RILC **Refugee & Immigration Legal Centre Inc**

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

1 Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre (**RILC**) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 25 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration's Advice and Application Assistance Scheme (**IAAAS**). RILC has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (**the Bill**). The focus of our submissions and recommendations reflect our experience and expertise as briefly outlined above.

2 Outline of submission

2.1 We recommend that the Act not be amended in the way proposed by the Bill. It is our opinion that the amendments proposed by the Bill represent a radical deviation from longstanding fundamental procedural and substantive legal protections for vulnerable persons seeking protection from serious human rights abuses. This serious erosion of essential statutory safeguards would heighten the risk of Australia wrongly refusing protection for individuals leading to them being returned to persecution or other significant harm. The proposed amendments would also consign thousands of persons who have sought Australia's protection to prolonged detention and deprive them of any certainty in a way that violates them and their family's basic rights and inflicts untold harm.

2.2 We have identified the following four areas of principal concern.

- **Denial of a fair hearing for asylum seekers.** The amendments proposed seek to deny asylum seekers what is a fundamental element in the protection assessment process a fair hearing of their claims. The right to a fair hearing is a foundational component of the Australian legal system, and the rule of law generally, and the Bill would remove this in favour of expedited decision-making.
- **Non-compliance with Australia's international legal obligations.** The proposed amendments would create a legal framework for processing protection claims that is largely inconsistent with international law as well as those tests applied by comparable developed countries.
- **Prolonged detention and denial of permanent protection for asylum seekers.** The proposed amendments would significantly and inhumanely restrict access to, and level of,

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

protection afforded to persons who engage Australia's protection obligations. They would also prolong detention for many and reduce the capacity for independent scrutiny of that detention.

- **Imposition of legal duties on public servants to act contrary to domestic and international law.** The proposed amendments would impose legal obligations on public servants to engage in conduct which would be unlawful under domestic and/or international law.

3 Denial of a fair hearing

3.1 An essential element of any legal or administrative process in Australia that adversely affects a person is for there to be a real and meaningful opportunity for that person to present their case, be told the substance of the case to be answered and be given an opportunity of replying to it.[2] The amendments proposed by the Bill seek to strip persons seeking protection in Australia of this fundamental opportunity.

3.2 This denial is significant, particularly in the context of what is at stake. The denial of a fair hearing increases the risk of an incorrect and unjust outcome and, in the context of protection claims, the implications of this could not be mores serious, that is, exposing the person to an appreciable risk of serious human rights abuses such as targeted killings and torture.

3.3 No case has been put forward by the government to justify such a radical erosion of fundamental rights and safeguards other than its desire to expedite decision-making processes. We consider this policy rationale to be totally inadequate and logically disproportionate to what is at stake.[3]

3.4 The amendments proposed by the Bill fly in the face of the concept of a fair hearing and represent a fundamental and radical departure from what the rule of law demands in Australia and also how other comparable countries consider and decide of protection claims. We now detail in each instance how the proposed amendments would deny persons the fundamental right to a fair hearing:

3.5 Denial of access to merits review

3.5.1 Access to a fair and robust merits review process is an integral safeguard in any protection assessment system. In recent years, the importance of effective merits review for asylum seekers has been underlined by the compelling statistics previously published by the Department of Immigration and Border Protection (**the Department**) and the Refugee Review Tribunal (**the RRT**). For example, in the financial years 2009-10; 2010-11; 2011-12; and 2012-13; the respective percentages of protection assessments that were overturned on merits review for persons arriving by boat were 67.9%; 87.5%; 85.3%; and 66.4%.[4] Despite

[2] See: *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 (18 December 1985), Mason J at [28]

[3] This policy intent is additionally unconvincing given many of the proposed Fast Track applicants have been in Australia for an extended period of time, some for over two years, in detention or living in the community unlawfully (through no fault of their own) or on a bridging visa without work rights. These people have been kept in legal limbo without certainty and are rightfully entitled to a fair and considered assessment of their protection claims.

[4] *Asylum Trends 2012-13*, Department of Immigration and Border Protection, Table 33: Overturn rate by countries of citizenship (IMA) – available at: https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf [accessed 10/11/2014]

these compelling statistics, the proposed amendments seek to deny many applicants the right to access merits review.

3.5.2 According to the Bill, there will be a class of people for whom no form of merits review will be available - namely those defined as 'excluded fast track review applicants' or for whom the Minister issues a conclusive certificate to the effect that it would be contrary to national interest to review or change a decision.

3.5.3 We understand that it is intended that the individual delegate responsible for determining whether a person is excluded from review is to be the delegate who made the primary decision to refuse their application in the first place. This has significant adverse implications for the integrity and impartiality of the decisions to exclude applicants from accessing review. We note that the categories specified in the definition of excluded fast track review applicants are broad and much of the criteria would require additional investigation and determination. These include:

3.5.4 *Those in a class specified by the Minister in a legislative instrument*

3.5.4.1 This proposed personal power for the Minister to prescribe any manner of additional excluded classes is alarming and completely without warrant. In essence, this amendment would provide the Minister of the day with unfettered power to arbitrarily exclude any person or class of persons from ordinary review mechanisms according to personal preference or whim.

3.5.4.2 Further, this amendment provides for these specifications to be made by way of a legislative instrument that is exempt from disallowance and any other form of scrutiny by Parliament. It is a matter of profound concern that the Executive could define classes of persons who would be excluded from an independent review of the merits of their case without impartial scrutiny. This measure would involve largely arbitrary unfettered power to deny a person the right to what has long been considered a fundamental and basic prerequisite for fair and just decision-making in this country where significant rights and interests of an individual are at stake.

3.5.5 *Persons who have previously applied for protection in Australia and withdrawn that application or had it refused*

3.5.5.1 There is no basis in international law to prohibit a person from seeking protection on more than one occasion. Such a barrier is also inherently inconsistent with the nature of protection and how from time-to-time a person's fear of harm in a country may change. For example, under the proposed scheme, an Iraqi national who had been found by the RRT in 2009 not to be a refugee would now be precluded from accessing merits review by the Immigration Assessment Authority (**the IAA**), despite there having been a significant and material deterioration in country conditions since the previous request for protection was made. Similarly, if a person previously withdrew his or her protection visa because of a change in country or personal circumstances (such as the end of a conflict or they stopped practising a banned religion), and those circumstances changed again prior to them departing Australia they would be legally barred from accessing merits review.

3.5.6 *Persons who have in the past been refused protection by another country or UNHCR*

3.5.6.1 These categories also fundamentally ignore the realities of the refugee system and its *realpolitk*. Although each party to the Convention is bound by its terms, different interpretations of the refugee definition do exist. Similar to the previous category, this exclusion is inherently inconsistent with the nature of protection and how a person's fear of harm in their home country may change over time. To deny merits review because an applicant has been previously refused by UNHCR or another country ignores the different legal and policy frameworks of the relevant country. For example, it fails to account for the real prospect that a person's previous refusal was wrongly decided, including by reason of inferior procedures and substantive safeguards applied in the foreign jurisdiction. The question under Australian law should be whether, under the applicable procedural and substantive (including definitional parameters) laws, a person is assessed to be in need of protection. Further, a prior application has no bearing on whether a well-founded fear of persecution exists at the time that an application in Australia for a protection visa is made or at the time that a determination to exclude fast track review is made.

3.5.6.2 The Bill seeks to punish an applicant who has potentially experienced multiple events of persecution or long-term ongoing fear or who has been denied settlement or other rights at the whim of officials in another, different system. The Explanatory Memorandum asserts, at [716] and [718], that an individual who has been refused previously in Australia or overseas has already had their opportunity to access protection. There is no basis in international law to restrict the number of refugee applications a person may make. This is unrealistic, would likely punish those who most need protection, and would risk returning those in need of protection to face persecution.

3.5.6.3 For example, a minor who is an Afghan national of Hazara ethnicity and Shia religion travelled to the United Kingdom (**the UK**) in 1995 to undertake a tertiary scholarship. While there, he applied for protection due to fears of harm from the Taliban, but this application was subsequently refused. The applicant returned to Afghanistan and, some years later during the war, he took up a senior advisor role with the coalition forces. This led to him becoming a high profile target for the Taliban. On learning that his name was on a Taliban list, he fled to Malaysia where he boarded a boat to Australia. Such a person would be prohibited from accessing merits review at the IAA despite having strong *prima facie* claims for refugee protection based on events subsequent to his earlier refusal.

3.5.7 *Persons who are a national of more than one country*

3.5.7.1 Similarly, the exclusion of these persons from accessing merits review is fundamentally inconsistent with the circumstances of asylum seekers. This is for essentially three compelling reasons.

3.5.7.2 Firstly, the legal concept of nationality under the Act is highly complex an, in many instances, incapable of being applied with precision. In Australia, the Federal Court has described the concept of 'nationality' as it relates to protection visas as follows:

> … ***a term somewhat lacking in precision***. *It is generally used to signify the legal connection between an individual and a State. The primary relevance of nationality under international law is to provide a basis upon which a State can exercise jurisdiction over persons. However,*

the term is employed in different ways in international law, and domestic law.[5] [emphasis added]

3.5.7.3 Such legal complexity is entirely inconsistent with more than one nationality being the basis for excluding merits review, a process where that very issue may be determinative for the outcome.

3.5.7.4 Secondly, for many asylum seekers, the facts and evidence necessary to make findings on nationality are not available. Precise locations of birth, nationality of parents, and whether they are deemed stateless, may not always be known or be able to be verified. Many have been displaced from their families and arrive with few or no documents. For these reasons, decision-makers may find that an applicant is not able to satisfy them, on the evidence, that they are not a dual national and on this basis exclude them from accessing merits review. For example, an applicant was born in Somalia but fled with his family across the border to Kenya in the early 1990's during the civil war. He then lived with his family unlawfully in Kenya until recently when he was able to obtain Kenyan identification documents which allowed him to obtain a Kenyan passport to travel to Australia. In these circumstances, a Departmental officer found that he could *not* be satisfied on the evidence that the applicant was *not* a national of both Kenya and Somalia but accepted that he had *prima facie* claims of protection against both those countries (and, on this basis, he was allowed to apply for a protection visa). If this person had been a fast track applicant, he would be denied the right to merits review despite having genuine claims against both countries.

3.5.7.5 Thirdly, for many asylum seekers, the fear of persecution is not limited to one country. This proposed criterion for excluding access to merits review does not take into account whether a second nationality may be 'effective' in offering protection from persecution in the other country. For example, if a person were a national of both Syria and Iran and had credible grounds for fearing targeted harm in one or both countries, that person would be barred from accessing merits review. This qualification on third country protection derives from the Refugee Convention[6] itself and is afforded to all other protection visa applicants under the Act.[7]

3.5.7.6 It is also helpful to note the longstanding policy and practice of the Australian government and independent merits review bodies not to be bound in any way by findings by third countries or UNHCR that a particular person *is* a refugee or otherwise owed protection. This follows the preference for our own decision-making processes and confidence in the integrity of our own decision making processes.

3.5.7.7 These legal and factual uncertainties, as well as legal complexities, are likely to lead to decision-making errors that result in a person being wrongly denied a fundamental right to merits review which may then lead them to being exposed to serious human rights abuses.

3.5.8 *The person makes a manifestly unfounded claim for protection*

[5] *VSAB v MIMIA* [2006] FCA 239 (Weinberg J, 17 March 2006), at [48]
[6] See: second paragraph of Article 1A(2) of the Refugees Convention
[7] For example: ss 36(4) to (5A); and the Department policy guidelines for the Minister's personal non-compellable power under s.91Q of the Act.

3.5.8.1 The phrase 'manifestly unfounded claim' is not defined and there is no indication in the Explanatory Memorandum of what this is intended to mean in policy. It is capable of an infinite variety of arbitrary and subjective interpretations.

3.5.8.2 The Human Rights Statement accompanying the Bill also asserts that UNHCR's guidance on accelerated procedures does not include merits review in its classification of procedural safeguards. This constitutes a misrepresentation of UNHCR standards. While UNHCR acknowledges that States are able to put in place accelerated procedures, it states that such processes should be limited to claims that are manifestly unfounded or clearly abusive. Arrival by boat does not, of itself, render asylum claims abusive or unfounded. UNHCR has stated that key procedural safeguards must still be present in order to meet the obligation of non-refoulement, an obligation which prevails over policy objectives of timely and cost-efficient asylum procedures. An ability to lodge an appeal for merits review *must* be available:

> *UNHCR considers that the right to an effective remedy in asylum cases includes the right to appeal a (negative) decision made in an accelerated procedure. To be effective, the remedy must provide for a review of the claim by a court or tribunal, and the review must examine both facts and law based on up-to-date information. In addition, in respect of the principle of non-refoulement, the remedy must allow automatic suspensive effect except for very limited cases.*[8]

3.5.8.3 UNHCR advises that the "full and rigorous scrutiny" of a negative decision is required to safeguard against a denial of the right to be protected from refoulement to serious harm.[9] The Human Rights Statement accompanying the Bill attempts to justify the limited review/lack of review that the Bill introduces by asserting that "there is no express requirement in the International Covenant on Civil and Political Rights (**ICCPR**) or the Convention Against Torture (**CAT**) for merits review of an assessment of protection obligations". This is not correct. Article 2(3) of the ICCPR provides that a person whose ICCPR rights are violated must have access to an effective remedy, which the Human Rights Committee has interpreted to be an available right of review where there is a risk of refoulement:

> *The prohibitions on refoulement contained in the ICCPR, together with the general obligation on States to provide an effective remedy, provide for a right to have a review or appeal of a negative decision which is available in law and practice, is accessible for the individual, allows a competent national authority to deal with the substance of the claim, and has the authority to grant appropriate relief. According to the Human Rights Committee, a decision on appeal must be binding.*[10]

3.5.9 *The person provides a bogus document (or causes such a document to be so provided, given or presented) in support of his or her application.*

3.5.9.1 Review is also excluded where the Department considers that bogus documents were presented after arrival in Australia. In RILC's considerable experience of assisting clients to make protection claims, first instance decision-makers often decide that documents are false or fraudulent without any evidence from experts, and often on the basis of a mere assertion

[8] UNHCR, UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, (May 2010).
[9] Ibid.
[10] Ibid, at para [25].

that false documents are easy to procure in a particular country. It is of serious concern that merits review could be excluded on the basis of such unfounded assertions or assumptions.

3.6 **Expedited and limited merits review**

3.6.1 Under the Fast Track assessment (**FTA**) process, those persons eligible to apply for merits review would be precluded from applying to the RRT and would only be able to access an extremely *limited* form of merits review under the proposed IAA. The nature of this limited review raises a number of profound concerns in relation to fair and just processing of protection claims.

3.6.2 The IAA's statutory mandate, as proposed by the Bill, is to "pursue the objective of providing a mechanism of *limited* review that is *efficient and quick*" [emphasis added]. This is in stark contrast to that of the RRT which is to provide a mechanism of review that is "*fair*, *just*, economical, informal and quick" [emphasis added]. By removing the objectives of review being fair and just, the provisions of this Bill seek to make it clear to reviewers that a correct or preferable decision is not required just so long as cases are disposed of quickly and efficiently. This approach is completely at odds with the UNHCR guidelines concerning rigorous review mechanisms and flies in the face of decades of administrative law in Australia that the role of merits review is to ensure the correct and preferable decision in a particular case.

3.6.3 *Decisions on the papers / no new information permitted*

3.6.3.1 The Bill provides that the IAA would receive *from the Minister* the findings of fact by the first instance decision-maker, information provided by the applicant at the time of the original application, and the reasons for the refusal. The review of negative decisions would take place *on the papers*. Also, critically, there is a *legal prohibition* on the IAA considering *any* new information for the purposes of making a decision unless it finds that there are exceptional circumstances justifying it. This prohibition would apply irrespective of whether the IAA obtained the information itself or if the applicant themselves provided it.

3.6.3.2 The Bill defines 'new information', but does not further explain the meaning of the 'exceptional circumstances' in which new information can be requested or provided. The Explanatory Memorandum states that the term 'exceptional circumstances' has been left undefined in order to allow an individual decision-maker the ability to decide what relevant new information will be accepted on a case-by-case basis. It is contemplated that the IAA will draft guidelines on this provision. A non-exhaustive list of examples is given in the Explanatory Memorandum at [915]-[916] which demonstrates that a high threshold for relevant new information is set. For example, a change in the political or security landscape of the relevant country of reference, or a credible change in personal circumstances which represents a substantial threat to the individual. This latter requirement for a substantial threat is not an element of the Refugee Convention and may represent an additional hurdle for an applicant to pass. It appears from this excerpt that it may be possible to provide information that could have been available previously, if there are "satisfactory" reasons why this was not done. This exception is not codified in the Bill, nor is a definition of 'satisfactory' or unsatisfactory reasons, resulting in a lack of legal certainty for applicants.

3.6.3.3 Country information reports relied on by refugee decision-makers are broad and inherently general yet the amendments may well prevent applicants from providing individual, first-

hand and responsive evidence, and/or ongoing and more current country information in support of their case at review. Even within a fast-track assessment process, there is the possibility for intervening events to occur in the applicant's country and new country information reports to be published, or for an applicant to discover other sources of information which counter information relied on by a primary decision-maker. The principle that a refugee assessment takes into account the fear of persecution at the date of the decision has existed in refugee decision-making in Australia for decades.[11]

3.6.3.4 This proposed amendment would create a real likelihood that significant and materially relevant information will be excluded. This prohibition denies persons the ability to present their case and have a fear hearing of key claims. This legal bar would also deprive decision-makers the ability to make accurate and fair findings on all core claims. No case has been made for these amendments.

3.6.4 *No oral hearing allowed*

3.6.4.1 Critically, not only do FTA merits review applicants have no legal entitlement to an oral hearing with the IAA, but the Bill places a legal prohibition on the IAA holding one unless the presiding reviewer can demonstrate exceptional circumstances. This is a fundamental and radical departure from longstanding and internationally recognised minimum standards for processing protection claims, statutory and non-statutory.

3.6.4.2 Australian case law provides that what constitutes a fair hearing for one person may not be the same for another and the requirements are dependent on the nature of the inquiry (including the statutory context) and the person's personal circumstances.[12] The courts have also stated that a fair hearing does not mandate an oral interview by the decision-maker with every applicant for refugee status but, in particular cases, including where a real issue of credibility is involved or it is otherwise apparent that an applicant is disadvantaged by being limited to submissions or written responses to the decision-maker, it may be that observance of the fundamental requirements of natural justice can only be satisfied by a determination made upon an oral hearing.[13]

3.6.4.3 For persons seeking to engage Australia's protection obligations, in determining what amounts to a fair hearing, including whether an oral hearing is necessary, regard must logically be had to the following:

- The factual and legal circumstances surrounding an individual's claims for protection are often extremely complex. Asylum seekers are predominantly highly vulnerable individuals, often suffering psychological and physical conditions, with little or no capacity to accurately present their case effectively, particularly in writing and in the English language;

- It is likely that only a very small minority of the persons affected by the Bill would be able to access professional representation or any assistance for the proposed process;

[11] See: *MIEA v Singh* (1997) 72 FCR 288
[12] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, at [26]
[13] *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* [1994] FCA 985 at [32]

- Asylum seekers are often from war-torn areas or have had to flee their country in haste and often carry very little documentary evidence to corroborate their claims. Due to the confidential nature of the asylum process, decision makers are not always able to gather specific information from within the country in question to verify specific claims. For these reasons, a significant majority of protection claims are approved or rejected on the basis of a decision-maker's finding that the person's evidence is credible or not credible. Such fair and just findings on credibility are not possible without a robust process for testing that person's evidence, including an oral hearing; and

- In the context of merits review, statistical data published by the Department demonstrates that a fair and just independent merits review processes is critical in ensuring the integrity of decisions on protection claims, and ultimately preventing Australia from exposing persons to human rights abuses in other countries.[14]

3.6.4.4 The process proposed would allow a primary decision-maker to find that country information does not support an applicant's claim, that an applicant's claims for protection are not credible, or that he or she provided documents that they consider not to be genuine, thereby preventing the applicant from accessing merits review. Even if the applicant were allowed to access review, the IAA reviewer would be prevented from allowing them to respond to those findings in any real and meaningful way.

3.6.4.5 The government's policy rationale for limiting the review and its process is fundamentally flawed. The Explanatory Memorandum states, at [893] and [920], that an applicant will already have had "ample opportunit[y]" to present claims and evidence prior to the first instance decision. However, it is one of the foundational principles of a legal system, and in particular the refugee legal framework, that an applicant before a court or tribunal (at first instance and on review) has a right to be heard. The amendments relating to the IAA's operation deny applicants procedural fairness, access to information, the opportunity to respond to adverse information and to be heard de novo by another decision-maker.

3.6.4.6 Further, the amendments do not sit with practical concerns and features of the process peculiar to refugee decision-making, all of which have developed from years of practice. It is not, as the government has argued, that an applicant will change his/her account in response to a decision setting out why he or she has not qualified for protection. In RILC's experience, an applicant's responses to a first-instance decision will often be to clarify information or clear up misunderstandings which may have arisen, for example, through the use of interpreters or as a consequence of decision-makers undertaking fact-finding in relation to countries about which they have no or little first-hand experience. The asylum system does not provide an environment where safe and full disclosure of trauma and other experiences occurs immediately. Shame, memory loss and dissociation can often prevent disclosure, particularly in a process where an applicant is not permitted the time to build a rapport with an adviser or other person.

[14] For example, the Department of Immigration and Border Protection previously reported that in the 2011-12 Financial Year over 82% of primary decisions were overturned on merits review for persons who arrived by boat. Further, between July 2012 and March 2013 the RRT overturned 74% of all decisions to refuse protection visas for boat arrivals.

3.6.4.7 The proposed amendments introduce a one-sided enquiry by the IAA, at odds with the well-established shared burden of enquiry between applicant and decision-maker in asylum systems,[15] and in both inquisitorial and adversarial court processes.

3.7 Shortened time frames for processing FTA applicants

3.7.1 The details of the FTA process at first instance are unknown at this stage. At paragraph [894], the Explanatory Memorandum accompanying the Bill states that timeframes and natural justice requirements will be prescribed later in the Migration Regulations 1994 (**the Regulations**) and that the time frames are intended to be shorter than for other protection visa applicants.

3.7.2 RILC strongly urges, in the event the Bill is passed, that the first instance timeframes allow, as a minimum, sufficient time for an applicant to be fully informed of the process, to attempt to engage professional assistance and prepare the application, and to exercise procedural rights in full. If the process is to be concluded within too short a timeframe, there is a real risk that instructions to legal representatives, reports from experts on country information and reports on an applicant's capacity and other vulnerabilities by medical professionals will not be possible or will be unable to be completed in full, leading to an unfair and prejudicial process which could result in the refusal of claims which should have succeeded.

3.7.3 RILC notes that a similar process in the UK, the Detained Fast-Track procedure, was recently found to be unlawful by the England and Wales High Court because the short time-frame in which applicants were detained, interviewed and given decisions limited the ability of applicants to properly give instructions to their legal representatives.[16] A short and unrealistic time-frame without full procedural safeguards will defeat the government's objective of time- and cost-efficient processing, as judicial review applications before the courts are likely to increase.

3.8 Implications of the removal of due process

3.8.1 Australia's fundamental obligations to protect people from future human rights abuse require a fair and full assessment of whether a person needs protection. This requires that the person seeking protection be able to present his or her claims for protection to authorities, to be heard on those claims and to have an effective remedy to a negative decision. If due process fails or miscarries, a person could be wrongly refused refugee protection and expelled to the real prospect of serious harm or death in their homeland. Under international law, Australia would be responsible for any refoulement that occurred as a result of this proposed system.

3.8.2 The Explanatory Memorandum and Human Rights Statement indicate at various points that it is intended that Ministerial discretion will to make up for shortcomings in the system; for example, that discretionary powers to prevent non-refoulement following a refusal would continue to be available. The availability of a personal discretionary (and one that in our experience is characteristically arbitrary, whimsical and highly inconsistent) cannot adequately replace a system of full merits review enshrined in law and available to all

[15] PAM: Asylum claims-Assessing credibility, section 1; UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, at [6].
[16] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin).

applicants. This is particularly so given the high number of overturned first instance decisions in recent years (indicating, in RILC's view, that first instance decision-makers are regularly making flawed decisions) and the low numbers, by comparison, of Ministerial interventions.

3.8.3 RILC also notes the Parliamentary Joint Committee on Human Rights recently found that such administrative arrangements would breach Australia's international obligations:

> *[…] non-reviewable, discretionary and non-compellable powers in relation to visa protection claims do not meet the requirement of independent, effective and impartial review of non-refoulement decisions, and are in breach of Australia's non-refoulement obligations under the ICCPR and the CAT.*[17]

3.8.4 The decision-making process for the assessment of protection claims is a highly complex task requiring a great deal of legal analysis and highly specialised knowledge. Due to this and further factual complexities surrounding protection claims, it would not only be extremely inefficient to rely on the Minister personally to ensure that a claim is not misconstrued, but it would also have an adverse effect on the integrity of protection decision outcomes. To vest such powers in the Minister personally would lead to a serious job description problem.

3.8.5 Ministerial discretionary powers are liable to arbitrariness and inconsistency because they lack the safeguards of a statutory process affording procedural and substantive rights. Discretionary powers are an inadequate and inappropriate mechanism to replace the necessary safeguards provided by due legal process. It is in the best interests of the government to avoid a concentration of personal power in a single Minister, particularly when Australia's fundamental human rights obligations, and consequently its international reputation, are at stake.

3.9 Discriminatory aspects of the FTA process

3.9.1 The Bill perpetuates the long-standing discriminatory treatment and penalisation of refugees who have arrived by boat, in contrast to those who arrived by air with prior authorisation. This contravenes the principle of non-discrimination in human rights treaties to which Australia is a party as well as the express prohibition on punishment and penalisation of unauthorised persons under Article 31 of the Refugee Convention.

3.9.2 The Bill, if passed, would unfairly deny due legal process including the right to a real and meaningful merits review process for people who arrived by boat in Australia. In some cases, the amendments would restrict merits review completely, based on reasons which are discriminatory. The Bill's denial of merits review to select groups lacks basis in any international law and places Australia outside the norm in refugee processing in other Convention States

4 Substantial diminishing of Australia's capacity to comply with its international legal obligations.

4.1 We submit that the codification of the government's interpretation of Refugee Convention obligations is entirely inappropriate and would further limit Australia's capacity to comply with

[17] Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, Parliamentary Fourteenth Report of the 44th Parliament; Bills introduced 30 September - 2 October 2014; Legislative Instruments received 13 – 19 September 2014, at [1.365]

its international obligations, and consequently increasing the risk of it breaching those obligations. These amendments would also likely lead to judicial uncertainty as the current definition has evolved incrementally from decades of domestic and international jurisprudence to a point of relative stability and certainty. RILC also has deep concerns with the policy objective apparent from the Explanatory Memorandum and Second Reading Speech, that these amendments are to enable the government to control who is eligible for protection, irrespective of what our international obligations may be.

4.2 The proposed codification in the Act of the definition of refugee directly contravenes Article 42 of the Refugee Convention which expressly prohibits States from varying the definition of refugee in Article 1. Under international law, Australia is not permitted to legislate to justify a failure to perform a treaty obligation[18] or unilaterally determine its obligations under a treaty after ratification.[19] Further, the proposed amendments codifying a stand-alone definition of refugee is also at odds with the practice of comparable developed countries, including Canada, the United Kingdom, the European Union, the United States and New Zealand.[20]

4.1 The approaches to internal relocation, state protection and particular social group are likely to result in refusal of refugee claims where applicants were previously entitled to refugee protection and mean that Australia would be responsible for returning refugees (albeit unrecognised in domestic law) to persecution. Recognition as a refugee is declaratory rather than constitutive, meaning that a person is a refugee under international law prior to adjudication of status. Therefore, a restrictive domestic definition does not affect the status of refugee at international law, under the Refugee Convention.

4.2 **Internal relocation**

4.2.1 Currently, under Australian and international law, a person is not eligible for protection if he or she can safely access another location within her home country where there is not a real chance of persecution, and it is reasonable for him or her to move to and settle there. The Bill seeks to depart from this internationally recognised test by removing the reasonableness element. That is, a person would no longer qualify for protection in Australia unless they can show that there is a real chance of persecution in all areas within the country, irrespective of the practicalities of the person moving to and living there.

4.2.2 To demonstrate a well-founded fear in all areas of the country is an additional requirement not required by the Refugee Convention and one which will be extremely difficult for an applicant to demonstrate. UNHCR has described this as an "impossible burden".[21] Coupled with the removal of the reasonableness concept, it is likely that internal relocation will

[18] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Article 27.
[19] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Articles 26, 27 and 31(1).
[20] Both Canada and New Zealand define "refugee" in their domestic legislation by reference to the Refugee Convention. In Canada, section 95 of the *Immigration and Refugee Protection Act 2001* incorporates in full the text of Article 1A of the Refugee Convention. In New Zealand, subsection 129(1) of the *Immigration Act 2009* states that "a person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention". The UK is bound by the EU Qualification Directive which codifies the definition of refugee in various articles. EU countries are bound to apply this definition as a minimum but are permitted to introduce or maintain more favourable measures. The UK has chosen to maintain the definition of refugee by reference to the Refugee Convention in most respects and in doing so, applies a more generous definition than that of the EU Qualification Directive. In the United States the definition of refugee is imported from the Convention in *Immigration and Nationality Act 1952*.
[21] UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) at [1], cited in Hathaway and Foster, *The Law of Refugee Status*, 2nd ed, (Cambridge, CUP, 2014) at 338.

become a regular basis to (wrongly) deny protection because an applicant will not be able to exclude areas to which they cannot relocate.

4.2.3 The Bill also omits the accessibility requirement from an internal relocation enquiry: that a relocation site must be safely and legally accessible. It is unclear why this element is not made explicit in the Bill's drafting. While the Explanatory Memorandum indicates that this is still a requirement at [1181], its absence from the Bill could result in decision-making which fails to apply this requirement. If an area of relocation is not practically and safely accessible, it cannot be considered as an alternative to the protection offered by Australia.[22]

4.2.4 This amendment would exclude consideration of physical or psychological vulnerabilities, cultural and religious factors, legal obstacles, family responsibility, and other compelling individual circumstances. Removing these considerations would in practice lead to absurd and overly harsh consequences.

4.2.5 For example, a single mother from Quetta, Pakistan, of Hazara ethnicity and Shia religion, may be found not be a refugee on this basis because she could relocate to Islamabad, despite her and her family facing significant discrimination and hardship if she attempted to do so. Similarly, on this basis a 16 year old orphaned child of Kurdish ethnicity and Sunni religion from Mosul in Northern Iraq could be found not to be eligible for protection in Australia on the basis that the harm he would suffer in Baghdad would be limited to general crime/terrorist attacks and not harm targeting him personally.

4.2.6 Removing the ability for decision-makers to consider the practical realities of internal relocation also could either give rise to new forms of persecution (e.g. if they are a religious minority in the proposed relocation site) or it will risk indirect *refoulement*, where circumstances in the relocation site are so poor as to drive the person back to her home region. Australia will be responsible for indirect *refoulement*, which is a serious breach of international law and one which will place Australia under the international spotlight.

4.3 **State protection**

4.3.1 The Bill proposes that there will be no well-founded fear of persecution where the State has certain mechanisms in place – an appropriate criminal law, reasonably effective police force and an impartial judiciary. However, inevitably such a standard leads to a focus by decision-makers on what State resources and initiatives *might* be made available to protect a person from harm, rather than what *would* be made available in his or her particular circumstances. This is the standard that the Refugee Convention mandates: that protection be effective to the extent that there is no longer a well-founded fear of persecution.

4.3.2 The proposed amendment represents a fundamental misunderstanding of refugee law that in practice would undermine an assessment of whether a person is owed protection. Australian case law states that, when considering whether there is effective protection in the home country, each case turns on its own facts; and the decision-maker must ensure they address the particular circumstances of the applicant and the particular harm feared when considering

[22] Ibid, page 342.

the question of state protection.[23] The courts have also stated that even if the general evidence points to a reasonably effective police force and a reasonably impartial system of justice, particular attention may need to be given to whether it meets the required standards in circumstances where protection sought was not provided or was not effective,[24] or where the claimed persecution is by 'rogue' state officials,[25] or where an applicant is in a particularly vulnerable position.[26] Even where there are laws and a functioning law enforcement system, there may be particular religious, social and cultural norms which prevent protection in practice.[27] For example, where an applicant is particularly vulnerable, perhaps a woman within a patriarchal society, the general effectiveness of the police force in countering crime does not mean that she will receive adequate protection for gender-specific persecution. The Australian courts have recognised this,[28] but the Bill fails to do so. It does not make sufficiently clear the requirement that protection be effective and adequate in all individual circumstances. The Bill fails to incorporate the protective features developed through jurisprudence.

4.3.3 Additionally, the amendments would deny protection to a person who is assessed as being able to obtain protection from private individuals where the State is not able or willing to do so. In practice, such non-State agents may include any, or a combination of: tribal warlords, mercenaries, private security services, or United Nations Peacekeepers. The Bill contains no restriction on what type of entity is capable of providing protection. This could lead to disastrous results. Unlike States, which are accountable under international law, a non-state entity is under no ongoing duty to protect persons under its de facto control. National protection can be the only meaningful alternative. Australia will fail to fulfil its obligations if it were to return persons to the dubious protection of non-state entities or individuals. We note that the amendments do not even require the protection to be durable

4.3.4 The denial of protection where non-State agents may assist is not correct as a matter of international law and risks returning people to persecution. As Hathaway and Foster have said, "[s]uch decisions are not only patently fraught with risk, but are more fundamentally misconceived as a matter of law".[29] The Convention's fundamental purpose is to provide refugees with *national* protection to replace that which they have lost. The wording of the Convention makes it clear that only national protection is relevant to the assessment of refugee status. Other aspects of the Act and this Bill acknowledge this: for example, the Act does not permit protection visa applications and the Bill does not allow fast-track review where an individual already has the protection of another state.

4.3.5 A non-state entity has no accountability at international law and is under no ongoing duty to protect persons under its de facto control. Because the refugee enquiry is forward looking, there needs to be ongoing, enforceable protection in place.[30] The analogous provision in the EU Qualification Directive at the very least contains the additional requirement that the

[23] See: *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [116] per Kirby J; *Marshood v MIMA* [1999] FCA 1415 (Kiefel J, 15 October 1999); *M251 of 2003 v MIMIA* [2005] FMCA 582 (McInnis FM, 5 May 2005); *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); and *SZAIX v MIMIA* (2006) 150 FCR 448.
[24] See: *M251 of 2003 v MIMIA* [2005] FMCA 582 (McInnis FM, 5 May 2005); *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); and *SZAIX v MIMIA* (2006) 150 FCR 448.
[25] See: *SZDWR v MIMIA* (2005) 192 FLR 299 and on appeal, *SZDWR v MIMIA* (2006) 149 FCR 550.
[26] See: *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); and *SZAIX v MIMIA* (2006) 150 FCR 448.
[27] Hathaway and Foster, *The Law of Refugee Status*, above n 10 at page 312.
[28] *SZAYT v MIMIA* [2005] FCA 857 (Wilcox J, 24 June 2005); *SZAIX v MIMIA* (2006) 150 FCR.
[29] Hathaway and Foster, *The law of Refugee Status*, above n 13, page 291.
[30] Ibid, pages 292.

protection offered be non-temporary. The Bill's provision does not even require durable protection. National protection can be the only meaningful alternative and Australia will fail to fulfil its obligations if it were to return persons to the dubious protection of non-state entities or individuals.

4.4 **Particular social group**

4.4.1 One of the ways in which an applicant qualifies for refugee protection is if they are at risk of being persecuted because they belong to a distinct social group in their society. Currently, such a group must be distinguished, or set apart, from the rest of society. The Bill introduces a double requirement for the formation of a particular social group (**PSG**): that the members of a group share an innate or fundamental attribute; *and* that the group be perceived as a group by members of the society in question. Currently, the courts have held that is no requirement under the Refugee Convention that the relevant group be recognised as such by the society in the home country.[31]

4.4.2 The proposed PSG amendments will, in practice, make it more difficult for an applicant to prove that a PSG exists and that they are a member of the group. The amendments will also increase the legal complexity of these claims for applicants and decision-makers alike. There is no reason to restrict the scope of groups that are capable of being recognised because a further step is still required to be established: that there is a connection between that membership of the group and the persecution. This is an inherent and lawful obstacle to protection that the Refugee Convention already provides. Instead, the Bill imposes different obstacles which amount to an avoidance of protection obligations which Australia owes.

4.4.3 The Explanatory Memorandum justifies the narrowing of the PSG test at [1217] on the basis that Australia has had a broader interpretation of the test than other countries, and that the proposed amendments have drawn from Canada, New Zealand, the EU and the USA. This is misleading. The approach to particular social group in the Bill is very restrictive and places Australia at odds with the conventional understanding of this element by the UNHCR and in the UK, Canada and New Zealand. The Bill introduces a double requirement for the formation of a particular social group: that the members of a group share an innate or fundamental attribute *and* that the group be perceived as a group by members of the society in question. Although the European Qualification Directive, on its face, also requires both limbs to be met, this has been deliberately read down by the UK. The UK has explicitly found that only one of these limbs needs to be met, so that the conjunctive *'and'* in the EU Qualification Directive is read as *'or'*.[32]

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[31] *Applicant S v MIMA* (2004) 217 CLR 387 at [27] per Gleeson CJ, Gummow and Kirby JJ. See also McHugh J at [66] - [68] who came to the same view and stated that to require evidence of a recognition or perception by the society that the collection of individuals in that society comprises „a particular social group" is to impose a condition that the Convention does not require.

[32] *K v Secretary of State for the Home Department; Fornah v Secretary of State for the Home* Department [2006] UKHL46, at [16]: "If, however, this article [of the Qualification Directive] were interpreted as meaning that a social group should only be recognised as a particular social group for the purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met. See also *DZ v Secretary of State for the Home Department* [2013] UKAITUR AA022492011.

4.4.4 Although the United States does require both limbs of the test, this has been strongly criticised and the UNHCR has objected to this aspect of the United States' legal framework in a number of court interventions.[33] UNHCR has stated that the United States' "restrictive view" of PSG "is inconsistent with the 1951 Convention and the 1967 Protocol, and it inappropriately limits the ability of individuals in need of international protection to receive it". Crucially, the UNHCR says that the United States' interpretation means that it "would provide *less* – not equal – protection than that established under international standards".[34] The government's view, then, that they will be brought into line with other jurisdictions and that it will continue to meet its obligations is not correct. Australia should not seek to emulate the United States, given the opposition to United States laws on PSG, that it will place Australia at odds with other jurisdictions such as New Zealand, Canada and the UK and that it will limit Australia's ability to fulfil its protection obligations and for vulnerable individuals to receive protection.

4.4.5 The Explanatory Memorandum also states that that new definition of PSG in section 5L is intended to reduce the incentive and capacity for applicants to advance extensive lists of possible groups. In RILC's view, the new formulation of the test only serves to make the definition more complicated. There is no reason to restrict the groups that an applicant puts forward, provided that they meet the test. There has never been a restriction on the number of grounds on which refugee status is recognised and nor should there be. To restrict the grounds on which an individual applicant is recognised may place the applicant in danger if cessation is raised or where refugee status is reassessed regularly (as is proposed by the introduction of TPVs).[35] The Bill makes completely unwarranted and unjustifiable adjustments to the Australian understanding of PSG.

4.5 **Requirement to be discreet**

4.5.1 At subsection 5J(3) the Bill introduces a requirement of discretion - that a person be expected to hide or modify the aspects of their behaviour or identity that have led to a risk of serious harm for them. This requirement was rejected in 2003 by the High Court in *Appellant S395/2002*.[36] McHugh and Kirby JJ found that to read in a requirement to act discreetly or to conceal opinions would undermine the very purpose of the Convention and was not intended by the drafters of the Convention:

> *The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.*[37]

[33] See for example, *Valdiviezo Galdamez* (BIA removal proceedings), UNHCR amicus curiae brief in support of respondent (10 August 2012) at pages 12-17.
[34] Ibid, page 13.
[35] It is particularly important for all grounds of risk to be recorded in a decision which is going to be reassessed against changing country conditions and with the effluxion of time. Moreover, the establishment of a group, however broad its membership, is only the first part of the enquiry. It is irrelevant how large or broad a particular social group is, and how many members of the society it encompasses, because a further step is still required to be established: that there is a connection between that membership and the persecution.
[36] *v Minister for Immigration and Multicultural Affairs* [2003] HCA 71.
[37] Ibid, [41].

Gummow and Hayne JJ also found:

> *But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant must do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection.*[38]

4.5.2 Australia should not seek to reintroduce discretion for these same reasons. Although the UK had at one time implemented a test of discretion (concealment that could be 'reasonably tolerated'), this requirement was emphatically rejected by the Supreme Court in 2010.[39]

4.5.3 The Bill makes an exception where the modification would conflict with a fundamental characteristic or conceal an innate or immutable characteristic. The fact that the exception depends on a decision-maker deciding for another person what is fundamental to their identity or conscience and what they can be expected to hide is inappropriate and will lead to arbitrary and subjective decision-making which would result in Australia breaching its human rights obligations.

4.5.4 For example, the Explanatory Memorandum gives the example at [1192] that proselytising may or may not be an acceptable activity to conceal, depending on the decision-maker's view of whether evangelising is a fundamental part of that individual's religion and their conscience. Religious beliefs are personal and difficult to adjudicate upon,[40] but it is not appropriate for a decision-maker to be deciding for an individual whether they are permitted to display their religion externally or not. Australia's human rights obligations ensure freedom of thought and conscience, and this is a right that cannot be derogated from in any circumstances. The Bill proposes to circumscribe this right in some circumstances, at the discretion of an administrative decision-maker.

4.5.5 There is also a risk that decision-maker will decide that certain conduct is not fundamental to an applicant because they have not been able to express this aspect of their identity or beliefs previously *because* of the fear of persecution in their home country. This threat of harm weighs against an applicant in a decision of this type.

5 Prolonged detention and preventing refugees from accessing permanent protection

5.1 The proposed amendments would significantly and inhumanely restrict the access and level of protection afforded to persons who engage Australia's protection obligations. Collectively, in practice the amendments would also unjustly prolong the detention of many asylum seekers and greatly reduce the Parliament and general public's ability to scrutinise cases where persons, including children, are detained for extended periods of time.

5.2 Temporary Protection and Safe Haven Enterprise Visas

5.2.1 The Bill retrospectively deems an application for a Permanent Protection visa (**PPV**) to be an application for a Temporary Protection visa (**TPV**). The Bill would ensure that a person eligible for a TPV is not eligible for a permanent protection visa. Following this, any person

[38] Ibid, [82].
[39] *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.
[40] UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, at [1] and [27].

who has previously been allowed to apply for a PPV but has not yet been granted that visa, including despite having been found to otherwise meet all of the criteria for that visa, will be retrospectively stripped of this entitlement.

5.2.2 The Bill proposes to provide that applications made by the following categories of persons are instead taken to be applications only for a TPV (despite that visa not existing at the time they were legally entitled to a PPV):

- those who arrived in Australia without a visa that was in effect at the time of entry;
- those who are deemed to be an *unauthorised maritime arrival*;
- those who arrived in Australia by air or sea with a valid visa in effect but were refused immigration clearance, including because they advised that they wished to apply for protection;
- those who hold or previously held a Temporary Safe Haven visa; and
- those who hold, or have held a Temporary Humanitarian Concern visa.

5.2.3 The Explanatory Memorandum indicates, at page 9, that the introduction of TPVs is punitive and meant as a deterrent measure to prevent people arriving by boat to Australia. Punishment based on method of arrival is discriminatory and at odds with the fundamental purpose of the Refugee Convention, to which Australia is a signatory: surrogate national protection is owed to refugees within a State's territory, regardless of how they came to be there.

5.2.4 RILC is also concerned that the proposed scheme perversely penalises those that arrive in Australia with a valid visa but who are honest and forthright in immigration clearance about their intention to seek asylum. Under the proposed amendments, these persons would only be eligible for a TPV. A recent example is where RILC was approached by an Iranian national who was recognised by the Australian government as a highly qualified medical doctor and granted a temporary skilled migration visa on that basis. She entered Australia on that skilled visa and, while in immigration clearance, she advised that, although she already had a visa for Australia and intended to work as a doctor here, she also feared returning to Iran for specific reasons and on that basis she was also intending to apply for protection. Her skilled visa was cancelled in immigration clearance (with no right to merits review in those circumstances) and she was placed in immigration detention.[41] Under the proposed amendments, she would only be eligible for a TPV. However, if she had passed through immigration clearance and then applied for protection, she would still be eligible for a permanent protection visa if the amendments are enacted.

5.2.5 Recipients of TPVs will live in an endless cycle of uncertainty about their safety and future because there is always the possibility that a TPV will not be reissued. The Minister can decide the length of time that a TPV lasts, up to a maximum of three years. The issuing of visas for periods of three years, or *less* will result in TPV-holders living in constant fear and may restrict their ability to work as many employers are unwilling to hire employees on short-term visas.

[41] Additionally, her husband and children's' visas were cancelled while they were in transit in a third country on their way to Australia.

5.2.6 TPV holders will not be able to sponsor family members, and in RILC's extensive experience, the prospects of family members being granted temporary visitor visas for Australia would be remote or nil. TPV holders will also be precluded from travelling outside Australia as their visas will cease if they leave Australia and barred from applying for any other kinds of visas in Australia other than another TPV.[42] For those TPV holders with immediate family, including wives, husbands and children, under the proposed scheme, there would be no prospect of them ever seeing these family members again unless they could find another safe third country that did not apply these inhumane restrictions in which to resettle.

5.2.7 In RILC's experience with the previous incarnation of TPVs[43], excluding TPV holders from family reunion and the ability to leave and return to Australia is cruel and damaging to the mental health of refugees, whom Australia is meant to protect. This potential for damage clearly forms part of the government's discriminatory deterrent strategy. The Human Rights Statement asserts that the family reunion prohibition policy is lawful under international law and is not discriminatory. This is based on the government's view that it is reasonable to differentiate based on whether arrival is legal or "illegal" and that it is a legitimate objective to maintain the integrity of Australia's system of migration. However, this is contrary to Australia's duty to refrain from discrimination on the basis of any status under the ICCPR. It is wrong to describe arrival by boat as illegal under international law because such arrival is sanctioned under the Refugee Convention and differentiation on this ground is not permitted. Refugee protection is an international exception to orderly migration, and it is well-recognised that family unity protects and promotes the emotional, physical and financial well-being of individuals.[44] Family unity also facilitates integration into the local community and economic self-sufficiency. This benefits not only the individual but the Australian community.[45] Respect for family unity was strongly recommended by the Conference of Plenipotentiaries on adoption of the Refugee Convention. Recommendation B states that 'the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee' and urged governments to 'take the necessary measures for the protection of the refugee's family'. The member states of the UNHCR Executive Committee have repeatedly affirmed state obligations in relation to family unity and reunification.[46]

5.2.8 The right to family unity is derived from Articles 17 and 23 of the ICCPR, which prevent interference with the family and require protection of the family unit, and Articles 9, 10 and 22 of the Convention on the Rights of the Child (**CRC**). Respecting these rights requires that States refrain from actions which would separate family members *and* that States take measures to reunite separated family members.

5.2.9 Refusal to allow family reunification may amount to an interference with the family,[47] particularly in the refugee context, where travel to the country of origin is not possible and

[42] TPV holders will be lawfully capable of departing Australia but on that departure the TPV ceases and they will have no right of re-entry to Australia.
[43] that operated between 1999 and 2008
[44] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [6] and K. Jastram and K. Newland, "Family Unity and Refugee Protection", 555-603, in E. Feller, V. Turk, and F. Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (CUP, 2003), at 557.
[45] Ibid, at 558. See also Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [6].
[46] Excom Conclusions on International Protection Nos. 1, 9, 15, 24, 84, 85, 88, 103, 104, and 107.
[47] Summary Conclusions on Family Unity, Expert Roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, at [5].

family reunification may be the only feasible way to reunite. Respect for family unity is an important part of Australia's international obligations to provide rights to refugees who cannot avail themselves of protection and rights in their home countries and to facilitate durable solutions.[48]

5.2.10 The Bill seeks to create a further class of protection visa known as a Safe Haven Enterprise Visa (**SHEV**). The Bill does not specify any criteria for this new class and as the Explanatory Memorandum states, it is intended that the criteria and legal framework for this visa will be prescribed in the Regulations. The Explanatory Memorandum does not indicate what the characteristics of this new class of visa may be but the Minister's Second Reading Speech indicates that the intention is for those persons found eligible to be granted a SHEV, if they work in regional Australia without requiring access to income support for 3½ years there will be an expectation that they may be able to apply, if they meet eligibility requirements, for another substantive visa, temporary or permanent, other than a PPV.[49]

5.2.11 The SHEV proposal is clearly dependent on agreements with state and territory governments to sign up and support the scheme. To date there has been no evidence of any related discussions at a state/territory-federal level, let alone in principle agreements. RILC is also very concerned with the complete lack of clarity on what the government intends to amount to compliance with requirements. We are also very mindful of a similar scheme introduced by the Howard Government in 2004. As was the case then, only an extremely limited number of TPV holders were found to be eligible due to the visa criteria being intrinsically restrictive and onerous for the large majority of asylum seekers.

5.2.12 Although TPV-holders may be eligible to apply for SHEVs, in RILC's view, only an exceptionally small number of TPV holders would subsequently be found eligible for the grant of a permanent visa. As was the case with the similar scheme in the past, the criteria will be unattainable for the overwhelming majority and for these the prospect of a permanent visa through the proposed SHEV scheme will be merely illusory.

5.3 **Statutory cap on protection visas**

5.3.1 Schedule 7 to the Bill purports to introduce a statutory cap on the number of protection visas issued within a financial year and removes the 90 day processing requirement for the Department and the RRT and related Parliamentary reporting requirements. The Explanatory Memorandum states at [1449]-[1450] that this amendment is in response to the decisions of the High Court in *Plaintiff S297 of 2013* and *Plaintiff M150 of 2013*[50] and to ensure that "the onshore component of the Humanitarian Programme is appropriately managed". These two measures apply to *all* applicants for protection visas, irrespective of how they arrived in Australia or whether they had been immigration cleared on entry.

5.3.2 Providing protection to those who arrive at the border is a universally recognised exception to a State's orderly migration regime. Australia is obliged under international law to provide protection to those who arrive at the border and who meet the Refugee Convention criteria. A cap prohibiting the grant of further protection visas, for people found to be refugees,

[48] Ibid, at 558.
[49] House of Representatives, Second Reading Speech, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Thursday, 25 September 2014.
[50] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25.

abrogates this important responsibility and risks inflicting harm on people Australia is meant to protect by leaving them in limbo for prolonged periods. In RILC's experience, without being eligible for any visa, many affected will be held in indefinite detention while others will be released on Bridging visas with no right to work and no access to Medicare. This extended period of hardship and/or detention would occur despite the person already being found to be a refugee or owed protection under the complementary protection criteria.

5.3.3 Under the current legal framework, many of those affected would not be eligible to apply for any other visa and be entirely reliant on the Minister to grant them a Bridging visa to leave detention. To grant them a Bridging visa the Minister must exercise a non-compellable and non-delegable power under the Act. In RILC's experience this process can often take a significant period of time, sometimes many months and even up to a year. In this regard, the Minister's non-compellable and non-delegable discretion to release protection visa applicants from detention is not an adequate safeguard against this risk of protracted detention.

5.3.4 RILC also observes that previous governmental decisions freezing granting of protection visas has resulted in noticeable increases in self-harming behaviour and other mental and physical harm to those affected.

5.3.5 RILC is also profoundly concerned with the proposed removal of reporting requirements for protection visas. Currently, the Department and the RRT are required to report on instances where a decision has not been made on a protection visa within the mandated 90 day period. The Minister is then obligated to table in each House of the Parliament a copy of that report. The government's rationale for repealing these essential provisions is limited to: because "they consume time and resources without adding value to the overall government objectives".[51] This intent is entirely inconsistent with the Coalition government's policy in 2005 that motivated the insertion, which related to identifying the cause of delays and allowing scrutiny of the timeliness of protection assessments:

> *This will enable protection visa application processing to be more rigorously overseen at all stages of decision making to identify and minimise the impacts of any factors which could delay finalisation of applications.*[52]

5.3.6 As well as causing significant harm to persons in immigration detention, prolonged detention also represents a significant financial cost for the Australian government, and ultimately the tax payer. In this regard we note that the policy rationale of resource efficiency is not consistent with practical outcome. These provisions are also a fundamental tool for Parliament and the general public to be informed on, and scrutinise, instances of prolonged detention of asylum seekers.

5.4 **Retrospective stripping of legal rights**

5.4.1 Schedule 6 to the Bill deals with the rights of children born subsequent to the arrival of their parents in Australia or in an offshore processing country. The Bill provides that children born to parents considered to be 'unauthorised maritime arrivals' are also deemed to have this status, which has the consequence that they will also be subject to transfer to a regional

[51] House of Representatives, Second Reading Speech, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Thursday, 25 September 2014.
[52] Explanatory Memorandum, Migration and Ombudsman Legislation Amendment Bill 2005, at [35].

processing country;[53] subject to removal as a transitory person;[54] and will be prevented from applying for a permanent protection visa. Children born to asylum-seekers who arrived on or after 13 August 2012 are not expressly defined to be unauthorised maritime arrivals.[55]

5.4.2 These amendments would apply retrospectively stripping legal rights that may be owed to children. This in-turn may expose newborn and young children to a risk of mistreatment and danger to their well-being in the poor conditions of regional processing countries, *refoulement* (given the other flaws in the processing and removal processes), or an uncertain future on a TPV.

5.4.3 Australia owes obligations under the CRC to children within its territory, including substantive rights relating to their well-being and development, as well as a prohibition on *refoulement* to torture or to deprivation of life.[56] The Explanatory Memorandum states that the measures proposed are well-intentioned: that they will prevent the separation of parents and children. The duty under the CRC to maintain family unity must be exercised by reference to the child's best interests according to Article 3 of the CRC. In most cases, this would entail that the parents and children be permitted to stay together where protection obligations are owed, in Australia. Current arrangements under the Act take account of a child's best interests: until now the relevant provisions of the Act had largely been interpreted as permitting children born within the migration zone to apply for (permanent) protection visas, with parents able to be granted derivative visas where the child is owed protection obligations.

6 Impose legal duties on public servants to act contrary to domestic and international law.

6.1 The proposed amendments would impose legal obligations on public servants to engage in conduct that in some circumstances would be unlawful under domestic and/or international law.

6.2 Amendment to the removal power

6.2.1 The Bill purports to impose a legal duty on an officer to remove a non-citizen from Australia in circumstances including where they have not had their protection claims assessed according to law. This amendment is of profound concern as it not only further facilitates breaches of Australia's non-refoulement obligations but it also imposes a legal obligation on officers to do so.

6.2.2 As the Explanatory Memorandum states at paragraph [1146]:

> *…If an unlawful non-citizen satisfies one of the conditions specified in section 198, the officer must remove the unlawful non-citizen as soon as reasonably practicable and* ***it is not open to the non-citizen to challenge their removal on the basis that there has been no assessment of protection obligations according to law or procedural fairness.*** [Emphasis added]

[53] Subsection 198AH(1B)
[54] Subsections 198(1B) and (1C)
[55] This issue is due to be considered by the Federal Court shortly (on appeal from *Plaintiff B9/2014 v MIBP* [2014] FCCA 2348)
[2014] FCCA 2348
[56] See Articles 6 and 37 of the CRC.

6.2.3 The Bill seeks to negate the decisions of the High Court in *M61*[57] and *M70*,[58] which recognised that the Act was to be read as a scheme designed to fulfil Australia's international *non-refoulement* obligations, as well as subsequent Federal Court decisions protecting plaintiffs from removal in circumstances which would have breached those obligations.[59] The proposed amendments attempt to remove any link between the removal power in the Act and other provisions governing the implementation of Australia's protection obligations. In seeking to remove this link, the amendments not only provide that an officer is not bound to consider whether or not a person subject to removal breaches Australia's *non-refoulement* obligations, but the amendments even go so far as to impose a legal duty on that officer to remove the person irrespective of whether that action would unlawful under Australian or international law. This amendment would also result in that officer having to remove the relevant non-citizen as a matter of haste, "soon as reasonably practicable".[60] This amendment is of profound concern as it not only authorises public servants to act urgently in a way that might be unlawful and may result in a person being exposed to serious human rights abuses, but it imposes a strict legal duty for those public servants to act in such a way.

6.2.4 Although the Explanatory Memorandum contends at [1142]-[1146] that the assessment of protection obligations would in practice be carried out through other processes, this duty on public servants to remove as soon as reasonably practicable and this policy to wait for an assessment of protection claims (which can take the Department many months, and in some instances, years, to undertake) are clearly at odds with each other.

6.2.5 By way of example to illustrate the consequences, consider a People's Republic of China citizen of Uyghur ethnicity with no English language skills who arrives in Australia on a visitor visa for the purpose of attending a Uyghur cultural event. At that event she comes to the adverse attention of the Chinese authorities such that she is now at risk of torture and/or unlawful detention and interrogation in China if she returns. She applies for a further visitor visa to extend her stay in Australia with the help of a friend but this is refused. She now has no visa and is consequently detained by a Departmental officer under s.189 because she is unlawful. Through an interpreter she explains to the Departmental officer the reasons why she fears returning to China but her lack of English language prevents her from completing the mandatory forms for a protection visa. Under the current legal framework, the duty on the Departmental officer to remove her to China as soon as reasonably practicable would be suspended pending an assessment of her protection claims under law (this might happen through a request to a not-for-profit community legal centre such as RILC to provide professional immigration assistance). In contrast, under the proposed statutory framework, there would be a legal duty on the Departmental officer requiring the woman's forced removal to China as soon as reasonably practicable. If that officer opted to follow the proposed policy referred to in the Explanatory Memorandum and sought to wait for her protection claims to be assessed he or she would be doing so in breach of his or her legal obligations under the Act, that is, they would be acting unlawfully under the proposed amendments. If the Departmental officer sought to comply with the proposed amendments and remove the woman to China, Australia would be in breach of its international *non-*

[57] *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41.
[58] *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[59] For example, *MIBP v SZQRB* [2013] FCAFC 33 (20 March 2013)
[60] See s.198

refoulement obligations, and ultimately be responsible for exposing an innocent person to torture, detention and possibly death.

6.2.6 RILC notes that while States retain some discretion in choosing how to implement their international obligations in domestic legislation, they are prohibited from doing where that legal framework obligates its agents to violate those obligations without providing any corresponding legal protection against such violations. Reliance on a policy that is inconsistent with legal obligations to avoid such violations is entirely inappropriate, and as discussed above, would likely be unlawful. Further, the proposed amendment is antithetical Australia's non-refoulement obligations which are absolute.

6.3 **Maritime Powers**

6.3.1 The *Maritime Powers Act 2013* gives Australian personnel powers to investigate breaches of, and ensure compliance with, the Migration Act and other relevant laws. This includes powers to board vessels, detain and transport vessels and the people within vessels. The Bill seeks to remove existing limitations, including those of international or other countries' laws, on the exercise of the powers under that Act. The Bill also seeks to remove from any judicial scrutiny the broad Ministerial powers to direct personnel to detain and transport vessels and people. The Bill expressly states that no civil or criminal proceeding can be brought, and it also proposes to make any review of the exercise of powers difficult or impossible due to the terms of the amendments, which seek to make international and domestic law irrelevant considerations and make the only relevant consideration for the exercise of a power the vague and undefined 'national interest'. The amendments are a direct and obvious attempt to ensure that a case challenging the detention powers, such as the current case before the High Court[61] is not brought again.

6.3.2 Although the Bill attempts to ensure that cases cannot be brought to court on the basis of violations of any domestic or international law, it is not possible to oust the jurisdiction of the High Court and public servants may well be exposed to claims under the High Court's original jurisdiction in relation to unlawful detention or wrongful imprisonment. Following this, there are serious questions as to the practical effect of these amendments.

6.3.3 In RILC's view, Australia will still be responsible as a matter of international law for breaches of its international obligations. Persons on the high seas or in Australian waters who are intercepted by Australian personnel are the responsibility of the Australian government. Australian officials who intercept, detain and/or transport people at sea have 'effective control' over those persons as a matter of jurisdiction under international law. Australia's duty not to *refoule* persons to serious harm is engaged at that point. Australian officials who fail to investigate whether the persons they detain at sea are seeking asylum, fail to hear claims, and who remove persons to their home country or to third countries, which may return those people to their home country, will be responsible for direct or indirect *refoulement* to persecution or other human rights abuses. Despite the terms of the Bill, Australia cannot avoid its part in a chain in which gross human rights abuses occur.[62]

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[61] *CPCF v Minister for Immigration and Border Protection (Plaintiff S169 of 2014)*.

[62] For a full explanation of Australia's obligations and the way in which they are engaged, see for example the *Submission of the Office of the United Nations High Commissioner for Refugees Seeking Leave to Appear as Amicus Curiae* (15 September 2014) in relation to *CPCF v Minister for Immigration and Border Protection (Plaintiff S169 of 2014)*, which was heard by the High Court of Australia on 14 and 15 October 2014.

6.3.4 In sum, these wide Ministerial powers give *carte blanche* to delegates of the Minister, subvert the rights of individuals seeking protection, and risk endangering the safety of these individuals at sea, as well as the safety of Australian personnel involved. Because the Bill removes limitations on such powers outside Australian waters and would permit the transport of persons to third countries without regard to any agreement with the third country, international relations with other countries in the region may well be adversely impacted.

7 Conclusion

7.1 RILC is profoundly concerned that the amendments proposed by the Bill represent a legislative package which would involve the most radical repudiation of Australia's international obligations to refuges and other persons in need of international protection since the Second World War.

7.2 These measures also represent a wholly unwarranted and radical deviation from fundamental principles of the rule of law under the Australian legal system. Principal amongst them is the right to a fair hearing. The provisions of the Bill would abandon this vital safeguard which has long been considered in this country and internationally, as a basic and essential pre-requisite for fairness, justice and the protection of individual rights under a constitutional democracy. Fundamentally, the amendments proposed would collectively substantially increase the risks of Australia being responsible for exposing people to serious human rights abuses; people who we have a duty to protect.

7.3 Ultimately, these measures risk gravely undermining Australia's authority and reputation in relation to respect and promotion of human rights and refugee protection in the international arena. For these reasons we submit that the Act not be amended in the way proposed by the Bill.

Refugee and Immigration Legal Centre Inc.

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