



Australian
Human Rights
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

31 October 2014

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Australian Government's Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

2 Summary

2. The Commission welcomes the opportunity to provide a submission to this inquiry.
3. The Australian Government has said that this Bill 'fundamentally changes Australia's approach to managing asylum seekers'.¹ The Commission agrees with this assessment. In particular, the Bill proposes to:
 - a. remove judicial scrutiny of whether Australia complies with certain human rights obligations and reduce the scope of these obligations
 - b. introduce a 'fast track' assessment process for protection visas which removes important procedural rights for asylum seekers
 - c. introduce temporary protection visas (TPVs) and safe haven enterprise visas (SHEVs)
 - d. allow people to be arrested at sea and taken to another country, without listening to their concerns and without any judicial assessment of whether this would put them at risk of persecution
 - e. require children born in Australia to asylum seeker parents who arrive by boat to be detained and transferred to Nauru.
4. The Commission is concerned that this package of amendments will:
 - a. significantly reduce the rights of asylum seekers travelling to or arriving in Australia
 - b. increase the risk that they will be wrongly found not to be refugees
 - c. increase the risk that they will be returned to a place where they have a well-founded fear of persecution, because of a lack of judicial oversight of relevant decisions
 - d. increase the risk that babies born in Australia, including those eligible for Australian citizenship, will be removed to Nauru.
5. The Commission has previously expressed its concern about TPVs. There is a significant body of medical evidence which shows the detrimental mental health impacts for people on TPVs. This arises from the uncertainty of their situation and the fear of being forcibly removed to face persecution in their country of origin when the TPV ends. In the Commission's view, people found to be refugees should be provided with permanent protection.

6. It is not necessary to introduce TPVs to remove people from immigration detention. The vast majority (approximately 90 per cent) of the more than 30,000 asylum seekers awaiting the processing of their claims for protection are living in the community. The remaining 10 per cent could be granted a bridging visa or placed into community detention while their protection claims are assessed. The Minister has the discretion to grant a bridging visa or make a community detention placement in relation to any asylum seeker in detention. This could be done immediately. Existing conditions on bridging visas could be amended by regulation to include work rights along with access to social security and access to necessary support services.
7. TPVs are not a deterrent to people seeking asylum in Australia for at least two reasons. First, historical evidence shows that after TPVs were introduced in late 1999 the numbers of asylum seekers coming to Australia increased to then record highs during the next two years. Secondly, the fact that people currently in Australia would be granted TPVs under this Bill is irrelevant to the decision by an asylum seeker to travel to Australia in the future because under the Australian Government's policy settings future asylum seekers will not receive TPVs.
8. The historical record also suggests that permanent protection visas could be granted to asylum seekers currently in Australia without an impact on the numbers of asylum seekers coming to Australia. When the Coalition was last in government, 95 per cent of irregular maritime arrivals who were initially granted a TPV (8,600 people) were eventually granted permanent visas. Following an announcement by the then Minister for Immigration in July 2004, TPV holders were able to apply for permanent protection visas. In the four years that followed, between 85 per cent and 93 per cent of protection visas issued by the Government were permanent protection visas. While TPV holders were being granted permanent visas throughout this period there was no significant increase in unauthorised boat arrivals.

3 Recommendations

9. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill not be passed.

Recommendation 2

The Commission recommends that the Australian Government promptly process the claims of the more than 30,000 people in Australia seeking asylum using the existing refugee status determination process with access to merits review in the Refugee Review Tribunal, and provide permanent protection visas to those found to be refugees.

Recommendation 3

The Commission recommends that if the asylum seekers are in detention, they should be granted a bridging visa or placed into community detention while their protection claims are assessed and that conditions on bridging visas be amended to include work rights, along with access to social security and access to necessary support services.

Recommendation 4

If Recommendations 1 and 2 are not accepted, the Commission recommends that the Bill be amended to ensure that if a person is granted a TPV, he or she will be eligible for a permanent protection visa at the expiry of the TPV. At that stage, the person will have demonstrated a continuing, well-founded fear of persecution and a permanent visa will be the best way of providing the person with a durable solution.

Recommendation 5

The Commission recommends that the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth) be passed, along with further legislative amendments to ensure that:

- (a) the parents of unlawful non-citizen children born in Australia are not liable to be taken to a regional processing country pursuant to s 198AD of the Migration Act, to avoid family separation; and
- (b) any asylum claims of such families are processed in Australia in accordance with recommendation 2.

Recommendation 6

The Commission recommends that the Australian Government publish administrative guidelines for relevant officers to facilitate the making and processing of applications for Australian citizenship by children born in Australia who would otherwise be stateless. The guidelines should make clear that in exercising those administrative functions, the officers should treat the best interests of the child as a primary consideration.

4 Removing and reducing judicial scrutiny of human rights obligations

10. The most obvious impact on human rights in the Bill appears in Schedule 5 which purports to 'clarify' Australia's international law obligations. The main objections with this Schedule are that it:
 - a. removes judicial scrutiny of whether Australia complies with its *non-refoulement* obligations in international law when removing people from Australia
 - b. removes references to the Refugee Convention from the *Migration Act 1958* (Cth) (Migration Act), so that when courts interpret the Migration

Act they will not need to read it in a way that is consistent with the Convention

- c. sets out the Government's interpretation of Australia's obligations under the Refugee Convention, which is narrower than the meaning given to these obligations in the Convention and in decided cases.

4.1 Judicial scrutiny of non-refoulement obligations

(a) Non-refoulement obligations

11. Australia has international obligations under a variety of Conventions and Covenants not to return people to countries where they have a well-founded fear of persecution or where there is a real risk that they will be tortured or arbitrarily killed. These obligations are referred to as non-refoulement obligations.
12. The Bill defines Australia's non-refoulement obligations as including Australia's obligations under the Refugee Convention, the *International Covenant on Civil and Political Rights* (ICCPR) or the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).²
13. The most significant of these non-refoulement obligations are:
 - a. Article 33(1) of the Refugee Convention:

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.
 - b. Article 6(1) of the ICCPR:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.
 - c. Article 6 of the ICCPR and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.
 - d. Article 7 of the ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
 - e. Article 3 of the CAT:
 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
14. Article 33(1) of the Refugee Convention and Article 3 of CAT refer explicitly to *non-refoulement*. In a series of cases, the United Nations Human Rights Committee 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.³
15. 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 under the ICCPR 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.⁴
- (b) *Removal of judicial scrutiny*
16. Proposed s 197C in the Bill deals with the power to remove people from Australia. It provides that when exercising the power to remove an unlawful non-citizen from Australia 'it is irrelevant whether Australia has *non-refoulement* obligations' to that person.⁵
17. Further, an officer's duty to remove an unlawful non-citizen from Australia 'arises irrespective of whether there has been an assessment, according to law, of Australia's *non-refoulement* obligations' in respect of that person.
18. The Government acknowledges that the plain meaning of proposed s 197C is 'capable of authorising actions which may not be consistent with Australia's *non-refoulement* obligations'.⁶ However, it says that the section is still compatible with human rights because, despite authorising conduct in breach of human rights, the Government does not intend to engage in such conduct.⁷
19. The Government's attitude to its human rights obligations in this context is to ask the public to trust it, and to attempt to remove any judicial scrutiny of its compliance.
20. If, despite its best intentions, the Government does act in breach of these human rights obligations, the breach would no longer be 'capable as a matter of domestic law of forming the basis of an invalidation' of the exercise of the power to remove someone from Australia.⁸
21. There are two ways in which the Government says *non-refoulement* claims could be considered prior to removal. However, neither of these grounds

justify the extraordinary statement in s 197C that, if these prove insufficient, a person can be removed from Australia in breach of Australia's *non-refoulement* obligations anyway.

- a. The first way that *non-refoulement* obligations could be considered is through the process of assessing a claim for a protection visa. However:
 - i. whether an asylum seeker arriving by boat is permitted to make an application for a protection visa is at the discretion of the Minister (s 46A)
 - ii. the Government proposes to narrow the grounds for a protection visa so that they do not include complementary protection under the ICCPR and the CAT (see section 4.1(d) below)
 - iii. if this Bill is passed and the proposed 'fast track' assessment process is introduced, the review rights of asylum seekers will be significantly reduced, leading to a real risk that they will be wrongly found not to be refugees (see section 5 below).
- b. The second way that *non-refoulement* obligations could be considered is as a result of the exercise by the Minister of 'a number of personal non-compellable powers' to permit someone to apply for a visa or to grant a visa.⁹ However:
 - i. because these powers are discretionary and non-compellable, if they are not exercised by the Minister then the asylum seeker has no remedy
 - ii. previous experience shows how a refusal to exercise these powers can lead to a breach of Australia's *non-refoulement* obligations (see section 4.1(c) below).

(c) *Reliance on non-compellable Ministerial powers is insufficient protection from non-refoulement*

22. The proposed amendments seek to overcome the unanimous decision of a five member bench of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.
23. In that case, the applicant was an asylum seeker from Afghanistan. He was found not to be a refugee and was liable to be removed from Australia. Prior to his removal, the Department of Immigration and Citizenship completed an International Treaties Obligation Assessment (ITOA) to determine whether Australia would be in breach of its *non-refoulement* obligations under the ICCPR or the CAT if he was sent back to Afghanistan. In carrying out the ITOA, the Department applied the wrong test.¹⁰ It considered whether it was 'more likely than not' that the applicant would be arbitrarily deprived of his life in Afghanistan. The correct test was whether there was a 'real chance' that the applicant would be arbitrarily deprived of his life. The applicant sought review of the ITOA.

24. Significantly, before that review was completed, the Minister decided that even if the ITOA was wrong he would not exercise his powers to grant the applicant a visa or allow him to apply for a visa.¹¹ That is, even if sending the applicant to Afghanistan would be a breach of Australia's *non-refoulement* obligations because there was a real chance that he would be killed, the Minister would not consider allowing the applicant to stay in Australia. The Minister's decision was made in the knowledge that the Department intended to remove the applicant from Australia in two days' time.¹²
 25. Ultimately, the Court held that it was appropriate to make a declaration that the ITOA was not made according to law and to grant an injunction preventing the applicant from being removed from Australia until his claims for protection under the ICCPR and the CAT had been assessed according to law.¹³ An application by the Minister for special leave to appeal to the High Court was refused on the basis that there were insufficient prospects of success.¹⁴
 26. In the light of decisions of this nature, it is difficult to accept the submission of the Government that it should be solely 'a matter for the Government' to assess whether Australia is meeting its *non-refoulement* obligations.¹⁵ The Government points to the Minister's personal non-compellable powers as an appropriate safeguard.¹⁶ Cases such as SZQRB demonstrate why the existence of such powers is insufficient.
- (d) *Removal of complementary protection would increase risk of non-refoulement*
27. There is another Bill currently before Parliament which, if passed along with the present Bill, would heighten risk that there will be a breach of *non-refoulement* obligations. The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth) proposes to repeal the complementary protection provisions from the Migration Act. Section 36(2)(aa) of the Migration Act currently provides that a protection visa can be granted if there is a real risk that a person would suffer significant harm contrary to article 6 or 7 of the ICCPR or article 3 of CAT if removed from Australia.
 28. If the complementary protection provisions are removed from the Migration Act, there is an increased risk that a person will be removed from Australia without appropriate consideration of Australia's protection obligations because an application for a protection visa could be 'finally determined' for the purposes of s 198 without considering these provisions. Any consideration of *non-refoulement* obligations under the ICCPR or the CAT would be left to non-statutory administrative processes. The Commission's submission to this Committee in relation to that Bill deals with the risks involved in such processes in more detail.¹⁷
 29. The Commission is concerned that the present Bill would compound those risks. The present Bill provides that if these non-statutory processes are not followed, there is no legal impediment to removing a person from Australia in breach of the obligations in the ICCPR and the CAT.

4.2 Relevance of Refugee Convention to the Migration Act

30. The High Court has recognised in several cases that the parts of the Migration Act that provide for the granting of protection visas are based on Australia's obligations under the Refugee Convention.
31. In *Plaintiff M61/2010E v Commonwealth of Australia*,¹⁸ the High Court said:
- ... the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.
32. The ambit of the duty and power to remove non-citizens from Australia pursuant to relevant provisions of the Migration Act must be understood in the context of these protection obligations.¹⁹ Australian courts will endeavour to adopt a construction of the Migration Act, if that construction is available, which conforms to the Refugee Convention.²⁰
33. The Bill proposes to 'remove most references to the Refugee Convention from the Migration Act'.²¹ Most significantly, it would remove the reference to the Refugee Convention in s 36 which sets out who is entitled to apply for a protection visa.²²
34. The intention is that rather than allowing independent judicial interpretation of the Migration Act in light of the full range of Australia's protection obligations in the Refugee Convention, the Act would be amended to codify the Government's interpretation of Australia's protection obligations under the Refugee Convention.²³ The Government's narrower interpretation would then form the basis for any interpretation of other parts of the Migration Act.

4.3 Limitation of Australia's protection obligations

35. The Migration Act already contains some qualifications to Australia's protection obligations under the Refugee Convention in ss 91R, 91S, 91T and 91U. The Bill proposes to repeal these sections but replace them with substantially equivalent provisions in ss 5J(4)-(6), 5K and 5M. Among other things, these already existing limitations on Australia's protection obligations include:
- a. creating a higher threshold for assessing whether conduct amounts to 'persecution' (s 91R(1) and (2))
 - b. placing the onus on the asylum seeker to prove that 'sur place' claims (ie claims based on conduct occurring in Australia) are not based on conduct engaged in for the purpose of strengthening the person's claim (s 91R(3))

- c. limiting the ways in which a person could claim protection based on membership of a particular social group that consists of the person's family (s 91S)
 - d. defining 'non-political crime' for the purpose of Article 1F of the Refugee Convention (s 91T)
 - e. defining 'particularly serious crime' for the purposes of Article 33(2) of the Refugee Convention (s 91U).
36. In addition, the Bill proposes to insert new provisions (ss 5H, 5J(1)-(3) and 5L) which would set out the Government's interpretation of:
- a. the definition of 'refugee'
 - b. the definition of 'well-founded fear of persecution'
 - c. the definition of 'membership of a particular social group'.
37. These proposed new statutory definitions are narrower than the meaning that these terms have in the Refugee Convention and in decided cases. These new narrower definitions would limit Australia's protection obligations in a number of ways.
- (a) *Internal relocation*
38. One way in which Australia's protection obligations would be limited is by what has been called the 'internal relocation principle'.²⁴ Proposed s 5J(1)(c) requires an asylum seeker to have a real chance of persecution in 'all areas' of their home country in order to have a well-founded fear of persecution. If there is at least one area anywhere in the asylum seeker's home country in which he or she would not have a real chance of persecution, then the person will not be considered to be a refugee. This is the case regardless of whether the person:
- a. had ever been to this place
 - b. could reasonably relocate to this place in light of the person's individual circumstances
 - c. could safely relocate to this place
 - d. could legally relocate to this place.²⁵
39. The internal relocation principle in proposed s 5J is not a codification of existing law. It is not found in the Refugee Convention and it is contrary to Australian authority dealing with the issue. In *SZATV v Minister for Immigration and Citizenship*, the High Court held that a well-founded fear of persecution need not always extend to the whole territory of a person's country of nationality in order for that person to qualify as a refugee.²⁶ In cases where the internal relocation principle arises, the issue is whether it is reasonable, in the sense of practicable, for the person to relocate.²⁷ Further,

what is reasonable must depend upon the particular circumstances of the person and the impact upon that person of relocation.²⁸

40. The internal relocation principle in proposed s 5J is also contrary to similar regimes in other countries, for example, in the United States. The United States Code of Federal Regulations relevantly provides in § 208.13 dealing with 'Establishing asylum eligibility':

An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, **if under all the circumstances it would be reasonable to expect the applicant to do so.**

(emphasis added)

(b) *Effective state protection*

41. A second way in which Australia's protection obligations would be limited is by extending the concept of 'effective protection' to non-state actors.

42. The test for whether a person is a refugee begins with an assessment of whether a person has a well-founded fear of persecution in the country of his or her nationality for a Convention reason. An essential aspect of the definition of 'refugee' in article 1A(2) of the Refugee Convention is that such a person has an inability or legitimate unwillingness 'to avail himself of the protection of that country'.

43. That is, if there is effective state protection, the person will not be a refugee. James Hathaway has summarised the position in the following way:

[P]ersecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which government cannot or will not prevent ...²⁹

44. The High Court has noted that states have the primary responsibility to safeguard the rights and freedoms of those within their jurisdiction. International responsibility under the Refugee Convention has been described as a form of 'surrogate protection'.³⁰ That is, international refugee law was meant to serve as a substitute for national protection where such protection was not provided.³¹

45. It appears that proposed s 5J(2)(b) seeks to expand the concept of effective protection to include protection by non-state actors. This is set out as an alternative to state protection in s 5J(2)(a). There is no support for this in the Convention and it is unclear how the Government expects that the test will operate in practice.

46. If a person has established that:

a. he or she fears persecution for a Convention reason;

- b. there is a real chance of persecution if the person is returned to the country; and
- c. there is no effective state protection,

then it appears inappropriate to inquire into whether or not other non-state actors could provide protection instead.

- 47. If s 5J(2)(b) merely goes to the question of whether there is a real chance that the person will be persecuted, it is unnecessary as this is dealt with in s 5J(1)(b).
- 48. The Government has not explained what non-state actors a decision maker should consider if the state cannot provide effective protection. Its reference to the first instance Federal Court judgment in *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953 suggests that the Government considers it would be sufficient if protection was provided by mercenaries, either alone or in the employment of government forces.³² The Commission considers this to be an unwarranted extension of the concept of effective state protection.

(c) *Acting discreetly to avoid persecution*

- 49. A third way in which Australia's protection obligations would be limited is by refusing protection to someone with a well-founded fear of persecution if they could act discreetly to avoid persecution.
- 50. In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, the High Court considered a claim by two men who feared persecution in Bangladesh because they were homosexual.³³ The Refugee Review Tribunal had said that the applicants had 'clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home now'. The High Court said that this reasoning was in error because it failed to consider *why* the applicants had acted discreetly while they were in Bangladesh and what consequences might attach to them living openly in the future. That is, did they have a well-founded fear of persecution which caused them to act discreetly?
- 51. In a later case, *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court considered a claim by an Iranian man who had converted to Christianity after leaving Iran and claimed to fear persecution because of his religious beliefs if he were to return to Iran.³⁴ The Tribunal had found that only Christians who were proselytizing or actively seeking attention on religious matters were at risk of persecution in Iran. The applicant had not practiced his Christian faith in an active way outside of Iran (where he was not at risk of persecution) and so he would not have a well-founded fear of persecution in Iran if he practiced his faith there in the same way. The Tribunal's decision was upheld by a majority of the High Court.
- 52. Proposed s 5J(3) goes beyond the findings in these cases to ask not only what a person *would* do if returned to their country of origin, but what they *could* do.³⁵ It provides that a person does not have a well-founded fear of

persecution if they could take reasonable steps to modify their behaviour to avoid persecution. There are two exceptions. The person would not be required to modify their conduct if this would:

- a. conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - b. conceal an innate or immutable characteristic of the person.
53. The Explanatory Memorandum says that the reference to 'conscience' is intended to encompass aspects such as religion, political opinion and moral beliefs. However, it also emphasises that only a modification of behaviour that is 'fundamental' to the person's conscience will be relevant to the exception.³⁶
54. The new section would require courts to make judgments about what aspects of a person's conscience are 'fundamental' and what are expendable and could be modified to avoid persecution. For example, in the case of religious persecution:
- a. should a person be required not to wear religious symbols such as a cross, or clothing required by religious tenets such as a headscarf?
 - b. should a person be required not to attend religious gatherings in public if such gatherings could be conducted privately?
 - c. should a person be required not to proselytize or actively seek attention on religious matters?
55. Equivalent issues arise in relation to persecution on the grounds of political opinion and persecution on the grounds of membership of a particular social group, for example one based on sexual orientation.
56. The Commission considers that it is a dangerous approach for the Government to take to seek to return people to a country where they have a well-founded fear of persecution, on the basis that it would be possible to hide the characteristic that would lead them to be persecuted.
- (d) *Limiting the scope of social groups that qualify for protection*
57. A fourth way in which Australia's protection obligations would be limited is by limiting the scope of social groups that qualify for protection.
58. The Refugee Convention provides that a person is a refugee if the person has a well-founded fear of persecution in their country of origin because of membership of a particular social group. There is a large body of existing cases that deal with how a particular social group is to be identified. For example, in the leading case of *Applicant A v Minister for Immigration and Ethnic Affairs*, McHugh J said that the members of a particular social group will be defined by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.³⁷

59. Proposed s 5L(1)(b) would narrow the classes of relevant social groups by requiring that the characteristic that is shared by the members of the group is either:³⁸
- a. an innate or immutable characteristic; or
 - b. so fundamental to a member's identity or conscience that the member should not be forced to renounce it.
60. The Explanatory Memorandum says that an 'innate' characteristic is intended to include things such as 'the colour of a person's skin, a disability that a person is born with or a person's gender'. It says that an 'immutable' characteristic is intended to encompass attributes of a person that are not capable of change. One example given is an acquired health status such as being HIV positive.
61. However, the Explanatory Memorandum goes on to say that an 'immutable' characteristic could also be a certain experience such as being a child soldier, sex worker or victim of human trafficking. The suggestion seems to be that these groups of people share an 'immutable' characteristic because they have had the same experience in the past. However, it appears that there is a real risk that such an interpretation of the section would not be adopted. For example, if a person is no longer a child soldier or a sex worker can it be said that the characteristic is 'immutable'?
62. The statement in the Explanatory Memorandum appears to be based on a hope that 'immutable' will be interpreted in a similarly expansive way to that adopted by some foreign tribunals, particularly the United States Board of Immigration Appeals. However, application of this test in the United States to cases dealing with 'past experiences' has been uneven. In *Gomez v Immigration and Naturalization Service*, the 2nd Circuit of the United States Court of Appeals affirmed a decision by the Board of Immigration Appeals to reject a claim to membership of a particular social group where the group was defined as 'women who have previously been battered and raped by Salvadorean guerrillas'.³⁹
63. As a result of interviews with people in immigration detention in Australia, the Commission is aware that many women seeking asylum in Australia are fleeing domestic violence. If there is no effective state protection against domestic violence in their home country it is possible that such women could qualify as refugees. The High Court considered this issue in *Minister for Immigration and Multicultural Affairs v Khawar*.⁴⁰ Ms Khawar's case was that she was a victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal was part of systematic discrimination against women which was both tolerated and sanctioned by the state.⁴¹ The members of the High Court variously considered that there could be a particular social group consisting of:
- a. 'women in Pakistan'⁴²

- b. 'married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household'⁴³
 - c. 'a woman, a married woman in conflict with her husband, or a married woman without male support seen as having broken the customs and mores of Pakistani society'.⁴⁴
64. While the characteristic of being a woman in Pakistan is innate or immutable, the narrowed definition of particular social group proposed by the Government in this Bill may exclude the other potential social groups found by the High Court in *Khawar*. This could have the result that women at risk of domestic violence that is tolerated and sanctioned in their home country may no longer qualify as refugees in Australia.
65. While the strategy of requiring that the relevant characteristic must be 'immutable' or 'fundamental' may provide a limiting principle to the definition of particular social group, this limitation is not compelled by the Refugee Convention or other authoritative sources.⁴⁵
66. The second part of the definition in s 5L(1)(b) raises the same problems identified in section 4.3(c) above. It would require courts to make judgments about what aspects of a person's conscience are 'fundamental' and what aspects are expendable and could be renounced.
67. Under the approach suggested in s 5L(1)(b), there are many social groups that satisfy the current test that would likely be denied protection. These may include groups such as private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, members of a labour union or students.⁴⁶ For example, in *Montoya*, the United Kingdom Immigration Appeals Tribunal considered a claim by a manager of a coffee plantation in Colombia who said that he faced threats and extortion from a revolutionary group that the government was unable or unwilling to control. The Tribunal held that the status of being 'an owner of land that is worked for profit' was a significant social identifier with historical overtones and that private landowners were ineffectively protected in Colombia from guerrilla groups.⁴⁷ But it concluded that the applicant was not a member of a particular social group because being a land owner was not a characteristic that he 'cannot change, or should not be required to change' to avoid persecution. The Tribunal said that the applicant could change his status as a landowner 'without that having a fundamental impact on his identity or conscience'.
68. In the Australian context, the High Court held in *Dranichnikov v Minister for Immigration and Multicultural Affairs* that a relevant social group was entrepreneurs and businessmen in Russia who publicly criticised law enforcement authorities for failing to take action against crime or criminals.⁴⁸ There is a real risk that such a group would no longer be accorded protection under the proposed narrowing of the definition of a particular social group.

5 'Fast track' assessment of protection visa applications

69. The proposed 'fast track' assessment process in Schedule 4 of the Bill would undoubtedly result in faster assessments of refugee applications. However, it would also significantly increase the risk that people who are in fact refugees would be wrongly found not to be refugees.
70. The primary problems with the process are that it:
- a. requires asylum seekers to provide a complete statement of their claims for protection during their first engagement with an officer of the Department, at a time when they may not have received appropriate legal advice about their claim
 - b. prevents asylum seekers from raising matters on review, even if these are highly relevant to their claim, if they were not raised with the initial decision maker
 - c. prevents asylum seekers from appearing in person before an independent reviewer to make submissions about their claims, at a time when they are more likely to have received proper legal advice.
71. This section of the submission considers the following issues:
- a. human rights principles relevant to the process of refugee status determination
 - b. the recommendations by the Expert Panel on Asylum Seekers for a review of the current system of refugee status determinations
 - c. the background to the introduction of the current system of merits review
 - d. the essential content of the process of merits review of refugee status determinations
 - e. the changes proposed by the Bill to a system of 'limited merits review'
 - f. the differences between review rights for different classes of people if the Bill is passed.

5.1 *Human rights principles relevant to assessment of refugee status*

72. The ICCPR contains a specific provision relating to the right of aliens to review of decisions to expel them from a country. Article 13 of the ICCPR provides:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the

competent authority or a person or persons especially designated by the competent authority.

73. There are several relevant elements to this right. It includes lawful decision making, the right to make submissions, the right of a review involving a hearing and the right to representation.

74. The Government focuses on the requirement that the alien be ‘lawfully’ present in the territory of the state. It says that this means the article does not apply to ‘unlawful maritime arrivals’ and therefore that these human rights protections need not be afforded to them.⁴⁹

75. Article 14 of the ICCPR provides more general due process guarantees in relation to legal proceedings. It relevantly provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

76. The right of access to courts and tribunals and equality before them, is not limited to citizens. The United Nations Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state and includes asylum seekers and refugees.⁵⁰ The concept of ‘suit at law’ encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.⁵¹ The right in article 14 does not apply to circumstances where the right in article 13 is applicable.⁵² However, if article 13 is not applicable (as the Government suggests) then the rights in article 14 are apt to apply to procedures aimed at determining refugee status. This seems to be accepted by the Government.⁵³

77. A key aspect of the hearing required by article 14 is that it is fair. In order for a hearing to be fair, it is essential that the person concerned ‘has a reasonable opportunity of presenting his case’.⁵⁴ This will include a reasonable opportunity to make relevant submissions and give evidence.⁵⁵

5.2 Recommendations by the Expert Panel for a review of the current system

78. The Expert Panel that reported to then Prime Minister Julia Gillard in August 2012 made a range of recommendations about changes to asylum seeker policy.⁵⁶

79. Recommendation 15 of the Expert Panel Report was that ‘a thorough review of refugee status determination (RSD) would be timely and useful’. It said that such a review should include a number of factors within its scope, including:

- a. a more expeditious assessment process to finalise RSDs
- b. the quality of application advice

- c. the primary decision and review process.
80. The proposals in the present Bill would provide a more expeditious process, but at the expense of allowing asylum seekers to receive a fair and rigorous assessment of their claims. In sacrificing accuracy of decision making for speed the Bill fails to strike the appropriate balance in assessing refugee claims.
81. Significantly, prior to the introduction of this Bill there has been no transparent and comprehensive public review process about how the current system could be amended. The ‘thorough review’ recommended by the Expert Panel should properly include public consultation. In this respect, the process has differed markedly from the detailed consideration given to the appropriate structure for merits review when the Refugee Review Tribunal was first established. This is dealt with in more detail in the following section.
82. In making the recommendation for review, the Expert Panel Report made reference to the success rates for protection claims by asylum seekers:
- Currently, close to 90 per cent of all [irregular maritime arrivals] coming to Australia are successful in being granted a protection visa at either the primary or review stage. For certain cohorts the success rate has exceeded 95 per cent for particular reporting periods.⁵⁷
83. The Report noted that, while these approval rates were high, they are ‘broadly consistent with UNHCR refugee status decision approval rates for similar caseloads in Malaysia and Indonesia’. That is, the evidence suggests that the current system of review produces outcomes that are in line with what would be expected.
84. For people seeking asylum in Australia, it is vitally important to have a process that is fair and that allows for a full evaluation of their claims. This is because it the evidence shows that the vast majority of people seeking asylum in Australia are in fact refugees. Therefore, the consequences of making a wrong decision are particularly grave for an individual applicant.

5.3 Introduction of merits review in migration matters

(a) *Administrative Review Council report*

85. The question of how migration decisions should be made and reviewed was considered comprehensively by the Administrative Review Council in a report to the Attorney-General in 1986.⁵⁸
86. The Council was strongly of the view that there was a need for a system of external review on the merits for migration decisions. A key reason for this was that ‘very significant personal interests’ may be affected by migration decisions.⁵⁹ This was particularly true in relation to decisions made in relation to refugee status. As the Council observed ‘very serious consequences may ... ensue if the decision is incorrect and the applicant is subsequently returned to his or her native country’.⁶⁰ Further:

the absence of a legally enforceable right of a refugee to be granted permanent resident status does not provide a sufficient reason for exempting a refugee status determination from external review when account is taken of the serious impact such a determination may have.⁶¹

87. The interests affected by migration decisions were 'no less vital to the persons concerned than decisions made in other areas of government administration' where merits review was available, such as social security decisions reviewable by the Administrative Appeals Tribunal.⁶²
88. External review would 'guard against arbitrary or defective administrative action' and was important to ensure that decisions were made 'fairly, on the basis of existing fact and in accordance with the requirements of law'.⁶³
89. The Council criticised the review process by the Determination of Refugee Status (DORS) Committee that existed at the time as inadequate, including because it 'does not allow applicants either to appear before it in person or to be represented by some other person'.⁶⁴

(b) *Joint Standing Committee on Migration Regulations*

90. The Joint Standing Committee on Migration Regulations was established in 1990. The Committee produced a report in 1992 which, among other things, dealt with review of refugee status determinations.⁶⁵
91. The Committee noted with approval the assessment of the Administrative Review Council that refugee status decisions were different from other administrative decisions because of:
 - a. the obligations imposed on Australia under international treaties; and
 - b. the 'desperate nature of the decisions involved, where it could be a matter of life or death'.⁶⁶
92. As to Australia's international obligations, the Committee observed:

Australia's approach to refugee determination has been and continues to be influenced by the requirements of international agreements to which Australia is a signatory. In particular, under the Refugee Convention and Protocol, Australia has an obligation to examine case by case claims from people at its frontiers or temporarily in Australia who are seeking to enter or remain on the basis of a claimed fear of persecution in their country of nationality or habitual residence.⁶⁷
93. Because a decision to refuse refugee status was of such significance to an applicant, and the consequences of a wrong decision were so severe, the Committee said that the decisions should be subject to merits review.⁶⁸
94. Like the Administrative Review Council, the Committee identified problems with the process used by the DORS Committee of reviewing decisions of primary decision makers 'on the papers'. This process had been criticised by a former UNHCR representative to Australia, including because:

the inability of DORS Committee members to question applicants directly or judge demeanor impairs assessment of claims because it forces them to rely on transcripts prepared by immigration officers who generally are inexperienced.⁶⁹

95. Concerns with the previous system had also been expressed by the Attorney-General's Department which had argued that immigration decision making should be modelled on principles which applied throughout the rest of the Commonwealth's public administration.⁷⁰
96. The Committee endorsed the establishment of the Refugee Review Tribunal as being 'demonstrably fairer' than the previous system of review on the papers because the tribunal member 'will see and question the refugee applicant' which would allow for 'more accurate assessment of the merits of a claim and the credibility of applicants'.⁷¹

(c) *Establishment of the Refugee Review Tribunal*

97. The Refugee Review Tribunal was established by amendments introduced in the *Migration Reform Act 1992* (Cth). The Explanatory Memorandum noted that the Bill extended the merits review regime in Australia to decisions which affect the capacity of a non-citizen to remain in Australia. In doing so, it addressed 'community concern about the impartiality of immigration decision-making in Australia in areas where no independent merits review is currently available'. The RRT would 'provide determinative independent merits review of refugee status matters'.
98. During the course of the second reading debates, Government members noted that 'the purpose of these reforms is to strike a better balance between the expectations of justice and speed in processing applications for residence'.⁷²

5.4 Essential content of merits review of refugee decisions

(a) *General principles*

99. 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.⁷³ In this context, the Council defines merits review as a process by which a person or body:
 - a. other than the primary decision maker
 - b. reconsiders the facts, law and policy aspects of the original decision; and
 - c. determines what is the correct and preferable decision.
100. 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.

101. 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.
102. 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.
103. 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'.⁷⁴ 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).
104. 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.⁷⁵ Similarly, the fact that a decision is exercised by reference to a government policy does not justify excluding merits review.⁷⁶ 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.⁷⁷

(b) *Procedures recommended and used by UNHCR*

105. The Office of the United Nations High Commissioner for Refugees has produced a handbook on procedures and criteria for determining refugee status.⁷⁸ As the Government notes in the Explanatory Memorandum to the Bill, UNHCR says that:

the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.⁷⁹

106. However, this statement should not be interpreted as meaning that all procedures are equally appropriate. There are currently 145 state parties to the Refugee Convention and the procedures that they each put in place will need to take into account their domestic legal systems and level of development. When considering the appropriate structure for Australia, having regard to its particular constitutional and administrative structure, the general principles identified by the Administrative Review Council set out above must be taken into account.

107. In Australia, the kinds of administrative decisions in which merits review is appropriate are ones where the rights of individuals are affected. There is no basis to provide a lesser standard of review to administrative decisions involving the determination of refugee status than is provided in relation to other Commonwealth administrative decisions such as decisions about social security. On the contrary, the very significant consequences of making a wrong decision in relation to a refugee status determination suggest that merits review of such decisions is highly desirable. If a wrong decision about refugee status is made, a 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.
108. One of the minimum requirements that UNHCR recommends all states adopt is that if an applicant is not recognised as being a refugee, he or she ‘should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or a different authority, whether administrative or judicial, according to the prevailing system’.⁸⁰
109. UNHCR also has procedural standards for how it conducts its own refugee status determination assessments. The following are important elements of the UNHCR process:⁸¹
- a. Every applicant has the right to appeal a negative refugee status determination decision.
 - b. The purpose of the appeal is to re-examine the first instance decision to assess whether it was based on a reasonable finding of fact and a correct application of the refugee criteria.
 - c. The officer conducting the appeal should consider the material before the original decision maker and any other information provided by the applicant in support of the appeal.
 - d. As a general rule, the applicant should have the opportunity to present their appeal in person.
 - e. In particular, an appeal interview should be granted where new evidence is raised in the appeal application that is relevant to the determination of the refugee claim.
110. The procedures that are proposed to be put in place by the current Bill are inferior to those used by UNHCR in several respects. The detail of these proposals is considered in more detail below.

5.5 Proposed change to ‘limited merits review’

111. The Bill would establish a new Immigration Assessment Authority (IAA) within the existing Refugee Review Tribunal.⁸² The role of the IAA would be to review ‘fast track reviewable decisions’.⁸³
112. Broadly, ‘fast track reviewable decisions’ are decisions to refuse to grant a protection visa to an asylum seeker who arrived in Australia by sea on or after

13 August 2012.⁸⁴ Currently there are more than 30,000 asylum seekers who arrived in Australia by sea after 13 August 2012 and who are awaiting a decision from the Minister as to whether they are able to make an application for a protection visa.⁸⁵

113. The Bill gives discretion to the Minister to expand the class of people who are subject to the fast track assessment process.⁸⁶ For example, the Government suggests that it could be expanded over time to include people arriving in Australia by air without a visa.⁸⁷ There is no limit in the Bill to the class of people denied a protection visa that the Minister could decide should be subject to the fast track process. That is, the fast track process could ultimately entirely replace the Refugee Review Tribunal. Further, the Minister can make such a decision by issuing a legislative instrument that cannot be disallowed by the Senate.⁸⁸
114. The 'fast track' process to be used by the IAA is described as a 'limited merits review'. It is not a merits review as that term is ordinarily understood or as used by the Administrative Law Council. The IAA does not conduct a rehearing. The IAA does not stand in the shoes of the original decision maker. The IAA does not have the power to consider all relevant facts and determine whether the original decision was correct and preferable.
115. Four of the most significant limitations of the proposed system, when compared with the current system of merits review through the RRT are as follows:
 - a. the IAA must not accept relevant information in relation to an applicant's claim, if this information was not raised by the applicant before the initial decision was made to refuse to grant a protection visa (unless there are 'exceptional circumstances'),⁸⁹
 - b. the IAA must not interview the applicant and must conduct a review on the papers (unless there are 'exceptional circumstances'),⁹⁰
 - c. the IAA has the power to affirm a decision to refuse a protection visa, or remit a decision to refuse a protection visa to the original decision maker, but does not have the power to either vary a decision or to set aside a decision and substitute a new decision granting a protection visa;
 - d. the IAA is to provide 'a mechanism of limited review that is efficient and quick' but unlike the RRT this mechanism is not required to be 'fair' or 'just', nor is the IAA (unlike the RRT) required to 'act according to substantial justice and the merits of the case'.⁹¹
- (a) *No 'new information' – significant risks of decisions based on incomplete information*
116. The prohibition on the IAA accepting relevant 'new information' means that it may not have all of the relevant facts at its disposal when it comes to make a review decision. This risk is heightened given that asylum seekers are no longer provided with legal advice and assistance in making their initial claims

for protection. If there are deficiencies in the way an asylum seeker's case is initially presented, there are real risks that the wrong decision will be made. If the system proposed by this Bill is adopted, these mistakes will not be able to be rectified on review.

117. The IAA must not generally accept or request 'new information'.⁹² New information is information that the IAA considers may be relevant, but was not before the original decision maker.⁹³ New information may only be considered if the IAA is satisfied that there are 'exceptional circumstances' and that the information could not have been provided to the original decision maker.⁹⁴
118. 'Exceptional circumstances' has not been defined.⁹⁵ The Government suggests that exceptional circumstances will not include circumstances where there was a 'misunderstanding or lack of awareness of Australia's processes and procedures'.⁹⁶
119. The Government claims that asylum seekers have 'ample opportunities' to present their claims and supporting evidence when their case is considered by the initial decision maker.⁹⁷ This is used as a justification for preventing them from leading relevant 'new information' on review. However, the premise is a false one.
120. It appears that the only opportunity that asylum seekers will now have to present their claims will be in the initial interview with an Onshore Protection decision maker.⁹⁸
121. 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.⁹⁹
122. For this reason, it may be necessary to have more than one interview so that apparent inconsistencies can be resolved.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²
123. However, under the fast track process proposed in the Bill, if an asylum seeker does not give a full account of all protection claims in this initial interview then he or she will be locked out of the chance to present other relevant information on review.
124. 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.¹⁰³ This situation has become more difficult since the removal of the Immigration Advice and Application Assistance Scheme (IAAAS).

125. 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.¹⁰⁴ This program was known as the 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.

126. Most applicants lodge visa applications without assistance.¹⁰⁵ The Refugee Advice and Casework Service (RACS) 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.¹⁰⁶

127. Representation also makes a significant difference to applicants on review to the RRT. In the RRT, the most recent figures show that represented applicants are successful in having a decision to refuse a protection visa set aside or remitted in 29% of cases. Unrepresented applicants are successful in 9% of cases.¹⁰⁷

128. On 31 March 2014, the Government announced that it would no longer provide access to the IAAAS for people who arrived in Australia without a visa, including unlawful maritime arrivals. The Minister for Immigration and Border Protection said:

From today people who arrived illegally by boat, as well as illegally by air, will no longer receive taxpayer funded immigration advice and assistance under the [IAAAS]. ... If people choose to violate how Australia chooses to run our refugee and humanitarian programme, they should not presume upon the support and assistance that is provided to those who seek to come the right way.¹⁰⁸

129. In place of immigration advice and assistance, asylum seekers are now provided with a handful of short brochures referred to as Protection Application Information and Guides (PAIG).¹⁰⁹ The Government has confirmed that: 'The only assistance available [from the Government] is the PAIG material. You will be referred to the PAIG material if you contact the immigration department for assistance'.¹¹⁰ For asylum seekers who arrived in Australia by boat after 13 August 2012, it does not appear that the relevant material has yet been made available. The one page brochure on the

department's website in relation to applying for protection in Australia notes: 'When the minister decides to lift the application bar for people who arrived illegally after 13 August 2012, PAIG material will be made available'.¹¹¹

130. The lack of assistance provided to asylum seekers in articulating their claims for protection makes it highly likely that interviews with Onshore Protection decision makers will be based on incomplete information. Under the fast track assessment process, this cannot be corrected on review.
131. The Department of Immigration and Border Protection said that '[r]emoving access to IAAAS removes an incentive to come to Australia illegally'.¹¹² The implication is that taking away immigration advice and assistance to asylum seekers will act as a disincentive because without such assistance there is less chance that they will be found to be a refugee.

(b) No interview – inability to test adverse credibility findings

132. The IAA must not interview the applicant and must conduct a review on the papers unless there are 'exceptional circumstances'.¹¹³
133. This proposal would amount to a return to the process for refugee status assessment that existed prior to 1992. That process had been criticised by the Administrative Review Council, the Joint Standing Committee on Migration Regulations and the Attorney-General's Department as being inadequate and less fair than a merits review process involving a hearing.
134. A review process without a hearing would mean that Australia's system of refugee status assessment would be inferior to that used by UNHCR discussed above.
135. A review hearing is particularly important where, as is common, the primary decision maker rejects claims made by an asylum seeker based on a view about the applicant's credibility. Unless there is a hearing on review where the applicant can give evidence in person, it will be almost impossible to make an assessment about the applicant's demeanor and credibility based on a review on the papers.¹¹⁴

(c) Limited powers of IAA – no ability to grant a protection visa

136. The IAA may affirm a fast track reviewable decision or remit the decision for reconsideration.¹¹⁵ These powers are narrower than those of the RRT. The RRT may exercise all of the powers and discretions that are conferred by the Migration Act on the person who made the original decision.¹¹⁶ In particular, the RRT has the power to:¹¹⁷
- a. affirm the decision
 - b. vary the decision
 - c. remit certain decisions for reconsideration
 - d. set aside the decision and substitute a new decision.

137. Because the IAA cannot substitute a new decision if the original decision was wrong, it has no ability to grant an applicant a protection visa in an appropriate case. The most it can do in the case of error is to send the decision back to an Onshore Protection decision maker employed by the Department of Immigration and Border Protection for reconsideration.

(d) *Way of operating – speed rather than fairness or justice*

138. Proposed s 473FA provides that in carrying out its functions, the IAA is to provide ‘a mechanism of limited review that is efficient and quick’.¹¹⁸

139. The difference with the objects of the RRT is stark. Section 420 of the Migration Act provides that the RRT is to provide ‘a mechanism of review that is fair, just, economical, informal and quick’. The emphasis in the RRT on a procedure that is fair reflects the rights in article 14 of the ICCPR discussed in section 5.1 above.

140. Further, unlike the RRT, the IAA is not required to ‘act according to substantial justice and the merits of the case’.¹¹⁹ The proposed new process prioritises speed at the expense of both fairness and justice.

5.6 Differences between review rights for different classes of people

(a) *Classes of asylum seekers*

141. The discussion above has focussed on the reduction of review rights accorded to one class of people referred to as ‘fast track review applicants’. Broadly, this class comprises asylum seeker who arrived in Australia by sea on or after 13 August 2012.

142. However, if the Bill is passed in its current form, it will create three classes of people, each of which have a different ability to access merits review of a decision to refuse them a protection visa. These classes of people are set out in the following table.

Class	People	Review rights
Excluded fast track review applicants	<p>A 'fast track applicant' who, in the opinion of the Minister:</p> <p>is covered by ss 91C or 91N; or¹²⁰</p> <p>has been refused refugee status by Australia in a previous application; or</p> <p>has been refused refugee status by another country; or</p> <p>has been refused refugee status by UNHCR; or</p> <p>makes a 'manifestly unfounded claim' for protection; or</p> <p>presents 'bogus documents' in support of an application, without reasonable explanation.</p>	No merits review
Fast track review applicants	<p>An unauthorised maritime arrival who:</p> <p>entered Australia on or after 13 August 2012; and</p> <p>has made a valid application for a protection visa; and</p> <p>is not an excluded fast track review applicant.</p>	Limited merits review (IAA)
Other applicants	<p>Any other asylum seeker who has applied for a protection visa, for example:</p> <p>unauthorised maritime arrivals prior to 13 August 2012; or</p> <p>air arrivals.</p>	Full merits review (RRT)

(b) *No review for ‘excluded fast track review applicants’*

143. The people who initially fall within the class of ‘excluded fast track review applicants’ is set out in the table above. However, the Bill gives discretion to the Minister to expand the class of people who are excluded from any form of merits review.¹²¹ There is no limit in the Bill to the class of people denied a protection visa that the Minister could decide should not have access to any administrative review at all. That is, the Minister could ultimately entirely prevent any recourse to either the IAA or the RRT. Further, the Minister can make such a decision by issuing a legislative instrument that cannot be disallowed by the Senate.¹²²

144. The rationale given for denying any merits review to the existing class of ‘excluded fast track review applicants’ is put in the following way:

The intention is to exclude ... from merits review ... those fast track applicants who, after an assessment of their protection claims, are determined to have put forward disingenuous information in support of their application or have access to protection elsewhere.¹²³

145. There are some concerns with this approach, particularly in relation to the scope of discretionary judgments that would need to be made by the Minister about whether or not a claim was ‘manifestly unfounded’ and, perhaps more significantly, whether or not it was reasonable for an asylum seeker to rely on ‘bogus documents’.

146. The Migration Act currently provides that if a person presented a ‘bogus document’ in relation to an application for a visa, the visa is liable to be cancelled unless the person shows cause why it should not be cancelled.¹²⁴ A bogus document is a document that the Minister reasonably suspects:

- a. purports to have been, but was not, issued in respect of the person; or
- b. is counterfeit or has been altered by a person who does not have authority to do so; or
- c. was obtained because of a false or misleading statement, whether or not made knowingly.¹²⁵

147. The provisions proposed in the Bill go significantly further than the existing provisions in the Migration Act in that they refuse any form of review of a decision to refuse a protection visa if the Minister considers that a bogus document was presented in support of an application for protection, without reasonable explanation.

148. The Explanatory Memorandum gives some indication of how the Minister will assess whether it was ‘reasonable’ to rely on the document:

The Government considers it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time when those documents may have facilitated the asylum seeker’s safe passage until such a time as they could claim protection at the first available opportunity. To continue to rely on them is considered purposefully misleading.¹²⁶

149. This passage recognises that it may have been necessary for an asylum seeker to rely on a bogus document to flee from a place of persecution, but applies a strict test that refuses access to merits review unless the reliance on the document ceases ‘at the first available opportunity’. It is unclear how the asylum seeker is in a position to judge the point in time at which the facilitation of safe passage has ended and the first opportunity to resile from a bogus document has arrived.

150. There is a risk in this provision that a person who is actually a refugee will be denied any form of review of his or her claims for protection, based only on an assessment of what is considered reasonable in such circumstances.

(c) *Discrimination between ‘fast track review applicants’ and other asylum seekers*

151. The fast track assessment process draws an unjustifiable distinction between ‘fast track review applicants’ and other asylum seekers who arrived by air, or who arrived by sea before 13 August 2012. Fast track review applicants are provided with the limited merits review which suffers from the deficiencies identified above. Other applicants have access to full merits review through the RRT.

152. Article 26 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

153. Similarly, by virtue of the non-discrimination provisions in article 2, the fair hearing required by article 14(1) of the ICCPR is to be provided to all individuals without distinction of any kind.

154. There is little justification given by the Government for the difference in treatment between these groups. The Statement of Compatibility with Human Rights acknowledges that different review rights for different groups engage the human rights principles identified above. The only statement made in support of this differential treatment is as follows:

It is the Government’s view that [unlawful maritime arrivals] with unmeritorious claims are often encouraged by private contacts to pursue vexatious merits review to prolong their stay. The length of time a person remains in Australia is relevant to a people smuggler’s message.¹²⁷

155. However, the fact that there may be a small minority of vexatious claims does not justify curtailing the opportunity to obtain proper advice and assistance and removing access to full merits review for this whole cohort. As noted above, on average 90% of this group are in fact refugees and not all of the remainder could be said to be vexatious.

156. No substantial justification has been provided for the differential treatment. In the Commission's view, this is a breach of article 26 and of article 14(1) read with article 2(1) of the ICCPR.

6 Temporary Protection Visas

6.1 Introduction

157. Schedule 2 of the Bill would reintroduce Temporary Protection Visas (TPVs) for asylum seekers who arrived in Australia without a valid visa (whether they arrived by boat or by plane) and are found to engage Australia's protection obligations (as redefined by Schedule 5 of the Bill). Under the proposed amendments, these refugees will not be eligible to apply for or be granted a permanent protection visa.¹²⁸
158. Schedule 2 will also apply retrospectively to asylum seekers who arrived unauthorised and who have already lodged a valid application for a permanent protection visa. If, at the time the Bill passes, their application for a permanent protection visa has not been decided, their application will be effectively converted into an application for a TPV.¹²⁹
159. The TPVs would only permit the holder to remain in Australia for a period of up to three years (unlike a permanent protection visa which grants the holder permanent resident status). As the TPV comes to an end, the holder can apply for a further TPV, and his or her protection claim will be reassessed at that point.¹³⁰
160. While on a TPV, the holder:
- will not be able to sponsor their family members to join them in Australia
 - will not be able to re-enter Australia if they leave the country
 - will be permitted to work, and will have access to employment services support
 - may be eligible for social security payments in the form of the Special Benefit or Family Tax Benefit if they are unable to work
 - will have access to Medicare.¹³¹

6.2 Summary

161. The Commission does not support the use of temporary protection visas for refugees. In 2006 a Senate Committee acknowledged in relation to the temporary protection regime that 'there is no doubt that its operation has had a considerable cost in terms of human suffering'.¹³²
162. It is not necessary to introduce TPVs to remove people from immigration detention. The vast majority (approximately 90 per cent) of the more than 30,000 asylum seekers awaiting the processing of their claims for protection are living in the community.¹³³ The remaining 10 per cent could be granted a

bridging visa or placed into community detention while their protection claims are assessed.

163. TPVs are not a deterrent to people seeking asylum in Australia for at least two reasons. First, historical evidence shows that after TPVs were introduced in late 1999 the numbers of asylum seekers coming to Australia increased to then record highs during the next two years.¹³⁴ Secondly, the fact that people currently in Australia would be granted TPVs under this Bill is irrelevant to the decision by an asylum seeker to travel to Australia in the future because under the Government's policy settings future asylum seekers will not receive TPVs.
164. The historical record also suggests that permanent protection visas could be granted to asylum seekers currently in Australia without an impact on the numbers of asylum seekers coming to Australia. The total number of TPVs granted from their inception to abolition (1999-2007) was 11,206. Of the 11,206 people granted a TPV 9,043 were irregular maritime arrivals. Of this number 8,600 (95 per cent) were eventually granted a permanent visa.¹³⁵ Following an announcement by the then Minister for Immigration in July 2004, TPV holders were able to apply for permanent protection visas. In the four years that followed, between 85 per cent and 93 per cent of protection visas issued by the Government were permanent protection visas. While TPV holders were being granted permanent visas throughout this period there was no significant increase in unauthorised boat arrivals.
165. All asylum seekers found to be refugees should be given permanent protection, with the associated entitlements to sponsor family members to come to Australia, and to travel outside of Australia.
166. If, contrary to this recommendation refugees are initially granted a three-year Temporary Protection Visa, they should be granted a permanent protection visa if after those three years they are found to still be in need of protection. By that stage, they would have demonstrated a continuing, well-founded fear of persecution.

6.3 *Temporary Protection Visas are not an alternative to detention*

167. The proposed temporary protection regime is targeted at a specific group of people, namely more than 30,000 asylum seekers who are already in Australia and who have not yet had their claims for protection processed.¹³⁶ The vast majority of these asylum seekers (approximately 90 per cent) are already living in the community, not in immigration detention facilities.¹³⁷
168. The proposed temporary protection regime will not operate as an alternative to the detention of asylum seekers while they are waiting to have their claims assessed. The temporary visas would only be granted after a person has had their protection claim assessed and been found to be a refugee.
169. The passage of TPVs is not necessary in order to release the 3,314 asylum seekers (including 603 children) currently held in immigration detention facilities on mainland Australia and on Christmas Island. The Government

already has existing options to release these asylum seekers from detention, namely placement into community detention and grant of Bridging Visa Es.

170. The Minister for Immigration and Border Protection had stated that the temporary protection regime will not apply to the 2,200 asylum seekers, including 186 children, who are detained in Nauru or on Manus Island in Papua New Guinea (as at 30 September 2014). It will also not apply to unauthorised asylum seekers who seek to come to Australia now or in the future.¹³⁸
171. Based on the letter from the Minister to Mr Clive Palmer MP, the Member for Fairfax, tabled in Parliament at the time of the second reading speech for the Bill, it appears that the Government has committed to cease transferring asylum seekers already in Australia to regional processing countries and to process their claims in Australia. The Minister has said that if found to be owed protection, asylum seekers already in Australia who would otherwise be liable for regional processing would be granted a TPV or SHEV.¹³⁹

6.4 Temporary Protection Visas are not an effective deterrent

172. The Government has stated that the aim of reintroducing TPVs is ‘to combat people smuggling and to discourage people from making dangerous voyages to Australia’.¹⁴⁰ The Government states that the proposed TPVs are a reasonable and proportionate measure to achieve this aim, and therefore to the extent that granting such visas to asylum seekers limits their rights, this is justified.¹⁴¹
173. This assertion is not supported by what occurred when Australia last used TPVs. The introduction of TPVs in October 1999 did not halt unauthorised boat arrivals – in fact, there was a significant surge in arrivals in 2001.¹⁴² A Senate Committee which reviewed the operation of the TPV regime in 2006 concluded that ‘there is little real evidence of its deterrent value’.¹⁴³
174. Also, the Commission questions how the introduction of TPVs will operate as a deterrent to asylum seekers thinking of coming to Australia given that the Minister has stated that this measure will not apply to future arrivals, as they will be transferred to Nauru or Manus Island.¹⁴⁴

6.5 People previously granted TPVs ultimately granted permanent visas

175. When TPVs were last introduced, the then Coalition Government did not ultimately require them to be renewed indefinitely and eventually granted permanent visas to 95 per cent of irregular maritime arrivals who had held a TPV.
176. The policy change allowing people on TPVs to apply for permanent protection visas was announced by the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone on 13 July 2004.¹⁴⁵ The Minister announced that ‘9500 temporary protection visa holders would have the opportunity to apply for mainstream migration visas to enable them to

remain in Australia permanently'. The announcement also referred to the return pending bridging visa which allowed people found not to be refugees to be released from immigration detention pending their removal from Australia.

177. In describing the policy behind these changes, the Minister said:

These arrangements will ensure that Australia's border integrity is maintained, our international obligations to refugees are met and that those who are making a significant contribution to the Australian community are able to remain here.¹⁴⁶

178. In the four years that followed the announcement, thousands of TPV holders made applications for further visas and were generally granted permanent protection visas. The number of permanent protection visas granted to temporary protection visa holders (including TPVs and temporary humanitarian visas) in each of these years was as follows:

Year	Permanent protection visas granted to temporary protection visa holders
2004-05	3,679*
2005-06	3,854
2006-07	514
2007-08	488

Source: Department of Immigration Annual Reports¹⁴⁷

179. The Annual Reports for the Department show that the proportion of protection visas granted in each of these years that were permanent protection visas was: 93 per cent (2004-05), 93 per cent (2005-06), 85 per cent (2006-07) and 91 per cent (2007-08). This was attributed in the Annual Reports to the small number of unauthorised boat arrivals during the year in question and the fact that almost all further protection visas granted to TPV holders were permanent protection visas.
180. While TPV holders were being granted permanent visas throughout this period there was no significant increase in unauthorised boat arrivals.¹⁴⁸

6.6 The Commission's concerns about TPVs

181. The Commission raised serious concerns about TPVs when they were used in Australia (with similar conditions attached) from 1999 to 2008.¹⁴⁹ In 2004 the Commission's National Inquiry into Children in Immigration Detention raised serious concerns about the impact of the TPVs on refugees, and found that their use breached a number of rights in the *Convention on the Rights of the Child*.¹⁵⁰

182. Based on the negative impacts of TPVs on refugees when they were last used, the Commission is concerned that the reintroduction of TPVs may lead to breaches of Australia's international obligations due to:
- the detrimental impact of temporary protection on the mental health of refugees
 - the prolonged separation of TPV holders from their family members, especially in the case of unaccompanied refugee children
 - the discrimination and penalisation of refugees for arriving without a valid visa.
183. The Parliamentary Joint Committee on Human Rights has similarly raised concerns that TPVs (with conditions such as a prohibition on sponsoring family members or leaving and re-entering Australia) cannot be reconciled with Australia's human rights obligations.¹⁵¹
- (a) *Detrimental impact of temporary protection on the mental health of refugees*
184. Under international human rights law, all people have a right to the highest attainable standard of physical and mental health.¹⁵²
185. The granting of protection to refugees only on a temporary basis had a significant detrimental impact upon their mental health when TPVs were last used in Australia.
186. The temporary nature of the protection granted under a TPV created uncertainty and insecurity in the life of refugees, who lived with the possibility of being forcibly removed to face persecution in their country of origin when the TPV ends. Those feelings of insecurity and fears of repatriation contribute to ongoing mental health problems.¹⁵³ Refugees on TPVs were likely to suffer from higher levels of anxiety, depression and post-traumatic stress disorder than those on permanent protection visas, despite the fact that the two groups had experienced similar levels of past trauma.¹⁵⁴
187. The uncertainty and anxiety of temporary residency status had a strong impact on children. It was reported that as a result of the uncertainty, children exhibited physiological and psychological symptoms including constant headaches, sleeping problems, problems with concentration and memory, and signs of depression.¹⁵⁵
188. The Commission's National Inquiry into Children in Immigration Detention found in 2004 that granting temporary protection was more likely to compound mental health problems for refugee children than facilitate their rehabilitation and integration into Australian society.¹⁵⁶ It concluded that the use of TPVs for refugee children had resulted in breaches of those children's rights to mental health, maximum possible development and recovery from past torture and trauma.¹⁵⁷
189. The Senate Legal and Constitutional References Committee which reviewed the Migration Act in 2006 acknowledged the negative impact that the temporary protection regime had on those subjected to it. It concluded that

‘there is no doubt that its operation has had a considerable cost in terms of human suffering’.¹⁵⁸

190. The Commission is concerned that the reintroduction of TPVs will result in breaches of the right of refugees to the highest attainable standard of health, given the clear evidence of the detrimental impact that granting temporary protection had last time TPVs were utilised.

(b) *Prolonged separation from family members*

191. The Government has stated that the refugees who are granted TPVs proposed in the Bill ‘will not be eligible to sponsor family members to migrate to Australia’.¹⁵⁹ Also, the visa ‘will cease automatically if the holder departs Australia’ and therefore the holder of a TPV will not be able to re-enter Australia if they depart.¹⁶⁰
192. The Commission is concerned that the prohibition on TPV holders sponsoring family members to join them in Australia, combined with the restrictions on travel outside of Australia while on a TPV, means that refugees, including unaccompanied children, may potentially be separated from their family for long periods of time, in breach of Australia’s human rights obligations.
193. The Government acknowledges that:
- As refugees are unable to return to their country of origin for fear of persecution, if family reunification is not available there is the potential that some Temporary Protection visa holders may remain separated from their family for years until they are either deemed not to engage Australia’s protection obligations and removed from Australia or choose to return home.¹⁶¹
194. Australia has obligations under international law to support families to reunify. Article 23 of the ICCPR provides:
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
 2. The right of men and women of marriageable age to marry and **to found a family** shall be recognized.
- (emphasis added)
195. Australia has similar obligations under the Convention on the Rights of the Child (CRC). Article 16 of the CRC provides that no child shall be subject to arbitrary or unlawful interference with his or her family (this is the equivalent of article 17 of the ICCPR).
196. Article 9(1) of the CRC provides that states shall ensure that a child shall not be separated from his or her parents against their will except where it is determined that this is in the child’s best interests.
197. Further, article 10(1) of the CRC relevantly provides that:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of reunification shall be dealt with in a positive, humane and expeditious manner.

198. The UN Human Rights Committee has confirmed that article 23 of the ICCPR places positive obligations on States Parties to adopt legislative, administrative and other measures to ensure the protection provided for in that article.¹⁶² The UN Committee has also stated that:

The right to found a family implies, in principle, the possibility to procreate and live together ... the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.¹⁶³

199. The Commission acknowledges that article 23 does not equate to a right to family reunification. However, the protection article 23 affords to the existence of the family requires States Parties to take steps to support families to reunify, as '[s]ince life together is an essential criterion for the existence of a family, members of a family are entitled to a stronger right to live together than other persons'.¹⁶⁴

200. The Government states that to the extent that the right in article 23 may be limited by the prohibition on TPV holders sponsoring family to come to Australia, it considers:

that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing UMAs [Unauthorised Maritime Arrivals] from making the dangerous journey to Australia by boat. The TPV Regulations were designed as part of a suite of measures, which includes the Regional Resettlement Arrangements (RRA), to act as a deterrent for people making the dangerous journey by boat to Australia.¹⁶⁵

201. The Parliamentary Joint Committee on Human Rights has emphasised that:

any restriction on rights which is aimed at achieving a legitimate objective must do so in a rational and proportionate manner ... the government bears the onus of demonstrating that a restriction is justifiable. Such measures must be supported by evidence ...¹⁶⁶

202. The evidence regarding Australia's past experience of TPVs does not support using a prohibition on family reunion to try to deter asylum seekers from coming to Australia by boat. In the years following the introduction of TPVs (with a similar restriction on family reunion) in 1999, the numbers of unauthorised boat arrivals reached (then) unprecedented levels.¹⁶⁷

203. Also, the Minister has made clear that the TPVs with these restrictions will only apply to asylum seekers who are already in Australia; they will not apply to future arrivals.¹⁶⁸ This undermines the reasonableness of the stated intention that the measures will operate as a deterrent to those considering coming to Australia.

204. Of particular concern to the Commission is the impact of these restrictions on child refugees who come to Australia without a parent or legal guardian. Unaccompanied children are particularly vulnerable and denying a right to family reunification to this group creates particular problems.

205. Article 3 of the *Convention on the Rights of the Child* requires that the best interests of the child shall be a primary consideration in all actions which concern children, and that States Parties shall take ‘all appropriate legislative and administrative measures’ to ‘ensure the child such protection and care as is necessary for his or her well-being’.¹⁶⁹ The Government’s view is that:

The reintroduction of Temporary Protection visas seeks to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of Australia’s migration system and protect the national interest, is also a primary consideration. Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that these amendments are consistent with Article 3 of the CRC.¹⁷⁰

206. The Parliamentary Joint Committee on Human Rights (considering a previous proposal to introduce TPVs) raised concerns about ‘a general policy denying the possibility of family reunion’, and questioned the Minister for Immigration and Border Protection as to:

whether and how the denial of family reunion without any consideration of individual circumstances is a reasonable and proportionate measure, particularly in light of the obligation to make the best interests of the child a primary consideration.¹⁷¹

207. The Commission is similarly concerned that a general policy which effectively prevents children who have been found by Australia to be owed protection from being reunited with their parents in Australia is not primarily informed by a concern for their best interests.

208. Directly relevant in this context is article 10(1) of the *Convention on the Rights of the Child*, which provides that:

applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

209. The Commission acknowledges that article 10 does not amount to a right to reunification. However, the requirement that applications for family reunification must be dealt with in a ‘positive’ and ‘humane’ manner suggests that there must be a level of engagement with the question of the impact on the child of a denial of reunification in the circumstances.¹⁷²

210. The justification given by the Government for the blanket policy is as follows:

The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited by the introduction of

Temporary Protection visas, Australia considers that these limitations are necessary, reasonable and proportionate to achieve a legitimate aim.¹⁷³

211. Again, the Commission questions whether denying unaccompanied refugee children family reunion can be considered as 'reasonable' and 'proportionate' limitations of the right in article 10.
212. Australia's past experience refutes the assertion that this is a reasonable measure to achieve the aim of deterring children from using people smugglers in future. In the period following the introduction of TPVs in 1999, there was in fact a marked increase in the numbers of women and children making unauthorised boat journeys to Australia.¹⁷⁴ The restrictions on family reunion and overseas travel may have directly contributed to this increase.¹⁷⁵
213. The Parliamentary Joint Committee on Human Rights recently raised the question whether a 'ban on family reunion rights is rationally connected to the objective of reducing the incentive for people, including children, from [sic] undertaking dangerous voyages'.¹⁷⁶
214. Looking at whether denying family reunion is a proportionate measure, the refugees who will be most adversely affected by the prohibition on family sponsorship are unaccompanied refugee children. Australia owes these children particular protection and assistance under articles 20 and 22 of the *Convention on the Rights of the Child*. The practical consequence of these restrictions last time TPVs were used was that children on TPVs whose parents were outside Australia were prevented from seeing them for the duration of their visa.¹⁷⁷

(c) *Discrimination and penalisation of refugees for arriving without a visa*

215. The proposed temporary protection regime would distinguish between asylum seekers who arrived in Australia with a valid visa, and those who arrive without one. If asylum seekers have a valid visa when they enter Australia, they can apply for (and, if found to be owed protection, be granted) a permanent protection visa. If they arrived without a visa, under the proposed changes they will only be eligible to apply for a TPV.
216. Under international human rights law, asylum seekers (and other non-citizens) have a right not to be discriminated against in the enjoyment of their rights.¹⁷⁸ Legislating to treat one group of asylum seekers differently to others will breach this right unless the criteria for the differential treatment are 'reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]'.¹⁷⁹
217. The Government states that:

To the extent that the regulations result in differential treatment between permanent protection visa holders and temporary protection visa holders in being unable to sponsor family members for reunification purposes, this treatment is based on reasonable and objective criteria. The criteria being applied is whether or not the individual entered Australia illegally, or applied to come to Australia via lawful means and is aimed at a legitimate purpose, that

is the need to maintain the integrity of Australia's migration system and encouraging the use of regular migration pathways to enter Australia.¹⁸⁰

218. It is questionable whether the differential treatment of asylum seekers under the proposed temporary protection regime can be said to be based on reasonable criteria, for the reasons set out in the sections above. The fact that in the years after TPVs were introduced in 1999 the numbers of asylum seekers coming unauthorised by boat ultimately rose suggests that they were not effective in 'encouraging the use of regular migration pathways' in the past. Also, the likelihood of the introduction of TPVs influencing the future behaviour of asylum seekers thinking of coming to Australia is significantly diminished by the fact the Minister has stated that this measure will not apply to them.
219. The differential treatment of asylum seekers who arrive unauthorised also raises issues under article 31 of the Refugee Convention. Article 31 prohibits States Parties from penalising asylum seekers on account of their unauthorised arrival in a country when they are coming directly from a territory where their life or freedom was threatened. The Commission is concerned that the provision of temporary protection to asylum seekers who arrive unauthorised may amount to a penalty contrary to article 31.

7 Safe Haven Enterprise Visas

220. The Bill would also introduce a new category of temporary visa called a Safe Haven Enterprise Visa (SHEV). The details of these visas are not contained in the Bill. In the Explanatory Memorandum it is stated that the requirements for this new type of visa will be set out in amendments to the Migration Regulations 1994 (Cth) once the visa has been introduced.
221. In his second reading speech, the Minister for Immigration and Border Protection explained his intention that the SHEV will be an alternative temporary protection visa to the TPV. The SHEV will be similar to the TPV in that it will not include family reunion or a right to re-enter Australia, and a SHEV holder will not be able to apply for a permanent protection visa.¹⁸¹
222. However, the Minister's intention is that SHEV will last for five rather than three years, and 'SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies'.¹⁸² Also, it is envisaged that there will be a pathway from a SHEV to certain types of permanent visas, as:

SHEV holders who have worked in regional Australia without requiring access to income support for 3½ years will be able to apply and if they meet eligibility requirements be granted other onshore visas—for example, a family or skilled visa as well as temporary skilled and student visa.¹⁸³

223. The Commission considers it prudent to wait to see the detail of this proposed new type of temporary protection visa before assessing whether they raise human rights concerns. However, to the extent that the Minister has foreshadowed that they will not allow for family reunion or travel outside of Australia, the Commission has concerns that, as in the case of TPVs, SHEVs may not be compatible with article 23 of the ICCPR.

8 Maritime Powers

224. The proposed amendments to the *Maritime Powers Act 2013* (Cth) (Maritime Powers Act) in Schedule 1 of the Bill will allow people to be arrested at sea and taken to another country, without listening to their concerns and without any judicial assessment of whether this would put them at risk of persecution.
225. The amendments are designed to overcome claims made by one of a group of 157 Tamil asylum seekers detained at sea by the Commonwealth for 4 weeks from 29 June 2014 until 27 July 2014. Those claims are the subject of a case heard by the High Court on 14 and 15 October 2014.¹⁸⁴ The Commission sought leave to intervene in this case and filed written submissions.¹⁸⁵ The Commission submitted, among other things, that the power in s 72(4) of the Maritime Powers Act to take a person to a particular place was limited by Australia's *non-refoulement* obligations. The plaintiff submitted, among other things, that the power in s 72(4) of the Maritime Powers Act was also limited by obligations of procedural fairness. Judgment in the case has been reserved.
226. The amendments to the Maritime Powers Act engage Australia's *non-refoulement* obligations and the prohibition against arbitrary detention.

8.1 Non-refoulement

227. The most significant of Australia's *non-refoulement* obligations are set out in paragraph 13 above.
228. The Maritime Powers Act has the potential to engage these *non-refoulement* obligations through the exercise of powers to take a person to a place outside Australia. The most relevant of those powers are in ss 69 and 72.
229. Section 69 of the Maritime Powers Act provides that a maritime officer may detain a vessel or aircraft and take it to a port, airport or other place that the officer considers appropriate.
230. Section 72 applies to a person on a detained vessel (or who was on a vessel when it was detained). It provides that the officer may detain the person and cause the person to be taken either to a place in the migration zone or to a place outside the migration zone including a place outside Australia (s 72(4)).
231. The Commission does not repeat in this submission all of the matters that led it to the conclusion that the power in s 72(4) to take a person to a place outside Australia is limited by Australia's *non-refoulement* obligations. These are set out in more detail in the Commission's submission to the High Court in *CPCF v Minister for Immigration and Border Protection*.¹⁸⁶
232. The Bill proposes to repeal and substitute subsections 72(3) and (4), to provide that a maritime officer may detain a person and take the person to a 'destination'. The destination may be in the migration zone or outside the migration zone (including outside Australia).¹⁸⁷ Similarly, subsections 69(2) and (3) will be repealed and substituted, providing that a maritime officer may take

a detained vessel or aircraft to a destination in the migration zone or outside the migration zone (including outside Australia).¹⁸⁸

233. A vessel, aircraft or person could be taken to a destination in another country (including the territorial sea of another country):
- a. whether or not Australia has an agreement or arrangement with any other country; and
 - b. irrespective of the international or domestic obligations of any other country (s 75C).¹⁸⁹
234. That is, under the proposed amendments it would be valid to take a person to another country that does not also have *non-refoulement* obligations. The obvious risk that this involves is that a refugee may be sent from such a country to the country where they fear persecution.
235. Further, new sections are proposed to be added dealing with the authorisation (s 22A) and the exercise (s 75A) of the powers to detain vessels and persons and take them to a destination outside Australia.¹⁹⁰ The authorisation and exercise of these powers would not be invalid:
- a. because of a failure to consider Australia's international obligations (or the international obligations or domestic law of any other country);
 - b. because of a defective consideration of Australia's international obligations (or the international obligations or domestic law of any other country);
 - c. because the exercise of the power is inconsistent with Australia's international obligations.
236. That is, under the proposed amendments Australia could validly return a person directly to a country where they fear persecution. These sections would allow Australia to validly disregard its *non-refoulement* obligations.
237. The Statement of Compatibility with Human Rights included with the Bill provides:
- While on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's *non-refoulement* obligations, the Government intends to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers.¹⁹¹
238. That is, the amendments are designed to prevent precisely the kind of judicial scrutiny that the High Court is currently engaged in in the matter of *CPCF v Minister for Immigration and Border Protection*. Again, the Government is saying that the public should be content to trust it to comply with its international human rights obligations, with no judicial scrutiny.
239. The Government says that 'the executive government is accountable to the international community for its compliance' with its international law obligations.¹⁹² However, the Government does not want to be accountable to Australian courts.

240. Finally, the Bill proposes that the new powers to detain vessels and persons and take them to a destination outside Australia would not in any respect be subject to, or limited by, the Migration Act (s 75E).¹⁹³ As noted in section 4.2 above, the High Court has recognised in several cases that the parts of the Migration Act that provide for the granting of protection visas are based on Australia's obligations under the Refugee Convention. As a result, the Migration Act needs to be read in a way that is consistent with the Refugee Convention. Proposed s 75E seeks to avoid reading the Maritime Powers Act in a way that is consistent with the Migration Act and Australia's protection obligations to refugees.

8.2 Natural justice

241. The rules of natural justice would not apply to the authorisation or the exercise of maritime powers under the proposed amendments.¹⁹⁴
242. That is, prior to a decision to authorise the exercise of powers to detain vessels and persons and take them to a destination outside Australia, and prior to a decision to exercise those powers, it would not be necessary for a maritime officer to allow people whose rights may be affected by such decisions to make submissions about whether the powers should be exercised or how the powers should be exercised.
243. In practical terms, this means that a maritime officer is not required to ask a person whether they fear persecution in a particular country before taking them there. A person could be taken to a country where they fear persecution, contrary to Australia's *non-refoulement* obligations, with no legal requirement for a maritime officer to ask the person any questions at all.

8.3 Detention of people at sea

(a) Human rights principles

244. The administrative detention of people at sea engages with the prohibition on arbitrary detention in article 9 of the ICCPR. This article provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

245. Arbitrariness includes elements of inappropriateness, injustice or lack of predictability.¹⁹⁵ To avoid being arbitrary, detention must be necessary and reasonable in all the circumstances of the case, and a proportionate means of achieving a legitimate aim.¹⁹⁶

(b) Amendments to the Maritime Powers Act

246. Proposed sections 69A and 72A would deal with the period for which people could be detained while they, or the vessel or aircraft that they are detained on, are taken to a destination pursuant to the new ss 69 or 72.¹⁹⁷

247. These proposed sections engage with the recent jurisprudence of the High Court dealing with administrative detention. In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, the High Court noted that the Migration Act does not authorise detention at the unconstrained discretion of the Executive.¹⁹⁸ Rather, detention under and for the purposes of the Migration Act is limited by the purposes for which the detention is being effected, and the purposes must be pursued and carried into effect as soon as reasonably practicable.¹⁹⁹ The duration of lawful detention is ‘fixed by reference to what is both necessary and incidental’ to carrying out those purposes.²⁰⁰
248. By parity of reasoning, the same limits must apply to the executive power to detain under the Maritime Powers Act. Under the law as it stands, detention for the purposes of taking a person to a particular place is limited to detention for that purpose, and the process of taking the person to that place must be pursued and carried into effect as soon as reasonably practicable.
249. The proposed amendments seek to expand the length of time that a person can be detained. This would include not only the period of time reasonably necessary to take the person to the destination, but also any additional period reasonably required:
- a. to decide which place should be the destination;
 - b. to consider whether the destination should be changed to another place, and to decide what that second destination should be;
 - c. for the Minister to consider making a determination or direction about the place that should be the destination;
 - d. for the Minister to consider making a determination or direction about a range of other matters.
250. Further, the proposed amendments seek to provide a high degree of flexibility in relation to how the person detained is taken to the destination. Rather than requiring someone to be taken to the destination identified as soon as reasonably practicable, the amendments would provide that a person can be detained ‘for the period it actually takes to travel to the destination’. In determining this period:
- a. there is no requirement to take the most direct route to the destination; and
 - b. the period of time can include stopovers at other places, and time for logistical, operational or other contingencies relating to the travel.
251. The time it actually takes to travel to the destination is not subject to any reasonableness requirement.²⁰¹
252. Given that these are powers which interfere with a person’s liberty, the Commission considers that it is appropriate for the legislation to provide more stringent criteria in relation to the period of detention. The authorisation of detention for as long as it actually takes to get to a place by a circuitous route involving multiple stopovers and including delays as a result of anything that

could be described as ‘logistical, operational or other contingencies’ is problematic.

9 Children born in Australia

9.1 Two models

(a) Greens Bill

253. This Committee has already considered a private members Bill introduced by Senator Sarah Hanson-Young dealing with the status of babies born in Australia to non-citizens without a visa. That Bill is the Migration Amendment (Protecting Babies Born in Australia) Bill 2014 (Cth) (Greens Bill).
254. The Greens Bill would have amended s 5AA(2)(a) of the Migration Act to confirm that a person does not become an ‘unauthorised maritime arrival’ merely by being born in the migration zone.
255. The Commission made a submission to the Senate Legal and Constitutional Affairs Committee in which it:
- a. supported the amendment proposed in the Greens Bill; and
 - b. recommended further legislative amendment to ensure that the parents of such children are not liable to be taken to a regional processing country pursuant to s 198AD, to avoid family separation.²⁰²
256. The Commission identified the problem sought to be addressed by the Greens Bill in the following way:

As the Migration Act currently stands, s 5AA and s 10 appear to produce the problematic result that whenever a non-citizen child is born in the migration zone, he or she is to be taken as having ‘entered Australia by sea’. Section 10 provides that a child who was born in the migration zone and was a non-citizen when he or she was born shall be taken to have entered Australia when he or she was born. Section 5AA(2)(a) provides that if a person entered the migration zone except on an aircraft that landed in the migration zone, then the person will be taken to have ‘entered Australia by sea’.

If the parents of the baby do not have a current visa at the time the baby is born, the baby will be an ‘unlawful non-citizen’ at birth. As a person deemed to have entered Australia by sea and become an unlawful non-citizen as a result, the baby will be an ‘unauthorised maritime arrival’ (unless he or she is a New Zealand citizen, a resident of Norfolk Island, or a person within a prescribed class). As an ‘unlawful non-citizen’, the baby would be liable to detention under s 189. As an ‘unauthorised maritime arrival’ the baby would then be liable to removal to a regional processing country pursuant to s 198AD.

This result seems to apply regardless of how the baby’s parents came to be in Australia. For example, it appears that if a woman arrives in Australia by air, overstays her visa and gives birth to a child who is not a citizen of Australia, then the child will be deemed to have ‘entered Australia by sea’ and be liable to be detained and then taken to a regional processing country.

257. That is, babies born in Australia to ‘unlawful non-citizens’ will be deemed to be ‘unauthorised maritime arrivals’ and will be subject to detention and regional processing, even if their parents are not.
258. The Commission referred to the extrinsic material that introduced s 5AA to show that this result appeared to have been unintended.
259. This interpretation of the interaction between ss 5AA and 10 of the Migration Act was recently confirmed by the Federal Circuit Court of Australia in *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348. In that case, the plaintiff was a baby named Ferouz Myuddin who was born in Australia to Rohingya parents from Myanmar who had sought asylum in Australia. The Court held that the Migration Act deemed him to be an ‘unauthorised maritime arrival’ despite not actually arriving in Australia by maritime means. As a result, he was barred from making an application for a protection visa. The plaintiff has filed an appeal against the orders made in that case.

(b) *Government Bill*

260. The present Bill seeks to achieve the opposite result of the Greens Bill. Schedule 6 proposes to insert new ss 5AA(1A) and 5AA(1AA) which would provide that a person is an unauthorised maritime arrival if:²⁰³
- a. the person is born in Australia or in a regional processing country
 - b. a parent of the person is, at the time of the person’s birth, an unauthorised maritime arrival; and
 - c. the person is not an Australian citizen at the time of birth because one of his or her parents is an Australian citizen or a permanent resident.
261. There are several problematic aspects of the Government’s Bill dealing with this issue. In particular:
- a. it would confirm the position that certain babies born in Australia are liable to be detained and taken to a regional processing country based on the fiction that they are ‘unauthorised maritime arrivals’
 - b. it would not address the anomaly that babies born in Australia to unlawful non-citizens who arrived in Australia by air would be liable to be detained and then taken to a regional processing country – creating a risk of family separation
 - c. it creates other risks of family separation by deeming a baby born in Australia to be an ‘unauthorised maritime arrival’ if only one parent is an ‘unauthorised maritime arrival’
 - d. it does not adequately deal with the position of babies who would otherwise be stateless and who would be eligible to apply for Australian citizenship.

9.2 **Family separation**

(a) *Relevant principles*

262. The ICCPR contains two relevant provisions dealing with interference with family. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his ... family

263. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

264. Professor Manfred Nowak has noted that:²⁰⁴

[T]he significance of Art. 23(1) lies in the protected existence of the institution “family”, whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.

265. The Commission takes the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).²⁰⁵

266. The exclusion of a person from a country where close members of his or her family are living is an interference with family.²⁰⁶

267. An unlawful interference with a person’s family is prohibited by article 17(1) of the ICCPR. A lawful interference with a person’s family will be prohibited by article 17(1) if it is arbitrary.

268. In its General Comment on article 17(1), the UNHRC confirmed that a lawful interference with a person’s family may be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.²⁰⁷ In *Toonen v Australia*, the United Nations Human Rights Committee held that the requirement of ‘reasonableness’ implies that any interference with family ‘must be proportional to the end sought and be necessary in the circumstances of any given case’.²⁰⁸

269. Article 16 of the CRC is in substantially the same form as article 17 of the ICCPR. As noted earlier, article 9(1) of the CRC also provides that a child shall not be separated from his or her parents against their will, unless this is in the child’s best interests.

(b) *Parents arriving by air*

270. As the Commission noted in its submission in relation to the Greens Bill, as the Migration Act currently stands it appears that if a woman arrives in

Australia by air, overstays her visa and gives birth to a child who is not a citizen of Australia, then the child will be deemed to have 'entered Australia by sea' and be liable to be detained and then taken to a regional processing country.

271. The Migration Act would appear to require that the mother and her child be separated, with the child being taken to a regional processing country, unless the Minister makes a determination under s 198AE.
272. This possibility was adverted to by Jarrett J in *Plaintiff B9/2014 v Minister for Immigration and Border Protection*.²⁰⁹
273. Such a result would clearly amount to an arbitrary interference with family. It is not supported by any policy aim. The Government Bill does nothing to address this issue.

(c) *Only one parent an unauthorised maritime arrival*

274. The proposed amendments would provide that a child born in Australia would be an unauthorised maritime arrival if at least one of his or her parents was also an unauthorised maritime arrival.
275. The Government says that this 'will ensure all members of the family are treated in the same way, where possible'.²¹⁰ However, if only one parent is an unlawful maritime arrival, this will not be the case.
276. Further, the drafting may well lead to anomalous results. For example, if a pregnant woman arrived in Australia by sea and sought asylum prior to 13 August 2012, she would not be subject to the regional processing arrangements. If the child's father arrived in Australia by sea after 13 August 2012 and also sought asylum, and the child was born after the father arrived in Australia, then both the father and the child, but not the mother, would be subject to offshore processing.
277. In the same way, if the man in the previous example arrived prior to 13 August 2012 and the woman arrived after 13 August 2012 and gave birth to the child in Australia, then both the mother and the child, but not the father, would be subject to offshore processing.
278. Each of these results would also amount to an arbitrary interference with family. They are contrary to the Government's announced policy of avoiding family separation, referred to below.

(d) *Resort to discretionary powers to avoid separation*

279. The Government says that its policy is that 'where possible, family units will not be separated by Australia and consideration will be given to family unity and to the best interests of the child on a case by case basis to ensure that the obligations in Articles 17 and 23 of the ICCPR and Article 3 of the CRC are met'.²¹¹

280. This suggests that where the Migration Act on its face requires the separation of families, Government policy is ‘where possible’ to use discretionary powers to avoid this outcome. One way of avoiding family separation as a result of the regional processing arrangements is for the Minister to exercise his power under s 198AE of the Migration Act. This power allows a Minister to determine that the requirement to take a person or a class of people to a regional processing country does not apply to that person or class.
281. The Commission considers that in the kinds cases identified above, it is unsatisfactory to rely on the Minister’s power under s 198AE to resolve the inconsistencies in the legislation and prevent family separation. This is primarily because the power is discretionary. The Minister does not have a duty to consider whether to exercise the power in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.²¹²
282. The preferable course is not to create a legislative scheme which requires these kinds of family separations. This could be achieved by legislative amendment requiring that asylum claims of each member of a family of children born in Australia be processed in Australia.

9.3 Stateless babies and Australian citizenship

283. As at 31 March 2014 there were at least 12 babies who had been born in immigration detention to mothers who were stateless.²¹³ These mothers are generally of Rohingya ethnic origin and come from Myanmar where they have no status as citizens and are not recorded in the census.²¹⁴
284. Under the *Convention on the Rights of the Child*, Australia has obligations to newborns. Article 7(1) requires that newborns:
- shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
285. Equivalent provisions dealing with the right to birth registration, a name and a nationality are contained in article 24(2) and (3) of the ICCPR.
286. Further, article 7(2) of the *Convention on the Rights of the Child* provides that these rights are to be implemented by States in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.
287. One key instrument in this field to which Australia is a party is the *Convention on the Reduction of Statelessness*.²¹⁵ Article 1 of the Convention seeks to prevent statelessness at birth by requiring States to grant their nationality to children born on their territory who would otherwise be stateless. Nationality is to be granted either automatically at birth or upon an application being lodged with an appropriate authority.

288. Australia has addressed this obligation through section 21(8) of the *Australian Citizenship Act 2007* (Cth) which provides that people born in Australia who would otherwise be stateless are eligible to become Australian citizens. Children who are born to stateless asylum seekers can make an application to the Minister to become an Australian citizen. The effect of section 24 is that the Minister will be required to approve such applications once they are made.
289. The Government has said that a stateless child's status as an unlawful maritime arrival does not alter that child's eligibility for citizenship under the citizenship laws of Australia.²¹⁶
290. However, if a child is an unlawful maritime arrival, an officer must take the child to a regional processing country as soon as reasonably practicable.²¹⁷
291. There is clearly a tension between the ability to apply for citizenship and the obligation to promptly take the child to a regional processing country.
292. The Commission is concerned that children born in Australia and eligible to become Australian citizens may be taken to a regional processing country before they have the opportunity to make an application for citizenship.
293. As a result, the Commission recommends that the Government publish administrative guidelines for relevant officers to facilitate the making and processing of applications for Australian citizenship by children born in Australia who would otherwise be stateless, so that they are not removed from Australia without having the opportunity to apply for Australian citizenship and have that application determined. The guidelines should make clear that in exercising those administrative functions, the officers should treat the best interests of the child as a primary consideration.²¹⁸

¹ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**EM**), p 2.

² Proposed s 5(1), Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (**Bill**), Sch 5, Pt 1, item 1, p 90.

³ *GT v Australia* UN Doc CCPR/C/61/D/706/1996 at [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 at [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 at [16.1]-[16.2]; *Judge v Canada* UN Doc CCPR/C/78/D/829/1998 at [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 at [6.3]; *Munaf v Romania* UN Doc CCPR/C/96/D/1539/2006 at [14.2].

⁴ UNHRC, 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 at [12] (29 March 2004).

⁵ Proposed s 197C, Bill, Sch 5, Pt 1, item 2, p 91.

⁶ EM, Statement of Compatibility with Human Rights, p 7.

⁷ EM, Statement of Compatibility with Human Rights, p 7.

⁸ EM, Statement of Compatibility with Human Rights, p 7.

⁹ EM, p 9.

¹⁰ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] and [247] (Lander and Gordon JJ).

¹¹ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [32] and [110] (Lander and Gordon JJ).

- ¹² *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [33], [267] and [268] (Lander and Gordon JJ).
- ¹³ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [264] and [272] (Lander and Gordon JJ), at [296], [297] and [300] (Besanko and Jagot JJ), at [342] (Flick J).
- ¹⁴ *Minister for Immigration and Citizenship v SZQRB* [2013] HCATrans 323 (13 December 2013). At <http://www.austlii.edu.au/au/cases/cth/HCATrans/2013/323.html> (viewed 24 October 2014).
- ¹⁵ EM, Statement of Compatibility with Human Rights, p 28.
- ¹⁶ EM, Statement of Compatibility with Human Rights, p 28.
- ¹⁷ Australian Human Rights Commission, submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. At <http://www.aph.gov.au/DocumentStore.ashx?id=6a2d64ab-3869-4e4e-a74b-600b070a7f50&subld=32277> (viewed 22 October 2014).
- ¹⁸ *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319 at 339 [27].
- ¹⁹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90] and [94] and 192 [98] (Gummow, Hayne, Crennan and Bell JJ), 230-232 [233]-[239] per Kiefel J.
- ²⁰ *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) CLR 1 at 15 [34] (Gummow A-CJ, Callinan, Heydon and Crennan JJ).
- ²¹ EM, p 4.
- ²² Bill, Sch 5, Pt 2, item 10, p 96.
- ²³ EM, pp 4 and 169 [1165].
- ²⁴ EM at [1181].
- ²⁵ The EM provides at [1181] that 'a decision maker will still be required to take into account whether the person can safely and legally access the area upon returning to the receiving country' but this statement appears inconsistent with the definition in proposed s 5J. No explanation is provided in the EM as to how these matters would be taken into account.
- ²⁶ *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18.
- ²⁷ *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 26 [23] (Gummow, Hayne and Crennan JJ), 42 [79]-[81] (Kirby J) and 49 [105] (Callinan J).
- ²⁸ *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 27 [24] (Gummow, Hayne and Crennan JJ), 42 [79]-[81] (Kirby J) and 49 [105] (Callinan J).
- ²⁹ J Hathaway, *The Law of Refugee Status* (Butterworths, 1991), p, 104-105.
- ³⁰ *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [20] (Gleeson CJ, Hayne and Heydon JJ).
- ³¹ *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [20] (Gleeson CJ, Hayne and Heydon JJ), referring to *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248 (Dawson J).
- ³² EM [1189].
- ³³ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.
- ³⁴ *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1.
- ³⁵ Proposed s 5J(3), Bill, Sch 5, Pt 2, item 7, p 93.
- ³⁶ EM at [1191].
- ³⁷ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 264 (McHugh J), referred to with approval in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 396 (Gleeson CJ, Gummow and Kirby JJ) and 411 (McHugh J).
- ³⁸ Proposed s 5L, Bill, Sch 5, Pt 2, item 7, p 95.
- ³⁹ *Gomez v INS 947 F 2d 660* (2nd Circuit), 1991.
- ⁴⁰ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.
- ⁴¹ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 6 [4] (Gleeson CJ).
- ⁴² *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 13 [32] (Gleeson CJ).
- ⁴³ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 28 [81] (McHugh and Gummow JJ).
- ⁴⁴ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 41 [123] (Kirby J).
- ⁴⁵ T Aleinkoff, 'Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group' in E Feller, V Türk and F Nicholson (eds) *Refugee*

- Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), pp 266 and 294.
- ⁴⁶ T Aleinkoff, 'Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), pp 272 and 295.
- ⁴⁷ Decision of the Immigration Appeals Tribunal of the United Kingdom in *Montoya*, Appeal No. CC/15806/2000, 27 April 2001.
- ⁴⁸ *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 395 [27] (Gummow and Callinan JJ).
- ⁴⁹ EM, Statement of Compatibility with Human Rights, p 22.
- ⁵⁰ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 9. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fG%2f32&Lang=en (viewed 17 October 2014).
- ⁵¹ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 16. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fG%2f32&Lang=en (viewed 17 October 2014).
- ⁵² Human Rights Committee, *Zundel v Canada*, Communication No. 1341/2005, UN Doc CCPR/C/89/D/1341/2005 (4 April 2007), para 6.8. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f89%2fD%2f1341%2f2005&Lang=en (viewed 17 October 2014).
- ⁵³ EM, Statement of Compatibility with Human Rights, p 25.
- ⁵⁴ *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (Tucker LJ), cited with approval in a unanimous judgment of the Full Court of the High Court in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553.
- ⁵⁵ See M Aronson and M Groves, *Judicial Review of Administrative Action* (5th ed, 2013) at [8.340] and cases cited therein.
- ⁵⁶ *Report of the Expert Panel on Asylum Seekers* (August 2012). At <http://expertpanelonasylumseekers.dpmc.gov.au/report.html> (viewed 7 October 2014).
- ⁵⁷ Expert Panel Report, note 56 above at [1.24].
- ⁵⁸ Administrative Review Council, *Review of Migration Decisions*, Report to the Attorney-General (1986).
- ⁵⁹ *Review of Migration Decisions*, p 49 [91].
- ⁶⁰ *Review of Migration Decisions*, p 115 [324].
- ⁶¹ *Review of Migration Decisions*, p 115 [325].
- ⁶² *Review of Migration Decisions*, p 50 [98].
- ⁶³ *Review of Migration Decisions*, pp 9 [4] and 52 [103].
- ⁶⁴ *Review of Migration Decisions*, p 115 [326].
- ⁶⁵ Commonwealth, Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control* (August 1992).
- ⁶⁶ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.17].
- ⁶⁷ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.5].
- ⁶⁸ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.18].
- ⁶⁹ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.13].
- ⁷⁰ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.68].
- ⁷¹ *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, at [6.84].
- ⁷² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1992, p 3147 (The Hon Dr Robert Catley MP, Member for Adelaide).

- ⁷³ Administrative Review Council, *What decisions should be subject to merit review?* (1999). At <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjectto meritreview1999.aspx> (viewed 16 October 2014).
- ⁷⁴ *What decisions should be subject to merit review?* at [4.56].
- ⁷⁵ *What decisions should be subject to merit review?* at [5.3].
- ⁷⁶ *What decisions should be subject to merit review?* at [5.12].
- ⁷⁷ *What decisions should be subject to merit review?* at [5.28].
- ⁷⁸ 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).
- ⁷⁹ *Handbook on Procedures and Criteria for Determining Refugee Status* at [189].
- ⁸⁰ *Handbook on Procedures and Criteria for Determining Refugee Status* at [192(vi)].
- ⁸¹ United Nations High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (20 November 2003) at [7.1.1] and [7.4.1]. At <http://www.refworld.org/docid/42d66dd84.html> (viewed 16 October 2014).
- ⁸² Proposed s 473JA(1), Bill, Sch 4, Pt 1, item 21, p 85.
- ⁸³ Proposed s 473CC, Bill, Sch 4, Pt 1, item 21, p 66.
- ⁸⁴ See definitions of 'fast track reviewable decision' in proposed s 473BB, Bill, Sch 4, Pt 1, item 21, p 63; and 'fast track applicant' and 'fast track decision' in proposed s 5(1), Bill, Sch 4, Pt 1, item 1, p 57.
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- ⁸⁶ Proposed s 5(1AA), Bill, Sch 4, Pt 1, item 2, p 59.
- ⁸⁷ EM [754].
- ⁸⁸ *Legislative Instruments Act 2003* (Cth), s 44(2), item 26. See EM [758].
- ⁸⁹ Proposed ss 473DB-473DD, Bill, Sch 4, Pt 1, item 21, pp 67-68.
- ⁹⁰ Proposed s 473DB(1)(ii), Bill, Sch 4, Pt 1, item 21, p 67.
- ⁹¹ Proposed s 473CC, Bill, Sch 4, Pt 1, item 21, p 66.
- ⁹² Proposed s 473DB(1)(i), Bill, Sch 4, Pt 1, item 21, p 67.
- ⁹³ Proposed s 473DC(1), Bill, Sch 4, Pt 1, item 21, p 68.
- ⁹⁴ Proposed s 473DD, Bill, Sch 4, Pt 1, item 21, p 68.
- ⁹⁵ EM at [914].
- ⁹⁶ EM at [916].
- ⁹⁷ EM at [893] and [920].
- ⁹⁸ EM, Statement of Compatibility with Human Rights, p 21.
- ⁹⁹ *Handbook on Procedures and Criteria for Determining Refugee Status* at [198].
- ¹⁰⁰ *Handbook on Procedures and Criteria for Determining Refugee Status* at [199].
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- ¹¹⁵ Proposed s 473CC, Bill, Sch 4, Pt 1, item 21, p 66.
- ¹¹⁶ Migration Act, s 415(1).
- ¹¹⁷ Migration Act, s 415(2).
- ¹¹⁸ Proposed s 473FA(1), Bill, Sch 4, Pt 1, item 21, p 72.
- ¹¹⁹ Migration Act, s 420(2)(b), compare proposed s 473FA(2), Bill, Sch 4, Pt 1, item 21, p 72.
- ¹²⁰ These sections provide that a non-citizen cannot apply for a protection visa if the person: is covered by the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees or another agreement between Australia and a safe third country, or is a dual national or otherwise has the right to enter and reside in a third country.
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- ¹²² *Legislative Instruments Act 2003* (Cth), s 44(2), item 26. See EM [758].
- ¹²³ EM [712].
- ¹²⁴ Migration Act, s 109.
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- ¹²⁶ EM [724].
- ¹²⁷ EM, Statement of Compatibility with Human Rights, p 23.
- ¹²⁸ EM, p 6.
- ¹²⁹ EM, p 7.
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- ¹³² Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and operation of the Migration Act 1958* (2006), para 8.33. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2004-07/migration/report/c08 (viewed 23 October 2014).
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