump in the number of women and children who arrived by boat. This happened because asylum seekers knew they would never see their families again

under TPVs and so tried to stay together.

· In September 2001, John Howard introduced many changes to the way we process asylum seekers, including sending asylum seekers to Nauru and Manus Island (known as The Pacific Solution), and excising thousands of islands around Australia from our migration zone. This meant that boats that came close to the Australian mainland were now classified as being in "international waters" so that Australia did not have to offer assistance under the Refugee Convention.

· John Howard also authorised the interception and tow-back of boats under Operation Relex. Because of these changes, there was a drop in the number of people who arrived in Australia by boat, however at no point did asylum seekers stop trying to come to Australia this way. From 2003, despite The Pacific Solution, the number of asylum seekers arriving by boat increased again. It is also important to remember that the number of people seeking asylum in 2001 and 2002 was lower all over the world – so it would be wrong to say that TPVs were a successful deterrent to boat arrivals.

· Of the asylum seekers who were sent to Nauru and Manus Island, 80% were eventually found to be refugees, meaning Australia did owe them protection and safety. In 2006, Shayan Badraie – an 11-year old Iranian boy – was paid \$400,000 in compensation for the psychological damage he endured being detained for two years in our detention system.

[1] See <http://www.australianchurchesrefugeetaskforce.com.au/about-us/members/>

[2] The full text of our submission is available at <http://www.australianchurchesrefugeetaskforce.com.au/wp-content/uploads/2014/11/ACRT-Submission-Resolving-Asylum-Caseload-Bill-301014.pdf>

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

<http://blogs.adelaide.edu.au/public-law-rc/2014/11/21/migration-and-maritime-powers-legislation-amendment-resolving-the-asylum-legacy-caseload-bill-2014/> December 11, 2014

Home > Post: Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

The PLPRU has made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Alex Reilly wrote this submission jointly with Libby Hogarth of Australian Migration Options, a migration agent company based in Adelaide. The Director, Libby Hogarth, has assisted asylum seekers for the past 22 years both in the community and in detention. In this submission, we raised concerns about changes to the Migration Act and Regulations which removed reference to the Refugee Convention from the Migration Act, and incorporated new more restrictive interpretations of Australia's protection obligations into the Act. The submission also raised concerns about replacing permanent protection visas with temporary protection visas, and new application processes which allowed for the 'fast-tracking' of some applications, and the removal or truncating of merits review of initial decisions in the Refugee Review Tribunal.

The submission can be viewed on the Senate Legal and Constitutional Affairs Committee website (click here).

## **Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Syrian conflict**

<http://www.minister.immi.gov.au/media/sm/2014/sm219967.htm> December 11, 2014

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Syrian conflict. Tuesday, 09 December 2014

Graham Richardson: We've got Scott Morrison in our Canberra studio. Welcome Scott.

Alan Jones: Minister for Immigration and Border Protection. How many illegal immigrants are living in Australia?

Minister Morrison: 30,000 have arrived by boat. They came under the previous government, on the 800 boats that turned up under their watch.

Jones: What are you doing about them?

Minister Morrison: Last week in the Senate as I am sure you know we were able to pass the Bill which will mean we are now able to go and process them. They will be living in the community where they will have work rights and we will resolve that legacy caseload which Labor left behind. Not only had they abandoned the borders but the legacy mess they left behind had to be addressed and that was the other big commitment we gave at the election. I was very pleased to get that support in the Senate last week. It means we can get on with the rest of the job of cleaning up the mess Labor left behind.

Jones: How many people are behind walls? That is the wall detention? The wires, the barb wire and so on? Let me ask the first question then how many children were in detention when – that's locked up behind barb wire when you came to office?

Jones: How many people are behind barb wire now?

Minister Morrison: The number of children including on Nauru who are in those facilities is 700 so we have halved it in a year. No one had done that previously, particularly at those volumes before, even under the Howard government it never got that bad. We have been able to achieve that and as a result of what we achieved last week we will see that number of children in detention in Australia go to effectively zero in a matter of months.

Jones: Because you have had no boats since last December...

Minister Morrison: Well just the one.

Jones: How many detention centres have you been able to shut?

Minister Morrison: Between – over the course of this financial year we will have shut ten, saving hundreds of millions of dollars. On Nauru the population in the centres is also declining now – as well as it is on Manus Island – there are less than a thousand people in the centre now on Manus Island because we are getting on with the processing as we are on Nauru. We are basically just resolving the problem that Labor left behind. It is still going to take some years yet to do and the legislation we passed last week as well as the headway we made up in Papua New Guinea, the Prime Minister and I a month or so ago we are getting through it. It is tough going but we are getting through it and we said we would.

Richardson: Scott, what about the 30,000 if they have now got rights to work what does that save us? If we are not feeding them and clothing them and all the rest of it, providing them with televisions and iPhones, how much money does that save us?

Minister Morrison: That saves us over \$100 million for those 30,000 and that is how we have been able to as a government we have been able to fund the increase in the refugee and humanitarian intake by 7,500 in our next budget. I think this is very important because what we are saying is when you stop the boats and you start resolving the legacy caseload and you clear the backlog then you can increase the intake. Now others say you 'oh you can just whack it up now and let everyone out'. That doesn't solve the problem and it creates a big budget problem. What we did last week is we have increased the intake without increasing the burden on the taxpayer. The Labor party blew out the budget annually by about \$2 to

\$3 billion a year, total blow outs of \$11.6 billion while they were in government on border protection. We are resolving the budget issue, we are resolving the humanitarian issue and we are delivering I think a very strong humanitarian dividend by getting kids out of detention. There are only 3,000 people on the mainland and on Christmas Island in detention and those kids will be getting off Christmas Island in the next few days and weeks.

Jones: Can I just say to you, this is not meant to be a criticism, but I mean you know this portfolio backwards and there is a tendency I think sometimes to take certain terminology for granted. Now I will come to temporary protection visas in a moment which the public don't clearly understand. Just explain though to us the bridging visa. How many are on the bridging visa and as I understand it a person on a bridging visa is entitled to 89 per cent of the welfare entitlements of an ordinary Australian. Can you just explain how many are on a bridging visa, what is a bridging visa and what do they get?

Minister Morrison: There are about 24,500 people on bridging visa. They now all have work rights which they didn't have last week and if they have got a job and they are ready to start working well we can facilitate that pretty quickly. If they can't work they will receive 89 per cent of whatever the other relevant benefit they might have got if they were a permanent resident. So that could be Newstart or even AusStudy in some cases, or things of that nature. So they don't get the same or more than say pensioners or others get, they don't get that.

Richardson: So it's cheaper to pay them than it is to keep them in detention?

Jones: But it's still worth, you're still up for about \$18 million per week aren't you?

Minister Morrison: The budget here is still going to run for some years yet while we work through this caseload, but I mean to give you an example, it costs around about \$40,000 a year to have someone in the community and that's not just the benefit payments, it's other things like medical and so on. Now if you've got them in held detention you're in the up towards \$200,000 a year and it varies.

Jones: That's phenomenal amounts of money. So you're talking about \$18 million—

Minister Morrison: It's very expensive, that's why—

Jones: Bridging visas – you're talking about \$18 million a week. Now you said that they are then in the community - how do we know about their health and their criminal record; their ability to integrate? How do we monitor them? Who keeps track of these people? Where are they? Are they being radicalised?

Minister Morrison: Well there's a range of questions there, Alan. First of all no one gets released into the community without a health clearance. Secondly there are basic security checks done on people who are released into the community as well. As I said on this programme last time I was with you the police are aware in each of our state and territory jurisdictions about where people are and so there aware of their presence in the community and that was one of the things we also changed. The previous government said that was an offensive thing to do, to tell the police who was actually in the community. I just thought it was common sense. So we've put that in place and of course my own department stays in contact with them because I should stress people on bridging visas have not been round to be refugees yet. We've got 24,500 people roughly on bridging visas, we've got about another 3,000 who are on community detention so they live in the community in a house, for all intents and purposes in the community. Then there are about 3,000 who are actually in held detention and that's where everyone is at the moment. Now we can start processing them. If they are found to be refugees, they will not get a permanent visa, and I'll tell you why they shouldn't get a permanent visa because if you've come illegally by boat, you shouldn't be able to get a permanent visa that gives you lifelong rights to welfare from the word go. You shouldn't get a passport to permanent welfare. So a Temporary Protection Visa doesn't give you that lifelong access to welfare. It also says you don't get family reunion which is an important part of why people sometimes take that method. But the other visa we said we would give them is a thing called the Safe Haven Enterprise Visa. Now that is also a temporary visa, but it says if someone goes out, if they're found to be a refugee, and works in a regional area and doesn't draw down benefits or they study, so they demonstrate that they're prepared to have a go and make a contribution, then they will be able to make an application for another type of visa in Australia. Not a protection visa, a permanent protection visa, but it could be a student visa or something like that.

Jones: Ok. Right. So what's the difference then between the bridging visa and the Temporary Protection Visa? And how temporary is temporary?

Minister Morrison: A Temporary Protection Visa is for three years, a Safe Haven visa, which is also a temporary visa is for five years. Someone who is on those visas has been found to be owed protection and they also then qualify for 100% benefits if they're not working. Now on a bridging visa, you haven't been found to be a refugee, your claims have not yet been proven and if you're not found to be a refugee then you go home.

Jones: But you can work? You can work?

Minister Morrison: You can work while your claim is being processed.

Richardson: But if you're on a Safe Haven—

Jones: Sorry, Graham, just one thing to clarify there. So if you're on a bridging visa and the temporary protection visa, you both can work, and on the bridging visa—

Minister Morrison: Yes. Now you can, yes.

Jones: And on the Temporary Protection Visa, if you can't get work, you're on full welfare benefit but on the bridging visa you're only equal to 89% of the welfare benefit because you haven't been assessed as being a refugee.

Richardson: If you're on this safe haven thing, and you're here for five years and you've worked in a regional area and all the rest of it, wouldn't you just let them in? Wouldn't you just say well ok, you've done the job for five years, you've worked in the community, you've established yourself, you're living somewhere, you know the local grocer and the butcher and everyone else benefit from the fact that you're working and you're buying your food, you can stay.

Minister Morrison: Well you can apply for a visa, a work visa or some other visa but you've got to meet the criteria for that. Why should someone in that situation who has come illegally by boat have a leg up to getting a permanent visa in Australia on all of those other criteria that someone else who would be applying and going through the proper rules don't get?

Richardson: But you've given them a leg up anyway, haven't you? You've given them a leg up already.

Minister Morrison: No, no, Graham. No. At the end of the safe haven visa what they've earned is the right to have the same crack at a visa in Australia as anybody else but I'm not going to give them a special advantage. They're not going to get some special rules for them, they'll get the same rules as everyone else. They've earned the right to basically have a crack at a permanent visa like someone sitting in the United States or the UK or in Greece or Italy or in Syria for that matter. So it's basically a level of the playing field which they've earned a right to, but I don't think they should get a leg up.

Jones: Scott, people watching you now are saying – forgive the flattery – this bloke knows his stuff, he's right on top of it, he's done a very good job. Their next question though is, given that he's as tough as he is, are there categories of people that we shouldn't be allowing into this country. This is the question that people are asking every day. We know that there are people who aren't prepared to assimilate. We know there are people

in this country who hate us, they say they hate us. They have a greater affinity with the country they've left than the one they've come to. Should there be a discriminatory immigration policy, that's the question that people are asking.

Minister Morrison: Well what we discriminate on the basis of at the moment, Alan, is whether people are coming to effectively work because our whole programme is all built around skills. Our view has always been that if you've come to make a contribution not take one, then you're the sort of Australian we want to come to this country. Now there are humanitarian aspects of our programme but it's not the dominant part of the programme. The people who want to come and work and not come for welfare, people who want to come and join us not change us, people who want to come and integrate as you say, and I think integration is the right word, I don't think it's an offensive word, I don't think we should be apologetic about it. The thing about Australia is that we all muck in, it's something that you participate in, not stand back from, and if you don't want to come and participate in the country, then I don't know why you want to come.

Richardson: Can I ask you then Scott, because you were telling me the other day and I hope I'm not revealing some dastardly secret—

Jones: Oh, another lunch. Another lunch.

Richardson: Excuse me. Can I just ask the bloke a question? Give me a break. I think you went to visit the parents of those brothers who went to Thailand and have gone over to fight for IS. Now a lot of people are saying, and I've had people directly say to me, "Oh they must have known, this is just nonsense, it's all an act, they must have known". Now you've been out to talk to these parents, you tell me, what did you find?

Richardson: Well, let's ask him.

Minister Morrison: When I walked in to their house in Yagoona, the dad was sitting there watching the cricket and he'd worked as a taxi driver all his life. He'd worked hard and his family had and he'd supported his family and he'd come to do exactly as I said before. And this was any anywhere street in Australia I've got to say. There were Christmas lights up in the street – they were a bit early I've got to say—

Richardson: Yagoona by the way is in the Western suburbs of Sydney, for viewers outside of New South Wales.

Minister Morrison: That's right. I have no doubt that this family had no inkling of what was going on and they were devastated. I mean, they've lost four sons. The likelihood is that they'll never see them ever again. These four sons were radicalised in Australia and I think this underscores the very real challenge we have. We need to fight in Iraq but we also have a battle here back at home and this family is a victim of this.

Richardson: Who did it to them? Who radicalised them? Who radicalised them?

Minister Morrison: Well without going into—

Jones: People watching this are saying "I don't believe this. I don't believe that parents can have four sons and not know they were being radicalised." People are saying "I don't believe it, I just heard the Minister, you mean to say you've got four sons, doesn't know they're being radicalised—

Minister Morrison: Well let me put this to you. In my community young men can be vulnerable at times in their life and they can be subject to a whole range of really bad influences and can make stupid decisions whether it's on drugs or violence or they can join gangs or they can drive cars too fast. Now they're the sorts of threats that are faced in my community in the Sutherland Shire for young people. They can drink too much and they can make geese of themselves. But in parts of our country and in parts in particularly my home city of Sydney, there are other predatory threats on young men. These four young men I believe fell victim to that. What it is is a wake-up call for everybody. One of them was 17 and he was a good young bloke who only the week before was asking about his homework plan...

Jones: Scott his mate at Birrong High School said 'I am proud of him. I would rather fight for them than for us'. That's what the mate at the Birrong High School said – 'I am proud he has gone over there'.

Minister Morrison: I am not going to defend...

Richardson: I know that. You have been there you have spoken to them. Obviously the AFP and others must be looking into whoever recruited these four young men.

Minister Morrison: Of course they are.

Richardson: Have we found that mongrel that is what I am trying to work out.

Minister Morrison: I don't want to disclose things in any ongoing operation but I can tell you this is where the battle is. There will be idiots who will say thing like that kid at Birrong said and what we need to do is work together as a community particularly with that community, the Islamic community, because they are the first victims of what is going on here. I am not excusing it, I think it is abhorrent. I think what they may now be up to is just absolutely terrible. But we can't kid ourselves - we all have to work together to try and stop this from happening. That's why we need to reach out. What I appeal for the parents to do is tell other parents in the community don't let your sons go and do this because there have been occasions where as a government we have been able to stop people mid-way on that journey when they have told us. Now if you don't tell us we can't help you. We really need to work closely together. I think people are waking up to that.

Richardson: We have got to go so I am getting the last question on a different tack entirely. You are the only bloke in your government who seems to be able to get anything through the Senate. Now when you have a conversation with Ricky Muir does he actually talk? I want to know does the man speak?

Minister Morrison: Yes he does and I have got to say I thought Ricky handled himself very well with this. He was the subject of the most vicious and appalling abuse by refugee advocates and others who preach compassion but loaded up on him and Nick Xenophon and the other crossbench Senators and I thought it was despicable. It all sort of came to a head when Sarah Hanson-Young got up in the Senate and started attacking a bloke called Paris Aristotle who has done more for refugees and people in need in his life than she will in 50 lifetimes. At the end of the day this is a very controversial debate. I know people have very strong views about it and know people might have strong views about me both ways but at the end of the day what happened last week – we are getting children out of detention, we are increasing the refugee and humanitarian intake, we are getting the kids off Christmas Island, we are processing the backlog of 30,000 people and we have stopped the boats. I think that speaks volumes about the policies we took to the Australian people and implemented and we end the year saying we did what we said we would do in the way we would do it.

Richardson: I have heard people say bad things about you mate, I think you are a good bloke you are just in the wrong party. I just want to say thank you very much for giving us your time tonight. You have interrupted my argument with Alan but I forgive you. We will talk to you soon.

Jones: Thanks Scott, well done.

Minister Morrison: I will let you guys get back to it. Thanks a lot Alan.

#### **Perverse migration bill shreds the rule of law – The Age « BroCAP**

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Perverse migration bill shreds the rule of law ... If passed, The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill ...

Perverse migration bill shreds the rule of law – The Age

If passed, The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill would effectively enshrine in law the mistreatment of asylum seekers and refugees who flee to our country to escape persecution, torture and death.

The legislation is the perverse creation of a Government prepared to tear up the rule of law for its own political ends. It bestows an unprecedented level of power on the immigration minister to make life and death decisions about individual refugee cases. It creates a regime where the chance of sending people back to a situation of grave danger, or even death, is a real possibility.

It denies permanent protection to those found to be refugees, simply because of their mode of arrival to this country. Even babies born on Australian soil to parents who arrived by boat will be denied protection, rendered stateless and detained offshore until being “resettled” in squalor and risk of attack on Nauru. We should rightly ask, if the government is prepared to be so cruel and give itself this much unchecked power over refugees, who's next?

SOURCE: Fraser, Malcolm and Jones, Barry. ‘Perverse migration bill shreds the rule of law.’ The Age 10 November 2014

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