

21 September 2015

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

By email: [freedoms@alrc.gov.au](mailto:freedoms@alrc.gov.au)

Dear Executive Director

## **Freedoms Inquiry – Interim Report**

The Refugee Advice and Casework Service (**RACS**) welcomes the opportunity to provide a further submission to the Australian Law Reform Commission (**ALRC**) in response to its Interim Report: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws.

Our comments below supplement our submission dated 27 February 2015 and address the following issues relevant to the Inquiry:

- our observations of the limitations of the Terms of Reference in supporting an examination of the encroachments on long-standing rights and freedoms in the context of the detention and treatment of non-citizens, including asylum-seekers and refugees; and
- developments in Australian immigration law relating to asylum-seekers in the period since our previous submission.

### **1. Limitations of the Terms of Reference**

#### *Relevance of international human rights standards*

- 1.1. RACS' submission dated 27 February 2015 describes many of the provisions of Australian immigration legislation that encroach on common law rights and freedoms in a manner we consider unjustified. These include:
  - provisions that limit judicial review of the exercise of executive power in relation to non-citizens;
  - provisions that allow retrospective interference with ongoing visa applications; and
  - provisions that limit procedural fairness in visa cancellation decisions and the fast-track process for the protection visa applications of unauthorised maritime arrivals.
- 1.2. Each of the encroachments upon rights listed above is directly relevant to the Inquiry's Terms of Reference and has been noted in the Interim Report. However, the practical injustice to RACS' clients caused by these provisions is

that their adverse application in many cases may result in mandatory detention and liability for removal from Australia. While these outcomes are relevant to the consideration of whether the relevant encroachments are justified in individual circumstances, the Inquiry's Terms of Reference render it an inappropriate lens for the examination of legal circumstances giving rise to detention and the duration of detention.

- 1.3. RACS is concerned that the Inquiry's Terms of Reference severely limit, without clear justification, its ability to examine many of the most significant encroachments upon individual rights that are relevant to Commonwealth laws in RACS' area of practice. Such encroachments profoundly affect the liberty of many thousands of non-citizens in Australia and have been identified in numerous submissions to the Inquiry. RACS is concerned that these limitations may distort the outcome of the Inquiry if, in identifying areas for further review, its report fails to acknowledge the significant encroachments of immigration legislation upon rights to which the Inquiry was not permitted to have reference.
- 1.4. The Terms of Reference extend to all Commonwealth laws, creating for the ALRC an extremely large and complex task. However, the Terms of Reference also have the effect that only laws that encroach on certain kinds of rights are subject to review, and the justification for the omission of some other rights which Australians may consider to be fundamental is not offered.
- 1.5. The Terms of Reference specify 19 classes of rights, freedoms and privileges that are stated to be "traditional" ones, as well as an additional category of "other similar legal rights, freedoms or privileges". The rationale for the distinction between the enumerated categories from other rights, freedoms and privileges is not evident from the Terms of Reference. The Terms of Reference are silent in relation to human rights and Australia's legal obligations under international human rights instruments.<sup>1</sup>
- 1.6. Accordingly, RACS considers that the scope of the Inquiry's task is both impossibly broad in relation to the field of potential subject matter and unduly narrow in terms of relevant rights and freedoms.
- 1.7. It is conceivable that the open-ended category of "other similar legal rights, freedoms or privileges" could support the consideration of Commonwealth laws that encroach upon long-standing human rights standards that are the subject of international law, especially those that have been informed by common law jurisprudence. However, given the enormous breadth of the Inquiry's task of individually addressing each Commonwealth law, and the conceptual difficulties regarding the interpretation of what ought to be considered "traditional", the ALRC's reluctance to adopt this approach is readily appreciable.
- 1.8. RACS considers it an important feature of the Inquiry's report that the effects of these limitations are appropriately recorded. If not, there may be a risk that the

---

<sup>1</sup> The effect of this limitation on the potential outcomes of the Inquiry was raised by Australian Lawyers for Human Rights, Statement in relation to Freedoms Inquiry, 3 June 2014, <<http://alhr.org.au/wp/wp-content/uploads/2014/06/ALHR-statement-Freedoms-Inquiry1.pdf>> (accessed 2 September 2015). It is addressed in detail in Dr Tasmin Clarke, 'Problems with Terms of Reference of the 'Freedoms' Enquiry' 26 May 2014, available at <<http://alhr.org.au/wp/wp-content/uploads/2014/06/Clarke-paper-on-Freedoms-TOR.pdf>> (accessed 2 September 2015).

Inquiry's work will be taken by some in the future to represent an exhaustive review of all Commonwealth laws that offend long-standing legal rights and freedoms, rather than those that offend only a certain selection of them.

### *Freedom of movement*

- 1.9. The Interim Report's observations in relation to non-citizens and freedom of movement amply illustrate the difficulties of divorcing common law rights from other rights that are relevant to Australia's contemporary legal system, including those arising from international obligations. The Interim Report observes that the common law conception of freedom of movement has historically concerned "the freedom of citizens to move freely within their own country and to leave and return to their own country"<sup>2</sup> and therefore has no application to non-citizens in Australia. This conception of freedom of movement is of limited practical utility in cases in which the affected individual is a refugee. In such a case, there is a difficulty in reconciling the Australian government's acknowledgement of the practical and legal impediments to that person's departure or removal from Australia on the one hand, with the view that the indefinite detention of such a person does not interfere with that person's freedom of movement, on the other. A similar observation can be made in relation to stateless persons.
- 1.10. In comparison, the right to personal liberty in article 9 the ICCPR, is not constrained by the question of whether the individual affected is a citizen of the relevant state, and the 1951 Refugee Convention establishes significant protections against arbitrary treatment of refugees within the territory of a signatory State. These sources of rights are of fundamental importance to RACs' clients.
- 1.11. This tension exposes the limitations of the Terms of Reference: by excluding from the scope of the Inquiry the contemporary relevance of long-standing human rights standards, the Terms of Reference do not permit the Inquiry to engage in a complete examination of the need for further review of the Migration Act.

## **2. Legal rights, freedoms or privileges similar to those mentioned in the Terms of Reference**

- 2.1. The Terms of Reference expressly extend to laws that interfere with any legal rights, freedoms or privileges similar to those 19 categories enumerated. As such, human rights may come within the purview of the inquiry of the Terms of Reference to the extent that they are similar to any of those other categories.
- 2.2. A significant encroachment on rights contained in the Migration Act is the prescription of detention for unlawful non-citizens without the requirement of any assessment of whether detention is reasonable, necessary or proportionate in the circumstances, and without any limit on the duration of detention. Even if it is considered that rights and freedoms promulgated in human rights instruments (such as freedom from torture and freedom from arbitrary detention in articles 7 and 9 of the ICCPR) may not be capable of characterisation within the common law rubric of the Terms of Reference, similar legal principals prohibiting unlawful detention such as the writ of *habeas corpus* are central to the common law

---

<sup>2</sup> Interim Report, 6.125 -6.126.

tradition, and therefore of relevance to the Inquiry's interpretation of the terms of reference set out in Chapter 1 of the Interim Report. Although detention of non-citizens is supported by legislative authority, the statutory bars on proceedings to challenge the lawfulness of such detention are incompatible with *habeas corpus*. For example, section 494AA of the Migration Act expressly provides that proceedings relating to the lawfulness of the detention of certain non-citizens may not be instituted in any court.<sup>3</sup> The *Maritime Powers Act 2013* contains similar barriers to the judicial review of the unlawful imprisonment of an individual detained by the executive at sea.<sup>4</sup>

- 2.3. As set out in our submission dated 27 February 2015, these provisions also constitute significant practical barriers to judicial review of unlawful government action, and are therefore also relevant to Chapter 18.

### 3. Developments since February 2015

#### *Migration Amendment (Protection and Other Measures) Act 2015*

- 3.1. Our submission dated 27 February describes the retroactive effect of provisions in the Migration Amendment (Protection and Other Measures) Bill 2014.<sup>5</sup> The bill passed both houses on 25 March 2015 and key provisions commenced in April 2015.<sup>6</sup>
- 3.2. Since that time, RACS has seen the introduction of the powers (in sections 91W and 91WA of the Migration Act) that allow the refusal of undecided protection visa applications on the basis of facts or statements that did not previously affect eligibility for the visa. For example, a protection visa applicant may now have his or her ongoing application refused on the basis of comments they previously made in relation to their disposal of documentary evidence of their identity, even in cases in which their identity is not in doubt. As described in our submission in relation to the bill, given that doubts as to identity could already give rise to refusal prior to the passage of the legislation,<sup>7</sup> and that indefinite detention is a possible legal outcome of a decision to refuse the application, the

<sup>3</sup> Section 494AA(1)(c). Subsection (3) allows for proceedings in the High Court in its original jurisdiction under section 75 of the Constitution.

<sup>4</sup> Section 75(2). The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* amended Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) so that the decisions made under the new powers in the *Maritime Powers Act 2013* are also not subject to judicial review. See sections 75D, 75F and 75H of the *Maritime Powers Act 2013*.

<sup>5</sup> At 3.12-3.13.

<sup>6</sup> Note however that Schedule 2 of Migration Amendment (Protection and Other Measures) Bill 2014 did not become law. Schedule 2 contained the proposed s 6AA in relation to the risk threshold for significant harm for the purposes of the complementary protection provisions in s 36 of the Act.

<sup>7</sup> See eg Senate Standing Committees on Legal and Constitutional Affairs, Migration Amendment (Protection and Other Measures) Bill 2014, Submission 10: Refugee Advice and Casework Service, 4 August 2014, 4.4-4.13. Available at: <<http://www.aph.gov.au/DocumentStore.ashx?id=f264412e-2d87-4c6c-9512-e9d3137506a0&subId=298741>> (accessed 2 September 2015).

justification for the retroactive application of this provision is not sufficiently clear.

- 3.3. RACS has also observed the effect of the new section 91WB. Prior to the introduction of this section, a protection visa applicant was eligible for the grant of the visa if they were a member of the same family unit as an existing protection visa holder who was found to be a person to whom Australia has protection obligations, even where the applicant applied for the visa after the grant of the visa to their family member. The effect of section 91WB is that some applicants who were previously eligible for a protection visa on the basis of their family relationship can no longer be granted the visa on this basis, even where the application was lodged several years ago and the applicant was clearly eligible for the grant of the visa prior to the commencement of section 91WB.

#### ***Bills before Parliament***

- 3.4. If it becomes law, other legislation before Parliament would also come within the purview of the Inquiry.
- 3.5. The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 passed the House of Representatives on 13 May 2015 and is currently before the Senate. Amendments proposed in bill would prohibit proceedings against the Commonwealth (or an officer) relating to the use of force by an officer against a detainee in an immigration detention facility, thereby restricting access to judicial review.<sup>8</sup>
- 3.6. By providing legal immunity to officers in immigration detention centres in relation to the use of force against detainees, the legislation also intends to authorise what would otherwise be a tort, by expressly authorising potentially tortious conduct.<sup>9</sup> The limits on the lawful use of force proposed by the bill are broader than those set out in the Issues Paper as common justifications for such laws.<sup>10</sup> They include the use of force (up to but excluding force that is likely to cause grievous bodily harm) for purposes including physically moving a person, preventing a person from interfering with property, and preventing a preventing from disturbing the good order or peace of the immigration detention facility.<sup>11</sup>

#### **4. Closing remarks**

- 4.1. As set out in our submission dated 27 February 2015, recent reforms to the *Migration Act* place new limits on procedural fairness in refugee decision-making and visa cancellation under Australian law. Other provisions can be seen to be retrospective in nature, or to unjustifiably restrict freedom of

---

<sup>8</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, proposed section 197BF.

<sup>9</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, Explanatory Memorandum, 15-16.

<sup>10</sup> Issues Paper, 16.16.

<sup>11</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, proposed section 197BA.

association. Each of these areas warrants detailed review on the basis of the observations in the Interim Report.

- 4.2. The importance of the consistency of these areas with common law rights and freedoms lies largely in preventing the deprivation of liberty of non-citizens in circumstances in a manner that is unjust. The conception of traditional rights and freedoms identified in the Interim Report is only of partial relevance to this aim, as it fails to recognise other sources of rights that accrue to non-citizens and refugees as special classes of persons under the law.
- 4.3. Accordingly, a contemporary rights-based examination of the provisions in Australian immigration law that adversely affect refugees and other non-citizens cannot be meaningfully accomplished by reference only to common law rights and freedoms. The Inquiry is therefore an imperfect mechanism for this task. While welcoming the Inquiry's attention to the provisions of the Migration Act that are most relevant to the Terms of Reference, RACS recommends a review of Migration Act in a way that permits appropriate reference to human rights which are the subject of international law.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC.

Per:

Scott Cosgriff  
Senior Solicitor