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Submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration and Maritime Powers Legislation Amendment (resolving the Asylum Legacy Caseload) Bill 2014 (the Bill).

NSW Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL thanks the Senate Committee for its invitation to make a submission on this bill. We would be happy to attend in person to speak about these matters if the Senate Committee so desires.

Summary & principal points

The CCL condemns the proposed amendments to the Migration and Maritime Powers Legislation, as it is clear these changes intend to punish those who seek asylum from persecution, and who arrive in Australia by boat. In doing so, this Bill perpetuates the myth that asylum seekers who arrive by boat are 'illegal' and have no legal right to seek asylum.

The CCL condemns the Bill's amendments which seek to treat those who arrive by boat differently and unfairly from other non-citizens in Australia. This Bill deprives these non-citizens with access to fair and just assessments of their claims for asylum, and when found to be refugees, denies them of their right to a life of certainty and dignity.

The CCL condemns the amendments which suspend the rules of natural justice as they apply in the Maritime Powers Act. Such suspension removes the possibility of oversight by the judiciary, limiting the challenges to keep the actions of government in check, particularly with respect to the implementation of punitive policies on asylum seekers and refugees.

The CCL endorses the extensive submission by the New South Wales Bar Council, both in general and in its detailed analysis and criticisms.

1. Codification of the Refugee Convention

The CCL is opposed to the weakening of the Refugee Convention by codification of Australia's interpretation of its protection obligations under the Convention.

To remove the reference to the Refugee Convention is to dismiss Australia's protection obligations and responsibilities as a signatory to the Convention, and is a gross failure of leadership in the International community.

2. Introduction of fast track assessment process

The CCL is opposed to the exclusion of procedural fairness and a fair process of review in the assessment of asylum claims for those who arrived by boat after 13th August 2012 through the introduction of a fast track assessment process.

The procedure for applying review of negative decisions should not be taken out of the hands of the Refugee Review Tribunal.

3. Introduction of Temporary Protection Visas & Safe Haven Enterprise Visa class

The CCL opposes the introduction of temporary protection visas for those found to be refugees.

Historically, the grant of temporary visas to a group of already seriously harmed people, has caused further harm, denying them the right to live life with dignity and to participate fully in Australian life.

4. Suspension of the rules of natural justice in the Maritime Powers Act.

The CCL opposes to suspension of the rules of natural justice in the Maritime Powers Act, and condemns the amendments which potentially breach Australian and International law.

Submissions

1. Codification of Refugee Convention

CCL is opposed to the weakening of the Refugee Convention by codification of Australia's interpretation of its protection obligations under the Convention and the removal of reference to the Refugee Convention in the Migration Act in Part 2 of Schedule 5.

To remove the reference to the Convention from the Migration Act is to dismiss Australia's responsibilities as a signatory to the Convention. The failure to consider Australia's obligations under international law demonstrates an arrogance by the Australian Government; a shunning of responsibilities in the region and internationally with respect to the refugee issue and indeed a disregard for the fundamentals of democracy.

It is not acceptable for a signatory nation to simply rewrite a human rights treaty for its own purposes. There is no evidence that the Australian government has consulted with the United Nations High Commissioner for Refugees on these amendments, and these amendments may well be found not to be consistent with international refugee law.

These changes come at a time when Australia holds a leadership role on the UN Security Council, with the Government espousing its commitment to the United Nations:

'Australia's commitment to the United Nations reflects the foundations on which our nation is built: equality, generosity, fairness and the belief that everyone should have equal access to opportunity.'

*The values of the United Nations Charter are central to how Australia conducts itself globally. We strongly support the rules-based international order underpinned by the Charter.*¹

It is neither fair nor just to amend the definition of ‘refugee’ as is proposed by the Bill. The proposed new definition of a refugee, will mean that if one area of an asylum seeker’s country of origin is deemed ‘safe,’ or if the country from which they fled is determined to have a ‘reasonably effective police force’ by the Australian Government, then the asylum seeker who fears persecution will not have met the criteria of a refugee.

Frequently independent research from international human rights organisations, which have strong links in countries under scrutiny, have different opinions from the Australian Government with respect to the safety and security of citizens in those countries. Historically many countries, including Australia, just ‘got it wrong’ about the Hitler government in the Second World War. Such errors of judgment about effective state protective mechanisms continue to be made, most recently with respect to Afghanistan in 2010. At that time, the Australian Government deemed that asylum seekers from Afghanistan were economic migrants, NOT refugees. The Government was forced to reverse this stated position 12 months later when reports of targeting killings of the Hazara ethnic group by the Taliban were abundant.

The CCL is opposed to the weakening of Australia’s non-refoulement obligations under the Refugee Convention, with the amendment of Part 1 of Schedule 5 which, inter alia, provides that an officer’s duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia’s non-refoulement obligations in respect of the non-citizen.

This amendment authorizes breach of Australia’s obligations under international law, creating a real risk of refoulement in circumstances where the assessment of such obligations has not been considered. The inclusion of this clause shows a blatant disrespect and dismissal of Australia’s obligations to treaties to which it is a signatory.

The CCL welcomes the statutory implementation of the ‘real chance test’ consistent with *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62. However, the CCL opposes the removal of the ‘reasonableness test,’ with respect to the ‘internal relocation’ assessment. In adopting this stance, Australia will fail to meet its legal and fundamental non-refoulement obligations. In our experience the ‘reasonable test’ has assisted in protecting the most vulnerable of asylum seekers. In countries where security and state protection are weak, women, children, and GLBTI rely on strong community support, or extended family for survival and safety. The removal of the ‘reasonable test’ will see these most vulnerable groups returned to their country of origin, and forced to live in areas unknown to them, without support or protection.

¹ Australia United Nations Security Council at <https://australia-unscc.gov.au/australia-and-the-unscc/> accessed 20 October 2014.

2. *Introduction of fast track assessment process*

The CCL is opposed to the exclusion of procedural fairness and a fair process of review in the assessment of asylum claims for those who arrived by boat after 13th August 2012 through the introduction of a fast track assessment process.

Moreover, creation of a separate system of assessment unlawfully discriminates against irregular arrivals in contravention of articles 3 and 31 of the Refugee Convention.

The existence of a robust and fair refugee assessment system ensures Australia's compliance with its human rights and *non-refoulement* obligations.

Australia is a democracy in which citizens and non-citizens alike are treated equally before the law. The Australian legal system is based on a fundamental belief in the rule of law, justice and the independence of the judiciary. Safeguards exist to ensure that people are not treated arbitrarily or unfairly by governments or officials. Principles such as procedural fairness, judicial precedent and the separation of powers are fundamental to Australia's legal system.

The CCL applauds the fast tracking of assessment of asylum seeker claims for this cohort, but is opposed to non-adherence to the principles of the rule of law, including the breach of the fundamental principle of equality before the law, which the Bill denies.

The Bill will introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT) and establishes the Immigration Assessment Authority (IAA) within the Refugee Review tribunal to consider fast track reviewable decisions. The IAA will conduct a limited merits review only, with consideration of all the evidence from a fresh point of view denied. The IAA will make decisions on the papers (without interviewing the applicant), and have the discretion to accept new information pertaining to the applications of asylum seekers only under exceptional circumstances.

All people seeking protection in Australia must have access to legal advice, interpreters and information about procedures assistance so as to understand their legal rights and ensure their claims for protection are properly explored and articulated. Prompt access to legal advice, interpreters and information about procedures is particularly important where the appeals process is expedited.

The fast track process would provide asylum seekers who arrived in Australia by boat after 13th August 2012 (when the No Advantage principle was applied) very limited options for appealing decisions and allows little time for the most vulnerable asylum seekers, including torture survivors or women who have survived sexual violence, to establish trust with those conducting the process. If asylum seekers don't feel able to share their deeply traumatic experiences within the time frames allowed by the fast track process then, ultimately, they may not be granted protection.

The proposed fast track process does not adhere to the rule of law principles. The fast track process removes the procedural safeguards and the protection of fundamental freedoms rendering it an inadequate and risky mechanism for determining whether Australia's protection obligations may be engaged and which could ultimately lead to refugees being returned to situations of danger, in breach of Australia's human rights obligations.

The CCL opposes removal of procedural fairness such as denial of the right to present and challenge evidence, and the removal of a proper independent merits review process through the Refugee Review Tribunal.

Based on the UK Border Protection experience, the fast track process means the refugee assessment interview may be brief and therefore fail to identify relevant claims. The UNHCR has observed (in relation to asylum procedures in the Netherlands), that accelerated procedures are inappropriate for vulnerable people:

*Generally vulnerable and traumatized asylum-seekers, including unaccompanied and separated children, require time to establish trust and confidence in the person(s) responsible for determining their claim, before they can explain the reasons for their flight or the cause of their trauma. Persons raising gender-related claims and survivors of torture or severe trauma in particular require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community. Particularly for survivors of sexual violence or other forms of trauma, subsequent interviews may be needed in order to establish trust and to obtain all the relevant information.*³⁸

There has been significant criticism of the UK's Detained Fast Track system upon which the Australian model is based. Criticisms include: that groups who are not supposed to be placed in the fast-track system (such as victims of torture and children) have ended up there, and that tight timeframes are often not able to be met, resulting in prolonged detention of asylum seekers.

The independent chief inspector of the UK Border Agency, John Vine, pointed to inadequate interviews that failed to produce proper information and left victims of torture and human trafficking vulnerable to deportation.

'The DFT is not working as quickly as intended and has insufficient safeguards to prevent people being incorrectly allocated to it,' Vine wrote in a report published last year. "While the agency does have safeguards in place, I'm concerned about the continued risks faced by victims of torture and trafficking."²

The UK civil liberties group, Liberty, says many complex claims are incorrectly sent through the fast track process. *'Trafficked women, torture victims, sufferers of sexual abuse and*

² Independent Chief Inspector of UK Border Agency, *Asylum: A thematic inspection of the Detained Fast Track*, July – September 2011 at http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf accessed 19 October 2014.

domestic violence, have all been through this system. With claims being made, assessed, decided and appeals (if possible) determined in the space of around one week, many complex and sensitive claims are rushed through, and genuine refugees are denied entry.'

A detailed Human Right Watch report states that the '*detained fast track*' system *doesn't meet even the basic standards of fairness. It is simply not equipped to handle rape, slavery, the threat of 'honour killings,' or other complex claims, and yet such cases are handed to it regularly.*³

The UK High Court intervened to stop the deportation of Tamil asylum seekers earlier in 2013, and in 2014, the Court has found that the Detainee Fast Track system for detaining asylum seekers is unlawful because the system carried 'an unacceptable risk of unfairness.'⁴

Human rights groups in the UK have stated constantly that the UK Border System of DFT system is designed to achieve, first and foremost, government removal targets rather than to give asylum seekers a fair chance to explain their circumstances. This outcome is clearly the intended outcome of the current Bill, as in Australia in 2011–12 the RRT overturned 82.4% of primary decisions by the Department to refuse protection visas for asylum seekers who arrived by boat.⁵

Moreover, during this period around 90% of asylum seekers arriving by boat were granted a protection visa.⁶ While this high rate of approval generated significant debate about the effectiveness of the refugee status determination process in Australia, the Expert Panel on Asylum Seekers noted in August 2012 that this high approval rate was 'broadly consistent with UNHCR refugee status decision approval rates for similar caseloads in Malaysia and Indonesia'.⁷

It is of note that in the UK only about 10% of asylum seekers are subject to the DFT system which is intended to apply to straightforward cases.⁸

³Human Rights Watch, *Accelerated Asylum Procedure Unsuitable to Complex Claims* 23 February 2010 at <http://www.hrw.org/news/2010/02/23/uk-fast-track-asylum-system-fails-women> accessed 19 October 2014.

⁴*Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) 9 July 2014.

⁵Department of Immigration and Citizenship, *Asylum Trends – Australia 2011–12* (2012), p 30 at <http://www.immi.gov.au/media/publications/statistics/> accessed 20 October 2014.

⁶Department of Immigration and Citizenship, *Asylum Trends – Australia 2011–12* (2012), p 31 at <http://www.immi.gov.au/media/publications/statistics/> accessed 20 October 2014.

⁷A Houston, P Aristotle and M L'Estrange, *Report on the Expert Panel On Asylum Seekers*, 28 June 2012, note 8, p 27 at <http://expertpanelonasylumseekers.dpmc.gov.au/report.html> accessed 20 October 2014.

⁸Australian Human Rights Commission, *Asylum seekers, refugees and human rights - Snapshot Report 2013* at <https://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report> accessed 19 October 2014.

3. *Introduction of Temporary Protection Visas & Safe Haven Enterprise Visa class*

The NSWCCCL is opposed to the introduction of Temporary Protection Visas (TPV) and Safe Haven Enterprise Visas on the basis that such visas are: known to cause harm; specifically penalize irregular boat arrivals; infringe on the right to family reunion, and restrict freedom of movement.

Temporary protection for refugees is not prohibited under the Refugee Convention. However, UNHCR recommends that it be only used in limited circumstances to meet urgent needs in the event of mass cross-border displacement.⁹

TPVs are known to cause harm to already seriously harmed refugees. TPVs were first introduced in 1999. Subsequent studies have shown that TPVs inflicted serious harm on the mental health of refugees. They experienced higher levels of stress, anxiety, depression and post-traumatic stress compared to those with permanent protection. Many refugees arrive in Australia suffering anxiety, depression and trauma. The grant of protection to refugees on a temporary basis, and the resulting uncertainty about their future, had this further detrimental impact upon their health,¹⁰ affecting their capacity to participate fully in social, employment and educational opportunities offered in Australia.¹¹ The infliction of this harm constitutes cruel and inhuman or degrading treatment, and is in breach of article 7 of the International Covenant on Civil and Political Rights (ICCPR).

The grant of TPVs to refugees specifically targets and penalizes irregular boat arrivals, creating two classes of asylum seekers. This clearly constitutes a breach of article 31 of the Refugee Convention which states that States ‘shall not impose penalties, on account of their illegal entry or presence, on refugees,’ and is contrary to the principle of non-discrimination enshrined in Australia law, and in breach of article 26 of the ICCPR.

History has shown that TPVs, in denying the holder access to family reunion, often leaving the visa holder completely alone, and in constant worry for their family in harm’s way in their country of origin. Combined with the effective ban on overseas travel, meant that some people faced prolonged

⁹ UNHCR, *Global Consultations on International Protection: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, UN Doc EC/GC/01/4 (2001), paras 4, 13, 14 and 15. At <http://www.refworld.org/docid/3bfa83504.html> accessed 20 October 2014.

¹⁰ See, for example, 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. In relation to the impact of TPVs on the mental health of children, see the discussion in HREOC, *A last resort?*, note 41, Chapter 16.

¹¹ Australian Human Rights Commission, *Asylum seekers, refugees and human rights - Snapshot Report 2013* at <https://www.humanrights.gov.au/publications/asylum-seekers-refugees-and-human-rights-snapshot-report> accessed 19 October 2014.

and indefinite periods of separation from their families,¹² inflicting further serious harm on some people's mental health and wellbeing. Furthermore, the lack of family reunion rights may have encouraged some family members, particularly women and children, to undertake the boat journey to Australia.

This denial of family reunion is a clear infringement on the right to family, and the freedom from arbitrary interference with the family life and constitutes breach of articles 17(1) and 23 of the ICCPR and article 10(1) of the Convention on the Rights of the Child.

On 3 December 2013, the Senate passed a disallowance motion against the reintroduction of the Government's TPV regulations for refugees. Moved by the Greens and supported by the Labor Party, the success of the disallowance of the TPV regulations, is an unequivocal acknowledgement of the harm TPVs have caused in the past and will continue to cause in the future to refugees.

It is clear that TPVs are not a human rights solution to Australia's inhumane refugee policies.

4. Power to detain upon the sea and suspension of the rules of natural justice in the Maritime Powers Act.

The CCL opposes suspension of the rules of natural justice in the Maritime Powers Act, and condemns the amendments which potentially breach Australian and International law.

1. International law.

This Bill gives the Minister extraordinary power to require that people on the seas (including in international waters) be detained, and then transferred to any place or country regardless of whether there is an agreement with the particular country, without the scrutiny of the Australian Parliament or the courts. According to the Bill, the Minister is not required to consider Australia's international legal obligations, such as the principle of non-refoulement or the prohibition on arbitrary detention (article 9 of the ICCPR).

Under international law, and in particular under the Treaty on the Law of the Sea, there is no such power. The actions would also contravene human rights law and refugee law. The minister and those whom he directs would also probably be contravening the domestic law of the countries to whom the detainees were sent—contravening their sovereignty.

The measures are of questionable constitutional validity, since they propose prolonged detention by the minister without any scrutiny by the courts, or even by the parliament.

Whatever Australia's domestic law might say, the minister and those whom he directs would be acting illegally.

¹² HEROC, *A last resort? National Inquiry into Children in Immigration Detention (2004)* note 41, section 16.2.2 at <https://www.humanrights.gov.au/last-resort-report-national-inquiry-children-immigration-detention-2004> accessed 20 October 2014.

The Australian Government has under international law the obligation not to refoul. Every person rescued at sea has the right to seek asylum and not be returned to their country of origin if they have expressed a fear for their safety in that country. The Australian Government has an obligation under International law to ensure the safety of life at sea,¹³ and to treat humanely all people in its care or control.

2. Rules of Natural Justice and International Obligations—Non-Refoulement.

Item 6 of Schedule 1 proposes that failure to consider international obligations does not invalidate an authorisation under the provisions of Division 2 of Part 2 of the Act. Similarly, Item 19 proposes similar enactments in relation to Divisions 7 and 8 of Part 1 of schedule 2 of the Act. The effect is to prevent a legal challenge on these grounds to the exercise of powers under the Maritime Powers Act.

The Explanatory Memorandum explains that 'this merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government.'

This is absurd—a naked attempt to avoid legal responsibility for government decisions. The principle proposed should never be accepted. All decisions of the executive government are subject to the sovereignty of parliament and the rule of law.

The same items also would also deny the application of the rules of natural justice. But the supposition the Memorandum makes that it is impossible, once a vessel has been detained, for fair procedures to be applied to what happens next is without rational foundation.

These items are merely attempts to set government actions beyond legal challenge, other than those guaranteed in the Constitution. They should be excised from the bill.

Part 1 of schedule 5 goes even further, in *mandating* an officer to remove unlawful non-citizens, even if removal will violate Australia's non-refoulement obligations.

The Statement of Compatibility with human rights, which forms part of the explanatory Memorandum, asserts that anyone who does engage Australia's non-refoulement obligations would not be removed—in effect, because the minister would use his discretion to grant a visa in such circumstances.

This assurance is all very well from the present Minister. The Act, however, will be administered by other ministers in the future. The decision of the minister of the time will be non-compellable and non-renewable; and is to be exercised in accordance with the public interest alone.

Like mandatory penalties in the criminal law, this measure, if enacted, is certain to bring about injustice. But in this case the results will not be unwarranted imprisonment, but refoulement—potentially, death.

¹³ *United Nations Convention on the Law of the Sea*, article 98(1).

3. Deterring Boat People and The National Interest.

In item 19 and elsewhere, it is provided that the only thing the minister is required to take into account when he or she issues directions is the national interest. The Explanatory Memorandum gives an alarmingly broad account of what may be included in the national interest. "Measures for the effective management of Australia's maritime security" and "border security"—the cant phrases for turning back boats of innocent but unauthorised asylum seekers—are, absurdly, included by fiat. So broad is the discretion, it is difficult to imagine any arbitrary exercise of the power which could not be covered.

The most extraordinary thing here is the absence of *any* reference to the need to stop people embarking on unseaworthy boats and drowning. This has been the great catch cry, the supposed moral justification for detaining people in intolerable conditions on Manus Island and Nauru.

Almost as absurd is the fact that the interests of the passengers and crews of the boats are to be completely disregarded. What will happen to them if they are refoiled? The minister is not to care. Will they be safe en route? The minister is not to care. What will happen to the children? The minister is not to care. Innocent, often desperate, asylum seekers escaping from torture and death travel via Indonesia, where they are at risk of imprisonment and refolement and have no rights to work, seek to find a country where they will be safe. The minister is not to care.

4. Hiding from parliamentary supervision.

Amongst the many items proposed in Item 19 of Schedule 1 lies subsection 75D(7). This would have the effect that the requirements of the Legislative Instruments Act 2003 would not apply to decisions to detain vessels and take them to a foreign country. The only reason given in the Explanatory Memorandum is that the determinations would contain sensitive operational matters which, in the public interest, would not be suitable for public release. Similar arguments are used in paragraphs 114, 128 and 148 of the explanatory memorandum.

The CCL considers this to be complete nonsense each time it occurs. It is not as though the naval vessels involved are engaged in acts of war. As a matter of democratic principle and in order to ensure accountability the exercise of such draconian powers, with their potential fatal consequences, should be made public as soon as possible. The only "sensitivity" involved is that of the minister, whose actions would come under scrutiny and possible adverse criticism.

The minister should not be allowed to hide what he or she is doing.

5. Relation to the Migration Act.

Also in item 19 lies new subsection 75E(1), which would prevent the provisions of the Migration Act from applying to the Maritime Powers Act. The CCL rejects this provision. The Migration Act includes vital principles which govern Australia's treatment of refugees. Rather than adopt subsection 75E(1), the parliament should insert a provision which ensures that the Maritime Powers Act is to be

interpreted in accordance with the Refugee Convention, and subject to that, in accordance with the Migration Act.

6. Protection Visas and Regulations.

Scattered through Schedule 2 are a series of provisions which can only be designed to enable the government to avoid all responsibility for giving protection visas to refugees. There is already a provision in Schedule 5 of the bill enabling the Minister to set a cap on the number of people who can receive protection visas. But in Schedule 2, we find:

The government can change the regulations which apply to applications for a class of visa. Asylum seekers who have already applied will have their applications judged according to the new criteria.

The changes to regulations can disadvantage those who have already made applications because subsection 12(2) of the Legislative Instruments Act and subsection 7(2) of the Acts Interpretation Act are not to apply. They may then have their applications rejected merely because they no longer meet the criteria.

This is so patently unjust, it is extraordinary that it is proposed. But what alternative reason can there be for excluding the sections of the two acts?

And again, there is a proposal that if there are no regulations for a given class of visa, no applications for that class are valid. Why is that there? Is the government proposing to have its spanking new Safe Haven Visas left without regulations, so that no one can apply for them? Is it intended to force the parliament to accept whatever regulations the government proposes? Is it, even more bizarrely, proposed that the government can remove the regulations for a class of visas, this invalidating a set of applications?

The safe conclusion from this set of measures is that the government proposes to have Australia fail meet its clear moral and international treaty obligations to asylum seekers.

5. Conclusion.

This Bill shows a flagrant disrespect for the Australian Constitution, the fundamental principles of democracy, and the separation of powers by denying scrutiny of the Minister's action by Parliament and the courts.

Jo Murphy, Assistant Secretary

Martin Bibby, Executive member

New South Wales Council for Civil Liberties