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

We welcome the opportunity to provide the following comments to the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee for the Scrutiny of Bills as well as the Senate Legal and Constitutional Affairs Legislation Committee as part of their inquiry into the provisions of the Law Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.

This submission is prepared by the following young solicitors and migration lawyers and refugee advocates in their personal capacity.

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Currently working in private and professional firms in the field of immigration, we amalgamate practical experience and knowledge of asylum seeker and refugee processing experience and advocacy in Australia as well as regional processing centres. Our submission is underlined by a passion to improve Australia’s migration policies in the humanitarian space.

Our submission will outline our key concerns with the Bill, which include:

- significant changes to the legal framework of refugee status determination processes;
- removal or substantial diminishment of merits review processes;
- increasing Ministerial power and discretion;
- reducing and eliminating judicial oversight
- retrospective application of most provisions of the Bill.

The lack of an entrenched bill of rights in the Australian constitution has meant that the Parliamentary Joint Committee on Human rights using the Human Rights (Parliamentary Scrutiny) Act 2011 has regarded the Bill as compatible with human rights. However, as outlined below we believe there may be serious infringements of human rights should this Bill be passed into law.

The Bill is long and complex, and significantly alters Australia's management and processing of asylum seekers and Australia’s commitments under international law instruments. The Bill is likely to have serious practical consequences for people seeking asylum in Australia, and it departs in many respects from years of case law established in the High Court, Federal Courts and international jurisdictions. In this context, each part of the Bill requires detailed consideration and must not be rushed through parliament. We encourage the various Parliamentary Committees to carefully evaluate each section and consider whether the changes are limited to the stated objective, or whether the powers go beyond what is necessary to achieve these objectives. It is vital also to consider potential unintended consequences.

The Bill will compromise Australia’s standing as a fair and respected “global citizen”, given the serious divergence from international instruments, principles and jurisprudence. Not only this, but the Bill is in effect usurping the balance of powers and ultimately undermines the rule of law by limiting the scope and practical implications of judicial decisions.

In light of these concerns, we submit that the Committee should recommend that the Bill not be passed in its entirety.
Key features of the Bill

The Minister for Immigration and Border Protection, Scott Morrison, introduced the Bill on Thursday 25 September 2014 and it passed the Lower House on 22 October 2014.

The Bill aims to amend the *Migration Act 1958* and the *Maritime Powers Act 2013* to implement a range of changes to the current system of refugee status determination in Australia, including:

1. Providing for the Minister of Immigration and Border Protection to have extraordinary powers to detain people on the seas, including the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, removing all parliamentary and judicial oversight;

2. Reintroducing the Temporary Protection Visa (TPV), creating a new Safe Haven Enterprise Visa (SHEV), changing the validity requirements for protection visas and providing for a framework for conversion of visa applications and deemed visa applications;

3. Creation of a parallel merits review process known as the Immigration Assessment Authority which conducts very limited review for asylum seekers, and in some cases removing merits review altogether;

4. Codification of the Refugee Convention and significant changes to elements of the test including state protection and relocation, and removal of complementary protection provisions;

5. Amending the considerations to be taken into account when removing (deporting) asylum seekers, effectively permitting delegates to disregard Australia’s *non-refoulement* obligations;

6. Introducing a ‘cap’ on the number of protection visas that can be issued in any year, allowing the Minister to suspend processing of protection visas once the ‘cap’ is reached.

We have focussed our submission on the particular Schedules and topics which are most concerning and where we have the greatest expertise.
Framework

We support efforts to enact a clear, fair and efficient system for assessing protection claims and issuing protection visas that is consistent with rule of law\(^1\) and Australia’s relevant international law obligations.

These principles require, for example, that Australia apply a consistent legal process for determining protection status that does not discriminate against applicants based on where they come from or how they arrive,\(^2\) and comply with Australia’s international obligations, such as the obligation to have robust safeguards in place to prevent against non-refoulement, including:

(a) a clear, legal process for determining whether a person invokes any of Australia's protection obligations, including those contained in the Convention Relating to the Status of Refugees (Convention), and on complementary protection grounds such as obligations to provide protection from certain types of serious harm under the Convention Against Torture (CAT), International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR, and the Convention on the Rights of the Child (CROC);

(b) access to independent legal or migration advice for all people seeking Australia's protection; and

(c) access to merits review of all administrative decisions concerning protection status.

In addition, we refer to the doctrine of the separation of powers, which govern the relationship between the Commonwealth Parliament and the courts referred to in Ch. III of the Commonwealth Constitution. This separation of powers is the cornerstone of our democracy and rule of law. We are concerned with the passage of this Bill that legislative interferences in the judicial process would give rise to a denial of procedural due process; that an essential element of the judicial power of the Commonwealth is being removed from the court; or, that the court is being required to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power.


Who is the “caseload legacy?”

Despite the notable lack of information surrounding asylum seekers under the current government, we understand that there are around 30,000 people who are already in Australia affected by the Bill in its retrospective application. There are subgroups within this number, primarily divided according to their date of arrival (due to regular changes in the law) as set out below:

1. Asylum seekers who arrived before 13 August 2012

All people who arrived before this date have lodged their initial protection visa application, and are at various stages of the refugee determination or appeal process. This includes people who have a protection visa application under consideration by the Department, a merits review case before the Tribunal, judicial review proceedings before the Federal Circuit Court, the Federal Court or the High Court, or people who are seeking Ministerial Intervention pursuant to section 417 or section 48B of the Act.

These asylum seekers usually reside in the Australian community in one of the following situations:

a) Bridging Visa E holder – those with a valid visa, a small portion of whom have work rights
b) Community detention – subject to a residence determination under section 197AB, no permission to work
c) Unlawful – due to the Minister refusing to renew BVEs for a prolonged period, no permission to work
d) Immigration detention facility – a number of people remain in closed immigration detention

The government has significantly delayed processing of these applications: in 2013–14 there were only 353 visa grants to UMAs and 2868 refusals. The Department comments that the much lower number of grants in 2013–14 compared to 2012–13 is an effect of the cap on Protection visa grants introduced on 5 March 2014 and Ministerial direction No. 57 which accorded priority to non-UMA application. The report confirms that there were no visa grants in the December, March and June quarters of 2013–14.3

2. Asylum seekers who arrived on or after 13 August 2012

We understand that no irregular maritime arrival after this date has been permitted to lodge their protection visa claim. Due to the application of the Expert Panel report and the "no advantage" principle, no asylum seeker is permitted to work.

Since the election of the Government in September 2013, it appears that the Minister has not exercised his discretion under section 46A(2) to allow illegal unauthorised maritime arrivals to apply for a protection visa in Australia. The Government is also continuing to pursue a policy introduced by the former Labor Government, which provides that all unauthorised maritime arrivals will be liable to be transferred to a regional processing country for the determination of their protection claims, and for settlement if they are found to be owed protection.

3. Asylum seekers who arrived on or after 19 July 2013

The situation for arrivals after 19 July 2013 is presently unclear: regional processing arrangements are in place but refugees are not being resettled. It is possible that the government will concede on its political stance and allow asylum seekers who arrived after this date to be processed in Australia, and consider applying the same laws (TPV/SHEV) to this caseload. The government has indicated that some asylum seekers currently in detention in Australia pending their transfer to Nauru may instead be assessed in Australia and eligible for TPVs, although this is unclear.
Maritime law amendments

Schedule 1 of the new Bill amends the *Maritime Powers Act 2013* to give the Minister extraordinary power to detain people on the seas, including the high seas, and to transfer them to any country (or a vessel of another country) that the Minister chooses, without any scrutiny by Parliament and with very limited possibilities for judicial review.

The Bill seeks to authorise actions similar to those undertaken by the Australian Government with respect to two boats of Sri Lankan asylum seekers in July 2014, including the transfer of one of the boats to the Sri Lankan navy and the attempted transfer of the other boat to India. The High Court is currently considering the powers to detain vessels and people under the MPA, as well as the limits of executive power, in the case of *CPCF v Minister for Immigration and Border Protection & Anor* (S169 of 2014)

Key changes

The amendments in Schedule 1 may be broadly summarized as follows:

1. Australia's international obligations:

   The new Bill provides that a failure to consider or comply with Australia’s international obligations or a failure to consider the domestic law or international obligations of another country will not invalidate an authorisation to exercise maritime powers under the MPA, including the power to detain vessels and people (section 75A of the MPA)

2. Rules of natural justice & judicial review:

   The new Bill states that the rules of natural justice do not apply to the exercise of a power to give an authorisation under Division 2 of Part 2 of the MPA (section 75B). It also amends the ADJR Act to provide that certain new decision-making powers (under proposed sections 75D, 75F and 75H of the MPA) are not subject to judicial review under the ADJR Act

3. Detention of vessels and people:

   The Bill provides that a detained vessel can be taken outside Australia and that the destination to which the vessel can be taken can repeatedly change. In regards to the length of detention, the amendments seek to extend the period of time a vessel can be detained and provides that the 28 day holding period for detained vessels does not commence until the vessel has reached its destination. The period of time a person can be required to remain on a detained vessel is also extended. In addition, a detained person can be taken outside Australia and that the destination to which they can be taken can repeatedly change, effectively providing for an unspecified period of detention during which a destination place is found (subsection 72A(1))

   The amendments provide that the destination to which a vessel or person may be taken does not need to be inside a country (for example, the high seas or another vessel) and that it is irrelevant whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country.

   A detained vessel, or one which is being used to detain people, excludes certain maritime laws including the Navigation Act 2012, which relevantly gives effect to Australia’s international obligations under various conventions to which Australia is a signatory, covering matters such as the safety of life at sea (proposed section 75H).
4. Ministerial discretion:

The new Bill inserts a broad Ministerial power to over-ride the general limitations on the exercise of powers in relation to foreign vessels between countries contained in existing section 41 (proposed section 75D). In addition the Minister may give directions relating to the way in which certain powers in the MPA are to be exercised, for example the destination a vessel or person is to be taken or matters to be taken into account when deciding a destination (proposed section 75F)

5. Interaction with Migration Act & Immigration (Guardianship of Children) Act:

Under the amendments, the MPA is not subject to or limited by the Migration (proposed section 75E)

The new Bill also confirms that the Minister does not have guardianship obligations to children under the Immigration (Guardianship of Children) Act (IGOC) when they are taken to a place outside Australia pursuant to the MPA, and nor does the IGOC Act affect the exercise of powers under the MPA.

The new Bill appears to depart significantly from Australia’s treaty obligations and in some respects wilfully disregards international law obligations. We are highly concerned that the Minister may detain and transfer people on the seas even if he fails to consider Australia’s international legal obligations, including the principle of non-refoulement and the prohibition on arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR). The new Bill inappropriately exceeds Australia’s international obligations and permissions, as it provides for the Minister powers to detain and transfer people on the high seas, despite the fact that the government does not have these powers under international law, including under the law of the sea, human rights law, and refugee law.

In particular, in all circumstances Australia has obligations to:

(a) ensure the safety of life at sea;\(^4\)
(b) treat humanely all people in its custody or control;\(^5\)
(c) refrain from arbitrarily or unlawfully detaining people contrary to international human rights law,\(^6\) including by incommunicado detention;
(d) respect the obligation of non-refoulement under international refugee law and human rights law, namely, not to return a person at risk to a country of risk (including by transfers at sea to a vessel of the country of persecution);
(e) respect freedom of navigation on the high seas;\(^7\)
(f) respect the sovereign maritime boundaries and areas of other countries;\(^8\) and
(g) provide accessible, timely and effective remedies for alleged violations of Australia’s international human rights law obligations.\(^9\)

\(^5\) See, for example: Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (Articles 2, 7 and 10) and International Covenant on Economic, Social and Cultural Rights.
\(^6\) Art 9 of the International Covenant on Civil and Political Rights.
\(^7\) Article 110 UNCLOS provides that interference with the freedom of navigation of foreign vessels outside territorial sea is only permissible under treaty arrangements (including in the case of rescue at sea), with authorisation of the flag State, or in cases such as slave trading or piracy.
\(^8\) Art 2 of the UNCLOS provides that the sovereignty of a coastal state extends to its territorial sea. Under UNCLOS coastal states also enjoy certain rights in their contiguous and exclusive economic zones.
\(^9\) Art 2 of the International Covenant on Civil and Political Rights.
Australia's position as a responsible global citizen is compromised, and the sovereignty of other States may be violated should Australia send asylum seekers to another country without the consent of that country.

We are also concerned that the Bill reduces the scope for judicial scrutiny of Government actions at sea by removing the right to natural justice and the ability of the Court to declare certain actions invalid where those actions are not authorised by existing Australian law, international obligations or the domestic law of other countries.

We agree with the Kaldor Centre in that the Bill raises serious constitutional concerns, as it envisages potentially prolonged detention by the Minister without any scrutiny by Parliament or the courts. Extended detention, without provision for review or oversight, may constitute an exercise of judicial power.
Temporary Protection Visas

Schedules 2 and 3 to the Bill provide the legislative framework to re-introduce the Temporary Protection Visa (TPV) and create the new Safe Haven Enterprise Visa (SHEV) for asylum seekers who arrive by boat or air in an unauthorised manner and who are found to engage Australia's protection obligations.

These amendments are designed to support the government’s political objective of only granting temporary protection to people who have arrived in Australia by boat. The changes also operate retrospectively, in accordance with the stated aim to 'clear the caseload legacy.' This means that people in Australia who have already made valid applications for subclass 866 Protection visas will no longer be able to meet the criteria for the visa, and their application will be deemed to be an application for a TPV. Future applicants for protection will only be eligible for a TPV if they are found to engage Australia’s protection obligations.

The changes predominantly affect asylum seekers who are have arrived by boat (unauthorised maritime arrivals as per section 5AA of the Act). However there are also provisions to extend TPVs to people who otherwise arrived in Australia without a visa; or were not immigration cleared on their last arrival in Australia.

Creation of new Temporary Protection Visa

The Bill re-introduces the Class XD (Subclass 785) Temporary Protection Visa, which is similar to the previous TPV provided under the Howard government in 1999 and the October 2013 amendments. The only major difference from the previous legislation is the removal of complementary protection provisions as a ground for engaging Australia’s protection obligations (discussed further below).

The Explanatory Memorandum states that the TPV is a "key element of the Government’s border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia."

In summary, the new Class XD Temporary Protection (Subclass 785) visa would be the only visa available to people who engage Australia's protection obligations who fall into one of the following groups:

- unauthorised maritime arrivals; or
- otherwise arrived in Australia without a visa; or
- were not immigration cleared on their last arrival in Australia; or
- are the member of the same family unit as a person mentioned above.

The Bill establishes the criteria for TPVs via amendments to Schedule 2 to the Regulations (the set of rules which must be met at the time of application for a visa, and at the time of a decision on the visa). The requirements are summarized below.

- Application must be made in Australia whilst the applicant in Australia;
- Can include members of the family unit who are also in Australia and who make a combined application (at the same time and place);

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10 The Explanatory Memorandum states that "Schedule 2 to the Bill will address the Government’s objective that any illegal arrivals who seek asylum in Australia will not be granted a Permanent Protection visa." Note that the Law Council of Australia does not support the term "illegal" applied to describe the method of arrival of asylum seekers.

11 The Explanatory Memorandum states that the intention is that those who are found to be in need of protection either through existing assessment processes or through the fast track assessment process will be eligible only for grant of temporary protection visas.
Available for people who hold, or have ever held, a subclass 785 TPV or subclass 786 THC; or unauthorized maritime arrivals; or who were not immigration cleared on their last arrival or did not hold a valid visa upon entry

At the time of application, the applicant claims that a criterion mentioned in 36(2)(a) or (aa) is satisfied; and "makes a specific claim" as to why that criterion is satisfied;

At the time of decision, the Minister is satisfied the person is someone to whom Australia owes protection obligations under section 36(2)(a) or (aa).

The applicant has undergone relevant medical examinations

The applicant is a person of good character and has signed the Australian Values Statement

The Minister is satisfied the grant of the visa is in the national interest

The visa is valid for a period of 3 years or a shorter period as determined by the Minister

The visa is subject to condition 8503 (No Further Stay) and 8565 (Notify Immigration of Change of Address)

People on TPVs will not have the right to depart and re-enter Australia, access to family reunion or the option to apply for permanent protection.

They will, however, have access to work rights, employment services, Medicare and income support, torture and trauma counselling, translating and interpreting services, complex case support and access to education for school aged children.

We are extremely concerned about the re-introduction of TPVs for the reasons articulated below.

TPVs are not a sustainable or appropriate mechanism for upholding Australia’s commitments under international law. The government has repeatedly stated that asylum seekers who arrived by boat will have no avenue for securing permanent protection in Australia.

Based on the negative impacts of TPVs on refugees when they were previously used under the Howard government, we are concerned that the reintroduction of TPVs may lead to breaches of Australia’s international human rights obligations.

Temporary protection for refugees is not prohibited under the Refugee Convention. However, a good faith interpretation of Article 1C (dealing with cessation of refugee status) suggests that the bar for excluding someone as a refugee is quite high, and that the onus should fall on the government to explain that there has been a fundamental change to the circumstances in the country of origin that removes the risk of persecution for the individual concerned. As such it is our view that TPVs, by requiring a new protection application to be made each time a TPV expires, violate Article 1C of the Refugee Convention.

The UNHCR has noted:

“Temporary protection is a group-based protection mechanism suited as a response to particularly complex circumstances, notably in contexts of mass displacement, where an individualized assessment of protection needs is not possible or practical. An approach that is punitive or deterrent in nature or prolongs uncertainty would be of concern”12

TPVs cause significant and ongoing mental health problems. The three year (or shorter) visa period causes uncertainty and insecurity, due to the constant fear of removal to the country.

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where the asylum seeker claims persecution. The AHRC reported that “[r]efugees on TPVs were likely to suffer from higher levels of anxiety, depression and post-traumatic stress disorder than those on PPVs, despite the fact that the two groups had experienced similar levels of past trauma”13

The conditions of uncertainty as a result of temporary residency status had a more profound impact on children. It was reported by the HREOC 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.14

In our view, TPVs constitute cruel, inhuman or degrading treatment in breach of article 7 of the International Covenant on Civil and Political Rights, as a result of the cumulative effect of these factors together with what is known about the adverse mental health impacts of temporary protection.

Furthermore, the denial of the right to family reunion and a ban on overseas travel means that refugees holding TPVs face prolonged separation from their family members. This has compounded the negative effect on people’s mental health and wellbeing. The denial of family reunion is in breach of the ICCPR, CROC in that they infringe the right to family and the freedom from arbitrary interference with family life.

In the past, the lack of family reunion rights may have encouraged some family members, particularly women and children, to undertake the boat journey to Australia in order to join their immediate family in Australia.15

Lastly, the amendments proposed by the Bill unlawfully discriminate against asylum seekers based on their method of arrival. This breaches article 31 of the Refugee Convention and the principle of non-discrimination, by penalising irregular arrivals and creating two classes of asylum seekers.

Safe Haven Enterprise Visas

The Bill creates a new temporary protection visa entitled the Safe Haven Enterprise Visa (SHEV)

The definition of a protection visa in section 35A of the Act will include SHEV, and the Act based visas listed in subsection 31(2) will also be amended include SHEV. Aside from creating the statutory framework, there is nothing in the Bill regarding the proposed visa criteria.

Whilst the EM states that amendments to the Migration Regulations will be made in 2015, presumably to add Schedule 2 criteria (the requirements to be met at the time of application and decision on the visa), there is no detail in the Act nor the Regulations as to the nature of eligibility or the terms of the grant.

From the public announcements made by the Minister, and the Palmer United Palmer, the

13 AHRC commenting on S Momartin et al, ‘A Comparison of the Mental Health of Refugees with Temporary versus Permanent Protection Visas’ (2006) 185 Medical Journal of Australia 357. See also Z Steel et al, ‘Two year psychosocial and mental health outcomes for refugees subjected to restrictive or supportive immigration policies’ (2011) 72 Social Science & Medicine 1149
SHEV may be considered for people who are found to engage Australia’s protection obligations and who are willing to move to a regional area (undefined at present), and either engage in study at a specific institution (also undefined) or undertake work which means they are not reliant on income support for more than 18 months in a 5 year period. There is no information supplied as to the conditions on the visas but in line with other TPV conditions, holders may be permitted to access Medicare but denied the opportunity to sponsor dependent family members, as any other temporary resident (457 or student visa holder) would normally be entitled to do.

After a certain period of time (most likely 3 ½ years and having met qualifying criteria), temporary visa holders may be eligible to apply for a migration visa – once again, neither the qualifying criteria nor does it specify which temporary or permanent visas SHEV holders might be eligible for.

Without any detail regarding the visa eligibility criteria, the conditions on the visa or information regarding the likelihood of a refugee qualifying for permanent residence, the we are wary of supporting the establishment of a framework for this visa.

Public statements indicate that the pathway to permanent residence will be difficult, if not impossible:

The Minister for Immigration and Border Protection stated in a media release on 25 September 2014:

> These are temporary visas. They do not provide a path to permanent protection visas…. these benchmarks of working or studying in these regional areas are very high. Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it. But if they do achieve it, then what we are doing here is not providing a pathway to welfare, and generational welfare at that. There is an opportunity here but I think it is a very limited opportunity and we will see how it works out.16

And the apparent architect of the SHEV scheme, Clive Palmer, told the Guardian Australia on 24 October 2014: “It looks like many of the people we thought would be able to apply for safe haven visas might not be able to”17

We are concerned about the lack of specified criteria for the grant of the SHEV, the conditions on such visas and the intended transition pathways to permanent residency. It is unclear whether SHEV holders would be eligible for student visas and temporary work visas, as it is unlikely they would satisfy a genuine temporary entrant requirements. However such visas could substantially improve their prospects for permanent skilled visas – in fact, most independent skilled and permanent employer sponsored migrants have previously held such temporary visas. Furthermore, as it seems that SHEV holders would not be eligible for permanent protection visas, the justification for denying these must be queried, considering by the end of their visa, the SHEV holder would have demonstrated their commitment to following normal migration procedures.

We believe that the creation of the SHEV creates a deep inconsistency between the refugee and humanitarian visa program, designed to give effect to Australia’s humanitarian goodwill

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and treaty obligations, and the discretionary selection processes which is the basis of the permanent skilled migration program.

In line with the concerns noted above in relation to TPVs, we strongly oppose the SHEV as a temporary protection measure. The SHEV will create uncertainty, exacerbate mental health problems for people who have may have previously experienced torture and trauma, create situations of prolonged separation from family members, and unlawfully discriminate against people who have arrived by boat or otherwise without a valid visa.

In addition, even if the legislation provides for a clear pathway to a permanent skilled migration visa, we acknowledge the significant difficulties faced by refugees in having their skills formally recognized. Whilst many people form refugee backgrounds have valuable skills which are in high demand in Australia, the process for skills recognition is lengthy and difficult. Acknowledging that many refugees flee their home countries without documentation, an intensive skills recognition process by Australian authorities would be effectively impossible. As such, the proposed SHEV visa fails to recognize the unique difficulties presented by people from refugee backgrounds.

Other amendments

There are a range of technical amendments to create multiple new classes of Act based visas. The proposed changes to the definition clauses will ensure that all types of temporary and permanent visas will be considered protection visas.

Aside from the statutory framework, there are highly troubling new powers to deem and convert existing and future applications.

Changes to classes of protection visas

The Bill establishes new classes of temporary and permanent protection visas. The definition sections in the Act (Section 5(1)) and the Regulations (regulation 1.03) will provide that "protection visa" has the meaning given by section 35A of the Act.

Currently, subsection 36(1) provides that there is a class of visas to be known as protection visas. The new section 35A of the Act provides that are different classes of protection visas including:

1. Class XA Permanent Protection visa (Subclass 866);
2. Class XD Temporary Protection visa (Subclass 785);
3. Safe Haven Enterprise visas (Class and Subclass yet to be specified)
4. other such visas prescribed in the future by regulations made under section 31(1);
5. classes of visas formerly prescribed under section 36(1) as it was in force before commencement of this section

The criteria that need to be satisfied for these visas will be in sections of the Act and in Schedules to the Migration Regulations.

The abovementioned amendments to the definition sections clarify that throughout the Act and the Regulations, the term protection visa includes all classes of permanent and temporary protection visas any additional classes of permanent or temporary visas that are prescribed as protection visas by the Migration Regulations.
Changes to validity requirements

Following from the amendments to the classes of protection visas available, the Bill provides for changes to validity requirements. In summary, the types of visas available to asylum seekers will be determined according to their mode of arrival, and whether they held a valid visa and were immigration cleared upon entry.

Amendments to the validity criteria (Schedule 1, Item 1403) provide that the following people will be unable to make a valid application for a permanent Subclass 866 (Protection) visa:

- those who hold, or have ever held, a subclass 785 TPV or subclass 786 THC
- those who arrived in Australia as an unauthorized maritime arrival
- those who were not immigration cleared on their last arrival or did not hold a valid visa upon entry.

Note: Specifically includes the (approximately) 18-20 people who were granted TPVs during the government's last attempt to bring this law in: see SLI 234/2013 which was registered on 18 October 2013 and disallowed on 2 December 2013.

People outside the cohort mentioned above are able to make valid Class XA Protection (Subclass 866) – as such, plane arrivals who are immigration cleared / hold a valid visa will still be able to make a valid application for a permanent visa.

Also in relation to validity requirements, the amendments in Schedule 3:

- provide that the regulations may, but need not, prescribe criteria for visas
- provide that an application for a visa is invalid if the regulations do not prescribe specific criteria for visa listed in section 31 of the Migration Act, including (amongst others) permanent and temporary protection visas and
- provide that if there are regulations that prescribe specific criteria, an application will also be invalid unless an applicant satisfies both the criteria in the Regulations and in the Migration Act

These changes are an unexpected and serious departure from the current framework for making and determining visa applications: (i.e. validity requirements as distinct from time of application criteria and time of decision criteria).

It is completely unclear why the Minister may require this very broad power and whether the consequences have been evaluated.

Effectively, the Bill provides that if a visa applicant does not meet the rules for granting the visa, it will never be a valid application in the first place. This excludes merits review, as a decision that an application is not valid, is not a decision to refuse the visa, and therefore not reviewable under Part 5 (MRT) or Part 7 (RRT).

A perhaps unintended consequence of retrospective invalidity in the manner outlined in the new Bill, is that the Department is not permitted to take VACs for invalid applications – are they going to refund these?

These amendments provide that the criteria for the visa may or may not be prescribed, which seriously undermines a key principle of the rule of law, in that the law must be both readily known and available, and certain and clear The Bill allows the Minister to change the visa requirements at any time, and retrospectively deem an application invalid.
Deemed visa applications – Regulation 2.08F

The Bill provides for deemed applications in prescribed circumstances. As set out below, certain types of applications will be ‘taken to be made’ as another type of application.

New Regulation 2.08F provides that Protection (Class XA) applications are taken not to be, and have never been, a valid application for a Protection (Class XA) visa; and are taken to be, and have always been, a valid application for a Temporary Protection (Class XD) visa, for a prescribed applicant. Prescribed applicants are people:

a) who hold, or have ever held, a Subclass 785 TPV granted before 2 December 2013, a Subclass 449 TSHV or a Subclass 786 THC; or
b) unauthorized maritime arrivals; or

c) people who entered Australia without a valid visa or who were no immigration cleared.

Under subregulation (3) the deemed application applies retrospectively to anyone whose application is not finally determined, including asylum seekers at all stages of the application process such as after remittal by the RRT, AAT or a court.

We are concerned about the broad use of deeming provisions, with necessarily retrospective application. In line with its Rule of Law Principles, the law must be both readily known and available, and certain and clear – in particular, laws which alters rights or penalizes should not be retrospective in their operation.

The operation of deeming provisions elsewhere in the Migration Act are used positively or to sensibly rectify situations created by the legislation. For example the circumstances in which the Regulations currently prescribe for deemed applications include: babies born after an application is made but before it is decided are deemed to be included on their parents application (Regulation 2.08), applicants for prospective marriage visas who marry their partner during the process are deemed to have made a partner visa application (instead of being forced to make a new application) (Regulation 2.08E).

The proposed deeming provisions allow the legitimate interests of asylum seekers who have made valid applications, many of whom have been waiting for many years for their application to be processed. Numerous asylum seekers have already been recognised as engaging Australia’s protection obligations, and received favourable outcomes from the Tribunal or the courts.

The intended scope of this deeming provision also unlawfully discriminates against asylum seekers on the basis of their method of arrival, in contravention of Article 31 of the Convention.
Conversion regulations – Section 45AA

This is one of the most legally technical sections of the Bill, yet has severe and possibly unpredicted consequences. Notably, these new powers apply to all visa classes, not just protection visas.

New section 45AA provides for an application for one visa taken to be an application for a different visa. The purpose is to allow an application to be converted into an application for a visa of a different class. The new section 45AA explains the situations in which a conversion regulation can be made, the effects of the conversion regulation and the consequences for applicants including in relation to first visa application charges, bridging visas and accrued rights.

Subsection (1) provides that a conversion regulation may be made where the following criteria are met:

a) a person has made a valid application (a pre-conversion application) for a visa (a pre-conversion visa) of a particular class; and
b) the pre-conversion visa has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application; and
c) since the application was made, one or more of the following events has occurred:
   • the requirements for making a valid application for that class of visa change;
   • the criteria for the grant of that class of visa change;
   • that class of visa ceases to exist; and

d) had the application been made after the event (or events) occurred, because of that event (or those events):
   e) the application would not have been valid; or
   f) that class of visa could not have been granted to the person.

The effect of the conversion regulation made under section 45AA is that the pre-conversion application for the pre-conversion visa:

• is taken not to be, and never to have been, a valid application for the pre-conversion visa; and
• is taken to be, and always to have been, a valid application (a converted application) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa.

Similar to our concerns about deemed applications, the retrospective application of these provisions is troubling. However this proposed law is far broader than the previous section, as could potentially apply to any visa subclass, at any stage of an application process, and to any individual or class of people. The law permits conversion regulations to be made for certain types of applications, certain types of applicants including applicants with a particular status. This again contravenes a fundamental principle of the rule of law, that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.

Such broad powers, with no prescribed safeguards, could have far-reaching practical consequences. As the conversion regulation entitles the government to convert an application at any stage of the visa process, a visa applicant may have been found to meet all of the core criteria for the visa and simply be awaiting a visa place to become available. For example, a subclass 115 Remaining Relative visa applicant may have been assessed and queued for a period of over 50 years (based on current estimated waiting times in the Other Family visa stream), and then the Minister may arbitrarily convert their application to another visa type for which there is another extraordinarily long waiting time. Similarly, the Minister may use the conversion regulation to effectively deny visas to people from a particular country, for
applicants above a certain age or from particular skilled occupations. Applicants may have undertaken medicals or English tests, paid second visa application charges (for a Contributory Parent visa application, up to $100,000 in total application fees).

The stated purpose of more effectively managing and processing visa applications, and greater flexibility in accordance with changing Government priorities, is already achieved through legislative tools such as the cap and queue / cap and cease provisions, and processing priority directions under section 499. The Minister’s existing discretionary powers to manage on-hand applications are sufficiently powerful and do not require legislative extension.

In regards to VACs which have been paid for pre-conversion applications, there are a convoluted series of amendments in this regard. In summary it provides that the visa application charge paid for the pre conversion application is taken to have been paid for the converted application. Although an applicant will not have to pay the difference if the converted application charge is higher, they will not be refunded if it is lower. The EM states that, "depending on the applicant’s particular circumstances, other grounds for the refund of the first instalment of the visa application charge under the Migration Act and the Migration Regulations may apply."

However, the Bill neglects to address the issues of second VACs (which can total $2,000 - $20,000 per person) and associated costs including medicals, DNA and English testing. Visa applicants who have invested such time and often significant finances, have a legitimate expectation that their visa will continue to be processed.

We submit that the conversion regulations provide far too much discretion to the Minister and are disproportionate to the stated aim. The proposed laws have potentially wide reaching consequences and severe practical implications for visa applicants, and breach important rule of law considerations. Whilst the we acknowledge that the Executive is unlikely to use such conversion regulations in a perverse or punitive manner, we submit that in the current format, the Bill is unnecessarily broad.
Fast track processing

Schedule 4 to the Bill creates a new system of ‘fast-track processing’ of protection claims and serious changes to the merits review system for asylum seekers. The Bill establishes the Immigration Assessment Authority (IAA) within the Refugee Review Tribunal (RRT), which will strictly limit independent review of certain categories of protection visa applicants, require claims to be referred to the IAA by the Minister, strictly limit the circumstances in which new material can be considered, and remove the right to a review hearing (decisions to be made on the papers).

Fast track applicants will be assessed by the Department of Immigration and Border Protection at the primary stage. Where the DIBP’s decision is negative, there will be no avenue for review by the Refugee Review Tribunal (RRT).

The Minister stated in the Second Reading Speech that the purpose of restricting merits review rights was that “a 'one size fits all' approach to responding to the spectrum of asylum claims made under Australia’s protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government's capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system.”

Key changes

New Part 7AA establishes the IAA and the new limited merits review framework.

The proposed fast track processing primarily targets asylum seekers who arrived by boat on or after 13 August 2012, and any other people that the Minister specifies by legislative instrument. As such it seems to apply only to new protection visa applications, and not asylum seekers who arrived before 13 August 2012 who may have lodged subclass 866 visa applications, and already had merits review at the RRT or are currently undertaking judicial review of RRT decisions (and if successful, be remitted to the RRT).

Under this Part, the Minister will be required to refer fast track reviewable decisions to the IAA and provide the IAA with review material as soon as reasonably practicable after the primary decision to refuse to grant a protection visa has been made under section 65 of the Migration Act. Similar to the RRT, the IAA will have the power to either affirm the decision or remit the decision to the department for reconsideration in accordance with prescribed directions or recommendations.

Some of the existing procedures of the RRT are maintained by the IAA however there are also crucial procedural and substantive differences. The objective of the RRT under existing section 420 of the Act to provide a mechanism of review that is ‘fair, just, economical, informal and quick’, whereas the limited review mechanism to be provided by the IAA need only be ‘efficient and quick’—not fair and just (proposed section 473FA). In contrast to the procedures adopted at the RRT, the IAA will not (unless there are exceptional circumstances) hold hearings and will only make decisions ‘on the papers’—that is using the information that was available to the original decision-maker (see proposed sections 473DB and 473DD). A fast track review applicant will still be provided with a written decision which sets out the decision and the reasons for decision (proposed sections 473EA and 473EB). The Principal Member may issue ‘guidance decisions’ which the IAA must follow unless the facts or circumstances of the decision are clearly different from the facts or circumstances of the guidance decision (proposed section 473FC).

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18 Commonwealth, Parliamentary Debates, Legislative Assembly, 25 September 2014 (Scott Morrison MP).
While there will be discretionary powers for the IAA to get new and relevant information and to get information in the most suitable and convenient way from applicants, the IAA is under no duty to accept or request new information or interview an applicant. Other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or provided by the applicant. In addition, where an applicant wishes to provide the IAA with new information, this will only be considered if the IAA is satisfied that there are exceptional circumstances to justify the consideration of that new information. The EM gives the example of where there is evidence of a significant change of conditions in the applicant’s country of origin that means the applicant may now engage Australia’s protection obligations. The applicant will also have to satisfy the IAA that the new information could not have been provided to the Minister before the primary decision was made.

The Minister has broad ranging powers in section 473BC to determine by legislative instrument that an individual decision or a class of decisions should be classified as ‘excluded fast track review applicants.’ The Minister may also issue conclusive certificates under section 473BD which remove review rights altogether, where he deems it is contrary to the national interest for the decision to be reviewed or changed.

The IAA will be independent of the Department of Immigration and Border Protection and be established as a separate office within the RRT. The Principal Member of the RRT will be responsible for the overall operation and administration of the IAA and will be able to issue practice directions and guidance decisions to the IAA. A Senior Reviewer will be appointed to oversee the functions and operations of the IAA and perform any powers and functions delegated by the Principal Member. The Senior Reviewer and reviewers of the IAA will all be engaged under the Public Service Act 1999.

The new Part 7AA also provides a power to exclude certain asylum seekers from merits review altogether. Asylum seekers defined as “excluded fast track review applicants” would only be allowed internal review by Department. Excluded fast track review applicants are:

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

However under the proposed amendments the Minister will have the power to expand the class of persons that will be excluded from merits review altogether and will also be able to expand the class of persons that will be subject to the fast track process. Both will be by way of a non-disallowable legislative instrument.

We are highly concerned about the removal, or restrictions, on merits review of decisions relating to refugee determination. In accordance with international obligations, we submit that Australia is required to have robust safeguards in place to protect against refoulement, including:

- a clear, legal process for determining whether a person invokes Australia's protection obligations;
- practical access to independent legal or migration advice for all people seeking Australia's protection;
The adequacy of refugee determination procedures, and safeguards such as thorough and impartial merits and judicial review, is crucially important on account of the dire consequences of incorrect decisions. Asylum seekers returned to their home country risk being placed in the very circumstances which they fear. As Kirby J stated in relation to the threshold for the "real chance" test, when dealing with the claims of an asylum seeker, there must be a recognition of the grave risk of error and therefore to return to the question: 'What if I am wrong?'

As such, the stated aim of efficiency in review processes must be measured by the serious nature of the matters under consideration and the consequences of error.

We are further concerned about the creation of an alternative model for protection obligations determination, as these have proved problematic in the past. With particular reference to the Independent Merits Review (IMR) process, in our experience this resulted in poor quality of decision making, vast amounts of litigation and high overturn rates. In addition, creation of a parallel process with highly prescriptive codes of procedures will result in unnecessary costs for establishment, implementation and ongoing operation. It is also noted that overly technical codes and exhaustive statements of natural justice actually result in a substantial increase in judicial review on procedural matters.

Furthermore, the IAA model unlawfully discriminates against asylum seekers by their irregular status. By grouping people in this manner, and defining sub-groups based on membership of a class, the Bill derogates from our international obligations. We submit that it is not possible to determine which applicants are in 'most need' of priority – all claim to engage Australia’s protection obligations. It is inefficient to make an assessment being made as to an order of processing. This may also invite a comparative approach to refugee claims, as opposed to the require case-by-case assessment, as foreseen by the Refugee Convention.

As such, the proposed Bill discriminates against asylum seekers who arrive by boat or without a valid visa, in prohibiting their access to justice which is in breach of the fundamental principle of equality before the law.

We are particularly concerned about the complete removal of merits review for 'excluded fast track review applicants.' This sub-group of 'fast track review applicants' is only eligible for internal Departmental review, however, there is no detail in the Bill as to the nature of this assessment. From our experience, we hold serious concerns about the quality of administrative decision making and the training of bureaucrats when dealing with complex and sensitive matters. The high percentage of overturn rates at the RRT indicates the serious risks associated with relying on primary level decisions and the importance of a robust, independent assessment. The lack of independent processes may also lead to claims of apprehended bias in Departmental decisions, which will further increase the possibility of litigation in the High Court's original jurisdiction.

The creation of a sub-group of excluded fast track review applicants, on the basis of the factors mentioned above (including provision of bogus documentation, manifestly unfounded claims and access to effective protection elsewhere), create significant (and perhaps

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19 See, for example, Art 16 of the Refugee Convention, Art 9 and 14 of the ICCPR
20 Minister for Immigration and Wu Shan Liang (1996) 185 CLR 259 at 293 per Kirby J
21 See Art 3 and 31 of the Refugee Convention
unintended) complexities. For example, the assessment of whether someone has provided a bogus document or has effective protection are complex legal and factual issues. The administrative decision to categorise someone as an excluded fast track review applicant will likely itself be subject to judicial review. This would result in unnecessary litigation and may thwart the stated aim of efficient and quick review processes.

We are also concerned about the Minister's wide ranging discretions to classify particular decisions (or classes of decisions) as 'excluded fast track review applicants.' In addition, the Minister's recent use of "conclusive certificates" (under the existing section 411(3)) in relation to asylum seekers who have already applied for permanent protection has been extremely troubling. We are aware that several such conclusive certificates have been issued where an asylum seeker has been found to engage Australia's protection obligations and otherwise met all of the requirements for the grant of a protection visa.23 In this case, the Minister determined that review of the decision is not in the national interest on account of policy considerations such as deterring irregular maritime arrivals and eliminating people smuggling.

The lawfulness of conclusive certificates is currently under consideration before the High Court, with a hearing to be held in December 2014, however the implications of such broad Ministerial discretion is apparent. Removal of review rights is an extremely serious decision, and one which requires adequate judicial and executive oversight.

In regards to Guidance Decisions for the RRT, whilst this may result in high quality decisions being more easily identified and utilized more consistently by Tribunal members, there is little details regarding how they will apply in practice.

The existence of such Guidance Decisions may affect the ability of Tribunal Members to make decisions based on the facts of each individual case. It is unclear from the Bill how Guidance Decisions that the Principal Member directs are to be complied with will be made and identified, and how the facts of a decision under review are distinguishable from a Guidance Decision. These changes raise questions about the underlying concept of precedent and the principle of justice that like cases should be treated alike.24 This principle acknowledges that following of principle or decisions is appropriate only where the facts are similar. To do otherwise would be to attempt to impose criteria additional to those imposed by Parliament in legislation, which is not the function of the Principal Member of the Tribunal, being a member of the Executive.

Lastly, we are concerned that the removal of most forms of government funded legal assistance (the IAAAS scheme) will have a heightened impact upon fast track review applicants and excluded fast track review applicants. Without appropriate advice and support, protection visa applicants may lack capacity to understand and navigate Australia’s protection system, access and produce documentation and make out a claim. In conjunction with the proposed changes to the merits review process, the removal of IAAAS increases the risk of refugees with meritous claims being returned to their home country, in breach of Australia's commitment to non-refoulement.

23 See for example S297 v Minister for Immigration and Border Protection [2014] HCA 39 (8 September 2014)
Codification of Refugees Convention

Schedule 5 of the Bill removes most references to the Refugees Convention from the Act and creates a new, independent and self-contained statutory framework which codifies Australia’s interpretation of its protection obligations under the Refugees Convention. These amendments provide for criteria to be satisfied in order to meet the new statutory definition of a refugee, and also clarify the grounds which exclude a person from refugee status.

Paragraph 36(2)(a) of the Act will be amended to provide as a criterion for the grant of a protection visa that the applicant satisfy the definition of a refugee as set out by the new statutory framework. The new section 5H which defines the term refugee and also provides the grounds where the meaning of refugee does not apply (consistent with the exclusion clause under Article 1F of the Refugees Convention)

The new section 5J sets out the circumstances that must be satisfied for a person to have a well-founded fear of persecution. This amendment sets out the five grounds for refugee status consistent with those listed in Article 1A(2) of the Refugees Convention, that is, race, nationality, religion, membership of a particular social group and political opinion.

The new statutory framework in 5J(1)(b) seems to leave intact the “real chance” test – that is, a fear of being persecuted is well-founded if there is a real chance of being persecuted.25

The proposed definition of ‘well-founded fear’ in proposed section 5J significantly changes this essential element of the Convention definition, in that it considerably broadens the basis upon which asylum seekers can be deemed not to have a well-founded fear of persecution and thus be found ineligible for protection. For example, the statutory framework regarding relocation and state protection are significant departures from the Convention and case law in this regard. Each of these changes is discussed further below.

The Bill will have the effect of removing most reference to the Refugee Convention from the Migration Act. It will create a ‘new, independent and self-contained statutory framework’ that articulates Australia’s own interpretation of its protection obligations under the Convention.

The attempt to codify and derogate from obligations under the Convention is a significant symbolic, legal and practical departure from our international obligations. In regards to the legality of such codification, Article 42(1) of the Convention prohibits reservations in relation to Article 1A(2) (the definition of a refugee), and therefore the proposed amendments would breach Australia's international obligations.

We believe that the intention of codifying Australia’s interpretation of its protection obligations fundamentally misunderstands the role of international law and treaty obligations, which requires a principled and universal approach. As Allsop J stated in the Full Federal Court, “[i]t is desirable that host states under an instrument such as the Convention be consistently interpreted in order that there be uniformity of approach not only as to host state rights and obligations, but also to the derivative legal position of refugees thereunder.”26

We note The Vienna Convention, at Article 31 prescribes how international treaties should be interpreted. The Article speaks of “good faith”, “context” and “ordinary meaning”. By removing the references to the Refugee Convention, the Australian government is taking away the context and totality of the Refugee Convention and thereby limiting the primary intention and purposes of this international instrument.

25 Chan v MIEA (1989) 169 CLR 379 per Mason CJ at 389
26 NBGM v Minister for Immigration and Multicultural Affairs (2006) 150 FCR 522 at 562-63
As such, we are concerned that the removal of references to the Convention and codification seem like an attempt to limit Australia’s obligations under the Convention and limit the way in which such obligations are interpreted by the judiciary. There is already a substantial amount of litigation and therefore a large, complex body of case law in this area. We believe that the new Bill may encourage an increase in litigation and will not assist to clarify the law in this regard.

Our particular concerns with elements of the codification are set out below.

Relocation

The new paragraph 5J(1)(c) provides that a person only has a well-founded fear if that person has a real chance of persecution in all areas of the receiving country.

The EM specifically states that it is “the Government’s intention that this statutory implementation of the internal relocation’ principle not encompass a reasonableness’ test which assesses whether it is reasonable for an asylum seeker to relocate to another area of the receiving country.”

We do not support this amendment as it provides for a serious departure from the current case law, and international jurisprudence.

Although the internal relocation’ principle is not explicitly provided for in the Refugees Convention, in the decision of *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 it was held that the text of the Refugees Convention supports the internal relocation principle and is part of Australian law.

In the leading case of *Randhawa*, the court found that "[t]he focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country."

The High Court has confirmed as a general proposition that, depending on the circumstances of the particular case, it may be reasonable for an applicant to relocate in their country to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution.

The RRT publication Guide to Refugee Law provides a helpful summary of the currently accepted principles regarding relocation:

> It is widely accepted that even where the feared persecution is localised, a person will not be excluded from refugee status merely because he or she could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him or her to do so. The High Court has endorsed this proposition, explaining that what is reasonable, in the sense of practicable, must depend upon the particular circumstances of the applicant and the impact upon that person of relocating within their country.

Under the current interpretation of the law, the reasonableness of relocation is a two part test; firstly considering whether the harm is localized or country wide, and if the former, whether it is reasonable for the person to relocate. The UNHCR has stated that internal relocation is is relevant only in certain cases, particularly when the source of persecution emanates from a non-State actor. Even when relevant, its applicability will depend on a full consideration of all

27 *Randhawa v MILGEA* (1994) 52 FCR 437 at 4401-1.
the circumstances of the case and the reasonableness of relocation to another area in the
country of origin.30

The new test requires an assessment of whether the person can safely and legally access any
area upon return to their country of origin. We believe that the proposed test of proving a real
chance of persecution in "all areas" is very different to a "general notion of protection" by that
country.

The internal relocation principle has already broad application and imposes a reasonableness
requirement. We note that the Hazara asylum seekers who have recently been deported to
Afghanistan (one of whom was tortured upon his involuntary return) indeed failed in their
refugee claims at the RRT primarily on the basis of internal relocation; that is, it was deemed
safe for them to reside in a particular area of the country. As such, broadening this test and
allowing decision makers to focus on a specific location in the country, without consideration
of a general notion of protection, is particularly troubling.

In addition, by removing the reasonableness requirement, vulnerable applicants with
particular circumstances (disability, caste, language barriers, lack of family connections)
would be considered objectively able to relocate within their country. The proposed
amendment may have a particularly adverse effect on female refugee applicants whose claims
are based on their gender and/or family violence. Such applicants may find it difficult to
prove that their family, and men in general, would be unable to harm them in all areas of the
country.

In summary, we submit that this section of the Bill should not be passed as it unnecessarily
broadens the relocation test and therefore heightens the risk of refugees being returned to the
country from which they fear persecution.

State protection

The proposed subsection 5J(2) provides for a new statutory definition of state protection.
Specifically, the new section provides that a person does not have a well founded fear of
persecution where either or both of the following are available to a person in a receiving
country:

(a) an appropriate criminal law, a reasonably effective police force and an impartial
judicial system provided by the relevant State;
(b) adequate and effective protection measures provided by a source other than the
relevant State.

The proposed test is another significant departure from the current jurisprudence. The notion
of effective state protection arises from the assessment of whether a fear is well founded.

Consideration of state protection does not usually arise where the harm feared is inflicted by
the state or its agents, or when the state is complicit: in such a case, the fear will be well-
founded, it may readily be characterised as persecution, and will justify the unwillingness to
seek (external) protection.31 As such, dispute about this issue normally arises in regards to
protection against privately inflicted harm. In S152/2003 the High Court held that where the
persecutor is a non-state agent, the willingness and ability of the state to protect its citizens
may be relevant to whether the conduct giving rise to the fear is persecution.32

32 Ibid.
The proposed test departs significantly from a good faith interpretation of the Convention.

The EM states that it is the Government’s intention to provide a statutory formulation of the concepts which is consistent with current Australian case law on effective state protection, particularly the reasoning of the High Court in S152/2003. However we submit that the new Bill is not consistent and this is a misreading of the case. In the court's reasoning, the factors such as the police force and judicial system were amongst an inclusive list of things which might point to effective state protection, and not the sole determining factors.

In addition the EM provides that the Bill codifies the law regarding adequate and effective protection measures provided by sources other than the relevant state, consistent with the reasoning in Siaw v Minister for Immigration and Multicultural Affairs [2001] FCA 953." Again we submit that this is a misreading of the case, as the general principle was that state protection might include some relevant protection by different types of government agencies, but it is assessed on the individual circumstances.

We are concerned that the new Bill will effectively remove consideration of someone's circumstances, which can diminish or remove their ability to access the protection of the state. There are often individual difficulties associated with accessing state protection for non-convention reasons (for example, gender, disability or low caste).

The proposed test is also practically untenable as the assessment of protection from non-stage agents could be extended to have extraordinary application: for example, whether the applicant can pay for a private army, or has a particularly high fence, or a guard dog.

The proposed test also eliminates the reasoning of the High Court in Khawar, whereby state protection selectively withheld from particular individuals for Convention based reasons, amounted to persecution.

In light of the significant departure from the current jurisprudence, we submit that this aspect of the Bill should not be passed.

Modification of behavior

The Bill also changes the law in regards to modification of behaviour to avoid persecution. The new section 5J(3) provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that 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

We are concerned that the new Bill directly contradicts the principles in S395, and may override the outcome in S109/2014. In particular, the joint judgment of Kirby and McHugh JJ which articulated the problem of requiring people to behave discreetly:

An applicant claiming refugee status is asserting an individual right and is entitled to have his or her claim considered as an individual, not as the undifferentiated member of a group. By declaring that there was no reason to suppose that the appellants would not continue to act discreetly in the future, the Tribunal effectively broke the genus of "homosexual males in

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33 MIMA v Khawar (2002) 210 CLR 1
34 The High Court is currently considering a matter regarding relocation for Afghan man who was a driver and the reasonableness of him changing occupation. See Minister for Immigration and Border Protection v SZSCA & Anor S109/2014 (heard 9 October 2014, decision pending)
Bangladesh” into two groups – discreet and non-discreet homosexual men in Bangladesh. By doing so, the Tribunal fell into jurisdictional error that renders its decision of no force or effect.35

Furthermore, Kirby J held that “persecution does not cease to be persecution for the purpose of the Convention because those who are persecuted can eliminate the harm by taking avoiding action within the country of nationality”.36 As very logically concluded, there would be no purpose for the Refugee Convention is people could simply modify their behaviour, or act discreetly “to avoid the wishes of the persecutors”.

We submit that the terms of the new test will result a significant amount of litigation on the definitions used.

There will be too much discretion on the part of the assessing officer to “innate or immutable”. For example, the explanatory memorandum foresees that an “immutable” characteristic is being a child soldier or sex worker. However, it is questionable why this should not be extended to a taxi driver, or shop owner.

The proposed test supports a troubling underlying view that people may choose to be refugees and can take steps to avoid being persecuted. This is fundamentally incorrect and ignores the worldwide reality of forced border crossings and asylum claims. In our experience of processing asylum seeker claims, grounds for persecution are unavoidable on account of lack of education, opportunity and non-State persecutors. It is always the intention of applicants to avoid persecution, before seeking asylum. To return people to their country of origin with an expectation that they can “modify” their behaviour is unrealistic and a breach human rights and the individual's ability to self-determination.

Membership of a social group

The proposed definition of ‘membership of a particular social group other than family’ in proposed section 5L of the Act will similarly limit the basis upon which asylum seekers can claim to have a well-founded fear of persecution for reasons of membership of a particular social group. This amendment will insert a new requirement—that a person can only claim to be a member of a particular social group if each member of the group shares a common characteristic and the characteristic is an innate or immutable characteristic or the characteristic is so fundamental to a member’s identity or conscience, the member should not be forced to renounce it.

The Bill provides that membership of a particular social group consisting of family will be dealt with separately under the new section 5K. The new section 5K is identical to the previous formulation at section 91S.

We are concerned that the new law conflicts with the High Court’s interpretation of broad grounds for the test in Applicant S.37 It also undermines the Convention, as Article 1A(2) of the 1951 Refugee Convention does not contain any such limitation on the definition of ‘particular social group.’ The EM states that the new section 5L is based on the approach taken in other jurisdictions (Canada, the United States of America, New Zealand and the European Union), however, we submit that it is an unnecessary and poorly formulated ability to undermine the intention of the Convention.

36 Ibid at [40].
37 Applicant S v Minister for Immigration and Multicultural Affairs [2004] 217 CLR 387
Removal of complementary protection provisions

The Bill amends the existing framework for subclass 866 Protection visas to remove provisions that enable those at real risk of execution, torture and other significant harm to apply for a protection visa under the “complementary protection” regime. The new subclass 785 TPV also does not contain complementary protection provisions.

The complementary protection regime was introduced in 2012 to ensure that persons who do not meet the definition of “refugee” in The Convention relating to the Status of Refugees as amended by the 1967 Protocol (“the Refugee Convention”) but who face a real risk of significant harm such as death, torture or cruel, inhuman or degrading treatment on return to another country, can apply for a protection visa and then be assessed against the other requirements of the Migration Act.

Removing these provisions would mean that even if a person can show that they face a real risk of significant harm if returned home they will not be eligible to apply for a protection visa, unless they meet the Refugee Convention criteria. Rather they will be left reliant upon the exercise of non-compellable, non-reviewable Ministerial discretion as to what visa - if any - they might be granted.

We believe that the exercise of Ministerial discretion does not provide appropriate or adequate protection against the risk of return to a place of significant harm and therefore does not adequately acquit Australia’s international protection obligations under the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, the Convention on the Rights of the Child (CROC) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) from which Australia’s complementary protection obligations flow.

Past experience suggests that reliance on the exercise of Ministerial discretion can also be an inefficient, inconsistent and costly approach to determining a person’s protection status. This experience is likely to be heightened should the Bill be passed, given the lack of access to legal advice for asylum seekers following the withdrawal of funding for the Immigration Advice and Application Assistance Scheme, the absence of a clear protection status determination process in place for asylum seekers arriving by boat and the proposed introduction of fast track processing.

Non-refoulement & removal

The Bill also clarifies that the power to a remove certain non-citizens from Australia are available even if an assessment of Australia’s international obligations and consideration of the risk of refoulement has not occurred.

The proposed section 197C of the Act directly conflicts with judicial reasoning that the removal power under section 198 of the Migration Act is to be read in light of, and subject to, Australia’s non-refoulement obligations under international law. The proposed legislation is intended to reverse the decisions in the High Court in Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32 and the Full Federal Court in Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33.

In directly overriding the court's reasoned arguments, we believe that the proposed amendments undermine the rule of law and the separation of powers by usurping the judicial review of migration decisions.

We are concerned that the new Bill breaches the principle of non-refoulement, which is chief amongst our binding international obligations. This non-derogable obligation prohibits States
from "expelling or returning 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"38

The Statement of Compatibility with Human Rights attached to the Bill claims that the introduction of this provision will not violate international law because ‘anyone who is found through visa or ministerial intervention processes to engage Australia’s non-refoulement obligations will not be removed in breach of these obligations’.

However, consider that people subject to removal under s198 may not have applied for visas at all. It also relies upon the Minister exercising his personal, non-compellable and non-reviewable discretion to grant a visa in the public interest if there is a risk that removal will breach Australia’s non-refoulement obligations. Kaldor Centre notes that “a mere discretion to consider non-refoulement obligations is insufficient to comply with duties under international law.”

The new section 197C actually requires breach of international obligations because it requires removal even if the non-refoulement obligations have not been considered (SZQRB)

Kaldor Centre states that this section “fundamentally misunderstands the nature of international law and the domestic implementation of treaty obligations. While States have some discretion in choosing how to implement their international obligations, they cannot introduce legislation that requires violations to be committed without any corresponding legal protection against such violations, and that relies solely on a political promise to comply with obligations as a matter of Executive discretion.”

The government’s stated aim of removing the ability of a person to challenge their removal in the courts on the basis that there has not been an assessment of protection obligations according to law: note that judicial review would not be a problem to lawful removal where all relevant factors had been properly considered, as the appeal would not be successful anyway. The government must therefore be insulating poor decision making processes if it is concerned about judicial review.

Note that one of the parts of the Convention not being codified is Article 33(1). This article contains the prohibition of expulsion or return (‘refoulement’)—which is the fundamental principle of refugee protection.

38 Art 33 of the Refugee Convention provides that narrow exceptions apply on grounds of national security or public order. Certain non-refoulement obligations also arise under the CAT, the ICCPR and the CROC, sometimes known as ‘complementary protection’ grounds: See for example, Art 3 of the CAT and the Second Optional Protocol to the ICCPR.
Cap on protection visas

Schedule 7 to the Bill will allow the Minister for Immigration and Border Protection to place a statutory limit on the number of protection visas granted each financial year.

The Bill proposes that Sections 65A and 414A of the Act (which require applications for protection visas to be decided in 90 days), and corresponding reporting requirements in sections 91Y and 440A, will be repealed. The Bill will also amend sections 84 and 85 of the Migration Act to specifically state that a visa of a specified class includes protection visas.

The amendments to Schedule 7 are clearly designed to reverse the High Court's decisions in the cases of Plaintiff S297/201339 and Plaintiff M150/201340 in which a majority of the High Court interpreted the time limit created by current section 65A for processing protection visas conflicts with the section 85 power to limit the number of visas that may be granted in a specified financial year. The court resolved that conflict by finding that section 85 did not apply to protection visas.

The court found that the express provisions41 of the Act relating to protection visas reflect their 'special purpose' and that general provisions of the Act "should not be construed in a way that is inconsistent with that purpose, involving the discharge of international obligations, unless their text plainly requires such a construction."42

Aside from the statutory construction principles, the court also found that the purpose of the protection visa is to uphold Australia's international treaty obligations:

"More generally, protection visas were not created for purposes relevant to a migration program of the kind amenable to management by the powers conferred by ss 84, 85 and 39. Protection visas are a mechanism, albeit not the only mechanism, by which Australia can discharge its international obligations not to send back to their countries of origin persons falling under the protection of the Refugees Convention and the other international conventions underpinning s 36(2)(aa)."

We agree that protection visas are of a distinguished nature on account of Australia's international obligations, and that therefore the statutory scheme should support and respect such commitments. In light of this, the 90 day decision requirement and the reporting requirement recognise that protection visas are different to other visas, and that the administrative arm of government should be supervised in this respect. As such we believe these provisions should not be removed, and the capping provisions in sections 84 and 85 should not be amended to expressly include protection visas.

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41 The Court referred to Section 39, Section 46A (requirement to provide personal identifiers), section 41 (the inability to prevent a protection visa application by a 'No Further Stay' condition), section 48A (bar on further protection visa applications and the Ministerial discretion in Section 48B), section 65A (imposing a decisional time limit for protection visas).
42 Plaintiff M150/2013 at [33].
Conclusion

In summary, we reiterate that this Bill should not be passed in its entirety.

If passed, the Bill will significantly alter Australia's management and processing of asylum seekers, but most importantly usurp the power of the judiciary and undermine the separation of powers, which is the keystone of our rule of law.

The Bill also removes or attempts to diminish review processes including merits review at the RRT and judicial review by the courts. For example, the Bill’s provisions attempt to reduce the scope for judicial scrutiny of Government actions at sea by removing the right to natural justice and the Bill’s proposed provisions giving the executive the power to limit’s court’s rule in the interpretation of our international law obligations under the Refugees Convention. The creation of the IAA and removal of RRT jurisdiction is another extraordinary example of the removal of such crucial legal protections.

The Bill radically increase already broad provisions for Ministerial discretion, and apply retrospectively in nearly all elements.

We believe that the Bill goes much further than dealing with the asylum legacy caseload and fundamentally undermines the fair process for determination of asylum claims in Australia.