



Australian
Human Rights
Commission

LA and LB v Commonwealth of Australia (DIBP)

[2015] AusHRC 96

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**LA and LB v Commonwealth
of Australia (Department
of Immigration and Border
Protection)**

[2015] AusHRC 96

Report into the 'enhanced screening'
process

Australian Human Rights Commission 2015



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**Australian
Human Rights
Commission**

August 2015

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr LA and Mr LB against the Commonwealth of Australia (Department of Immigration and Border Protection) (department).

I have found that the department's decisions to screen out the complainants and return them to Sri Lanka without conducting a full assessment of their protection claims raised a real risk that they would be subject to treatment prohibited by article 7 of the *International Covenant on Civil and Political Rights*.

In light of my findings, I recommended that the department discontinue the practice of enhanced screening of asylum seekers; or, in the alternative, that the department change its policies in relation to enhanced screening.

The department provided a response to my findings and recommendations on 15 June 2015. In particular, the department maintained that enhanced screening provides an adequate process for considering a person's protection claims. The department noted that it had taken action in relation to my recommendation that interviewees be directly asked whether they have any concerns about being returned to their country of origin. The department also noted that the enhanced screening process, as it applied to Mr LA and LB, has since changed. I have set out the department's response to my recommendations at Part 8 of my report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into complaints by Mr LA and Mr LB, two Sri Lankan nationals who arrived in Australia by boat in October and August 2012 respectively. They were put through an ‘enhanced screening’ process that the Australian Government applies to Sri Lankans seeking asylum in Australia. As a result of that process the Department of Immigration and Border Protection (department) identified that each of the men claimed to fear persecution in Sri Lanka, but officers of the department concluded that their claims did not warrant full consideration under Australia’s refugee status determination process. The men were both returned to Sri Lanka. They claim that the act of screening them out amounted to a breach of their human rights.
2. The inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. The complaints raise issues under article 7 of the *International Covenant on Civil and Political Rights* (ICCPR).¹ This article, when considered along with article 2 dealing with scope of the Covenant, contains a prohibition on returning a person to a country where there is a real risk that the person would be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
4. The enhanced screening process was designed for a related purpose, that is, to determine whether the claims made by Sri Lankan asylum seekers ‘could reasonably engage Australia’s *non-refoulement* obligations’ under the Refugee Convention.² If that threshold is met, the process requires a full assessment of their claims to be conducted to determine whether they are a refugee. A crucial aspect of being a refugee is that the person has a well-founded fear of being persecuted in their country of origin for reasons of race, religion, nationality, membership of a particular social group or political opinion.
5. As a result of the inquiry I find that Mr LA and Mr LB raised protection claims that should have been fully considered prior to their removal to Sri Lanka. I find that the decisions to screen out Mr LA and Mr LB and return them to Sri Lanka without conducting a full assessment of their claims raised a real risk that they would be subject to treatment prohibited by article 7 of the ICCPR. As a result, the decisions to screen them out were inconsistent with or contrary to their human rights.
6. Enhanced screening commenced in October 2012. Mr LA and Mr LB were interviewed in November 2012, prior to the development of documented guidelines setting out how enhanced screening was to be conducted. The department says that since this time the process has evolved in response to both the department’s experience and feedback from stakeholders.
7. In light of the breaches that occurred in the cases of Mr LA and Mr LB, this report also considers the practice of enhanced screening more generally since changes to the process were put in place. In particular, the Commission has considered the guidelines and procedures that were adopted in April 2013, after the interviews of the complainants, as well as information provided by the department in response to the Commission’s preliminary views in this matter dealing with the current operation of the process.

8. Based on a review of this material, I consider that the enhanced screening process still contains a number of significant risks that people with substantive claims for protection will not be identified. First, people subjected to enhanced screening are not informed that they have a right to request legal advice. This may mean that they have no assistance in articulating all of their relevant claims for protection. Secondly, those interviewed are not asked directly whether they have concerns about being returned to their country of origin. If this question is not asked directly, and sufficiently explored, it may not be answered. Thirdly, enhanced screening allows officers of the department to screen out people who make claims for protection if the officer believes that the claims are not sufficiently material. This is a lower threshold for removal than the standard refugee status determination process. In effect, it allows officers of the department to make a substantive assessment of a claim without the protection of independent review of this decision on the merits. Fourthly, those subject to a decision to screen them out are not given a written record of this decision as a matter of course and are not informed of their right to seek judicial review of this decision.
9. In order to prevent a continuation of practices that may result in breaches of rights in future cases similar to those that occurred in the cases of Mr LA and Mr LB, I recommend that the Australian Government discontinue the practice of enhanced screening of asylum seekers and instead process the claims of all asylum seekers through Australia's refugee status determination and complementary protection processes.
10. If the Government does not adopt this recommendation, I make the following recommendations aimed at improving the enhanced screening process:
 - (a) people who are to be interviewed during an enhanced screening process should be informed in advance that they have the right to seek legal advice and, if they want legal advice, the department should assist them to access lawyers prepared to act for them;
 - (b) people interviewed during an enhanced screening process should be directly asked whether they have any concerns about being returned to their country of origin;
 - (c) any use of enhanced screening should be limited to screening out only those people who do not make any claims for protection;
 - (d) any person who makes a claim for protection should be screened in for a full assessment of their claims through the refugee status determination and complementary protection processes, and any substantive assessment of a person's credibility or the merits of any claim for protection should be left to these processes;
 - (e) decisions to screen out should be subject to independent merits review; and
 - (f) people who are screened out should be provided with a written record of the reasons for the decision and informed that they have the right to seek judicial review of this decision.

2 Legal framework

2.1 Functions of the Commission

11. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, s 11(1)(f) gives the Commission the following functions:
 - to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
12. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
13. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

2.2 Scope of ‘act’ and ‘practice’

14. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
15. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
16. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;³ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Non-refoulement

17. The primary *non-refoulement* obligation considered by Australia in assessing claims by asylum seekers is that found in article 33(1) of the Refugee Convention, which provides:
 - No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
18. Australia has similar obligations under the ICCPR, which are often referred to as ‘complementary’ to the protection obligations under the Refugee Convention.⁴ The rights contained in the ICCPR are ‘human rights’ for the purposes of the Commission’s inquiry function. This report focuses on whether there has been a breach of the ICCPR.

19. Article 7 of the ICCPR relevantly provides that:
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
20. In a series of cases, the United Nations Human Rights Committee (UNHRC) has found that signatories to the ICCPR are subject to a *non-refoulement* obligation in cases involving potential breaches of articles 6 and 7 of that Convention.⁵
21. In *Nakrash and Qifen v Sweden* the UNHRC said that in order to determine whether there had been a breach of the *non-refoulement* obligation in respect of article 7 of the ICCPR there needed to be an assessment of:
- whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Syria, there is a real risk that the author would be subjected to treatment prohibited by article 7.⁶
22. General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant adopted on 29 March 2004 by the UNHRC summarised the position in the following way:
- ... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁷
23. Both the *non-refoulement* obligation under the Refugee Convention and the equivalent obligation under the ICCPR are reflected in the terms of the *Migration Act 1958* (Cth) (Migration Act). Section 36 of the Migration Act provides that a criterion for a protection visa is that a person is either:
- a person in respect of whom Australia has protection obligations under the Refugee Convention; or
 - a person in respect of whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.
24. 'Significant harm' is defined to include torture and cruel, inhuman or degrading treatment or punishment.⁸ These terms are further defined for the purposes of the Migration Act.⁹
25. Torture is the most reprehensible of the standards of treatment described in article 7 of the ICCPR. It involves the intentional infliction by a public official of severe pain and suffering, whether physical or mental, on another person for the purposes of obtaining information or a confession, punishing, intimidating or coercing the person, or for any other reason based on discrimination of any kind.¹⁰
26. Cruel, inhuman or degrading treatment or punishment is a lesser standard than 'torture' but still is of a level of severity that could be described as 'heinous'.¹¹ The UNHRC notes that it is not necessary to draw sharp distinctions between whether treatment or punishment is cruel, inhuman or degrading with respect to whether article 7 has been breached.¹² Some commentary suggests that these terms are arranged in descending order of severity.¹³

27. The kinds of cases in which findings of a breach of the prohibitions on cruel, inhuman or degrading treatment or punishment have been found by the UNHRC are summarised in the Commission's report into the complaint of *Nguyen and Okoye v Commonwealth* [2008] AusHRC 39 at [227]-[232].

3 Enhanced screening

3.1 Background

28. The *non-refoulement* obligation under the Refugee Convention brings with it an obligation not to return a person to a country in which he or she *claims* to have a well-founded fear of persecution, unless those claims have been assessed and rejected.¹⁴
29. In October 2012, the Australian Government began a process of pre-screening certain asylum seekers arriving in Australia. The process was referred to as 'enhanced screening'. It initially applied only to Sri Lankan nationals arriving by sea without a valid visa.¹⁵
30. The purpose of enhanced screening was to obtain information about a person's reasons for coming to Australia, and filter out those people who did not raise a claim that could reasonably engage Australia's protection obligations.¹⁶ The intention was to allow Australia to return such people to Sri Lanka without engaging Australia's refugee status determination process. The Government claimed that this process was consistent with Australia's *non-refoulement* obligations.
31. The then Secretary for the department, Mr Martin Bowles PSM, explained that enhanced screening was introduced because of 'the increase in the arrivals of Sri Lankans, in particular with a greater number of people coming for, as they described it, work and economic reasons'.¹⁷ He said:

What we were seeing is quite a significant increase in numbers; from almost nothing within that Sri Lankan cohort to significant numbers in the latter part of 2012. So we had a look at our processes and at what was the best way to deal with people who were arriving for largely economic reasons and did not engage our obligations. We looked at this process; we introduced the enhanced screening and we went from there.¹⁸

32. In response to the Commission's preliminary view in this matter, the department has provided a more detailed explanation of the basis for introducing the enhanced screening process. It said:

In late 2012, there was an unprecedented increase in Sri Lankan illegal maritime arrivals (IMA) travelling directly from Sri Lanka to Australia. This increase surpassed all previous experience of Sri Lankan arrivals, including the previous high in 2009 following the defeat of the Liberation Tigers of Tamil Eelam.

More than 2500 Sri Lankan IMAs arrived in Australia between August and October 2012, compared with only 16 arrivals across the same three month period in 2011. This sudden and dramatic increase was contrary to Sri Lankan asylum seeker movements internationally, with UNHCR figures suggesting that the numbers had been fairly constant between 2010 and 2012 and that circumstances in Sri Lanka had been improving.

Initial interviews with Sri Lankan IMAs at the beginning of this surge suggested that a significant proportion of the arrivals were coming to Australia for economic reasons. In response to this issue, the former Minister for Immigration and Citizenship requested, in September 2012, that the Department bring forward the development of an expedited process for considering the claims of Sri Lankan IMAs. On the basis of a request from the former Government the Enhanced Screening Process (ESP) was applied to Sinhalese asylum seekers who had arrived at any time on or after 13 August 2012. In November 2012, the former Minister for Immigration and Citizenship gave authority to the Department to use the ESP to consider the claims of Tamil Sri Lankan IMAs in addition to Sinhalese Sri Lankan IMAs.

The Department implemented an ESP whereby the reasons presented by an IMA for leaving Sri Lanka were able to be quickly considered to assess whether an IMA may engage Australia's protection obligations so as to require the IMA's circumstances to be further examined and, if not, whether the IMA could be rapidly returned to Sri Lanka.

Rapid returns of those who did not engage Australia's non-refoulement obligations was part of a multi-layered approach, which included direct engagement with the Sri Lankan Government by the then Australian Minister for Foreign Affairs.

33. In this report, the Commission does not seek to make any factual findings about the nature or extent of the risk of persecution faced by people in Sri Lanka. There does not appear to be any dispute that certain groups of people were at risk of persecution on the basis of their political opinion, and that this was supported by country information available to the decision makers considering the claims made by Mr LA and Mr LB. I note, without making any findings, that a number of NGOs including the Public Interest Advocacy Centre,¹⁹ Human Rights Watch,²⁰ Amnesty International²¹ and the Human Rights Law Centre²² have investigated and reported on recent alleged human rights abuses in Sri Lanka and issues raised by the return of people to Sri Lanka by the Australian Government.
34. From 27 October 2012 until 31 October 2013, the department conducted enhanced screening interviews involving 3,063 people and 1,588 people were screened out. By 31 October 2013, 1,191 of those screened out had been returned to Sri Lanka.²³
35. From 19 July 2013, following an announcement by the then Prime Minister, the Hon Kevin Rudd MP, all asylum seekers arriving in Australia by boat were subject to offshore processing pursuant to a regional resettlement arrangement with Papua New Guinea and later Nauru.
36. Since the federal election in September 2013, the incoming government has continued the regional resettlement arrangement and the policy of enhanced screening of Sri Lankan nationals. This has resulted in more than 200 people being returned to Sri Lanka based on enhanced screening and apparently only two people being screened in. In late 2013, 79 Sri Lankans who had arrived together by boat were all screened out and returned to Sri Lanka.²⁴ In February 2014, 45 Sri Lankans who had arrived in Australia were screened out and returned to Sri Lanka.²⁵ In July 2014, 41 Sri Lankans were intercepted at sea, 40 were screened out and ultimately all 41 were returned to Sri Lanka.²⁶

37. The most recent public reference to the use of enhanced screening that the Commission is aware of is an announcement by the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP on 29 November 2014.²⁷ Minister Morrison reported that a boat carrying 38 Sri Lankan nationals was intercepted by Australian authorities north west of Cocos Islands on 15 November 2014. Thirty-seven of the people were returned to Sri Lanka following interviews conducted at sea. The Minister said:

Consistent with Australia's international obligations, all persons intercepted and returned were individually assessed under an enhanced screening process, as also practiced by the previous government. Interviews were conducted in person, on board the vessel assigned to BPC [Border Protection Command], by trained protection officers, supported by qualified Tamil and Sinhalese interpreters.

In one case a referral for a refugee determination process was recommended. In such cases, the Government's policy is to transfer these persons to either the country of Papua New Guinea or the country of Nauru for processing. The individual remains in the care of Australian Government authorities and will be transferred to an offshore processing centre.

38. On 5 May 2015, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, confirmed media reports that 46 Vietnamese nationals had attempted to travel to Australia by boat and had been returned by Australia to Vietnam. The Minister said:

The 46 people were able to be safely returned to Vietnam after we were assured that they did not have a claim to protection and that we had met our international obligations. This would have not been possible without the assistance of the Vietnamese Government.²⁸

The Minister's media statement did not make explicit reference to the use of enhanced screening, however, it appears that the same or a similar process may have been used.

3.2 Process

39. Enhanced screening is based on a single interview with the asylum seeker and then a desk review of the transcript of that interview as recorded by the interviewing officers.
40. In the case of the present two complainants the interviews were between 20 and 40 minutes long. There was no audio recording of the interviews and the written notes of the interviewing officers do not appear to be a complete verbatim record of the interviews. The department says that all interviews are now digitally recorded and transcribed.
41. The department says that there was an 'absence of documented guidelines at the initial stages of enhanced screening'. This included the period of time when the two complainants were interviewed in November 2012. The department says that screening began without formal guidelines 'due to the dramatic increase in Sri Lankan IMA arrivals and the Government's request that a screening process be applied'. Guidelines were subsequently put in place. The department has provided the Commission with a copy of its Enhanced Screening Policy Guidelines dated April 2013. The information about the process described below is taken from these guidelines.

42. The guidelines describe the way in which interviews were to be conducted in the following way:

This interview is not a full protection assessment interview. Information is to be gathered to enable officers involved in the process to determine if the case could reasonably engage Australia's *non-refoulement* obligations so as to warrant a full protection assessment. The focus of the interview should therefore be on exploring the person's reasons for coming to Australia. Where the person, in giving those reasons, claims to have suffered harm in the past or claims to fear harm in the future, those claims should be explored to determine whether they have a Convention-nexus or are relevant to complementary protection and, if so, whether they are plausible. As the interview is not a full PV [protection visa] interview, issues of potential internal relocation and potential state protection are not relevant matters to explore.²⁹

43. At the conclusion of the interview, the interviewing officer considered whether Australia's protection obligations may be engaged. This is described by the guidelines in the following way:

Following the interview a case should be reviewed immediately by the interviewing officer who conducted the interview. This review should consider whether the person's reasons for coming to Australia raise issues relevant to Australia's *non refoulement* obligations and, if so:

- the relevant issues the person raises (express or implied);
- the nature of the harm experienced and/or feared;
- the timeline of events relating to those issues;
- any adverse information put to the client and their response; and
- any credibility concerns.

This is not a refugee claims assessment and does not require the officer to be satisfied that the person engages Australia's *non refoulement* obligations as would be the case in a protection assessment process. Rather these issues are to be considered to the extent necessary to form a view about whether the claims *may* potentially engage Australia's *non refoulement* obligations.³⁰

(emphasis in original)

44. It is clear from this passage that the threshold to be applied by the interviewing officer was a low one.

45. The interviewing officer was required to complete an Enhanced Screening Protection File Note which recorded one of three outcomes. The outcomes were:

- The case **does not** raise issues relevant to Australia's *non refoulement* obligations. Therefore the case should be 'screened out' and proceed to removal.
- The case **could potentially** engage Australia's *non refoulement* obligations. This includes cases where:
 - » The view of the interviewing officer is that the claims made while they may be superficially Convention-related, are so implausible or lacking in substance as not to warrant being considered in a RSD [Refugee Status Determination] process.
 - » The view of the interviewing officer is that the claims made are **specific and may be well founded**.

In all circumstances, the case is to be referred to a senior officer for consideration.³¹

(emphasis in original)

46. Different types of review were conducted depending on the views of the interviewing officer.

47. The first type of case was where the interviewing officer considered that the person had not raised issues relevant to Australia's *non-refoulement* obligations. Those cases would be referred to a Local Senior Officer. The Local Senior Officer could either screen the person out (referred to as a 'local screen out'), determine that the person be re-interviewed, or refer the case to the Enhanced Screening Operations (ESO) Unit for further consideration with the recommendation that the person has raised claims that could reasonably engage Australia's *non-refoulement* obligations.
48. The second type of case was where the interviewing officer considered that protection claims had been raised but that the claims were 'implausible or lacking in substance'. In those cases the interviewing officer was to recommend that the removal of the person is consistent with Australia's *non-refoulement* obligations.
49. The guidelines set out certain factors that an interviewing officer was to consider in determining whether claims were implausible or lacking in substance but then provide that 'these factors are not to be considered as fully under enhanced screening as would be the case in a protection assessment process'.³²
50. In cases where the interviewing officer considers that a case raises protection issues but that they are implausible or lacking in substance, the case is referred to the ESO Unit for a desk review. A senior officer in the ESO Unit could then either screen the person out, determine that the person be re-interviewed, or overrule the interviewing officer and recommend that the person be screened in.
51. The third type of case was where the interviewing officer considered that the person had raised specific and plausible claims that could reasonably engage Australia's *non-refoulement* obligations. Again, the case is referred to the ESO Unit for a desk review. A senior officer in the ESO Unit could then either screen the person in, determine that the person be re-interviewed, or overrule the interviewing officer and recommend that the person be screened out. If the senior officer recommends that a person be screened out in these circumstances, the officer is required to refer the case to another senior officer within the ESO for a second opinion. A person will be screened out in these circumstances only if both senior officers agree.

4 Claims for protection

4.1 Mr LA

52. Mr LA is a 33 year old man from Sri Lanka.

53. He arrived in Australia at the Cocos (Keeling) Islands on 23 October 2012 and was transferred to Christmas Island Immigration Detention Centre. On 8 November 2012 he participated in an enhanced screening interview with two officers of the department and a Sinhalese interpreter.

54. Mr LA said that he had come to Australia because he had received death threats. He claimed that these threats were made because of his political opinion. In a section of the interview record headed 'further examination of protection related information' the departmental officers asked Mr LA which political party he was supporting. He said:

I was supporting the UNP [United National Party] from the beginning. Once the UNP government lost their power and the current government came to power, I received death threats. I went to Singapore for two weeks and when I returned I was attacked. My leg was cut and I still have scars.
...

They cut my leg and ran over my leg with a vehicle and now my foot is not proper.

55. The interviewing officer recorded in the file note that he or she had observed a foot injury.

56. Mr LA said that in 2004 he had worked as a driver for about 6 months for a local politician in the Provincial Council called Ayoub Khan who was a member of the UNP. Prior to this, he said he had worked for another politician called Neomal Perera who introduced him to Ayoub Khan.

57. UNP lost the election in 2004 and Mr LA said that he went to Singapore after that. He said that Ayoub Khan told him to stay in Singapore 'until things settled'. He said that when he returned to Sri Lanka his family told him that people were looking for him, so he didn't go home. Instead he went to Colombo where he stayed for the next two to three years.

58. Mr LA said that he returned to Chilaw in 2009 and that during 2010 he was putting up posters and campaigning for the UNP in council, provincial and presidential elections.

59. He claims that he was kidnapped on 22 March 2010 by people who were campaigning for the People's Alliance Party. He said that he was suspected of damaging a banner worth 20,000 rupees. He claims that he was held for two hours and that the people who kidnapped him also threatened him and beat him. He said that when he tried to escape, they cut his leg.

60. Mr LA said that he spent three days in hospital and required surgery. He has a medical report in Sri Lanka that contains details of the surgery. The police visited him in hospital and he said he made an official complaint to the police.

61. The interviewing officers asked if he had been threatened since the kidnapping in 2010. The transcript of this interview says:

So have you been threatened since 2010?

After that I have been continuously received death threats. Drunken people come to my house and threaten me. So I used to go and stay at a friend's house in Anuradhapura. I would stay there for 2-3 days at a time. I could not step out of my house because I would be threatened.

When was the last time you were threatened?

2-3 months [ago] a henchman of the mayor came to my house and asked me if I was supporting the UNP. Told me to support the People's Alliance as UNP will not come to power.

62. The interviewing officers asked if there was any reason that he could not relocate to Colombo to avoid persecution. Mr LA said that he did not have a house in Colombo and could not stay with friends all the time.
63. The interviewing officers asked what would happen to him if he went back to Colombo. Mr LA said: 'These people are armed people and they can do harm to me at any time'.
64. At the conclusion of the interview, the interviewing officer checked a box on the form stating:
- This person has made claims that I believe may engage Australia's *non refoulement* obligations but I am referring this record of interview for further consideration.
65. A file note prepared by the same officer after the interview set out the documents that were considered in forming a view about Mr LA's protection claims. These documents were:
- Record of interview conducted on 9/11/2012
 - Summary of Country Information on Sri Lanka – as at October 2012
 - Letter from the Hon Chris Bowen MP, Minister for Immigration and Citizenship, to Mr Martin Bowles PSM, Acting Secretary Department of Immigration and Citizenship advising that it is the Government's view that, based on country information, the UNHCR's Eligibility Guidelines and advice provided by the Sri Lankan External Affairs Minister that any returned Sri Lankan citizen will be treated entirely consistently with Sri Lankan law, it is safe to return Sri Lankans of Sinhalese ethnicity, unless they raise claims under the Refugees Convention specific to their individual circumstances.
66. The Summary of Country Information confirms that 'Possible claims relating to Convention grounds include: - Political activity in opposition to the Government of Sri Lanka'. It contains an extract from the *Freedom House* Report, 'Countries at the Crossroads 2012 – Sri Lanka' published on 20 September 2012 which provides:
- Electoral violence and intimidation have continued to make campaigning a dangerous activity. In order to guard themselves from potential attackers, many politicians have assembled armies of thugs who provide protection. This has added to the increased campaign violence because the distinct bands of thugs often clash when they encounter each other. In addition, many of the thugs are involved in the criminal underworld and receive protection in return if their candidate wins election.
67. The file note summarised the key parts of the transcript and the interviewing officer concluded it by checking a box stating:
- This person potentially engages Australia's *non refoulement* obligations and further consideration of their circumstances is required. Removal is therefore not appropriate at this time.

68. The file note was considered by a senior officer in the National Office on 9 November 2012. The senior officer overruled the assessment by the interviewing officer. The reasons given by the senior officer amount to only five sentences. In their entirety, they are:

On the basis of the information before me, my view is that removal of this person would be consistent with Australia's international *non-refoulement* obligations.

The client has claimed to have suffered politically-motivated harm in 2010. However, he has relocated to Colombo for three years and has faced no harm. The client has given insufficient reason why it wouldn't be reasonable for him to relocate to Colombo currently. Having regard to all of the above, I am of the view that:

Removal of this person to Sri Lanka would be consistent with Australia's *non refoulement* obligations.

69. The senior officer did not suggest that it was necessary to interview Mr LA again to ask him any further questions about the possibility of relocation. The department has provided no information to suggest that the assessment by the senior officer was reviewed by any other senior officer. The next day, on 10 November 2012, Mr LA was removed from Australia to Sri Lanka.
70. Mr LA says that when he arrived back in Sri Lanka he was taken into custody by the Sri Lankan authorities and held for 4 days. During this time, he says he was assaulted by a police officer and his right ear was injured. He says that he was questioned by Sri Lankan authorities about coming to Australia and a case was filed against him in court. He says that two days after he was released, he was again subjected to death threats and had stones thrown at his house.

4.2 Mr LB

71. Mr LB is a 26 year old man from Sri Lanka. His father is Tamil and his mother is Sinhalese. He identifies as a Tamil.
72. He arrived in Australia at the Cocos (Keeling) Islands on 29 August 2012 and was initially interviewed by officers of the department on 7 October 2012 with the assistance of an interpreter. As part of this interview he was asked why he left Sri Lanka and came to Australia. In the three lines provided to answer this question on the form, his answer is recorded in the following way:
- My brother was supporting the Politician and the other Party will cause me to trouble. The party took me and threatened. [In the margin is the word 'twice'.] Went to Singapore then returned to Sri Lanka and then to Australia.
73. Mr LB was transferred to Christmas Island Immigration Detention Centre on 1 September 2012, to Wickham Point Immigration Detention Centre in Darwin on 13 October 2012 and to Northern Immigration Detention Centre also in Darwin on 15 November 2012.
74. On 19 November 2012 he participated in an enhanced screening interview with two officers of the department and a Sinhalese interpreter. Mr LB complains that the quality of interpreting was not very good and that the interpreter only interpreted some of what he said.
75. According to the record of interview, Mr LB said that he had come to Australia because his brother was involved in politics. He claims that his brother had been threatened because of his support for the UNP and that he had also suffered threats as a result.

76. In a section of the interview record headed 'further examination of protection related information' the departmental officers asked Mr LB about his fears in Sri Lanka which caused him to come to Australia. The record of interview contains both statements by Mr LB interspersed with questions by the interviewers. The first part of it reads:
- People coming after my brother were coming to our place and that's why he left for Singapore. Why Singapore? Because it is easy to get a visa. After he came back to Sri Lanka the people came and disturbed me and that's why I went to Singapore. They asked me where my brother was. They did this couple of times. They wanted to find my brother. My brother was involved with UNP. They disturbed me because of my brother. He worked for this party, and that's why they were after him. They told me if your brother does not come out they will take me.
77. Mr LB said that he was threatened in December 2007 and again in September 2011. On the second occasion, he was threatened by people who came to his office.
78. When the interviewing officer came to fill out the file note after this interview, she said that there were 'serious credibility issues with this case'. She identified three issues that were said to go to Mr LB's credibility. The first was that in his entry interview he was recorded as saying, through the interpreter, that people opposing the UNP 'took me and threatened', but in the enhanced screening interview he denied being taken anywhere. The second was that he did not identify the party that these people supported, although there is no record in the transcript of him being asked this question. The third was that he was unclear about whether the first time he was threatened was 2005 or 2007.
79. The conclusion by the interviewing officer was that Mr LB 'is not a credible witness and does not engage Australia's *non refoulement* obligations'.
80. On review, the senior officer did not make findings about Mr LB's credibility. He acknowledged that Mr LB 'claims he was threatened by political opponents on two occasions – in December 2007 and September 2011'.
81. However, the senior officer concluded that 'I am not satisfied that [Mr LB's] fear of harm is supported by his claimed past threats of harm'. Four reasons were given for this. First, the senior officer did not consider that Mr LB had any profile himself as a political supporter. Secondly, the senior officer did not consider it plausible that Mr LB would face any risk of harm in the future due to his brother's political opinion. It is not clear on what basis this conclusion was reached in light of the claims of past threats he had received. Thirdly, the senior officer noted that Mr LB had not received any threats since September 2011 (less than 12 months before Mr LB came to Australia) and has never been harmed. Finally, the senior officer appears to have made a finding that there was effective state protection. He said that Mr LB 'believed the authorities might help him out if he continued to have troubles'. This finding appears to be based on the following part of the interview:
- Do you think the authorities of that country can and will protect you if you go back?
- I am not sure. Maybe they might help me out. Other people around us are all Singhalese.
- As noted above, Mr LB is a Tamil. The interview continued:
- Have you ever sought the protection of the police or government?
- No. Why? They told me not to go to the police.

82. The senior officer concluded that removal of Mr LB to Sri Lanka would be consistent with Australia's *non-refoulement* obligations. The department has provided no information to suggest that the assessment by the senior officer was reviewed by any other senior officer. On 27 November 2012, Mr LB was removed from Australia to Sri Lanka.
83. Mr LB says that when he arrived back in Sri Lanka he was arrested by the Criminal Investigation Department (CID) and held in custody for a day. During his detention, he says he was assaulted by a CID officer. He says that he was questioned about coming to Australia and a case was filed against him in court. He says that CID asked for a bond so that he could be released. He says that he could not pay the bond but a friend of his brother's took responsibility for him and gave an undertaking that he would not leave Sri Lanka.
84. Mr LB says that in order to obtain money to pay for a place on the boat to Australia he had to mortgage his home. He said that after he returned to Sri Lanka people came to his house because they wanted him to repay the money to release his mortgage. He was unable to pay them and they threatened him. He says that on 13 February 2013 they assaulted him. Mr LB sent photographs to the Commission showing injuries to his face that he says he sustained in these assaults.

5 Consideration of particular complaints

5.1 Mr LA

85. Mr LA's interview was conducted in November 2012 at a time when there was an 'absence of documented guidelines' for enhanced screening. There are two very significant ways in which his interview did not comply with the later April 2013 guidelines that the department has provided to the Commission.
86. The first departure from the guidelines is that the senior officer reviewing the case made a decision that Mr LA could be safely returned to Sri Lanka, despite his claims that he feared persecution as a result of his political opinion, because he could relocate to Colombo. This was the only reason given in justification for returning Mr LA to Sri Lanka.
87. As noted above, the guidelines provide that: 'As the interview is not a full PV [protection visa] interview, issues of potential internal relocation and potential state protection are not relevant matters to explore'.
88. Once a person has raised claims that could reasonably engage Australia's protection obligations, they should not be returned to the place where they fear persecution until those claims have been fully considered. Instead, the senior officer in this case appears to have made an assessment about the substance of a protection claim based only on the limited information able to be obtained during the enhanced screening interview. This information comprised a brief written record of a 40 minute interview during which Mr LA did not agree that he could safely relocate to Colombo.

89. The second departure from the guidelines is that there does not appear to have been any review of the senior officer's decision. The file note by the interviewing officer indicated that Mr LA potentially engages Australia's *non-refoulement* obligations and further consideration of his circumstances was required. The guidelines provide that if a senior reviewing officer disagrees with such an assessment, then the senior officer 'is required to refer the case to another senior officer within the ESO unit for a second opinion' (emphasis in original).³³ The guidelines provide that 'The screen out finding is only confirmed if both officers agree, otherwise the person receives the benefit of the doubt and is screened in pending further decisions as to how their claims will be processed'. The clear rationale for such a system is to minimise the risk of error in cases where protection claims have been identified. There has been no suggestion that a second opinion was sought in this case, and Mr LA was removed from Australia to Sri Lanka the next day.
90. The Commission does not seek to criticise the department for failing to comply with guidelines that had not yet been circulated to officers. However, the failure to satisfy two very important safeguards in those later guidelines is symptomatic of an underlying problem with the assessment of Mr LA's case. Mr LA claimed that he had a well-founded fear of persecution on the basis of his political opinion. The risk of persecution on the basis of political opinion in Sri Lanka was supported by independent country information available to reviewing officers. The interviewing officer considered that these claims required further consideration. The reviewing senior officer acknowledged that Mr LA claimed to have suffered politically-motivated harm in 2010. Given the aims of the enhanced screening process, namely, assessing whether a person could reasonably engage Australia's protection obligations, this should have been sufficient for Mr LA to be screened in. The decision to screen him out in these circumstances, without any prospect for an independent review of this decision, raised a real risk of error and potential *refoulement*.
91. I find that the decisions to screen out Mr LA and return him to Sri Lanka without conducting a full assessment of his claims raised a real risk that he would be subject to treatment prohibited by article 7 of the ICCPR. As a result, the decision to screen him out was inconsistent with or contrary to his human rights.

5.2 Mr LB

92. As with Mr LA's interview, the interview with Mr LB was conducted in November 2012 at a time when there was an 'absence of documented guidelines' for enhanced screening. Both the initial interviewer and the reviewing officer did not comply with the later April 2013 Enhanced Screening Policy Guidelines.
93. As noted above, the interviewing officer reached the conclusion that Mr LB did not engage Australia's *non-refoulement* obligations because he was 'not a credible witness'. However, conducting an assessment of an asylum seeker's credibility is not a function of the enhanced screening interview.

94. During a Senate Estimates hearing on 28 May 2013, Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, said that the credibility of a person's claim is not assessed during enhanced screening interviews:

Senator RHIANNON: During the screening process is the credibility of claims assessed?

Ms Larkins: No. It is not a refugee status determination process. We are testing whether the client is putting forward claims that engage our protection obligations.³⁴

95. The department acknowledges that the assessment by the interviewing officer of Mr LB's credibility during the screening interview was an error. In the Commission's view, if the senior officer who conducted the review was not satisfied that Mr LB should be screened in, then the fact that the interviewing officer had erroneously made an assessment of Mr LB's credibility should have been sufficient reason to refer Mr LB back for a further interview.
96. As noted above, Mr LB said that he had come to Australia because his brother was involved in politics. He claims that his brother had been threatened because of his support for the UNP and that he had also suffered threats as a result. It is possible that this could be a claim of persecution based on an imputed political opinion or based on his association with his brother.
97. The senior officer who conducted the review acknowledged that Mr LB raised claims that he feared persecution for political reasons but dismissed these claims as not being sufficiently substantial. This was contrary to the purpose of the enhanced screening process which was to determine if the case could reasonably engage Australia's *non-refoulement* obligations. Full assessment of the merits of those claims is the purpose of the refugee status determination process, not the screening interview.
98. The guidelines set out a number of issues that officers were required to consider to determine if a claim was implausible or lacking in substance.³⁵ None of these issues were present in Mr LB's case. The first was whether the person's claim is about a general fear or general violence or is economic in nature. Here, the fear claimed was specific to Mr LB and based either on a political opinion imputed to him, or on his relationship with his brother (which may be relevant to a claim of persecution on the basis of membership of a particular social group). The second was whether the claim is personal to the individual and involves an element of targeting or intent. Here, Mr LB had identified specific threats he had received on two occasions. The third was whether the person had experienced harm on the basis of their specific circumstances, which includes consideration of the frequency, recency and nature of the harm. Here, although the threats had not been carried out, there were claims of recent, specific threats of serious harm. The fourth was whether relevant and up-to-date country information supports the person's claims. Here, the country information indicated that there were real risks involved in political activity in opposition to the Government of Sri Lanka.
99. The guidelines suggested that a cumulative assessment should be made of all relevant factors to determine whether on balance the claim is plausible and has substance.³⁶ Mr LB's case should have been found to meet this threshold.
100. Finally, the senior officer who conducted the review had regard to other matters that were properly the subject of a full refugee status determination. One of the factors he relied on was the existence of effective state protection. The guidelines, however, provide that: 'As the interview is not a full PV [protection visa] interview, issues of potential internal relocation and potential state protection are not relevant matters to explore'. In any event, the finding was not well supported by the evidence given by Mr LB in his interview (see paragraph 81 above).

101. Again, I emphasise that the Commission does not seek to criticise the department for failing to comply with guidelines that had not yet been circulated to officers. However, the failure to satisfy important safeguards in those later guidelines is symptomatic of an underlying problem with the assessment of Mr LB's case. Mr LB claimed that he had a well-founded fear of persecution for political reasons which could have involved either an imputed political opinion or the membership of a particular social group. The risk of persecution on the basis of political opinion in Sri Lanka was supported by independent country information available to reviewing officers. The reviewing senior officer acknowledged that a relevant claim had been made. Given the aims of the enhanced screening process, namely, assessing whether a person could reasonably engage Australia's protection obligations, this should have been sufficient for Mr LB to be screened in. The decision to screen him out in these circumstances raised a real risk of error and potential *refoulement*.
102. I find that the decisions to screen out Mr LB and return him to Sri Lanka without conducting a full assessment of his claims raised a real risk that he would be subject to treatment prohibited by article 7 of the ICCPR. As a result, the decision to screen him out was inconsistent with or contrary to his human rights.

6 Consideration of enhanced screening process more generally

103. The department says that the process used to assess the claims of the present complainants 'is referred to as enhanced screening because it builds on our normal border screening procedures'.³⁷ However, when compared with the normal refugee status determination process, the screening is not properly described as 'enhanced'. In fact, it represents a significant curtailing of the refugee status determination process.
104. It is concerning that in the two cases described in this preliminary view, departmental officers have effectively conducted an abbreviated assessment of substantive protection claims without the procedural safeguards involved in the ordinary refugee status determination process including independent merits review of adverse decisions and judicial review of decisions which may involve jurisdictional error.
105. I make some further comments below about the practice of enhanced screening based on the information and documents provided to the Commission in the course of the present inquiry and other publicly available material. In section 7 below I make some recommendations about the enhanced screening process.

6.1 Risk of refoulement

106. The Commission's primary concern is that the enhanced screening process does not appear to provide sufficient protection against the risk of *refoulement*.
107. One reason for this is that the process provides several opportunities for people who prima facie raise protection obligations to nevertheless be screened out. This is evidenced by the way in which the claims of Mr LA and Mr LB were dealt with.

108. In Mr LB's case, his claims were screened out as lacking in substance (the 'second type of case' discussed in paragraph 48 above), despite making specific claims to a fear of persecution for political reasons. Some comments made by the department suggest that this aspect of 'enhanced screening' differentiates it from other screening conducted by the department. In answers to a Senate inquiry in July 2014, the department said:³⁸
- Enhanced screening raises the threshold by allowing a person to be 'screened out' if they make a claim that is so lacking in substance that it is considered to be far-fetched or fanciful.
109. Recommending removal of a person from Australia pursuant to a finding of this nature as a result of an abbreviated interview process is problematic. It raises a real risk that someone who has valid claims to protection in Australia will be 'screened out' following a brief initial interview, without a full assessment of those claims being made. Once a person has made a Convention-related claim, those claims should be fully explored prior to a finding that they are implausible or lacking in substance. Given the very serious consequences for individuals if an incorrect assessment is made by the interviewing officer, the guidelines appear to inappropriately deal with the risk of *refoulement*.
110. In Mr LA's case, his claims were initially identified as ones that were specific and may be well founded (the 'third type of case' discussed in paragraph 51 above). However, this finding was then overturned on the basis of a desk review by a senior officer.
111. Again, there are real concerns about the process in this third category. In these cases, the officer who conducted the face-to-face interview identified specific claims to protection and considered that they may be well founded and require further investigation. Rather than proceeding directly to an investigation of the person's protection claims, the guidelines provide for a system where these preliminary findings can be overruled based on a review on the papers by two senior officers. If the findings are overruled, there is no opportunity for a full assessment of the claims made by the asylum seeker.
112. The department says that since enhanced screening was first used in October 2012, it has adapted policy in response to criticism from external stakeholders, which the department claims has greatly improved the operation of the process. The department says that the current process of interview, consideration of relevant country information and senior officer review provides adequate protection against the risk of *refoulement*.
113. However, for the reasons identified above, the enhanced screening process significantly increases the risk of *refoulement* as compared to the ordinary process of refugee status determination. The basis for the reduction in safeguards appears to be a presumption about the nature of those seeking asylum, namely, that a significant proportion of them are economic migrants and do not have substantial claims for protection as refugees. By making it easier to return people without a substantive assessment of their claims, the risk is increased that people who have a well-founded fear of persecution may be returned to harm.
114. If this kind of screening is to be used at all, it should be limited to screening out only those people who do not make any substantive claims for protection.

115. Any person who makes a claim to protection should be screened in for a full assessment of their claims through the refugee status determination and complementary protection processes. Any substantive assessment of a person's credibility or the merits of any claim for protection should be left to these processes. If this is not done, there is a real risk that any mistakes made in the process will not be able to be corrected before a person is removed from Australia.

6.2 Nature of the interview process

116. The Commission is also concerned that the enhanced screening interview process may be insufficient to ensure that all relevant protection claims are raised.
117. The interviews conducted may be brief. In the cases of Mr LA and Mr LB they were between 20 minutes and 40 minutes long. Those interviews were not recorded, however, the department says that all interviews are now digitally recorded and transcribed.
118. As at 31 May 2013, the pro forma preamble to the interview said that the purpose of the interview was to determine whether the person had a 'valid reason' for coming to Australia and during the course of the interview they would be asked to provide their reasons for coming to Australia.³⁹ The department says that this is no longer part of the preamble. Rather, the person being interviewed is now asked 'It is intended that you will be taken back to Sri Lanka. Do you wish to say something about that?' The Commission is concerned that if a person with protection claims does not articulate those claims sufficiently when this question is asked, they may be screened out.
119. The department says that it 'would not be appropriate' to frame questions in an enhanced screening interview in the same way as questions in a refugee status determination. It is not clear why this would not be appropriate if the aim is to determine whether or not a person has a valid claim for protection as a refugee.
120. The department says that interview officers are trained to be aware and listen for any cues of protection-related claims and to gather information in relation to a person's circumstances and possible protection issues. However, by adopting a system where the officers conducting the interview do not directly put to the people being interviewed the key question to be determined, there is a risk that the question will merely remain unanswered.
121. The nature of this process means that there are real risks for people who have valid protection claims but who do not articulate them sufficiently. There may be many reasons why an asylum seeker may not provide a full account of their protection claims in their first interview with government officials.
122. The Office of the United Nations High Commissioner for Refugees (UNHCR) has produced a handbook on procedures and criteria for determining refugee status.⁴⁰ UNHCR notes that:

A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.⁴¹

123. For this reason, it may be necessary to have more than one interview so that apparent inconsistencies can be resolved.⁴² UNHCR says that it will be necessary for the examiner to gain the confidence of the applicant in order to assist the applicant in putting forward his case and fully explaining his opinions and feelings.⁴³ It notes that:

Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading.⁴⁴

124. If the purpose of the interview is to determine whether a person has a valid claim for protection, then this needs to be made clear to the person being interviewed and questions designed to elicit any potential claim for protection should be asked. It does not appear that the current process satisfies this requirement.

6.3 Legal advice

125. In many cases asylum seekers are not able to fully present their claims during an initial interview with departmental officers unless they are able to access legal advice about the assessment process and assistance in identifying and fully describing those experiences that are relevant to their claims for protection.⁴⁵
126. UNHCR has expressed the view that the right to legal assistance and representation is an 'essential safeguard', especially in first instance procedures.⁴⁶
127. Prior to 31 March 2014, the Government provided funding to a panel of migration agents to help asylum seekers in immigration detention and disadvantaged applicants for protection visas in the community with professionally qualified application assistance, including interpreters and attendance at a visa interview.⁴⁷ This program was known as the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS providers would help their clients complete protection visa applications, liaise with the department, provide advice on immigration matters, explain the outcomes of applications and provide information and advice on further options available in the event of a refusal decision. IAAAS assistance was also available for merits review of visa refusals.
128. The Refugee Advice and Casework Service has said that:
- From our experience with clients who lodged their protection visa applications unrepresented, we can confirm that legal representation makes a significant difference in a decision-maker's ability to quickly grasp and assess a person's claims for protection, allowing quicker and less costly decision-making. ...
- RACS solicitors currently play a crucial role in early intervention in the refugee jurisdiction. RACS solicitors are able to effectively present an asylum seeker's claims in the form in which they are most efficiently able to be processed by the Department of Immigration.⁴⁸
129. IAAAS assistance was not available to people being processed by way of enhanced screening.
130. On 31 March 2014, the Government announced that it would no longer provide access to the IAAAS to anyone who arrived in Australia without a visa, regardless of where they had come from or how they arrived.⁴⁹

131. The template for the enhanced screening interview does not include a statement informing people that they have the right to seek legal advice.
132. It appears that the department has adopted a passive, reactive approach to the right to obtain legal advice for people being processed by way of enhanced screening. It will allow access to legal advisers but will take no proactive steps to inform people of their right to a lawyer. During Senate Estimates on 28 May 2013, the Chief Lawyer in the department's Legal and Assurance Division provided the following description of how requests for legal advice are dealt with during the enhanced screening process:
- Senator HANSON-YOUNG:** What information are asylum seekers given in relation to their legal rights during the screening-in interview?
- Ms Parker:** Under the Migration Act we rely on section 256, which indicates that, if they request legal advice, we will facilitate that.
- Senator HANSON-YOUNG:** They are not told they are able to request legal advice?
- Ms Parker:** Not so far as I am aware.
- Senator HANSON-YOUNG:** Would you step me through what happens if somebody does seek legal advice.
- Ms Parker:** If they seek legal advice, we facilitate that contact with a legal adviser of their choice.
- Senator HANSON-YOUNG:** How do they choose somebody if they have only just arrived in the country?
- Ms Parker:** We provide them with a telephone book and access to a telephone, and an interpreter if necessary, I believe.⁵⁰
133. In response to the Commission's preliminary view in this matter, the department has confirmed that its 'position on access and facilitation of access to legal advice as part of the [enhanced screening process] remains as previously stated'. Namely:
- The Department will provide a person with a telephone, an interpreter and a telephone book upon request for access to legal advice. If a person asks to speak to a particular migration agent and/or legal representative, the Department will provide the business hours and telephone number for that person and facilitate contact. Where available, access to the internet is facilitated.
134. Section 256 of the Migration Act relevantly provides that where a person is in immigration detention 'the person responsible for his or her detention shall, at the request of the person in immigration detention, ... afford to him or her all reasonable facilities ... for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention'. Only on the most restrictive view of this statutory obligation could the provision of a telephone book and access to a telephone and interpreter satisfy this requirement. The more substantive question is whether these steps are likely to be sufficient in order to ensure access to legal advice for those who may want it. My view is that these steps are insufficient for this purpose.

6.4 Review rights

135. People who are screened out of the enhanced screening process are not given a written record of the reasons for the decision as a matter of course. The department says that it is policy to notify persons of their enhanced screening process recommendation verbally but if a person requests the written protection file note it will be provided to them.
136. Those screened out are immediately able to be removed from Australia. In the case of Mr LA he was removed from Australia the next day.
137. There is no system of independent merits review of enhanced screening decisions. The department says that 'an independent merits review type process would not be consistent with rapid removal'. It considers that internal review by a senior officer of the department is sufficient. While a desire by the Government for a speedy process is one factor to consider in determining whether merits review is appropriate, this needs to be balanced against other factors including the gravity of the decision and the risk that a wrong decision will be reached.
138. The Administrative Review Council has developed principles that it uses when advising the Attorney-General of the kinds of decisions that should be subject to merits review.⁵¹ In this context, the Council defines merits review as a process by which a person or body:
- other than the primary decision maker
 - reconsiders the facts, law and policy aspects of the original decision; and
 - determines what is the correct and preferable decision.
139. This process is often described as 'stepping into the shoes' of the primary decision maker. The principle object of merits review is to ensure that administrative decisions are correct and preferable. A 'correct' decision is one made according to law. A 'preferable' decision is the best decision that could be made on the basis of the relevant facts.
140. The starting point is that an administrative decision that is likely to affect the interests of a person should ordinarily be subject to merits review.
141. In order to overcome this presumption and not provide merits review, the benefits to be gained must outweigh the adverse consequences of not providing merits review. These adverse consequences will generally involve the risk of reaching decisions that are not correct or preferable. This may involve adverse consequences for the individual whose rights are affected, and also consequences for the overall quality of government decision making.
142. The Council recognises that merits review costs money and that 'it would obviously be inappropriate to provide a system of merits review where the cost of the system would be vastly disproportionate to the significance of the decision under review'.⁵² By way of example, it says that merits review of a decision not to waive a filing fee of, say, \$150 may be difficult to justify on an economic basis. This is because the cost of conducting a review of the decision would be disproportionate to the adverse consequence to the individual (paying the fee of \$150).

143. The Council has identified factors that it considers do not justify excluding merits review of a decision that should otherwise be subject to review. These include decisions that involve matters of national sovereignty, such as the question of who is admitted to enter Australia.⁵³ Similarly, the fact that a decision is exercised by reference to a government policy does not justify excluding merits review.⁵⁴ Further, the fact that there is a potential for a relatively large number of people to seek merits review of decisions does not justify excluding those decisions from review.⁵⁵
144. The very significant consequences of making a wrong decision during the course of an enhanced screening assessment suggests that merits review of such decisions is highly desirable. If a wrong decision is made about the potential for a person to make a valid refugee claim, the person may be returned to persecution, torture or the risk of being arbitrarily killed. The aim of merits review should be to ensure the correct and preferable decision in each case.
145. Further, in the current enhanced screening process, it appears that there are very limited, if any, opportunities to seek judicial review of decisions. People screened out would almost certainly require legal assistance in order to pursue judicial review.

7 Findings and recommendations

146. As a result of the inquiry I find that Mr LA and Mr LB raised protection claims that should have been fully considered prior to their removal to Sri Lanka. I find that the decisions to screen out Mr LA and Mr LB and return them to Sri Lanka without conducting a full assessment of their claims raised a real risk that they would be subject to treatment prohibited by article 7 of the ICCPR. As a result, the decisions to screen them out were inconsistent with or contrary to their human rights.
147. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.⁵⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.⁵⁷
148. The Commission recognises that since the decisions to screen out Mr LA and Mr LB the department has introduced written guidelines to govern the enhanced screening process. However, the current process still contains a number of significant risks that people with substantive claims for protection will not be identified. First, people subjected to enhanced screening are not informed that they have a right to request legal advice. This may mean that they have no assistance in articulating all of their relevant claims for protection. Secondly, those interviewed are not asked directly whether they have concerns about being returned to their country of origin. If this question is not asked directly, and sufficiently explored, it may not be answered. Thirdly, enhanced screening allows officers of the department to screen out people who make claims for protection if the officer believes that the claims are not sufficiently material. This is a lower threshold for removal than the standard refugee status determination process. In effect, it allows officers of the department to make a substantive assessment of a claim without the protection of independent review of this decision on the merits. Fourthly, those subject to a decision to screen them out are not given a written record of this decision as a matter of course and are not informed of their right to seek judicial review of this decision.

149. The recommendations made below relate to the current operation of the enhanced screening process and are intended to prevent a continuation of practices that may result in breaches of rights in future cases similar to those that occurred in the cases of Mr LA and Mr LB.

Recommendation 1

150. The Commission recommends that the Australian Government discontinue the practice of enhanced screening of asylum seekers and instead process the claims of all asylum seekers through Australia's refugee status determination and complementary protection processes.

Recommendation 2

151. If the Australian Government does not adopt recommendation 1, the Commission recommends that:
- (a) people who are to be interviewed during an enhanced screening process should be informed in advance that they have the right to seek legal advice and, if they want legal advice, the department should assist them to access lawyers prepared to act for them;
 - (b) people interviewed during an enhanced screening process should be directly asked whether they have any concerns about being returned to their country of origin;
 - (c) any use of enhanced screening should be limited to screening out only those people who do not make any claims for protection;
 - (d) any person who makes a claim for protection should be screened in for a full assessment of their claims through the refugee status determination and complementary protection processes, and any substantive assessment of a person's credibility or the merits of any claim for protection should be left to these processes;
 - (e) decisions to screen out should be subject to independent merits review; and
 - (f) people who are screened out should be provided with a written record of the reasons for the decision and informed that they have the right to seek judicial review of this decision.

8 Department's response

152. The department provided a response to my findings and recommendations on 15 June 2015. The Secretary of the department stated:

I note that the AHRC found that the Department's decision to screen out [Mr LA] and [Mr LB] without conducting a full assessment of their claims raised a real risk that they would be subject to treatment prohibited by article 7 of the *International Covenant on Civil and Political Rights* and was inconsistent with their human rights.

You requested that I advise you whether the Commonwealth has taken or is taking any action as a result of the findings and recommendations outlined in the section 29 notice and if so, the nature of that action.

I have carefully reviewed the findings and recommendations outlined in the section 29 notice and wish to inform you that the Department has not taken and is not taking any action in relation to Recommendation 1, Recommendation 2(a), 2(c), 2(d), 2(e) or 2(f).

The Department maintains that the enhanced screening process provides an adequate process for considering whether a person's reasons for leaving their country may engage Australia's protection obligations. The process identifies persons who have claims that require further consideration through a refugee status determination process and persons who are clearly not seeking Australia's protection or have implausible or immaterial claims and, as such, are available for rapid return.

The Department has taken action in relation to Recommendation 2(b).

Please note that enhanced screening, as it existed at the time [Mr LA] and [Mr LB] were screened, is not currently used by the Department.

However, the on-water assessment process, which is based on enhanced screening, uses an interview template that includes advising the interviewee that they will be taken back to Sri Lanka and invites them to comment on this information. This key question begins an examination of any concerns the person has about being returned to their country of origin. If protection related information is presented by the person in response to this question, that information is further explored with the person.

153. I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs
President
Australian Human Rights Commission

August 2015

- 1 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).
- 2 Convention relating to the Status of Refugees, opened for signature 28 July 1951, [1954] ATS 5 (entered into force generally 22 April 1954; entered into force for Australia on 22 April 1954), as amended by the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, [1973] ATS 37 (entered into force generally on 4 October 1967; entered into force for Australia on 13 December 1973) (together the Refugee Convention).
- 3 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 4 For example, see the changes introduced by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) and the explanatory memorandum dealing with those changes.
- 5 United Nations Human Rights Committee, *GT v Australia* UN Doc CCPR/C/61/D/706/1996, [8.1]-[8.2]; *ARJ v Australia* UN Doc CCPR/C/60/D/692/1996; *C v Australia* UN Doc CCPR/C/76/D/900/1999; *Kindler v Canada* UN Doc CCPR/C/48/D/470/1991, [13.1]-[13.2]; *Ng v Canada* UN Doc CCPR/C/49/D/469/1991 at [14.1]-[14.2]; *Cox v Canada* UN Doc CCPR/C/52/D/539/1993, [16.1]-[16.2]; *Judge v Canada* UN Doc CCPR/C/78/D/829/1998, [10.2]-[10.7]; *Nakrash and Qifen v Sweden* UN Doc CCPR/C/94/D/1540/2007 at [7.3]; *Bauetdinov v Uzbekistan* UN Doc CCPR/C/92/D/1205/2003, [6.3]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006, [14.2].
- 6 United Nations Human Rights Committee *Nakrash and Qifen v Sweden* UN Doc CCPR/C/94/D/1540/2007, [7.3]. See also: *Bauetdinov v Uzbekistan* UN Doc CCPR/C/92/D/1205/2003, [6.3]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006, [14.2].
- 7 United Nations Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004), [12].
- 8 Migration Act, s 36(2A).
- 9 Migration Act, s 5.
- 10 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, widely accepted as setting out the definition of torture.
- 11 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004, Oxford University Press), [9.01].
- 12 United Nations Human Rights Committee, *General Comment 20 (Replaces general comment 7 concerning prohibition of torture and cruel treatment and punishment)* (10 March 1992), [4].
- 13 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005, NP Engel) 160, [4].
- 14 *Eg Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 191 [94] per Gummow, Hayne, Crennan and Bell JJ, 224 [215], 230 [233], 231 [237] per Kiefel J; United Nations High Commission for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, [6]. At <http://www.refworld.org/docid/45f17a1a4.html> (viewed 22 January 2015).
- 15 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), Appendix A. It appears that the same or a similar process was also used on 23 October 2013 to return 18 people to Vietnam and in April 2015 to return 46 other people to Vietnam: the Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Operation Sovereign Borders update', 25 October 2013, at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2013/sm209107.htm> (viewed 20 January 2015), the Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Operation Sovereign Borders update', 5 May 2015, at <http://www.minister.immi.gov.au/peterdutton/2015/Pages/operation-sovereign-borders-update.aspx> (viewed 7 May 2015).
- 16 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 5.
- 17 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 28 May 2013, 47 (Mr Martin Bowles PSM), at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0f70343a-b92d-45d8-b692-58b9623ba9cd/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_05_28_1971_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0f70343a-b92d-45d8-b692-58b9623ba9cd/0000%22 (viewed 20 January 2015).
- 18 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 28 May 2013, 47 (Mr Martin Bowles PSM).
- 19 Public Interest Advocacy Centre, *Island of impunity? Investigation into international crimes in the final stages of the Sri Lankan civil war* (1 February 2014), at <http://www.piac.asn.au/publication/2014/02/island-impunity> (viewed 22 January 2015).
- 20 Human Rights Watch, "We Will Teach You a Lesson": *Sexual Violence against Tamils by Sri Lankan Security Forces* (26 February 2013), at <http://www.hrw.org/reports/2013/02/26/we-will-teach-you-lesson> (viewed 22 January 2015).
- 21 Amnesty International, *Ensuring Justice: Protecting human rights for Sri Lanka's future* (August 2014), at <http://www.amnesty.org/en/library/asset/ASA37/011/2014/en/4c09c88e-a298-4cba-bdee-4b6a077ef55a/asa370112014en.pdf> (viewed 22 January 2015).
- 22 Human Rights Law Centre, *Can't flee, can't stay: Australia's interception and return of Sri Lankan asylum seekers* (March 2014), at http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf (viewed 22 January 2015).
- 23 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Supplementary Budget Estimates Hearing*, Question on notice SE13/0059, 19 November 2013, at http://www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/sup_1314/DIBP/SE13-0059.ashx (viewed 20 January 2015).
- 24 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Operation Sovereign Borders update', 8 November 2013, at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2013/sm209431.htm> (viewed 20 January 2015).

- 25 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Sri Lankan boat arrivals returned to Colombo', *Media Release*, 6 February 2014, at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm211527.htm> (viewed 19 January 2015).
- 26 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Australian Government returns Sri Lankan people smuggling venture', *Media Release*, 7 July 2014, at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm216152.htm> (viewed 19 January 2015).
- 27 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'People smuggling venture returned to Sri Lanka', *Media Release*, 29 November 2014, at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm219651.htm> (viewed 19 January 2015).
- 28 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Operation Sovereign Borders update', 5 May 2015, at <http://www.minister.immi.gov.au/peterdutton/2015/Pages/operation-sovereign-borders-update.aspx> (viewed 7 May 2015).
- 29 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 7.
- 30 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 9.
- 31 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 10.
- 32 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 10.
- 33 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 12.
- 34 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 28 May 2013, 27 (Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Citizenship).
- 35 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 10.
- 36 Department of Immigration and Citizenship, *Enhanced Screening Policy Guidelines* (April 2013), 10.
- 37 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 28 May 2013, 27 (Ms Alison Larkins, First Assistant Secretary, Refugee, Humanitarian and International Policy Division, Department of Immigration and Citizenship).
- 38 Commonwealth, Senate Legal and Constitutional Affairs References Committee, Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014, *Department of Immigration and Border Protection and the Joint Agency Taskforce - answers to questions taken on notice at public hearing on 11 July 2014, and written questions (received 15 August 2014)*, 2, at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Additional_Documents (viewed 23 January 2015).
- 39 Enhanced screening interview transcript pro forma (31 May 2013), released by the Department of Immigration and Citizenship on 23 August 2013 pursuant to freedom of information request FA 13/06/00920, at <https://www.righttoknow.org.au/request/670/response/2186/attach/3/23%2008%202013%20FA%2013%2006%2000920%20Enhanced%20Screening%20Policy%20Guidelines%20file%20note%20and%20interview%20transcript%20pro%20formas.pdf> (viewed 22 January 2015).
- 40 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/REV.1 (January 1992).
- 41 *Handbook on Procedures and Criteria for Determining Refugee Status*, [198].
- 42 *Handbook on Procedures and Criteria for Determining Refugee Status*, [199].
- 43 *Handbook on Procedures and Criteria for Determining Refugee Status*, [200].
- 44 *Handbook on Procedures and Criteria for Determining Refugee Status*, [201].
- 45 United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards* (2 September 2005), 3, at <http://www.refworld.org/docid/432ae9204.html> (viewed 21 January 2015).
- 46 United Nations High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards* (2 September 2005), 3.
- 47 Department of Immigration and Citizenship, *Annual Report 2011-12*, p 121; Department of Immigration and Citizenship, *Annual Report 2012-13*, 116.
- 48 RACS, Submission to the Productivity Commission inquiry into Access to Justice Arrangements, 4 November 2013, 6, 8, at <http://www.racs.org.au/wp-content/uploads/Productivity-Commission.pdf> (viewed 23 January 2015).
- 49 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Media Release, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (31 March 2014), at <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm213047.htm> (viewed 23 January 2015).
- 50 Commonwealth, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates*, 28 May 2013, 62 (Ms Vicki Parker, Chief Lawyer, Legal and Assurance Division, Department of Immigration and Citizenship).
- 51 Administrative Review Council, *What decisions should be subject to merit review?* (1999), at <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx> (viewed 11 May 2015).
- 52 *What decisions should be subject to merit review?*, [4.56].
- 53 *What decisions should be subject to merit review?*, [5.3].
- 54 *What decisions should be subject to merit review?*, [5.12].
- 55 *What decisions should be subject to merit review?*, [5.28].
- 56 AHRC Act s 29(2)(a).
- 57 AHRC Act s 29(2)(b).

Further Information

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