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31 October 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

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

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

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

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 platitudinous" 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."[1]

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.[2] This amendment appears to be an attempt to counteract the High Court

[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].
[2] See proposed sections 69(2) and (3) and 72(3) and (4) of the Bill.

challenge[3] 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"[4] – an undefined and subjective term with such breadth[5] 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.[6] 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*[7] 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.[8]

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

[3] *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.
[4] See subsections 75D(4) and 75F(5) of the Bill.
[5] See Explanatory Memorandum at [105].
[6] 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> (accessed 16 October).
[7] *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.
[8] *International Covenant on Civil and Political Rights* (ICCPR), art. 6, 7 and 10.

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.[9] 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."[10]

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

[9] See *TI v United Kingdom*, 2000-III ECtHR 435 at 456–57.
[10] See Explanatory Memorandum at [48] and [79]

therefore compatible with Article 9(1) of the ICCPR.[11] 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.[12]

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[13] 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.[15] As noted by the Explanatory Memorandum, the intention of this provision is that "the failure to consider or comply

[11] See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 8
[12] *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].
[13] See subsection 69(3A) of the Bill.
[14] See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 8.
[15] 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."[16] 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."[17] 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" [18] 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". [19] The Government's unspecific assurance that it "intends to continue to comply with these obligations"[20] 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."[21] 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

[16] See Explanatory Memorandum at [85].
[17] See Explanatory Memorandum at [86].
[18] See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 5
[19] See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 7
[20] See Statement of Compatibility with Human Rights (annexed to Explanatory Memorandum) at 7
[21] 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 of 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.[22] 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.

[22] In addition, through proposed section 22B, natural justice also does not apply to authorisations of the exercise of maritime power.

- 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.[23] 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.[24]

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

[23] See Explanatory Memorandum at 6.
[24] See Explanatory Memorandum at 6.

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."[25] 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".[26] 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.[27]

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."[28] 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".[29] 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.[30]

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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[25] See Explanatory Memorandum at 6.
[26] 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 at [8.33].
[27] 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.
[28] See Second Reading Speech at 5
[29] Above n. 26 at [8.33].
[30] Above n. 27 at 820.

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."[31] 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;[32]
- The right of asylum seekers not to be discriminated against, including on the basis of how they arrive in the country;[33]
- 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;[34]
- The right to family unity and to be free from arbitrary interference with family life;[35] 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.[36]

The cumulative effect of the uncertainty surrounding TPVs and the human rights violations highlighted above may also constitute cruel, inhuman or degrading

[31] Above n. 27 at 841.
[32] *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."
[33] Refugee Convention, art. 3.
[34] Refugee Convention, art. 31.
[35] Refugee Convention, Recommendation B; ICCPR art. 17; *Universal Declaration of Human Rights*, art. 12
[36] CRC, art. 3(1), 6(2), 10(1), 20(1), 22(1), 24(1) and 39.

treatment in violation of the ICCPR and CAT.[37] 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.[38] 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."[39] 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 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

[37] ICCPR, art. 7; UNCAT, art. 16.
[38] See Second Reading Speech at 6.
[39] See Explanatory Memorandum at 7.

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

[40] See Second Reading Speech at 6.

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."[41] However, the statistical evidence demonstrates that almost 50% of

[41] Elibritt Karlsen, Janet Phillips and Harriet Spinks, 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014,' Parliamentary Library, *Bills Digest*

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.[42] 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.[43] 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.

No. 40, 2014-15 (23 October 2014), 17, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F3464004%22

[42] *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 at [1.24]

[43] Ibid at 98

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

grant a protection visa[44] or waive the bar to an application for a protection visa[45] 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. [46]

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.

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

[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

framework."[47] 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."[48] 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

[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.

system of any individual contracting state".[49] 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.[50] 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 *refoule* 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".[51] 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 Refugees Convention, as interpreted in Australian case

[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.

law, into Part 1 of the Migration Act".[52] 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[53], 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".[54] 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.[55] 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

[52] See Explanatory Memorandum at [1167].
[53] 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.
[54] In most instances the reference to "receiving country" will mean the refugee's country of nationality or former habitual residence.
[55] *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (*SZATV*).

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.[56] 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.*[57] The principle of state protection is complicated, both in it 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*[58], 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[59] 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[60]. 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.[61]

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

[56] *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.
[57] *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR.
[58] *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14.
[59] *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.
[60] Refugee Status Appeals Authority, No 71427/99.
[61] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2007), 3rd edition, Oxford University Press at 10.

there is no adequate state protection in cases where the persecutor is the State.[62] 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 available 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.[63] 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.

[62] 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.
[63] 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).

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.

Yours faithfully,

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