Human Rights Law Centre

Increasing power and decreasing accountability

Submission to the Senate Legal and Constitutional Affairs Legislation Committee review of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth)

31 October 2014

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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Endorsements

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1. Executive summary

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission on the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) (**Bill**).

2. The Bill contains a suite of proposed changes that carry significant human rights risks.

3. The HRLC is particularly concerned that the Bill would:

   (a) amend the *Maritime Powers Act 2013* (Cth) (***Maritime Powers Act***) to effectively licence the Government to breach international law and the rules of natural justice when conducting boat turn-backs and detaining asylum seekers at sea;

   (b) classify children born in Australia as 'unauthorised maritime arrivals' (**UMAs**) if one of their parents is a UMA, leaving those children subject to mandatory detention and transfer to Nauru;

   (c) sever Australia's non-refoulement obligations from the removal provisions of the *Migration Act 1958* (Cth) (***Migration Act***), meaning that the power to deport asylum seekers would not be subject to any legally-enforceable requirement to first consider their refugee claims;

   (d) remove references to the *Refugees Convention*[1] from the *Migration Act* and replace them with the Government's own interpretation of the Convention – in effect, a sudden and unilateral reinterpretation of a treaty that has been signed by 145 countries around the world and has been the cornerstone of international refugee protection for over 60 years;

   (e) implement 'rapid processing' and 'streamlined review arrangements' for asylum seekers arriving by boat, introducing administrative shortcuts into a process that makes life or death decisions; and

   (f) 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.

[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (together, ***Refugees Convention***).

4. While the changes included in the Bill are numerous and diverse, they share some common features. They seek to widen ministerial discretion, marginalise international law and wind back the ability of Australian courts to scrutinise the Government's treatment of people seeking Australia's protection.

5. These changes would create significant risks that Australia will violate international law and constrain the power of our justice system to do anything about it.

6. The HRLC strongly recommends that the Bill not be passed.

Recommendation: **That the Bill not be passed.**

2. Changes to maritime powers

7. The Bill seeks to amend the *Maritime Powers Act* to significantly expand the scope of the Government's powers to intercept and detain vessels, and the people on them, and to take them elsewhere. In addition to expanding the Government's maritime powers, the Bill would dramatically cut the judiciary's oversight of them by making the exercise of such powers immune from legal challenge on the basis of international law or rules of natural justice.

8. The combination of increased power and decreased judicial oversight is particularly concerning in the context of the Government's asylum seeker policy and the absence of any transparency surrounding 'on-water operations'.

2.1 Exclusion of international legal obligations

9. The *Maritime Powers Act* currently permits an authorised officer (i.e. a senior maritime officer, commander of a Commonwealth ship or any other person appointed by the Minister) to exercise 'maritime powers' in relation to a vessel in prescribed circumstances. These circumstances include where the officer reasonably suspects the vessel is contravening Australian law or for the purpose of implementing an international agreement, identifying a vessel or administering a monitoring law (such as Australia's migration, customs and fishing laws).[2]

10. 'Maritime powers' are wide-ranging and include boarding, searching and detaining vessels, seizing and retaining found items, and detaining, moving and arresting persons aboard detained vessels.[3]

[2] *Maritime Powers Act 2013* (Cth) pt 2 div 2.

[3] *Maritime Powers Act 2013* (Cth) pt 3.

11. The Bill proposes to amend the *Maritime Powers Act* such that neither the decision to authorise the exercise of maritime powers nor the actual exercise of those powers could be invalidated by:[4]

    (a) inconsistency with Australia's international obligations;

    (b) a failure to consider, or a defective consideration of, Australia's international obligations; or

    (c) a failure to consider, or a defective consideration of, the international obligations or domestic law of another country.

12. Essentially, the Australian Government would not need to comply with, or even consider, international law when exercising maritime powers. Intercepting asylum seeker vessels, detaining people at sea, and returning the vessels' passengers directly to the country from which they fled without any assessment of their refugee claims could not be challenged in Australian courts on the basis that such conduct directly violates Australia's non-refoulement obligations.[5]

13. The Immigration Minister,[6] the Foreign Minister[7] and the Prime Minister[8] have repeatedly asserted that everything the Government does at sea complies with international law. Yet this Bill seeks to remove the ability of the courts to hold them to account if they don't.

[4] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Bill**) sch 1 item 6 inserting s 22A into the *Maritime Powers Act 2013* (Cth) and sch 1 item 19 inserting s 75A into the *Maritime Powers Act 2013* (Cth).

[5] Australia has non-refoulement obligations under the following human rights treaties: the *Refugees Convention*, the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (***ICCPR***) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987) (***CAT***).

[6] Scott Morrison, 'Australian Government returns Sri Lankan people smuggling venture' (Media Release, 7 July 2014) www.minister.immi.gov.au/media/sm/2014/sm216152.htm; Scott Morrison, 'No illegal boat arrivals for more than three weeks' (Media Release, 10 January 2014) www.minister.immi.gov.au/media/sm/2014/sm210747.htm.

[7] Australian Broadcasting Corporation, 'Interview with Foreign Minister Julie Bishop by Samantha Hawley', *ABC News*, 3 July 2014 (Julie Bishop) http://foreignminister.gov.au/transcripts/Pages/2014/jb_tr_140703a.aspx?ministerid=4.

[8] Tony Abbott, 'Malaysia Airlines Flight MH17; Operation Sovereign Borders' (Press Conference, 26 July 2014) www.pm.gov.au/media/2014-07-26/press-conference-parliament-house-canberra.

2.2 Exclusion of the rules of natural justice

14. The Bill would also remove any requirement for maritime powers to be exercised in accordance with the rules of natural justice.[9]

15. The concept of natural justice is generally considered to encompass three elements: the right to be given a fair hearing to present one's case, the right to have a decision made by an unbiased decision-maker, and the right to have that decision based on logically-probative evidence.[10]

16. These rules are deeply rooted in Australian law and underpin 'important societal values applicable to any form of official decision-making which can affect individual interests'.[11] They are 'indispensable to justice'.[12] Yet this Bill seeks to dispense with them as they apply to the exercise of maritime powers.

17. Absolving the Australian Government of the legal requirement to comply with natural justice principles effectively licences it to make important decisions about detaining people at sea and transferring them to other places unfairly and without any consideration of individual circumstances or vulnerabilities.

18. The Government justifies trying to licence itself to act unfairly on the basis that fairness at sea can sometimes be 'impracticable'.[13] However, the rules of natural justice and procedural fairness are, at least to some extent, flexible – the courts have recognised that even though there may be an overarching duty to act fairly, the content of that duty is adaptable to circumstance.[14] As such, 'impracticability' does not justify completely excluding the duty to act fairly. It is a factor relevant to what fairness practically requires in the particular circumstances.

19. More fundamentally, to the extent that acting fairly at sea could carry practical challenges, administrative inconvenience is a necessary and reasonable price to pay to ensure important

[9] Bill sch 1 item 6 inserting s 22B into the *Maritime Powers Act 2013* (Cth).

[10] See *Salemi v MacKellar (No 2)* (1977) 137 CLR 396; LexisNexis, *Halsbury's Laws of Australia* (at 22 November 2010) 10 Administrative Law, 'Grounds for Review – Natural Justice or Procedural Fairness' [10-1868].

[11] Chief Justice Robert French, 'Procedural Fairness – Indispensable to Justice?' (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 7 October 2010) 1, 22 www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf.

[12] Ibid 22-23.

[13] Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Explanatory Memorandum**) [25].

[14] *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

decisions affecting people's rights and liberties are properly made. The obligation at the core of the *Refugees Convention* and other international human rights treaties to which Australia is a party is to not return people to real risks of serious harm. Compliance with that obligation requires a fair and thorough assessment of individual protection claims – something the Bill would absolve the Government of needing to do when using maritime powers to intercept, detain and return asylum seekers.

2.3 Expansion of power to detain and move vessels

20. The Bill also seeks to significantly expand the Government's powers to detain vessels and their passengers and take them to some other place.[15] The Minister is to be given even greater authority and discretion over how certain maritime powers are exercised, including the power to determine that the general limits on interfering with foreign vessels between countries (i.e. outside of Australia) do not apply if he or she thinks it to be in the national interest.[16]

21. Such determinations – despite authorising the exercise of significant powers on the high seas on the basis of one person's opinion – would be exempt from publication and could not be invalidated on the basis of inconsistency with international law.[17]

22. The Bill also seeks to significantly increase the potential duration of people's detention at sea. The proposed new subsection 72A(1) of the *Maritime Powers Act* provides that a person may be detained at sea for as long as is reasonably required:[18]

    (a) to decide the place to which they should be taken;

    (b) to consider whether that place should be changed;

    (c) if the place is to be changed, to decide the new place to which they should be taken;

    (d) to actually travel to that place, including allowances for stopovers along the way and 'logistical, operational or other contingencies';

    (e) to make arrangements for the release of the person at the place; and

[15] Bill sch 1 items 11-18 amending ss 69 and 72 of the *Maritime Powers Act 2013* (Cth) and inserting ss 69A and 72A into the *Maritime Powers Act 2013* (Cth); Bill sch 1 item 19 inserting ss 75C and 75D into the *Maritime Powers Act 2013* (Cth).

[16] Bill sch 1 item 19 inserting s 75D into the *Maritime Powers Act 2013* (Cth).

[17] Bill sch 1 item 19 inserting ss 75A and 75D(7) into the *Maritime Powers Act 2013* (Cth).

[18] Bill sch 1 item 18 inserting s 72A into the *Maritime Powers Act 2013* (Cth).

(f) for the Minister to consider whether or not to make a range of other determinations or directions.

23. Further, the destination to which a detained person is being taken does not need to be an actual place within a country and, if it is a country, there does not need to be any agreement in place for that country to receive them.[19]

24. In effect, a detained person's destination could be a country that has not agreed to receive them. It need not even be a country but could simply be a geographic coordinate in the middle of the ocean.

2.4 Conclusion on changes to maritime powers

25. When the issue in question is the scope of the Government's power to detain vulnerable people on a boat somewhere at sea and take them elsewhere, it is imperative that the limits on those powers be clear and reasonable. Under this Bill, they are not.

26. By sidelining rules of international law and natural justice, the Bill seeks to empower the Government to intercept and return asylum seekers without any legally-enforceable obligation to first assess their protection claims, creating an absolutely unambiguous risk of refoulement.

27. The Government continually emphasises that it intends to comply with international law, yet in this Bill it seeks the explicit power to do otherwise.

3. Children of UMAs

3.1 Newborn children deemed UMAs

28. The Bill amends the definition of 'unauthorised maritime arrival' to include a child born in Australia or a regional processing centre who has at least one parent who is a UMA, provided that child is not deemed an 'Australian citizen' under the *Australian Citizenship Act 2007* (Cth).[20] The amendment has retrospective application: babies born in Australian hospitals before the commencement of the relevant provision would be treated as if they came by boat.[21]

29. In addition to the obvious illogicality of classifying people born in Australia as if they arrived on a boat, defining these children as UMAs triggers a series of cruel and unlawful consequences.

[19] Bill sch 1 item 19 inserting s 75C(1) into the *Maritime Powers Act 2013* (Cth).

[20] Bill sch 6 item 2 inserting ss 5AA(1A) and 5AA(1AA) into the *Migration Act 1958* (Cth).

[21] Bill sch 5 item 11.

30. Australian-born children classified as UMAs would be subject to mandatory detention and transfer to a regional processing centre.[22] The mandatory nature of those consequences and the clear harm they would cause to the children affected[23] mean this aspect of the Bill would be fundamentally incompatible with the duty in article 3(1) of the *Convention on the Rights of the Child*[24] (***CRC***) to ensure primary consideration is always given to the best interests of the child.

31. The Explanatory Memorandum contends that these measures are necessary so as not to 'undermine the objectives of the regional processing framework'.[25] However, such a broad and generic justification does not bring the mandatory detention and removal of Australian-born children into compliance with the *CRC*.

32. The mandatory detention and removal of children to offshore detention is also inconsistent with other articles of the *CRC*, such as the State obligation to ensure adequate care and protection for a child's wellbeing, the State obligation to take measures to protect against physical or mental injury or maltreatment, and a child's right to not be deprived of his or her liberty arbitrarily.[26]

3.2 Forced statelessness

33. A child classified as a UMA would also be stateless. They would not be granted a protection visa[27] or otherwise have the option of obtaining Australian citizenship, and the proposed

[22] Bill sch 6 item 7 inserting s 198(1C) into the *Migration Act 1958* (Cth).

[23] See eg The Royal Australasian College of Physicians, Submission No 103 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*; The Royal Australian & New Zealand College of Psychiatrists, Submission No 48 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*, May 2014; Australian Association of Social Workers, Submission No 90 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*, May 2014; Australian Healthcare and Hospitals Association, Submission No 47 to Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*, May 2014; UNHCR Regional Representation Canberra, *UNHCR Monitoring Visit to the Republic of Nauru 7-9 October 2013* (26 November 2013) http://unhcr.org.au/unhcr/images/2013-11-6%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf.

[24] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (***CRC***).

[25] Explanatory Memorandum [1382].

[26] *CRC* arts 3(2), 19(1), 37(b). See also *ICCPR* art 9.

[27] Bill sch 2 item 29 inserting r 1401(3)(d) into sch 1 of the *Migration Regulations 1994* (Cth).

amendments would also invalidate any visa application already made on behalf of such children before the commencement of the Bill.[28]

34. Their statelessness would be perpetuated until such time as a country other than Australia grants them a protection visa, which may then permit the child to apply for citizenship of that country. In any event, there is also no guarantee that the receiving country would grant citizenship, so it is possible that some of these children born in Australia would remain stateless indefinitely.

35. Stateless persons face a range of problems, including an inability to travel internationally or vote, the risk of prolonged or indefinite detention, and difficulty accessing basic social services, such as education, healthcare and social security.[29] Stateless children are at greater risk of experiencing labour exploitation, sexual exploitation, trafficking, poverty and discrimination. Statelessness imposes practical limits on the freedom of movement of families, and can have profound, negative effects on children's identity and their development.[30]

36. Enacting laws that effectively force persons into statelessness undermines the right to acquire a nationality[31] and the principles of the *1954 Convention relating to the Status of Stateless Persons*,[32] and codifies an inherently arbitrary and inhumane process for dealing with newborn children.

4. Severance of non-refoulement obligations

37. The Bill seeks to introduce a new provision into the *Migration Act* which provides that, for the purposes of section 198 of the Act (which outlines the circumstances in which an unlawful non-citizen is subject to mandatory removal from Australia), it is irrelevant whether Australia

[28] Bill sch 6 items 13, 14.

[29] United Nations High Commissioner for Refugees, *Problems faced by Stateless People* www.unhcr.org/pages/49c3646c161.html.

[30] United Nations High Commissioner for Refugees and Plan International, *Under the Radar and Under Protected: The urgent need to address stateless children's rights* (2012) https://plan-international.org/files/global/publications/campaigns/under-the-radar-english.

[31] *ICCPR* art 24; *CRC* art 7.

[32] *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

has non-refoulement obligations[33] in respect of that person.[34] This part of the Bill is in response to decisions of the High Court of Australia which have found that the *Migration Act* as a whole is designed to address Australia's non-refoulement obligations.[35]

38. The principle of non-refoulement is the cornerstone of international refugee protection and is enshrined in article 33(1) of the *Refugees Convention*. It 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 on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.

39. In the Government's own words, the amendment would mean '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'.[36]

40. The only way to ever know with any certainty whether an asylum seeker would face the risk of persecution on return is to fairly and thoroughly assess their refugee claims. By the Government's own admission, the legal duty to do so before returning a person is precisely what this Bill seeks to cut from the *Migration Act*.

4.1 Inappropriate reliance on ministerial discretion

41. The Government seeks to reassure that it would not return people to harm by citing three existing discretionary powers under the *Migration Act* which may be used by the Minister to consider non-refoulement obligations.[37] However, these powers are personal, non-compellable and non-reviewable. There is no requirement that they be exercised fairly or at all.[38]

42. Each is also a 'public interest' power, meaning that it is 'open to the Minister to exclude any consideration of an individual's interests where that interest is not reflected in the public

[33] 'Non-refoulement obligations' is defined broadly by reference to the *Refugees Convention*, the *ICCPR*, the *CAT* and customary international law: see Bill sch 5 item 1 amending s 5(1) of the *Migration Act 1958* (Cth).

[34] Bill sch 5 item 2 inserting s 197C into the *Migration Act 1958* (Cth).

[35] Explanatory Memorandum [1133]-[1137]. See eg *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319.

[36] Explanatory Memorandum [1141].

[37] *Migration Act 1958* (Cth) ss 46A, 195A, 417. See Explanatory Memorandum [1142]-[1145].

[38] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

interest',[39] a power which has been described by the courts as 'indeterminate and very impressionistic'.[40]

43. Personal, non-compellable and non-reviewable ministerial discretion is an inadequate safeguard against wrongful return to persecution. Strong, clear and legally-enforceable protection, not personal discretion, is required to guarantee fundamental rights.

5. Re-interpreting the *Refugees Convention*

44. The Bill seeks to remove most references to the *Refugees Convention* from the *Migration Act* and instead create a new, independent and self-contained statutory framework that articulates the Government's own interpretation of its protection obligations under the *Refugees Convention*.[41] So while it is perhaps 'not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention',[42] the Government wants to determine what those obligations are, and how and when they should apply.

45. Inherent in these amendments is a fundamental misunderstanding of how international law operates. The *Refugees Convention* continues to be the cornerstone of international refugee protection and has 145 State parties. It cannot be unilaterally redefined by Australia more than 60 years after we signed it. As the House of Lords in the United Kingdom has stated: '*there can only be one true interpretation of a treaty* [and national courts] must search for the true autonomous international meaning of a treaty'.[43]

5.1 Relocation on return need not be reasonable

46. The Government's redefinition of the *Refugees Convention* unduly narrows its scope in several concerning respects.

47. It is widely recognised that a person is not a refugee if they can 'reasonably relocate' within their country of origin and avoid persecution.[44] The Bill seeks to remove the reasonableness

[39] Ibid 671-672 [114] (Heydon J)

[40] Ibid 671 [113] (Heydon J).

[41] Bill sch 5 pt 2.

[42] Explanatory Memorandum 10.

[43] *R v Secretary of State for the Home Department, ex parte Adan* [2000] 2 AC 477, 516–17 (emphasis added).

[44] See *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18; Explanatory Memorandum [1182].

consideration – effectively denying protection to people on the expectation that they relocate, even where that expectation is unreasonable.[45]

48. If the Bill is passed, persons who have fled a country due to persecution may be returned on the ground that it is technically possible for them to live in another part of the country, regardless of whether in that place:

(a) there are significant cultural and language differences;

(b) they have no familial connections;

(c) they have no friends or other contacts;

(d) they will be unable to work; or

(e) there are other circumstances that make their relocation to that place entirely unreasonable.

49. Protection from persecution should not be contingent on there not being some corner of a person's country of origin to which they can be unreasonably required to relocate. This Bill would make it so.

5.2 Modification of behaviour to avoid persecution

50. The Bill also provides that a well-founded fear of persecution would not exist if a person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in the receiving country.[46]

51. The Bill does contain some important exceptions. For instance, a person would not be required to take steps that conflict with a characteristic that is fundamental to their identity or conscience, which the Government intends to encompass religion, political opinion and moral beliefs.[47] An exception is also created for modifications that conceal an innate characteristic of a person (meaning an inborn or genetic characteristic, such as skin colour, disability, gender) or an immutable characteristic, which is intended to cover a shared common background that cannot be changed (e.g. HIV status or history as a child soldier or sex worker).[48]

52. However, these exceptions do not cover a range of important situations. Under the Bill, a person could be required to not attend or participate in any political activity, such as attending a rally, if such conduct is not considered to be of fundamental importance to the person's

[45] Explanatory Memorandum [1183].

[46] Bill sch 5 item 7 inserting s 5J(3) into the *Migration Act 1958* (Cth).

[47] Explanatory Memorandum [1191].

[48] Ibid [1193].

political beliefs. Similarly, a person who has previously worked as a journalist in his or her originating country could be required to cease work as a journalist if the content of their published work risked attracting persecution.

53. This amendment would place an unreasonable burden on returnees to significantly alter their behaviour so as to avoid persecution. Making refugee protection contingent on persecuted individuals taking steps to avoid offending their persecutors would undermine a central purpose of the *Refugees Convention*.[49] Living 'discreetly' or otherwise sacrificing an attribute of human existence is also inconsistent with the United Nations High Commissioner for Refugee's (**UNHCR**) position that persons are 'not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution'.[50]

54. Protection from persecution should not be contingent on the oppressed avoiding conduct that might agitate their oppressors. This Bill would significantly increase the extent to which it is.

6. Limiting review rights

55. The Bill seeks to introduce a new 'fast track' visa assessment process, which would apply to all UMAs who entered Australia after 13 August 2012 and who have applied or will apply for a protection visa.[51] Expeditious processing of refugee claims is undoubtedly an important goal to reduce the length of time asylum seekers are left in limbo. However, speed cannot come at the expense of fairness and accuracy.

6.1 Inferior review mechanism

56. Fast track applicants would not be permitted to seek review from the Refugee Review Tribunal (**RRT**), instead being referred to the Immigration Assessment Authority (**IAA**) which would conduct a 'limited review' of protection visa application decisions.

57. The IAA would only have limited powers to review adverse protection visa application decisions 'on the papers' and no obligation to interview or otherwise hear from an applicant. Notably, the IAA cannot consider any new information unless 'exceptional circumstances' exist which justify considering the new information and the fast track review applicant has

[49] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 28 [28] referring to *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, 489 [40].

[50] United Nations High Commissioner for Refugees, *Guidelines on international protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/03/04 (23 July 2003) [19].

[51] Bill sch 4.

demonstrated that the new information was not and could not have been provided to the Minister before the primary decision was made.[52]

58. 'Exceptional circumstances' is an undefined concept but the Government expects it to include where the conditions in the applicant's originating country have deteriorated or where new credible personal information has arisen suggesting the applicant would face a significant threat if returned.[53] The Government has acknowledged that exceptional circumstances would not exist where the applicant has a general misunderstanding or lack of awareness of Australia's processes and procedures.[54]

59. Further, while exceptional circumstances need to be demonstrated to enliven the power to consider new information, the decision as to whether or not to do so would then be at the unfettered personal discretion of the IAA.[55] So even in exceptional circumstances, there is no guarantee relevant and important new information would be considered. This is particularly troubling given that the IAA review process is expressly deemed to be an exhaustive statement of the requirements of the natural justice hearing rule.[56]

60. The UNHCR has emphasised that an asylum seeker who has been found to not engage Australia's protection obligations should have the ability to seek review of the decision.[57] That right to review needs to allow for a proper and thorough review of the original decision and, if necessary, a consideration of new information which may assist in determining whether Australia's protection obligations under the *Refugees Convention* are engaged. The Bill denies access to such a process.

61. This amendment would disproportionately impact those persons who have not previously dealt with the Australian government or legal system or who have limited education or lack proficiency in English; a problem compounded by the Government's decision to remove

[52] Bill sch 4 item 21 inserting s 473DD into the *Migration Act 1958* (Cth).

[53] Explanatory Memorandum [915].

[54] Ibid [916].

[55] Ibid [914].

[56] Bill sch 4 item 21 inserting s 473DA(1) into the *Migration Act 1958* (Cth).

[57] United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.3 (December 2011) [192]; Office of the High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) www.unhcr.org.au/pdfs/detentionguidelines.pdf.

UMAs' access to the Immigration Advice and Application Assistance Scheme, effective from 31 March 2014.[58]

6.2 Total exclusion of review rights

62. The Bill would deny some asylum seekers access to even this inferior form of merits review.

63. The Bill seeks to deny any and all merits review rights (to the IAA and RRT) to those fast track applicants who, after an assessment of their protection claim, are found to have put forward a claim which indicates they:[59]

    (a) without reasonable explanation, provided a 'bogus document' as part of their application;

    (b) have a manifestly unfounded claim for protection;

    (c) have previously been refused protection by Australia, another country or the UNHCR;

    (d) already have protection available elsewhere by reason of holding nationality or a right to enter and reside in a third country; or

    (e) fall within a class of persons prescribed by the Minister.

64. There are numerous instances where a person may be unfairly caught by the operation of these provisions. For instance, there are many good reasons refugees often arrive with 'bogus documents'. They often cannot ask the regimes from which they are fleeing for help getting all their paperwork in order. Sometimes they require and obtain fake documentation to escape. As the UNHCR recognises in its *Handbook on Procedures and Criteria for Determining Refugee Status*, 'in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents'.[60]

65. So when someone does flee without documents or with fake ones, they should not automatically be viewed with suspicion. They may simply be the victims of circumstance. Australia's legal and moral duty to fairly and thoroughly assess their refugee claims, including providing access to independent merits review, is not diminished just because a refugee arrives with a bogus document.

[58] Department of Immigration and Border Protection, *Removal of the Immigration Advice and Application Assistance Scheme and introduction of Protection Application Information Guides* (March 2014) Commonwealth of Australia www.immi.gov.au/Live/Documents/paig-b.pdf.

[59] Bill sch 4 item 1 amending s 5(1) of the *Migration Act 1958* (Cth).

[60] United Nations High Commissioner for Refugees, above n 57, [196].

6.3 Weakening a system that already makes mistakes

66. Between 1 July 2010 and 30 September 2014, more than 4,800 refugee claims denied by the Department of Immigration and Border Protection were overturned by the RRT, representing approximately 33 percent of all protection claims during this period.[61] That is at least 4,800 people who could have been wrongfully returned to harm but for a robust appeals process.

67. The assessment of a protection claim has serious consequences for the individual concerned. The stakes could not be higher. The 'fast track' process proposed in this Bill would introduce shortcuts into a system that already gets it wrong too often and would also limit access to the tribunal which corrects those mistakes. The amendments would increase the risk of error in a context in which the margin for error is nil.

7. Temporary protection visas

68. The Bill would reintroduce multiple types of temporary protection visas (**TPVs**) for refugees who arrived in Australia without a visa (i.e. predominantly UMAs).[62] A person granted a TPV would be ineligible for a permanent protection visa.[63]

69. The Government has justified the reintroduction of TPVs as part of its border protection strategy to 'combat people smuggling and to discourage people from making dangerous voyages to Australia'.[64] TPVs also form part of the Government's attempt to reduce the

[61] Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Caseload Report: 30 June 2011* (2011) Commonwealth of Australia, 4 www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=8601a67f-1b6e-4be8-aede-6685d1ba787c; Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Caseload Report: 30 June 2012* (2012) Commonwealth of Australia, 4 www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=3efb7fc1-b3a1-4ab4-b33d-07fc27547420; Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Caseload Report: 30 June 2013* (2013) Commonwealth of Australia, 5 www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=54a69d0e-232f-42cd-8e96-847fafc7c8b9; Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Caseload Report: Financial year to 30 June 2014* (2014) Commonwealth of Australia, 5 www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=62f4457a-c355-4364-b6e1-db6d0c92d3a4; Migration Review Tribunal and Refugee Review Tribunal, *MRT-RRT Caseload Report: Financial year to 30 September 2014* (2014) Commonwealth of Australia, 5 www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=6d984253-edc7-48e0-af78-2f894199e5f8.

[62] Bill sch 2 item 5 inserting s 35A into the *Migration Act 1958* (Cth) and item 30 inserting r 1403 into sch 1 of the *Migration Regulations 1994* (Cth).

[63] Bill sch 2 item 29 inserting r 1401(3)(d) into sch 1 of the *Migration Regulations 1994* (Cth).

[64] Attachment A to the Explanatory Memorandum 9.

number of persons in immigration detention with undetermined claims.[65] Reducing the number of refugees in detention is a legitimate policy objective. However, for several reasons, not least of which is the psychological harm caused by TPVs to its holders, especially children,[66] reintroducing TPVs is not an appropriate way to achieve these policy goals.

70. Perversely, the preclusion of TPV holders from leaving Australia and sponsoring family members to migrate to Australia incentivises boat travel for members of the family who have become separated. In the three years following the introduction of TPVs in 1999, more than 12,000 people arrived in Australia by boat seeking protection.[67] This was a tenfold increase to the less than 1,200 people who arrived by boat seeking protection in the preceding two years.[68]

71. Tragically, among the 353 people killed when the SIEV X sank in October 2001 were 142 women and 146 children, many of whom were attempting to reunite with husbands and fathers already in Australia on TPVs.[69]

72. Furthermore, current law and policy already mandates that any UMA who now arrives is subject to mandatory transfer to a regional processing centre, either in Nauru or on Manus Island. There are already harsh deterrence measures in place for asylum seekers seeking to come to Australia. TPVs needlessly punish refugees who are already here.

73. Article 31 of the *Refugees Convention* expressly prohibits states from penalising refugees on account of their 'illegal entry'. That provision was included in the Convention in recognition of the practical reality that flight from persecution is often urgent and irregular and, by necessity, undertaken without prior approval from the State whose protection is being sought. By offering an inferior form of protection to UMAs solely on the basis that their entry into Australia was unauthorised, and doing so solely with the objective of deterring others, the Bill would violate both the letter and the purpose of article 31.

[65] Scott Morrison, 'Restoring TPVs to resolve labor's legacy caseload (Media Release, 25 September 2014) www.minister.immi.gov.au/media/sm/2014/sm218127.htm.

[66] See Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004) 815-817.

[67] Refugee Council of Australia, *Temporary Protection Visas* (September 2014) http://refugeecouncil.org.au/n/mr/1409_TPVs.pdf.

[68] Ibid.

[69] Ibid.

8. Conclusion

74. If passed, the Bill would empower the Government to use extraordinary measures at sea to stop asylum seekers attempting to reach Australia, take dangerous shortcuts when processing those who arrive and offer inferior protection to those already here.

75. Both at sea and within Australian territory, the Bill seeks to expand government power, widen personal ministerial discretions, exclude international law and the rules of natural justice, and sideline the courts.

76. It is deeply concerning that the Bill would increase executive power but decrease the checks and balances on its exercise.

77. The HRLC reiterates its recommendation that the Bill not be passed.

Recommendation: **That the Bill not be passed.**