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Dear Committee Secretary,

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

We welcome the opportunity to provide a submission to the Committee's Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth). Our submission focuses on the international law dimensions of the Bill, although we also comment briefly on some other aspects of the Bill.

Several aspects of the Bill risk undermining, and at times directly violating, Australia's international law obligations.

We recommend that the Bill should **not** be passed. Our principal concerns include that:

- the Bill expressly empowers the Minister to detain people on the high seas and transfer them to countries even if this would amount to *refoulement*, and in circumstances that would also violate the international legal prohibition on arbitrary detention;
- the Bill authorizes other violations of Australia's *non-refoulement* obligations under international law, including the return of people to persecution or other forms of significant harm;
- by seeking to remove references to the *1951 Convention relating to the Status of Refugees* from the *Migration Act 1958* (Cth), the Bill fundamentally misunderstands the system of international law in general, and treaty interpretation in particular;
- the Bill's provisions for 'fast tracking' decisions by removing or limiting access to merits review significantly increase the risk of *refoulement*, and may also constitute an unlawful penalty for asylum seekers who arrive irregularly;
- the Bill provides for the detention and transfer to regional processing countries of children who are born to 'unauthorised maritime arrivals' and 'transitory persons' in Australia, and also potentially restricts such children's access to immediate birth registration and the acquisition of a birth certificate;
- by enabling the Minister to 'cap' the number of protection visas, the Bill would allow arbitrary and prolonged detention.

Please do not hesitate to contact us if we can provide any further information.

Yours sincerely,

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1 Overview

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Bill) proposes a number of sweeping changes to Australia's treatment of asylum seekers and the refugee status determination system. These include:

- removing most references to the *1951 Convention relating to the Status of Refugees* (Refugee Convention) from the *Migration Act 1958* (Cth) (Migration Act) and instead creating a 'new, independent and self-contained statutory framework' which sets out Australia's own interpretation of its protection obligations under the Refugee Convention;
- introducing a requirement that officers remove asylum seekers even where removal could breach Australia's *non-refoulement* obligations;
- granting the Minister of Immigration and Border Protection (Minister) extraordinary powers to detain people at sea, including on the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, without parliamentary scrutiny and with very limited possibilities for judicial review;
- introducing a differentiated system for reviewing protection decisions, with some asylum seekers being denied any independent merits review and others being denied access to the Refugee Review Tribunal (RRT);
- re-introducing Temporary Protection Visas (TPVs) and creating a new Safe Haven Enterprise Visa (SHEV); and
- placing a 'cap' on the number of protection visas that can be issued in any one year, allowing the Minister to suspend processing of protection visas once the 'cap' is reached.

These changes would not only fundamentally change the character of Australia's asylum system, but also expose Australia to the risk of violating international law.

Our submission proceeds in order of the Bill's Schedules.

2 Schedule 1: Powers to detain and transfer on the seas

2.1 Summary of change

Schedule 1 proposes amendments to the *Maritime Powers Act 2013* (Cth) (MPA). It seeks to grant the Minister extraordinary powers to detain people at sea, including on the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, without parliamentary scrutiny and with very limited possibilities for judicial review.

The purpose of the Schedule is to authorize actions similar to those undertaken by the Australian Government in mid-2014 with respect to two boats carrying Sri Lankan asylum seekers. The asylum seekers on the first boat were subjected to a cursory screening process, then handed over to Sri Lankan authorities at sea. The asylum seekers on the second boat were detained at sea for four weeks, with attempts made to transfer them to Indian authorities. They were ultimately transported to Nauru. The High Court is currently considering the legality of the Australian government's actions with respect to the second boat.[1] Since Schedule 1 of the Bill will not have retrospective effect it cannot directly affect

[1] *CPCF v Minister for Immigration and Border Protection & Anor*, Case No. S169 of 2014.

the outcome of that case,[2] but it would provide a statutory basis for authorizing any similar actions the Government might take in the future.

2.2 Concerns

Failure to consider or comply with Australia's international law obligations

First, we are very concerned that Schedule 1 expressly provides that a failure to consider Australia's international law obligations – or, indeed, to act consistently with such obligations – will not invalidate the exercise of powers under the MPA.[3]

The Explanatory Memorandum states that the intention of the provision is that:

> as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers to give an authorisation under Division 2 of Part 2 of the MPA.[4]

We have grave concerns about any legislative provision that seeks to oust consideration of Australia's international law obligations from judicial or parliamentary scrutiny in this way. It also suggests a disregard for obligations that Australia has undertaken vis-à-vis other States, in noting 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'.[5]

In fact, the terms of the Bill go far beyond merely 'interpreting' or 'applying' international law obligations, to in fact authorizing officers to ignore or potentially even breach international law. For instance, proposed section 75A of the MPA provides that the exercise of a power is not invalid

(a) because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or
(b) because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or
(c) because the exercise of the power is inconsistent with Australia's international obligations.

This section (and other sections in similar terms[6]) cannot properly be characterized as an 'interpretation' or 'application' of Australia's international law obligations. They are designed to prevent any breach of international law from being challenged domestically.

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[2] Schedule 1 of the Bill is also expressed as not intending to affect, by implication, the interpretation of the Act prior to commencement: Sch 1, Pt 3, item 39(5).
[3] Proposed amendment to s 7 and proposed ss 22A, 75A and 75C(1)(b)(ii) of the MPA. The proposed amendment to s 7 would omit the recognition that the exercise of powers outside Australia is limited by international law; proposed ss 22A and 75A provide that the exercise of certain powers is not invalid because of a failure to consider Australia's or another State's international obligations, a defective consideration of those obligations or an inconsistency with Australia's international obligations; proposed s 75C(1)(b)(ii) provides that an asylum seeker may be transferred to a place 'irrespective of the international obligations or domestic law of any other country'.
[4] Explanatory Memorandum, para 16.
[5] Explanatory Memorandum, para 17.
[6] For example, proposed s 22A of the MPA.

Extraordinary powers of the Minister, unconstrained by parliamentary or judicial oversight

Secondly, Schedule 1 of the Bill confers on the Minister sweeping powers to detain people on the high seas and return them to any country he or she chooses, without any scrutiny by Parliament and with virtually no scrutiny by the courts.[7] The only constraint on the Minister's power is that he or she considers its exercise to be in the 'national interest'.[8] This test is wholly discretionary and not amenable to judicial review by the courts.[9]

The sweeping and unconstrained powers which Schedule 1 seeks to confer on the Minister are particularly concerning in light of proposed amendments providing that:

- a person has no right to natural justice with respect to a decision to take them somewhere;[10]
- a person may be taken to any country, even if Australia does not have an arrangement with that country, and 'irrespective of the international obligations or domestic law of any other country';[11] and
- detention may be authorized 'for any period reasonably required' to decide where to take asylum seekers, to negotiate entry elsewhere, or for other logistical reasons. A note to proposed section 69A(1) makes clear that this period may be longer than 28 days.[12]

These and other provisions carry a significant risk of violating both international law and fundamental principles of Australian law, since they may authorize:

- violations of the well-established rule that an asylum seeker may only be transferred somewhere else where Refugee Convention rights will be respected;[13]
- violations of the individual right to a fair hearing and basic principles of procedural fairness;
- intrusions on the sovereignty of other States by transferring asylum seekers without the agreement of those States;[14] and
- violations of the prohibition on arbitrary detention under international human rights law.[15]

Possible violations of international law of the sea

Thirdly, proposed section 75D of the MPA uncouples the grounds for detention of a foreign-flagged vessel on the high seas from those authorized by the international law of the sea. In

[7] Already there remains only the possibility of review by the High Court under its original jurisdiction, as other legal proceedings in respect of detention are excluded by s 75 of the MPA.
[8] Proposed ss 75F(5), 121(1) of the MPA. The maritime officer must comply with such a direction except if there is an inconsistent superior order or the officer reasonably believes it is unsafe to comply: proposed s 75G(1) of the MPA.
[9] As the High Court recently affirmed, '[w]hat is in the national interest is largely a political question': *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014) at [40].
[10] See proposed ss 22B, 79, 93(1), 93(3) of the MPA.
[11] See proposed s 75C(1)(b) of the MPA.
[12] See proposed ss 69A, 72A of the MPA.
[13] See for example, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
[14] There are insufficient safeguards in s 40 of the MPA to make clear that, as a matter of international law, Australia must not engage in any act in another State (which includes the State's territorial sea and archipelagic waters) that would breach the sovereignty of that State.
[15] See for example, *1966 International Covenant on Civil and Political Rights* (ICCPR), art 9(1); *Universal Declaration of Human Rights* (UDHR), art 9; *1989 Convention on the Rights of the Child* (CRC), art 37(b); *2007 Convention on the Rights of Persons with Disabilities,* art 14(1)(b). For information about the right to detain vessels under international law, see the following section.

other words, the Bill authorizes detention on grounds that are not permitted by the law of the sea. Any such detention could be challenged in the international arena (for example, before the International Tribunal on the Law of the Sea or the International Court of Justice) on the basis of unlawful interference with foreign vessels. An adverse finding against Australia on this basis would not serve Australia's international reputation well,[16] especially at a time when Australia is seeking to enhance its role on the international stage.[17]

Further, under proposed section 75H of the MPA, the *Navigation Act 2012* (Cth), the *Shipping Registration Act 1981* (Cth) and the *Marine Safety (Domestic Commercial Vessel) National Law Act* 2012 (Cth) would no longer apply in relation to vessels detained under section 69 of the MPA or used to detain and/or take persons to another place within or outside Australia pursuant to sections 72(4) and (5). Proposed section 75H is of concern because:

- Australia is required by article 94 of the *1982 United Nations Law of the Sea Convention* (UNCLOS) to maintain a register of vessels flying its flag, and the *Shipping Registration Act* governs this process domestically; and
- the *Navigation Act* and the *Marine Safety (Domestic Commercial Vessel) National Law Act* are intended to ensure safety of navigation and the safety of life at sea, and to give effect to Australia's obligations on these matters under UNCLOS, the *1974 International Convention on the Safety of Life at the Sea* (SOLAS), and the *1979 International Convention on Maritime Search and Rescue* (SAR Convention).

Accordingly, not applying the abovementioned domestic laws is not only at odds with the suggestion in the Explanatory Memorandum that measures authorized by the MPA (as amended by the Bill) are directed towards preventing the loss of lives at sea, but also risks violating Australia's obligations under a number of treaties.

Expansion of powers of maritime officers

Fourthly, the Explanatory Memorandum claims that the proposed amendments to the MPA 'do not seek to create new powers beyond what is already available to maritime officers – instead, they clarify the intended operation of those powers and their relationship with other law'.[18] However, given that the MPA as it currently stands recognizes that '[i]n accordance with international law, the exercise of powers is limited in places outside Australia' (section 7), and this Bill proposes to dismiss that limitation, this Bill could in fact expand the powers of maritime officers by purporting to remove the limits placed upon them by international law.

[16] Under international law, the fact that Australia's domestic legislation authorizes certain activities would not be a defence to a claim that those activities breach international law. The *1969 Vienna Convention on the Law of Treaties* (VCLT) provides that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty': art 27. The International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) also provide that 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law': art 3.

[17] For example, Australia's bid for a seat on the UN Human Rights Council in 2018 could be negatively impacted if Australia demonstrates an unwillingness to comply with fundamental principles of international law.

[18] Explanatory Memorandum, Outline, p 5.

3 Schedules 2 and 3: Temporary Protection Visas

3.1 Summary of change

Schedules 2 and 3 seek to amend the Migration Act to allow for the reintroduction of TPVs, and the creation of a new visa, the SHEV.

3.2 Concerns

TPVs do not provide sustainable solutions for refugees. They risk exacerbating (and creating) psychological problems for refugees because of the legal limbo in which they leave people. They also breach article 1C of the Refugee Convention by requiring a new protection application to be made each time a TPV expires, rather than the onus falling on the government to demonstrate (in accordance with article 1C) that there has been a fundamental change to the circumstances in the country of origin that removes the risk of persecution for the individual concerned.

Such visas may additionally:

- breach article 31 of the Refugee Convention, by penalizing irregular arrivals;
- breach the principle of non-discrimination, by creating two classes of asylum seekers;[19]
- infringe the right to family life and freedom from arbitrary interference with family life;[20] and
- constitute cruel, inhuman or degrading treatment in breach of article 7 of the *1966 International Covenant on Civil and Political Rights* (ICCPR) and article 37(a) of the *1989 Convention on the Rights of the Child* (CRC) (as a result of the cumulative effect of these factors, together with what is known about the adverse mental health impacts of temporary protection).

The details of the proposed SHEV have not been set out. What we know from the Minister's public remarks and second reading speech is that TPV holders will have the opportunity to transition to a five-year SHEV if they agree to move to a regional area (yet to be defined) and engage in study at an approved institution (yet to be defined), or undertake work that means they are not reliant on income support for more than 18 months in the five-year period. At the end of the five years, they will be eligible to apply for a standard onshore migration visa giving rise to permanent residence.

However, statements by the Minister suggest that the SHEV is not intended as a solution for many people. He has indicated that the threshold for applying for a migration visa will be very high, and has said of those who may wish to apply for one, 'good luck to them'.[21] No

[19] Non-discrimination is a fundamental principle underlying both international refugee and human rights law. For example, the ICCPR affirms that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination *on any ground*': art 26 (emphasis added). Differential treatment is prohibited as discriminatory unless 'the criteria for such differentiation are reasonable and objective and… the aim is to achieve a purpose which is legitimate under the [ICCPR]': UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, http://www.refworld.org/docid/453883fa8 html, para 13. In light of the extreme disadvantage and hardship which TPVs place on asylum seekers, and the fact that they do not meet or resolve the protection needs of asylum seekers, temporary protection cannot be justified under international law and constitutes unlawful discrimination.

[20] ICCPR, art 17; UDHR, art 12; CRC, art 16.

[21] At a press conference in Canberra on 26 September 2014, the Minister stated 'Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to

analysis has been undertaken as to the likelihood of a refugee qualifying for an existing onshore visa.

Our primary concern is that the SHEV 'pathway' attempts to convert humanitarian protection (based on treaty obligations) into a discretionary skilled migration program, through which Australia can pick and choose which refugees (if any) remain permanently. It will leave many refugees, in particular the most vulnerable, without the possibility for permanent protection.

4 Schedule 4: Limiting or excluding access to merits review

4.1 Summary of change

Schedule 4 limits certain asylum seekers' access to merits review of decisions about their protection status. It proposes to characterize asylum seekers who arrived irregularly by boat on or after 13 August 2012 as 'fast track applicants', and to create a new statutory body called the Immigration Assessment Authority (IAA), which will be constituted by members of the RRT.[22]

Fast track applicants will no longer have access to the RRT, and instead will only be entitled to a review on the papers – that is, without a hearing – by the IAA.[23] The IAA reviewer will not be permitted to take into account new evidence or claims other than in exceptional circumstances.[24] This review process is said to have the objective of being 'efficient and quick' – omitting the RRT's other objectives of being 'fair and just'.[25]

A subset of this 'fast track' group, defined as 'excluded fast track review applicants', will not have access even to this very curtailed form of review.[26] Instead, they will only have access to an internal review by the Immigration Department. (Although such review is not guaranteed by the legislation, we understand that this is the intention.) Those who will fall into this category include asylum seekers:

- considered to have arrived on a 'bogus' document 'without reasonable explanation';
- considered to have made a 'manifestly unfounded claim for protection';
- who were previously refused protection in Australia or elsewhere by UNHCR or another country;
- who are considered to have come from a 'safe third country' or have access to 'effective protection' in another country.[27]

In addition, proposed section 473BD seeks to give the Minister a further power to issue a 'conclusive certificate' preventing individual decisions from being changed or reviewed, on

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do that and if they achieve it' (transcript available at http://www.minister.immi.gov.au/media/sm/2014/sm218131 htm).

[22] Proposed amendments to s 5(1) of the Migration Act inserting definitions of 'fast track applicant' and 'Immigration Assessment Authority', and proposed s 473JA.

[23] Proposed s 473DB of the Migration Act.

[24] Proposed s 473DD of the Migration Act.

[25] See proposed s 473FA(1) of the Migration Act; cf Migration Act, s 420.

[26] Proposed amendment to s 5(1) of the Migration Act inserting definition of 'excluded fast track review applicant', together with proposed ss 473BA, 473BB. Under proposed s 473BC the Minister may determine, by legislative instrument, that a decision to refuse to grant a visa to an 'excluded fast track review applicant' or a specified class of such applicants should be reviewed by the IAA.

[27] Proposed amendment to s 5(1) of the Migration Act inserting definition of 'excluded fast track review applicant'.

the basis that a change or review would be 'contrary to the national interest'.[28] We understand that a number of conclusive certificates have already been issued.

Finally, it is expected that the *Migration Regulations 1994* (Cth) will be amended to introduce a new 'Code of Procedure' that will include the timeframes that will apply to review by the new IAA.[29] While the exact timeframes are still unknown, the Coalition's policy before the 2013 election provided indicative guidance: an initial decision would be made within 14 days, a 'rapid review' of adverse decisions would be conducted within another 14 days, and removal (where appropriate) would take place within 21 days thereafter.[30] The Code of Procedure is also intended to codify the obligations of the IAA reviewer to provide natural justice to applicants.[31]

4.2 Concerns

These amendments, especially when considered alongside the Migration Amendment (Protection and Other Measures) Bill 2014, create a significant risk of Australia breaching its *non-refoulement* obligations. As set out fully in the Andrew & Renata Kaldor Centre for International Refugee Law's submission to the inquiry into the other Bill,[32] a sufficiently robust refugee status determination procedure is an essential precondition for ensuring compliance with the Refugee Convention. If the procedure is inadequate, then there is a high risk that refugees will be returned to persecution or other significant harm in breach of international law.

This risk can be substantiated by evidence. Historically, the RRT has overturned between 20–37 per cent of decisions made by the Immigration Department.[33] Further, when a separate independent merits review process was developed specifically for irregular maritime arrivals, that process overturned the vast majority of decisions made by the Immigration Department (at times up to 100 per cent, but generally between 70–80 per cent – see Table below). These figures illustrate the importance of careful oversight of first-instance decisions, especially in the politicized environment concerning irregular maritime arrivals.

The risks created by introducing an extremely limited form of merits review for certain classes of asylum seekers are compounded by the very tight timeframes that are likely to be applied. By its nature, the process for determining whether a person is a refugee is complex and difficult, and an error can result in grave consequences for the individual concerned. It is not reasonable to expect that such decisions can be made adequately within two weeks. These risks are compounded now that asylum seekers are not entitled to funded legal assistance.

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[28] Proposed section 473BD of the Migration Act.
[29] Explanatory Memorandum, para 894.
[30] Liberal Party of Australia and National Party of Australia, *The Coalition's Policy to Clear Labor's 30,000 Border Failure* Backlog (August 2013) , http://lpaweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf, pp 7–8. This compares with the current processing target of 90 days: Migration Act, s 65A. Schedule 7 of the Bill seeks to repeal this provision: Schedule 7, Pt 1, item 4. It is also noted that although the median processing time was 89 days, in 2012-2013 only 51% of decisions were made within this period (this figure does not apply to assessments made in relation to irregular arrivals): Department of Immigration and Citizenship, *Annual Report 2012-2013*, http://www.immi.gov.au/about/reports/annual/2012-13/html/performance/outcome_2/protection_visas_onshore.htm.
[31] Explanatory Memorandum, para 894.
[32] Andrew & Renata Kaldor Centre for International Refugee Law, *Submission to the Senate Legal and Constitutional Affairs Committee concerning the Migration Amendment (Protection and Other Measures) Bill 2014,* 4 August 2014, http://www.kaldorcentre.unsw.edu.au/node/362.
[33] These statistics are taken from the Department of Immigration's annual reports.

Table: Overturn rate of Immigration Department decisions concerning irregular maritime arrivals, by country of citizenship

Citizenship	2009-10	2010-11	2011-12	2012-13
Afghanistan	n/a	90.7%	92.8%	84.5%
Iran	100.0%	83.9%	79.1%	62.5%
Sri Lanka	39.5%	72.9%	82.3%	44.0%
Pakistan	66.7%	76.9%	78.9%	83.1%
Stateless	100.0%	92.3%	88.6%	71.7%
Iraq	92.9%	82.7%	77.7%	60.0%
Total	**67.9%**	**87.5%**	**85.3%**	**66.4%**

Source: Department of Immigration and Citizenship, *Asylum Trends 2012–2013*, Table 33.

We are also very concerned by the Minister's proposed power to issue conclusive certificates preventing individual decisions from being changed or reviewed.[34] This power is wholly discretionary and no legislative criteria are set down to guide or limit the application of the 'national interest' test. This provision could potentially empower the Minister to prohibit merits review of all decisions refusing to grant a protection visa. In light of the above statistics on the overturning of initial decisions, such an outcome would undermine the quality of Australia's refugee status determination procedure as a whole, and risk violating Australia's *non-refoulement* obligations if claims are not properly assessed and asylum seekers are returned to countries where they fear persecution or other significant harm.

Further, the inclusion of the power to 'exclude fast track review applicants' considered to have arrived on a 'bogus' document 'without reasonable explanation' reveals a lack of awareness about the nature of refugee flight, including the difficulties refugees face in obtaining identity and travel documents. It is may contravene article 31 of the Refugee Convention and the requirement that Australia implement its treaty obligations in good faith.[35]

Finally, it is questionable whether the creation of a differentiated system for reviewing protection decisions represents sound public policy or sound administrative efficiency. It is clear that legislation cannot oust the original jurisdiction of Chapter III courts, and reducing the possibility for robust merits review is more likely to lead to incorrect decision-making that is liable to judicial review, as evidenced by the failure of the so-called 'non-statutory' processing system established by the former government on Christmas Island.[36]

The United Kingdom's 'DFT' process compared

The policy of 'fast tracking' has been inspired by the United Kingdom's Detained Fast Track system (DFT).[37] However, the context and the practice of 'fast tracking' procedures in the United Kingdom are very different from those proposed in the Bill. These differences include the following:

[34] Proposed section 473BD of the Migration Act.
[35] VCLT, arts 26 and 31.
[36] *M61/2010 v Commonwealth of Australia & Ors* [2010] HCA 41.
[37] Liberal Party of Australia and National Party of Australia, above note 30, p 7.

- the DFT was said to be justified by both a continuing and dramatic surge in asylum applications, and alleged 'abuse' of the system. Neither of these justifications is relevant in Australia, where irregular arrivals have been found overwhelmingly to be refugees;[38]
- unlike the fast track process proposed in the Bill, the DFT policy includes an entitlement to funded legal advice and representation, and access to the full review system (including judicial review), albeit in a compressed timeframe;
- the key selection criterion for the DFT is that 'it appears that a quick decision is possible',[39] whereas in Australia 'fast tracking' would apply to all 'unauthorised maritime arrivals' arriving on or after 13 August 2012;[40]
- unlike the fast track process proposed in the Bill, the DFT policy excludes categories of vulnerable asylum seekers, including children, families, pregnant women,[41] victims of trafficking or torture, persons with a disability, persons with a physical or mental health condition that cannot adequately be dealt with in detention, and those who clearly lack the mental and cognitive capacity to understand the process and/or present their claim;[42] and
- the DFT policy requires on-going consideration of the need for greater flexibility in the timetable,[43] or removal from DFT into the regular process, where fairness demands it,[44] whereas no such provision is made under the proposed Australian system.

The practice of the DFT also highlights the significant problems involved in 'fast tracking'. Notwithstanding the safeguards built into the United Kingdom's system (which are absent from the Bill), the DFT has been subject to significant criticism from various stakeholders, including those charged with its oversight. The Chief Inspector of the UK Border Agency has noted that 'fast tracking' is not as fast as claimed in practice, and has criticized the 'significant disparity' between published timescales and the reality.[45] The UK Home Affairs Committee and the UK Joint Committee on Human Rights have also criticized the DFT's operation, noting that it is likely to prejudice vulnerable groups, such as victims of sexual abuse or torture, who are unlikely to communicate their claims to a stranger in a short time period, especially if they are denied access to legal advice and support services.[46]

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[38] Between 2008-2013, the final refugee recognition rate for irregular arrivals by boat ranged from 88% to 100%: see Department of Immigration and Citizenship, *Asylum Trends 2012-2013*, https://www.immi.gov.au/media/publications/statistics/immigration-update/asylum-trends-aus-2012-13.pdf, Table 34.

[39] United Kingdom Government, UK Visas and Immigration, *Detained Fast Track Processes: Instruction*, 11 June 2013, https://www.gov.uk/government/publications/detained-fast-track-processes-instruction, para 2.1.

[40] See proposed s 5(1). For example, it is hard to see how the provision of 'bogus documents' would make it an easier case to resolve. In fact, this condition is likely to make it more difficult, as the asylum seeker's identity would need to be established.

[41] For pregnant women who are 24 or more weeks pregnant.

[42] United Kingdom Government, UK Visas and Immigration, above note 39, para 2.3.

[43] Ibid., para 2.1.1.

[44] United Kingdom Government, UK Visas and Immigration, *Detained Fast Track Processes – Timetable Flexibility: Asylum Instruction,* 11 November 2012, https://www.gov.uk/government/publications/detained-fast-track-processes-timetable-flexibility-instruction, para 2.1.

[45] John Vine, *Asylum: A Thematic Inspection of the Detained Fast Track, July–September 2011*, 23 September 2012, http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf, pp 3, 23, 25.

[46] United Kingdom House of Lords and House of Commons, Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006-2007, HL 81/HC 60, 30 March 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm, para 226. The Home Affairs Committee expressed concern over the high rate of people wrongly placed on the DFT (around a third), and noted the risk that the model was 'too dependent on decisions made at a very early stage in the process which might, as further information becomes available, turn out to have been based on mistaken assumption': United Kingdom House of Commons, Home Affairs Committee, *Asylum,* Seventh Report of Session 2013-2014, HC

Finally, the High Court of England and Wales held earlier this year that the DFT process 'carrie[d] an unacceptably high risk of unfairness' because of the limitations on access to legal advice and representation.[47] This risk of unfairness would be exacerbated in Australia given that irregular arrivals in Australia are no longer entitled to funded legal advice or representation.

5 Schedule 5, Part 1: *Non-refoulement* obligations and removal

5.1 Summary of change

Part 1 of Schedule 5 seeks to amend the Migration Act so that an officer must remove an unlawful non-citizen under section 198 even if that would violate Australia's *non-refoulement* obligations.

The Part is intended to overturn two court decisions: the decision of the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 and the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

5.2 Concerns

The Statement of Compatibility with Human Rights attached to the Bill claims that the introduction of this provision 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'.[48]

This statement is inaccurate. Section 198 requires removals to be carried out in a range of circumstances, including where people may not have applied for visas or had their protection needs considered through a visa process at all. It also relies upon the Minister exercising his or her personal, non-compellable and non-reviewable discretion to decide that it is in the 'public interest' to grant a visa where there is a risk that removal will breach Australia's *non-refoulement* obligations. A mere discretion to consider *non-refoulement* obligations is insufficient to comply with the absolute and non-derogable requirement under international law that Australia will not expose people to a real risk of torture; cruel, inhuman or degrading treatment or punishment; the death penalty; or arbitrary deprivation of life. This point is detailed in the submission of 21 refugee law experts to the Senate Legal and Constitutional Affairs Committee inquiry into complementary protection.[49]

Other issues of concern include that the proposed amendment:

- not only authorizes possible violations of Australia's international obligations, but may indeed require that violations be committed in certain cases, because it requires removal even if Australia's *non-refoulement* obligations have not been considered;

71, 11 October 2013, http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71.pdf, paras 36, 66.

[47] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), [197].

[48] Statement of Compatibility with Human Rights, p 28.

[49] Professor Jane McAdam et al, *Submission to the Senate Legal and Constitutional Affairs Committee: Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013,* Submission No. 4, 6 December 2013, http://www.aph.gov.au/Parliamentary Business/Committees/Senate/Legal and Constitutional Affairs/Migration Amendment bill/Submissions, pp. 4-6.

- creates a real risk of *refoulement* because, as discussed above, there are circumstances where such obligations will not have been previously considered; and
- fundamentally misunderstands the nature of international law and the domestic implementation of treaty obligations.

While States have some discretion in choosing how to implement their international obligations, they cannot introduce legislation that requires violations to be committed without any corresponding legal protection against such violations, and which relies solely on a political promise to comply with obligations as a matter of executive discretion.

6 Schedule 5, Part 2: Removing references to the Refugee Convention

6.1 Summary of change

Part 2 of Schedule 5 of the Bill seeks to 'clarify Australia's international law obligations', including by codifying the definition of a refugee. Part 2 seeks to remove most references to the Refugee Convention from the Migration Act and instead create a 'new, independent and self-contained statutory framework' which sets out Australia's own interpretation of its protection obligations under the Refugee Convention. The Minister has stated that the intention of these amendments is to ensure that the Australian Parliament defines Australia's international obligations.[50] The Statement of Compatibility with Human Rights also reveals that a key concern of these provisions is that 'judicial interpretation of specific provisions has not been consistent with the Government's intended interpretations'.[51]

6.2 Concerns

Our concerns arising from the proposed new definition of a refugee include that it:

- alters the definition of a refugee in a way which may be inconsistent with international refugee law, and which therefore creates risks of Australia violating its obligations under the Refugee Convention;
- confuses and conflates the separate concepts of 'persecution' and 'protection';
- replaces the concept of State protection with a different and lesser standard;
- introduces the possibility that non-State actors can be sources of protection;
- provides no requirement that protection be stable, effective or durable;
- fundamentally misunderstands the system of international law in general, and treaty interpretation in particular, amounting to an isolationist approach which is fundamentally at odds with the purpose of international law; and
- excludes Australian courts from interpreting Australia's obligations under the Refugee Convention, in a way which could be seen as undermining the rule of law in Australia by overtly attempting to interfere with the independent judiciary's interpretation of our international protection obligations.

(a) Different definition from that in the Refugee Convention

We have two major concerns with the Bill's purported attempt to codify Australia's international obligations by defining a 'refugee'.

[50] Scott Morrison MP, 'Interview with Chris Uhlmann', *ABC AM Programme*, 25 September 2014, http://www.minister.immi.gov.au/media/sm/2014/sm218187 htm.
[51] Statement of Compatibility with Human Rights, p 28.

First, the Bill attempts to create an Australian system of refugee law that is independent and insulated from international refugee law and the Refugee Convention. Article 42 of the Refugee Convention expressly provides that no reservations can be made with respect to the definition of a refugee in article 1; hence Australia continues to be bound as a matter of international law to interpret correctly the definition set out in the Refugee Convention.[52] Australia is not permitted to invoke a provision of its domestic law to justify a failure to perform a treaty obligation.[53]

Accordingly, it is not open to Australia as a party to the Refugee Convention to devise its own idiosyncratic interpretation that is inconsistent with accepted international authority. In particular, Australia must ensure that its interpretation of the elements of the definition is undertaken 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[54]

The approach embodied in this Bill is not only fundamentally at odds with the nature of international law generally, and Australia's obligations under international law in particular, but also the practice of other States. As noted by the United Nations High Commissioner for Refugees (UNHCR):

> UNHCR has often stressed that, since one of the main features of refugee status is its international character, and since recognition of refugee status under the 1951 Convention and 1967 Protocol has certain extraterritorial effects, it is essential that States parties to these international instruments apply the substantive criteria of the refugee definition in a harmonised and mutually consistent manner.[55]

In line with this position, the Member States of the European Union have repeatedly acknowledged that the Refugee Convention 'provide[s] the cornerstone of the international legal regime for the protection of refugees' and that they should work towards a 'full and inclusive application' of the Refugee Convention.[56] Other States, such as Canada, have also included in their national legislation a provision expressly stating that the purpose of their law is to ensure that international legal obligations with regard to refugees are fulfilled.[57]

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[52] Article 26 of the VCLT provides that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
[53] VCLT, art 27.
[54] Ibid., art 31(1).
[55] UNHCR, *UNHCR's Observations on the European Commission's proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (Brussels 12 September 2001, COM(2001) 510 final, 2001/0207(CNS))*, November 2001, Geneva, http://www refworld.org/docid/3c6a69254.html, para 3.
[56] Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF (Qualification Directive), Preamble, paras (2) and (3); Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF (recast Qualification Directive), Preamble, paras (3) and (4).
[57] The *Immigration and Refugee Protection Act (S.C. 2001, c. 27)* (Canada) provides that 'The objectives of this Act with respect to refugees are… to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement': s 3(2)(b) (available at: http://laws.justice.gc.ca/eng/acts/i-2.5/).

Further, Australia's attempt to establish a unique system of international refugee law is contrary to the practice of States such as Canada,[58] New Zealand,[59] the United Kingdom,[60] and the United States,[61] all of which include references to the Convention definition of a refugee or transpose it directly in their relevant legislation, rather than creating their own definition.

Our second concern is that as a result of differences between the proposed new definition of a refugee and that which is set out in the Refugee Convention, the Bill does not in fact codify Australia's obligations under the Refugee Convention, but instead codifies different and lesser obligations (see the sections below). As such, Australia is at risk of not complying with its obligations under international law.

(b) Well-founded fear

Proposed section 5J(c)(1) provides that a person has a well-founded fear of persecution if it relates to all areas of a receiving country'. In effect, this would require an applicant to establish 'country-wide persecution', which is inconsistent with the Refugee Convention and established international practice for several reasons.

First, the definition of a refugee in the Refugee Convention does not contain any reference to the need to establish a well-founded fear of persecution 'in all areas of the receiving country'. This provision therefore inserts an additional, limiting phrase that is inconsistent with the ordinary meaning of the treaty.

Secondly, this provision is not consistent with the protective object and purpose of the Refugee Convention because, in the words of the UNHCR, a 'country-wide persecution requirement' imposes on an applicant 'an impossible burden and one which is patently at odds with the refugee definition'.[62]

Thirdly, the provision suggests that where a person has a well-founded fear of persecution in one part of their country, they can be returned to any other part of their country so long as they would not face a well-founded fear of persecution in that alternative place.[63] However,

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[58] The *Immigration and Refugee Protection Act (S.C. 2001, c. 27)* (Canada) provides that 'Refugee protection is conferred on a person when…the person has been determined to be a Convention refugee…', and that a 'Convention refugee' is a person who meets the definition set out in the Refugee Convention: ss 95(1)(a), 96.

[59] The *Immigration Act 2009* (New Zealand) provides that 'A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention': s 129(1) (available at: http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440797.html).

[60] The *Immigration and Asylum Act 1999* (United Kingdom) defines a 'claim for asylum' as 'a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom', except for in Parts V and VI of that Act where the definition is even broader: ss 82(1), 94(1), 167(1) (available at: http://www.legislation.gov.uk/ukpga/1999/33/contents).

[61] The *Immigration and Nationality Act 1952* (United States) defines a refugee in the same terms as the Refugee Convention and extends the definition to other persons facing persecution that the President of the United States may specify: s 101(a)(42) (available at: http://uscode house.gov/view.xhtml?req=refugee&f=treesort&fq=true&num=7&hl=true&edition=prelim&granuleId=USC-prelim-title8-section1101).

[62] UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001 http://www.refworld.org/docid/3b20a3914 html, note 28.

[63] The Explanatory Memorandum states that 'it is the Government's intention that the [internal relocation] principle will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person. The Government considers that in interpreting the 'reasonableness' element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation': para 1183.

international practice is consistent in requiring a State to be satisfied that where an applicant is at risk of persecution in one part of the country, he or she will only be returned to an alternative part of the country if he or she has the prospect of re-establishing a life with dignity. For example, article 8 of the European Union's recast Qualification Directive provides that in considering whether a person can be returned to an alternative place, consideration must be given to whether 'he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there'. This requires having regard to 'the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant' (article 8(2)). Similarly, UNHCR Guidelines on this matter reflect prevailing State practice in requiring an analysis of, inter alia, whether there is respect for basic human rights, including consideration of whether a person would be relocated to 'face economic destitution or existence below at least an adequate level of subsistence'.[64]

Finally, by attempting to prevent Australian courts from applying pre-existing authority on whether relocation would be 'reasonable',[65] the Bill puts Australia at risk of violating its obligations under the Refugee Convention.

(c) Confusion and conflation of the concepts of 'persecution' and 'protection'

The refugee definition in the Refugee Convention contains two related but separate elements: (i) a well-founded fear of persecution; and (ii) a refugee's inability or unwillingness to avail him or herself of the protection of his or her country owing to that fear. By contrast, although the proposed definition in the Bill appears to recognize that persecution and protection are two different concepts in proposed section 5H(1) (at least for persons with a nationality), it then collapses the concept of protection into the analysis of whether there is a well-founded fear of persecution in proposed section 5J(2).

Concerns about the proposed definition include that it:

- risks producing results that do not comply with Australia's obligations under the Refugee Convention, since it defines a 'refugee' in in terms other than those contained in the Convention (in particular by codifying that a person cannot have a well-founded fear of persecution if the conditions in proposed section 5J(2) are met); and
- abandons conceptual clarity in favour of a confusing and circular definition which risks posing practical difficulties for decision-makers, since it establishes protection and persecution as two separate elements, but also establishes protection as part of the definition of persecution.

(d) The concept of State protection is replaced with a different and lesser standard

Proposed section 5J(2)(a) replaces the well-established concept of State protection with a fundamentally different test, namely the existence of 'an appropriate criminal law, a

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[64] UNHCR, *Guidelines on International Protection No. 4: 'Internal Flight or Relocation Alternative' Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, http://www refworld.org/docid/3f2791a44.html, para 29.

[65] The Explanatory Memorandum states that 'it is the Government's intention that the [internal relocation] principle will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person. The Government considers that in interpreting the 'reasonableness' element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation': para 1183.

reasonably effective police force and an impartial judicial system' which are 'available' to an alleged refugee.

We have a number of concerns with this provision.

First, it replaces an analysis of whether protection is available as a matter of fact (determined in the circumstances of each case) with a determination of whether an objective criterion is met (namely, the existence and availability of a criminal justice system of the character described above).

Secondly, the existence and general 'availability' of a functioning criminal justice system does not necessarily mean that protection is available, especially since the Bill includes no requirement that the system actually be willing and able to investigate, prosecute and punish acts of persecution. In this way, the Bill fundamentally differs not only from the Refugee Convention, but also from similar provisions in Europe on which it may be based.[66]

Thirdly, even if the criminal justice system in a country of origin were able and willing to prosecute acts of persecution, proposed section 5J(2)(a) equates the mere existence of such a system with 'protection'. Although the existence of a functioning criminal justice system will often play a large part in the analysis of whether protection against persecution is available in a country, protection generally also requires a degree of physical safety and security against harm, and assurances that conditions are in place to allow people to exercise their basic rights. As recognized by the English Court of Appeal:

> it may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murderers or assailants to justice. He is concerned with the risk that he may be killed or tortured and if the authorities cannot provide effective protection to avoid the risk there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed.[67]

Fourthly, this provision appears to require decision-makers to conclude that no person from a country with a functioning criminal justice system can ever have a well-founded fear of persecution (and therefore be a refugee), despite ample historical and practical evidence to the contrary. Such a requirement is also inconsistent with the emphatic insistence by courts across the common law, and increasingly civil law, world[68] that protection must be 'effective' and 'meaningful', and that the assessment of the availability of protection must be made 'at the operational level' in order to ascertain whether a State's protective efforts have 'actually translated into adequate state protection' or have had any 'real impact on the ground'.[69]

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[66] The European Union Qualification Directive, in setting out the actors of protection, stated that: 'Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system *for the detection, prosecution and punishment of acts constituting persecution or serious harm*, and the applicant has access to such protection': art 7(2) (emphasis added). The recast Qualification Directive not only repeats the requirement that a legal system must do more than merely exist, but also re-emphasizes the importance of a legal system actually offering protection by adding that protection against persecution can only be provided by actors 'provided they are willing and able to offer protection': arts 7(1) and (2).

[67] *Atkinson* (Eng. CA, 2004) at 610 [39].

[68] Courts and tribunals in Australia, Belgium and Switzerland have rejected a finding of State protection based on 'efforts' by the police and government alone: see James C. Hathaway and Michelle Foster, *The Law of Refugee Status,* 2nd ed., Cambridge: Cambridge University Press, 2014, p 317.

[69] Ibid., p 316.

Finally, this provision appears to require that a person who is persecuted by State agents be denied refugee status if the State also has a reasonably adequate criminal justice system in place. This requirement is in contrast to the general presumption that State protection will only become relevant if persecution results from the conduct of non-State actors (since it is presumed that a State will not be willing to provide protection against persecution carried out by its own agents).

(e) The possibility of non-State actors (NSAs) as sources of protection

Another concerning feature of the Bill's proposed refugee definition is the possibility that NSAs could be provide protection (proposed section 5J(2)(b)).

The idea that NSAs can provide adequate protection is controversial in international practice. It could be argued that protection within the meaning of the Refugee Convention can only mean State protection, since article 1A(2) refers to a refugee's inability or unwillingness to avail himself or herself of the protection of his or her country of nationality or former habitual residence. While the European Union Qualification Directive recognizes the possibility of NSAs as sources of protection, it has been extensively criticized, in particular by UNHCR and the European Council on Refugees and Exiles (ECRE).[70] It has also proven difficult to implement in practice. Some of the main arguments against NSAs being recognized as sources of protection, based both on principled and practical considerations, include that:

- NSAs do not meet a key condition for providing protection, namely being a party to the Refugee Convention and/or having an established practice of compliance with its provisions;
- NSAs are not legally bound by any international human rights treaties and cannot be held accountable under them;
- NSAs are unlikely to have been in a stable position over a sufficient period of time to (i) establish a practice of compliance with international standards; or (ii) be able to provide protection on an on-going and continuous basis;
- NSAs are unlikely to be able to have the undisputed control of territory and administrative authority to enforce the rule of law and guarantee human rights; and
- the notion of NSAs as actors of protection has proven problematic in practice for national decision-makers and courts, with no consensus on what criteria must be established to be satisfied that a sufficient level of protection will be provided. Indeed most decisions have continued to view the State as the main source of protection.

In addition to these issues, our main concerns with proposed section 5J(2)(b) include that:

- it risks not complying with Australia's obligations under the Refugee Convention, because it remains disputed whether denying refugee status on the basis of NSA protection accords with its provisions;

[70] See, for example, UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, July 2010, http://www refworld.org/pdfid/4c503db52.pdf, p 5; ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive*, 2 March 2010, www.ecre.org/component/downloads/downloads/128 html, p 8. Similar criticisms were also made about the Qualification Directive.

- by referring only to 'a source other than the relevant State', rather than specific types of NSAs or to NSAs with certain characteristics (such as control over the State or a substantial part of the territory of the State[71]), it allows for groups such as clans, tribes, families or other small networks to be deemed sources of protection (and thus for a refugee claim to be denied). Such a finding would be at odds with international refugee law;[72]
- it contains no requirement that the protection provided by NSAs be stable, effective or durable (see below);
- it risks creating immense factual and practical difficulties for decision-makers, and negatively impacting the quality of decision-making, by requiring assessments to be made about the changing capabilities of rebel groups, militias, clans, tribal groups or families in complex situations about which decision-makers may have no reliable or comprehensive information; and
- it constitutes a failure to learn from the experience of other States. Despite recognition of NSAs as actors of protection in the European Union Qualification Directive, no settled criteria have emerged in European case law for when a NSA can be an actor of protection, and in practice 'decision-makers do not usually treat non-state entities as stand-alone protection actors. If they are referenced it is as reinforcement for state-provided protection, as for example with protection with the aid of multinational forces.'[73]

(f) No requirement that protection be stable, effective and durable

Proposed section 5J(2) contains no requirement that protection (from either a State or NSA source) be stable, effective and durable (non-temporary).

Our concerns about the failure to require that protection has these characteristics include that it:

- is at odds with the underlying principles of the Refugee Convention;
- makes it harder to identify what kind of NSA may be capable of providing protection, since there are no minimum requirements about the stability or duration of protection;
- may lead to results that breach Australia's obligations under the Refugee Convention, for example if a person is denied refugee status on the basis that they could receive protection from a group that has only a transient, temporary and fleeting ability to provide any level of protection;
- leaves unclear whether refugees would be required to move around the territory of their country of origin with the shifting sphere of influence of their protector (which would be inconsistent with the objects of the Refugee Convention); and
- constitutes another failure to learn from the experiences of the other States on this exact issue. When the European Union Qualification Directive was recast in 2011, it amended the definition of an actor of protection to address concerns that the lack of clarity in the concept of protection under the Qualification Directive 'allow[ed] for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection'.[74] The recast Qualification

[71] Qualification Directive, art 7(1)(b) (preserved in the recast Qualification Directive).
[72] UNHCR, *Guidelines on International Protection No. 4*, above note 64, para 17.
[73] ECRE, *Actors of Protection and the Application of the Internal Protection Alternative: European Comparative Report,* 2014, http://www.ecre.org/component/content/article/63-projects/326-apaipa html, p 50.
[74] Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Brussels, 21.10.2009,*

Directive amended article 7(2) by adding an explicit requirement that 'protection against persecution or serious harm must be effective and of a non-temporary nature'. By contrast, the Bill proposes a definition of the sources of protection that not only does not include these requirements, but that is even more unrestrained than the original Qualification Directive in that it does not even require that NSAs have some level of control over all or a substantial part of a State's territory.

(g) The exercise of discretion

Proposed section 5J(3) provides that a person does not have a well-founded fear of persecution if he or she could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution, provided that modification would not conflict with a characteristic fundamental to the person's identity or conscience, or conceal an innate or immutable characteristic. This provision effectively puts the onus on an applicant to 'avoid persecution',[75] a position fundamentally at odds with the human rights principles underlying the Refugee Convention.

In particular, we are concerned that this provision is inconsistent with the emphatic rejection across the common law world,[76] and recently by the Court of Justice of the European Union,[77] of any 'discretion' or 'modification' requirement in the Refugee Convention.

Although the Bill purports to limit the impact of the 'discretion' or 'modification' requirement by protecting fundamental characteristics, it is not clear how this would be applied or interpreted in practice. The Statement of Compatibility with Human Rights states that under the ICCPR, some rights, such as those to freedom of thought, conscience and religion and to hold opinions, may be limited 'as long as it is reasonable, proportionate and adapted to achieve a legitimate objective'.[78] This seems to suggest that this framework may guide an analysis of when a person can be expected to modify or repress his or her behaviour. However, since any limitation on rights in the ICCPR must be 'prescribed by law' and are addressed to when *governments* may limit rights, this rule does not assist in assessing when a person can be expected or required to *self*-moderate or *self*-limit, and is particularly unhelpful when an applicant fears harm by NSAs at home.

(h) Membership of a particular social group (MPSG)

Family as a social group

Proposed section 5K is inconsistent with the refugee definition in the Refugee Convention. It replicates section 91S of the Migration Act, which limits the situations in which a person may claim refugee status where the fear of persecution is for reasons of membership in a family. While acknowledging that family is properly considered a social group under the Refugee Convention,[79] the Bill seeks to continue the restrictive effect of section 91S which precludes family as a Convention ground where the original family member was targeted for a non-

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COM(2009) 551 final) – Annex: Detailed Explanation of the Proposal, http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&f=ST+14863+2009+ADD+3, p 3.

[75] Explanatory Memorandum, paras 1192 and 1194.

[76] See, for example, Australia: *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; United Kingdom: *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; United States: *Karouni v Gonzales* (2005) 399 F. 3d 1163 (USCA, 9th Cir); New Zealand: *Refugee Appeal No. 74665/03* [2005] INLR 68; Canada: *Fosu v Canada* (2008) 335 FTR 223 (Can. FC 2008).

[77] *Bundesrepublik Deutschland v Y* (C-71/11) and Z (C-99/11) (CJEU, Sept. 5, 2012) at [79].

[78] Statement of Compatibility with Human Rights, p 29.

[79] Explanatory Memorandum, para 1215.

Convention reason (such as membership in a drug cartel). In other words, refugee status would be denied even if a persecutor applied 'the time-honoured theory of *cherchez la famille* ("look for the family") to extract information', seek revenge or punish.[80]

This approach has been heavily criticized in the United States as 'erecting artificial barriers to asylum eligibility',[81] and by the House of Lords in the United Kingdom on the basis that to persecute a person 'simply because he is a member of the same family as someone else is as arbitrary and capricious and just as pernicious, as persecution for reasons of race and religion'.[82]

General definition of a 'social group'

Proposed section 5L applies to all refugee claims that rely on 'membership of a particular social group'. It 'seeks to clarify and limit' this Convention ground[83] by importing an additional element into the test for establishing that a social group exists. The Bill acknowledges that existing practice in Australia is consistent with High Court jurisprudence, but believes that this approach requires modification because it is 'broad and complex'.[84]

This provision is said to be drawn from the approach taken in other jurisdictions, including Canada, the United States, New Zealand and the European Union. However, in reality it would introduce a test for establishing 'membership of a particular social group' which is inconsistent with international law, and different from prevailing State practice, in that it would require an applicant to satisfy *two tests*.

The first test is that the shared characteristic of the group is innate, immutable or fundamental to identity and conscience (protected characteristics test). The second test is that the person shares, or is perceived as sharing, that characteristic (social perception test). The first test is well established and applied in Canada, the United States and New Zealand, while the social perception approach has traditionally only been applied in Australia and France. However, it is important to note that these tests have always been *alternative* methods of satisfying the 'membership of a particular social group' ground, not *cumulative* requirements. To combine the two distinct and separate tests into one imposes an onerous and artificial barrier to refugee status.

While the European Union Qualification Directive appears to require the satisfaction of both tests, this has been widely understood as a mistaken reading of the UNHCR Guidelines on 'membership of a particular social group'.[85] As the UNHCR has emphasized repeatedly, 'the two approaches – "protected characteristics" and "social perception" – to identifying "particular social groups" reflected in this definition are *alternative*, not cumulative tests'.[86]

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[80] *Gebremichael* (USCA, 1st Cir 1993) at 35.
[81] *Thomas* (USCA, 9th Cir, 2005) at 1189.
[82] *Fornah* (UKHL, 2006) at 445 [45] per Lord Hope.
[83] Explanatory Memorandum, para 1216.
[84] Explanatory Memorandum, para 1217.
[85] UNHCR, *Guidelines on International Protection: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, http://www.unhcr.org/3d58de2da.html. This misinterpretation of these guidelines is explained in: Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*, UNHCR Legal and Protection Policy Research Series, August 2012, PPLA/2012/02, http://www.refworld.org/docid/4f7d94722 html.
[86] UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, http://www.refworld.org/docid/50348afc2.html, para 45.

Proposed section 5L should be rejected for the following reasons:

- the imposition of two dissonant tests is impossible to justify as a matter of treaty interpretation, and there has been no attempt to explain the basis on which such an approach could be supported, other than as a blatant attempt to 'limit' the ambit of the Refugee Convention;
- the European Union's approach of apparently requiring the satisfaction of both tests has been widely criticized as a distortion of the Refugee Convention's meaning, that is likely to lead to protection gaps;
- the European Union's apparent dual approach has not been followed in many Member States, with few transposing it in legislation or applying it in practice.[87] Indeed, Lord Bingham of the House of Lords noted that the European Union test 'propounds a test more stringent than is warranted by international authority' and should therefore not be followed in the United Kingdom;[88]
- in the few European Union Member States that have adopted the dual test, it has sometimes proven difficult for applicants to satisfy both tests, even where their claims are based on grounds long-recognized as providing the basis for refugee status, such as gender, sexuality or family;[89] and
- in light of the above, the adoption of a dual requirement for establishing 'membership of a particular social group' puts Australia at risk of violating international law.

(i) Treaty interpretation

In relation to international law generally, and treaty interpretation in particular, we note the following principles:

- treaties are to be interpreted 'in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its *object and purpose*';[90]
- 'the Refugee Convention must be given an independent meaning … without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore *there can only be one true interpretation of a treaty* [and national courts] must search … for the true autonomous and international meaning of the treaty';[91]
- while the 'literal meaning of the words used must be the starting point … the words must be construed in context, and an instrument such as the *Refugee Convention must be given a purposive construction consistent with its humanitarian terms*';[92] and
- 'the [Refugee] Convention must be seen as a living instrument in the sense that while its meaning does not change over times its application will'.[93]

The Bill is inconsistent with these fundamental principles in a number of ways. In particular, it overtly disregards the principles of treaty interpretation with respect to the Refugee Convention. Some specific examples of proposed changes in the Bill that violate Australia's

[87] Foster, above note 85.
[88] *Secretary of State for the Home Department v K (FC); Fornah (FC) v Secretary of State for the Home Department* [2006] UKHL 46 (18 October 2006) at 433.
[89] Hathaway and Foster, above note 68, p 430.
[90] VCLT, art 31(1) (emphasis added).
[91] *R v Secretary of State for the Home Department; ex parte Adan* [2000] 2 AC 477 at 516–17 (emphasis added).
[92] *R v Asfaw* [2008] 1 AC 1061 at [11] (emphasis added).
[93] *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 at [6].

obligations under the Refugee Convention, and which are not a good faith interpretation of its terms, include:

- codification of the exception to the principle of *non-refoulement* in article 33 of the Refugee Convention as a formal exclusion clause, notwithstanding the fact that the exclusion clauses contained in the Refugee Convention are absolute and cannot be added to in this way; and
- envisaging that protection may be provided in another country by an NSA, which does not have international legal obligations towards asylum seekers or refugees.

Other examples have been detailed elsewhere in this submission.

7 Schedule 6: Newborn children

7.1 Summary of change

The effect of Schedule 6 is to amend the Migration Act to provide that children born to asylum seeker parents, either in Australia or in an offshore processing country, have the same legal status as their parents. As a result of being classified as 'unauthorised maritime arrivals' (UMA) or as 'transitory persons', newborn children can be detained, processed offshore and denied permanent protection in Australia in the same way as their parents.

The Explanatory Memorandum states that these amendments are necessary to 'maintain consistency within the family unit and ensure families are not separated by the operation of the Migration Act'.[94]

In relation to transitory persons and their children born in Australia, proposed section 198(1C) provides that 'an officer must remove the non-citizen and the child as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved)'.

7.2 Concerns

False assertions in the Explanatory Memorandum regarding different legal status

The assertions in the Explanatory Memorandum that these changes are necessary to prevent the separation of families by the operation of the Migration Act are plainly false, since there are already safeguards within the Migration Act which, if applied, would prevent children with a different legal status from being separated from their parents.

While section 198AD requires an officer to, 'as soon as reasonably practicable, take an 'unauthorised maritime arrival' to whom this section applies from Australia to a regional processing country', the Minister has a number of discretionary powers which could be exercised to prevent removal if it would lead to the separation of families. For example:

- under section 198AE, the Minister has a discretionary power to determine that certain UMAs will not be transferred to a regional processing country under section 198AD; and

[94] Explanatory Memorandum, 'Outline', p 12. See also: Explanatory Memorandum, paras 1378, 1381 (concerning children of UMAs) and paras 1363, 1365 (concerning children of 'transitory persons').

- under sections 46A(2), 46B(2) and 48B, the Minister has discretionary powers to determine that the bars on applying for a protection visa under sections 46A(1), 46B(1) and 48A do not apply to certain UMAs, 'transitory persons' or other non-citizens.

Thus, according to the law as it currently stands, the Minister already has the power to ensure that no child is separated from his or her family by the operation of the Migration Act. Further, it is noted that the Minister not only has a discretion, but indeed an obligation, to exercise his or her powers in this way, since Australia is bound by a number of international legal obligations that prohibit the separation of children from their parents on the basis of legal status alone.[95]

Possible violation of children's rights to birth registration and a nationality

The requirement in proposed section 198(1C) that children born in Australia to a transitory person be removed 'as soon as reasonably practicable' creates a significant risk of violating Australia's obligations to ensure that all children are registered immediately after birth and have the right to acquire a nationality.[96] The right to immediate birth registration is a distinct right by which the State records and acknowledges the existence and legal personality of a child.[97] The United Nations Committee on the Rights of the Child has interpreted immediate birth registration to mean that registration 'should take place as soon as practically possible, within days rather than months after birth'.[98] Birth registration is an important tool for the prevention of statelessness[99] because it establishes a legal record of where a child was born and who his or her parents are.[100] The right to a birth certificate is necessarily implied into the right to immediate birth registration.[101]

For children born in Australia to UMAs and 'transitory persons', the proposed amendment may restrict access to immediate birth registration and the acquisition of a birth certificate. The term 'reasonably practicable' is not defined in the Bill, and does not require that a child remain in Australia until registered. As such, it creates the risk of a child being transferred to a regional processing country before completion of their birth registration process. This risk may be increased by other factors, including:

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[95] For example, Australia has obligations relating to the best interests of children and the protection of family unity under arts 3(1), 8 and 16 of the CRC, and arts 17, 23 and 24 of the ICCPR.
[96] ICCPR, art 24(2); CRC, art 7(1).
[97] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of The Child*, United Nations Children's Fund, New York, 2002, http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, p 97.
[98] Ibid., p 100.
[99] The *1954 Convention relating to the Status of Stateless Persons* defines a stateless person as a 'person who is not considered as a national by any State under the operation of its law': art 1. Persons who are stateless or at risk of statelessness have limited access or no access to basic rights such as education, employment, housing, and health services. These persons are also at a heightened risk of exploitation, human trafficking, arrest, and arbitrary detention because they cannot prove who they are or where they come from. With no legal identity, stateless persons are often unable to pay taxation, buy and sell property, open a bank account, get married legally, or register the birth of a child. See generally: UNHCR, *Nationality and Statelessness: Handbook for Parliamentarians No 22*, July 2014, http://www.refworld.org/docid/53d0a0974.html.
[100] UNHCR, *Birth Registration*, Issue Brief, August 2013, http://www.refworld.org/pdfid/523fe9214.pdf. If children are denied birth registration and access to a nationality, they may grow up to become stateless adults, incapable of transferring a nationality to their children, and thereby perpetuating statelessness: Inge Sturkenboom, *Under the Radar and Under Protected: The Urgent Need to Address Stateless Children's Rights*, European Network on Statelessness, 8 November 2012, http://www.statelessness.eu/blog/under-radar-and-under-protected-urgent-need-address-stateless-children%E2%80%99s-rights.
[101] Paula Gerber, Andy Gargett and Melissa Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?' (2011) 29 *Netherlands Quarterly of Human Rights* 434, 435–36.

- errors in birth registration forms, which could delay their processing;
- the length of the birth registration and birth certificate process, which can take a number of weeks depending on the state in which registration is sought;[102] and
- the complexity of the birth certificate application forms, and the fees and documentary requirements associated with applying for a birth certificate, which are likely to prohibit many asylum seekers in detention from applying for a birth certificate for their newborn children.

Risk of premature removal from Australia despite medical needs and advice

The inclusion of the phrase 'whether or not that purpose has been achieved' in proposed section 198(1C) could be interpreted as authorizing the removal from Australia of UMAs and transitory persons who are receiving medical treatment, before that treatment has concluded and against medical advice. We submit that the 'purpose' of the transfer, and whether the purpose has been 'achieved', should be determined with reference to expert advice by the treating medical professionals (assuming that the transfer to Australia was for the purpose of medical treatment). No child or new mother should be removed from Australia contrary to medical advice or their health needs.

For further information on the concerns raised above, please see our submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth).[103]

8 Schedule 7: 'Cap' on protection visas

8.1 Summary of change

The effect of Schedule 7 is to allow the Minister to 'cap' the number of protection visas available in a year, and to suspend processing of protection visas once the 'cap' is reached, with the result that people entitled to a protection visa would remain in prolonged detention.[104] The Minister made such a determination on 4 March 2014, but the High Court later held that he did not have the power to 'cap' protection visas (in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24 and *Plaintiff M150/2013 v Minister for Immigration and Border Protection* [2014] HCA 25).

Schedule 7 would also repeal the provisions currently in the Migration Act that set a 90-day timeframe for processing and reviewing protection decisions, and that require the

[102] For example, in Queensland, the processing of a child's registration can take up to 10 business days and the birth certificate is posted to the applicant following completion of the birth registration process: Births, Deaths, Marriages and Divorces (Queensland), *Register a birth*, 30 June 2014, https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-registration-and-adoption-records/register-a-birth/. In NSW, it can take up to six weeks for a non-urgent registration (which includes the issuing of a birth certificate): Registry of Births Deaths and Marriages (NSW), *Forms Fees and Turnaround*, 18 August 2014 http://www.bdm nsw.gov.au/bdm_fft html.

[103] Professor Michelle Foster, Professor Jane McAdam and Davina Wadley, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth)*, Submission No. 5, 29 August 2014, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Protecting_Babies/Submissions.

[104] Schedule 7 would have this effect by making section 65 of the Migration Act (which currently requires the Minister to either grant or refuse a visa) subject to sections 84 and 86; and by repealing sections 65A, 91Y, 414A and 440A which impose a time limit of 90 days for making and reviewing protection decisions (although failure to meet that deadline does not affect the validity of any decision).

Immigration Department and the RRT to report on their compliance with this period.[105] These provisions were central to the High Court's decision that the Minister's power to 'cap' visas did not extend to protection visas in the two cases cited above. The repeal of these provisions would also have the effect of reducing transparency and scrutiny, since public reporting of compliance with the 90-day period is the only mandated benchmark of the timeliness of decision-making and review.

8.2 Concerns

Schedule 7 creates real risks of arbitrary and prolonged detention, since those whose applications are 'suspended' are liable to detention until the 'cap' is lifted. As the High Court has noted, giving the Minister the power to 'cap' protection visas means giving him or her the power to decide the length of detention, with the effect of enabling detention at the discretion of the executive.[106] Such an arrangement breaches Australia's obligations under international human rights law not to arbitrarily detain people,[107] and undermines fundamental democratic principles upon which the Australian system of government is based.

Finally, the possibility of 'capping' protection visas is not a good faith implementation of Australia's obligations under the Refugee Convention. As the High Court has noted, the purpose of the Migration Act (including the provisions concerning protection visas) is to respond to Australia's international legal obligations under that Convention.[108] The Refugee Convention would be undermined if it were possible, in effect, to deny protection to refugees until a date that suits the Minister. Since Schedule 7 would confer extraordinary power on the Minister to determine the implementation of Australia's international legal obligations, with limited parliamentary or judicial scrutiny, it should not be adopted.

[105] Migration Act, ss 65A, 91Y, 414A, 440A.
[106] *Plaintiff M150/2013 v Minister for Immigration and Border Protection* [2014] HCA 25, [84].
[107] See above note 15.
[108] *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, [27].