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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
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Dear Committee Secretary

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

### **Submission by the Refugee Advice & Casework Service (Aust) Inc.**

The Refugee Advice & Casework Service (**RACS**) is a specialised refugee community legal centre and has been assisting asylum-seekers seeking refugee status in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to voice our strong opposition to provisions of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the **Bill**) that are likely to significantly negatively affect our clients.

The case studies set out in this submission do not refer to real people, but are examples that illustrate the effect of the proposed changes on the real situations of many of RACS' clients. We would welcome any opportunity to provide further information to the Committee in relation to any aspect of the Bill or this submission.

Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

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#### **List of abbreviations**

Convention against Torture	CAT
International Covenant on Civil and Political Rights	ICCPR
Refugee Review Tribunal	RRT
Immigration Assessment Authority	IAA
Unauthorised Maritime Arrival	UMA
United Nations High Commissioner for Refugees	UNHCR
Temporary Protection Visa	TPV
Safe Haven Enterprise Visa	SHEV
<i>Maritime Powers Act 2013</i>	MPA

## 1. General observations

- 1.1 The Bill constitutes a significant repudiation of Australia's international non-refoulement obligations and authorises other human rights violations under Australian law, as well as undermining existing processes for assessing protection claims and offering durable protection to refugees in Australia. RACS does not support any of the amendments in the Bill.

### *Amending Australian law to explicitly authorise the breach of international law*

- 1.2 The Bill would amend both the *Migration Act 1958* (the **Act**) and the *Maritime Powers Act 2013* (**MPA**) to allow the Australian Government to breach its international non-refoulement obligations both in the course of removing non-citizens from Australia and the interception and handling of non-citizens at sea.
- 1.3 By removing legislative safeguards intended to support compliance with international obligations, the Bill undermines Australia's capacity to fulfil those obligations. Despite the Government's stated intention "not to resile from Australia's protection obligations"<sup>1</sup> these amendments are irreconcilable with a genuine intention to ensure observance of those obligations.

### *Extraordinary expansion of ministerial and government power*

- 1.4 The Bill would also allow a remarkable shift of powers from the Parliament and the courts to the Minister responsible for the Migration Act and MPA. These powers have implications for all areas of the Government's handling of asylum seekers. The absence of effective checks on the exercise of the Ministerial powers proposed under the Bill raises serious concerns about accountability and appropriate oversight.
- 1.5 In addition to authorising the return of refugees to harm, the Bill would dispose of several restrictions on Ministerial power that may be exercised to disadvantage the existing legal rights of visa applicants. In particular, the amendments in Schedule 2 would allow unprecedented power to interfere with existing visa applications, including a power to retrospectively deem applications to have never been valid. Schedule 7 would reduce accountability and expressly give the Minister the power to determine that protection visa processing should be suspended in its entirety.

### *Less procedural protection for those more likely to need it*

- 1.6 The concept of the "legacy caseload" is the result of policy developments flowing from the 2012 report of the Expert Panel on Asylum Seekers, which recommended a suite of measures aimed at discouraging asylum seekers from boat journeys to Australia by minimising benefits an asylum seeker might gain from that travel.<sup>2</sup> These included the policy that the Minister would decline to exercise the power to allow an unauthorised maritime arrival (**UMA**) to make a valid application for a protection visa. The "legacy caseload"

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<sup>1</sup> Explanatory Memorandum, 10.

<sup>2</sup> Australian Government, Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers*, Canberra, August 2012, 9.

includes the asylum seekers in that cohort who were not transferred to a regional processing country for assessment or resettlement after 13 August 2012.

- 1.7 The imposition of new, less robust assessment processes solely for UMAs is conceptually flawed in light of the historically high protection needs of asylum seekers who arrive in Australia by boat, as reflected in the statistics maintained by the Department of Immigration and Border Protection (the **Department**). The proposed framework allows the Minister to determine that broad classes of asylum seekers will have no right to merits review of any kind, leaving the decision about their future to rest with a single decision-maker. This marks a significant departure from Australia's existing legal framework which affords asylum seekers the right to review by an independent merits tribunal.
- 1.8 The nature of the review process for those who are given access to the new Immigration Assessment Authority (**IAA**) is deeply flawed. Fast track applicants have no right to a hearing, no right to comment on adverse information arising at the Department stage and no right to put forward new information except where it is considered that there are exceptional circumstances. The proposed fast track framework increases the risk that Australia will return asylum seekers to a country where they face persecution due to the inadequacy of the merits review process.
- 1.9 Changes to Australian policy have already resulted in lengthy delays for this group of asylum seekers, either in the form of prolonged detention or subsistence in the Australian community without the right to work. The deficient procedural safeguards proposed in the fast track process compound the injustice that this group have already experienced.

#### *Selective and defective codification of obligations under the Refugee Convention*

- 1.10 Eligibility for a protection visa based on status as a refugee under the Refugee Convention will be replaced by a requirement that an applicant meet a new definition of "refugee" to be inserted in the Act. The Bill disconnects the Act from Australian and international jurisprudence on refugee law. Significantly, it would undermine existing law relating to internal relocation by requiring an applicant to demonstrate a well-founded fear of persecution in relation to all areas of a country. The effect of this and other changes is that a proportion of refugees will no longer be considered refugees under Australian law.

#### *Needlessly cruel visa arrangements for those recognised to need protection*

- 1.11 Refugees who successfully demonstrate that they meet the narrower concept of "refugee" in the course of the flawed fast track assessment process will be eligible for a new, inferior visa that will deny them the certainty of future protection from harm or the ability to reunite in Australia with their spouses or children.
- 1.12 Meanwhile, new powers will allow thousands of refugees awaiting the grant of permanent protection visas after lengthy processes to have their applications retrospectively deemed invalid and treated as an application for a TPV.

## 2. Schedule 1: Amendments relating to maritime powers

2.1 The amendments contained in Schedule 1 respond to many of the issues raised in *CPCF v Minister for Immigration and Border Protection & Anor (S169/2014)*<sup>3</sup> (**CPCF**), which was heard by the High Court on 14 and 15 October 2014. The case concerns the lawfulness of the Government's treatment of 157 asylum seekers intercepted in June 2014.

### *New Ministerial powers relating to direction and detention on the high seas*

2.2 The Bill would give the Minister administering the MPA the personal power to determine and give directions about the exercise of powers in relation to the detention and control of vessels and people on the high seas. The power is constrained by the requirement that Minister must think that giving the direction "is in the national interest".<sup>4</sup>

2.3 The Minister administering the MPA is the Minister for Immigration and Border Protection.<sup>5</sup>

2.4 The Bill creates the power to detain people at sea for an unspecified period of time while the Government determines where they may be taken.<sup>6</sup> Item 19 specifies that their destination need not be in a country, and may be a vessel.<sup>7</sup> This would appear to be relevant to the use of lifeboats in Operation Sovereign Borders and government actions such as the on-sea transfer of Sri Lankan asylum seekers to Sri Lankan authorities that occurred on 6 July 2014.<sup>8</sup>

2.5 In *Ruddock v Vadarlis* (2001) 110 FCR 491 (the **Tampa Case**), which preceded the enactment of the MPA, the Full Federal Court found that the executive power of the Commonwealth, absent statutory extinguishment, includes a power to prevent the entry of non-citizens to Australia. This included preventing a boat from docking at an Australian port, restraining a person or boat from entering Australian waters, and compelling a person or a boat to leave.<sup>9</sup> However, by authorising the detention of asylum seekers outside Australia for an unspecified period and their direct transfer to the authorities of country of origin in the absence of any consideration of non-refoulement obligations, the Bill seeks to go well beyond the executive power identified in the Tampa Case.

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<sup>3</sup> *CPCF v Minister for Immigration and Border Protection & Anor (S169/2014)*, <[http://www.hcourt.gov.au/cases/case\\_s169-2014](http://www.hcourt.gov.au/cases/case_s169-2014)>.

<sup>4</sup> Schedule 1, Part 1, Item 19: proposed sections 75D and 75F of the MPA.

<sup>5</sup> Commonwealth of Australia, Administrative Arrangements Order, 12 December 2013.

<sup>6</sup> Schedule 1, Part 1, Item 18: proposed section 72A of the MPA.

<sup>7</sup> Schedule 1, Part 1, Item 19: proposed section 75C of the MPA.

<sup>8</sup> Scott Morrison MP, "Australian Government returns Sri Lankan people smuggling venture", 7 July 2014, <<http://www.minister.immi.gov.au/media/sm/2014/sm216152.htm>> accessed 24 October 2014.

<sup>9</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491 at 544-45 (French J). Beaumont J agreed.

- 2.6 RACS is concerned that the amendments proposed in the Bill clearly seek to authorise actions beyond those taken by the Australian Government in the case of CPCF, which appear to take Australia beyond appropriate limits of executive power and to give the Minister the powers that Australia does not have under international law, including the law of the sea, human rights law, and refugee law.
- 2.7 The amendments would also authorise acts that violate the sovereignty of other states by authorising Australia to take asylum seekers to another country without the consent of that country. This is in response to the argument in CPCF that the detention of the 157 asylum seekers on the high seas was unlawful because the intended destination was not one where there was any agreement to allow entry. The Bill would therefore purport to render lawful, under Australian law, executive actions that may constitute flagrant breaches of international law<sup>10</sup> and compromise Australia's international relations.

#### *Non-refoulement obligations and maritime powers*

- 2.8 The amendments would explicitly authorise the breach of Australia's international obligations in the course of its handling of people on boats intercepted at sea, including outside Australian waters.<sup>11</sup> The proposed section 22A of the MPA (authorising breach of non-refoulement obligations at sea), mirrors the effect of the proposed section 197C of the Migration Act in relation to the removal of non-citizens from Australia (discussed below at 5).
- 2.9 At the time of writing, the High Court is yet to hand down its decision in CPCF. In submissions, the Minister contends that the existing non-statutory executive powers are not qualified by any international law obligations, including non-refoulement obligations. The United Nations High Commissioner for Refugees (**UNHCR**), in its application for leave to intervene as *amicus curiae* in the case, contend the non-refoulement obligations contained in the Refugee Convention apply in any circumstances in which a state exercises effective control over a refugee or asylum seeker, and that the MPA is constrained by that obligation.<sup>12</sup>

#### *Exclusion of judicial review*

- 2.10 The amendments would reduce judicial scrutiny of actions at sea by purporting to remove any right to natural justice and the ability of Australian courts to invalidate actions where they breach Australia's international obligations or the domestic law of other countries. Item 31 of Schedule 1 would amend the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)* with the intent that the decisions made under the new powers in the MPA would not be subject to judicial review.<sup>13</sup>

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<sup>10</sup> For example, Article 2(4) of the United Nations Charter, which protects the territorial integrity of states from infringements by others.

<sup>11</sup> Schedule 1, Part 1, Item 6: proposed sections 22A and 22B of the MPA.

<sup>12</sup> *CPCF v Minister for Immigration and Border Protection & Anor (S169/2014)*, submissions of the UNHCR, 15 September 2014, 2, <[http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF\\_UNHCR.pdf](http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf)>

<sup>13</sup> Schedule 1, Part 2, Item 31: proposed sections 75D, 75F and 75H of the MPA.

- 2.11 RACS holds serious concerns about the creation of new Ministerial powers that are not subject to any scrutiny by Parliament and offer very limited possibilities for judicial oversight. As such, the Bill significantly adjusts of the balance of power between the legislative, executive and judicial branches of government in relation to executive handling of asylum seekers at sea.
- 2.12 Irrespective of any view on the relevance of international law obligations, RACS believes that the Committee should exercise extreme caution in relation to legislation that proposes to allow the prolonged detention of any person in the absence of Parliamentary or judicial scrutiny.

### *Safety at sea*

- 2.13 The Bill would exempt vessels detained under the MPA from the application of the *Navigation Act 2012*, the *Shipping Registration Act 1981* and certain marine safety legislation.<sup>14</sup> This would extend to vessels on which asylum seekers are placed under section 72 of the MPA. This provision is concerning in light of the evidence of the Australian Maritime Safety Authority (**AMSA**) to the Senate Rural and Regional Affairs and Transport Committee that the stripping of emergency equipment and the capping of their fuel tanks of lifeboats used in the course of Operation Sovereign Borders, would render the lifeboats “non-compliant” with the International Convention for the Safety of Life at Sea.<sup>15</sup>

## **3. Schedule 2: Protection visas and other measures and Schedule 3: Act based visas**

### *Retrospective conversion of visa applications*

- 3.1 The potential for serious human rights violations supported by amendments elsewhere in the Bill should not distract attention from the enormous significance of the amendments in Schedule 2 to the structure and operation of Australia’s migration program.
- 3.2 The conversion mechanism provided for in the proposed section 45AA of the Act and allows valid applications for any class of visa to be retrospectively deemed invalid. The Bill purports to expressly exclude the recognition of “accrued rights” that a visa applicant might otherwise have to be granted a visa on the basis of the relevant regulations as they existed prior to the changes that caused either the invalidity of the application or the ineligibility of the applicant.<sup>16</sup>
- 3.3 This constitutes a radical change that threatens to undermine the integrity of the Migration Act by allowing the Government to render a person ineligible for a visa retrospectively, or to grant a visa with less advantageous rights or conditions, despite the applicant’s original eligibility for the preferable visa, or the application fee that was paid, or the steps that the

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<sup>14</sup> Schedule 1, Part 2, Item 31: proposed section 75H of the MPA.

<sup>15</sup> Parliament of Australia, Senate Rural and Regional Affairs and Transport Legislation Committee, Estimates, 27 May 2014, 84.

<sup>16</sup> Schedule 2, Part 2, Item 20: proposed paragraph 45AA(8).

applicant may have taken in the knowledge that he or she met all relevant criteria at the time of application.

- 3.4 The commencement provisions in Division 2 of Schedule 2 provide that the conversion mechanism would apply to applications made prior to the commencement of the amendments, allowing the Government to deem any existing visa application an application for another class of visa.
- 3.5 Legislative reforms in 1992 modernised the regulatory framework underpinning the Australian migration program by providing for codified administrative procedures for the assessment of visa applications against criteria that are clear and known to applicants. The Conversion power introduced by Schedule 2 significantly destabilises these arrangements by rendering every valid visa application potentially subject to interference and annulment.
- 3.6 In the context of protection visas, the provisions of the proposed regulation 2.08F of the *Migration Regulations 1994* have the effect that where a UMA (or other person who was not immigration cleared) makes an application for a permanent protection visa, the Minister must treat the application as an application for a temporary protection visa (TPV).<sup>17</sup> The retrospective effect of the power allows undecided protection visa applications of UMAs to be treated as if they had never been made, thereby allowing the Minister to obviate the obligation to grant the visa to an applicant who satisfies all criteria for that visa,<sup>18</sup> and to offend the reasonable expectation that the application would be determined according to the criteria.

#### *Three types of protection visa*

- 3.7 Existing law provides for one class of protection visa that may be applied for and granted under the Act. The Bill introduces two new classes, and redefines the term “protection visa” to refer to any of the three classes. As such, with the passage of the Bill the existing (Class XA) protection visa would be known as a “permanent protection visa”, and would exist alongside the new (Class XD) temporary protection visa.
- 3.8 The Bill gives effect to the Government’s intention to introduce TPVs for asylum seekers who arrive irregularly by boat or otherwise, and who are found to engage Australia’s protection obligations. The Bill also proposes to create a class of temporary protection visa called a Safe Haven Enterprise Visa (**SHEV**).
- 3.9 Permanent protection visas will continue to be available for applicants who arrived in Australia with a visa and were immigration cleared and who meet the relevant criteria, subject to the changes to refugee law (described below from 5.20), the proposed Ministerial power to cap protection visa numbers (described below at 7) and the proposed conversion powers (described above at 3.1 – 3.6).
- 3.10 Under the arrangements proposed in the Bill, TPV-holders would be prevented from applying for permanent protection visas. They would also be restricted from applying for other

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<sup>17</sup> Schedule 2, Part 2, Item 38: proposed regulation 2.08F.

<sup>18</sup> Under section 65.

substantive visas in Australia (such as business or student visas). The Bill contemplates that TPV-holders will be able to apply for subsequent TPVs but would only be granted a further TPV if they are found to continue to require protection. This would lock refugees in Australia in a cycle of applying for TPV after TPV with no pathway to permanency on the basis of protection needs.

3.11 RACS continues to oppose temporary visas for refugees. In summary, our particular concerns in relation to the currently proposed version of TPVs are that:

- Unlike the framework which existed between 1999 and 2007, it is proposed that TPV-holders (including SHEV-holders) will have no avenue for ever applying for a permanent protection visa or obtaining permanent residence in Australia on the basis of their refugee status.
- There is extensive, credible evidence that temporary visas have enormous, ongoing costs in terms of human suffering and mental health. This is most commonly caused by uncertainty of residence and the denial of family reunion for those whose spouse or children remain outside Australia (or, in the case of unaccompanied children, whose parents remain outside Australia). These costs will be mainly borne in the Australian community.
- In the current policy setting, any argument that temporary visas might deter people-smuggling ventures or prevent deaths at sea is spurious and should be subject to rigorous examination.

3.12 Problems identified in relation to the proposed introduction of the SHEV are described below at 3.32 – 3.39. However, because the benefit of a SHEV to a refugee depends entirely upon that person's ability to make a valid application and meet the criteria for the grant of another class of visa (such as a skilled visa) in the future (and because there is no pathway from TPVs on the basis of protection needs alone), our comments on temporary visas for refugees apply equally to TPVs and SHEVs.

#### *The unnecessary damage caused by temporary visas*

3.13 The proposed TPV and SHEV framework will have an extraordinarily negative psychological impact many of RACS' clients who have experienced significant trauma. The Bill threatens to keep refugees in Australia in state of flight forever. The limited duration of these visas erects significant psychological barriers to rebuilding a life in a country of refuge. Evidence from Australia's previous experience shows that TPV-holders lived with enduring and elevated anxiety due to the fear of being returned to the place in which they fear harm after the period of the validity of their temporary visa. This prevents those people that Australia has recognised as refugees from embarking upon meaningful settlement into life in Australia.

3.14 The cohort of people affected by the policy displays one of the highest incidences of trauma-related psychiatric symptoms of any group in the community. The psychiatric evidence shows that certainty of residency is an essential element for recovery from trauma-related psychiatric symptoms. The negative features of TPVs can therefore be seen to apply to precisely those people who are likely to suffer most from them.

**Example case study 1: Mental health issues associated with ongoing fear of return**

Uma is a single woman from Sri Lanka who arrived in Australia in 2011, alone with no family. She suffered greatly in Sri Lanka in the civil conflict in 2009 and was subjected to horrific instances of sexual violence by members the military. She made a protection visa application in 2012. The Minister has recognised that there is a real chance that she would suffer persecution if she were to return, recognising her as a refugee. However, she has been awaiting the outcome of security checks, which was completed in early 2013. She will now no longer have any certainty as to whether she will be allowed to remain in Australia for more than three years, and must live day to day with the prospect of being returned, compounding the trauma she has already experienced and undermining her recovery.

- 3.15 TPVs create other significant barriers to resettlement and recovery from trauma. In our experience with the previous TPV framework, although TPV-holders had work rights, many potential employers favoured the employment of permanent visa holders over those whose ongoing residence in Australia was uncertain. This gave rise to an artificially high rate of reliance on social welfare, with further ramifications for community participation, self-esteem and mental health.
- 3.16 It is for these reasons that in other countries temporary protection mechanisms are only used as a short-term emergency mechanism in response to mass influx situations that overwhelm the ordinary asylum system.

***No deterrence benefit***

- 3.17 While RACS is conscious of the rationale for successive governments' attention to policies that discourage asylum seekers from dangerous boat journeys, the grant of temporary visas to UMAs already in Australia cannot reasonably be viewed to contribute to this policy goal in the current policy setting.
- 3.18 The two years following the introduction of TPVs in 1999 saw a significant increase in boat arrivals, increasingly comprised of the spouses and children of TPV-holders who were unable to access family reunion pathways to join their family members.<sup>19</sup> In this context, temporary visas for UMAs could in fact be seen to *increase* incentives for reaching Australia by boat.
- 3.19 However, in light of the Government's current policies, little weight can be given to the view that a punitive visa policy is necessary or helpful for deterring asylum seekers from hazardous modes of travel. These policies include:

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<sup>19</sup> Senate Legal and Constitutional Affairs Committee, Answers to Questions on Notice, Immigration and Citizenship Portfolio, Budget Estimates 2012–13, 21-22 May 2012, Question BE12/0265, accessed 25 October 2014.

- mandatory third-country resettlement (applicable to unauthorised maritime arrivals from 19 July 2013, including any UMA that may arrive in Australia after the commencement of the Bill); and
- the implementation of Operation Sovereign Borders.

### *Refugee Convention implications*

3.20 The international legal basis for the legality of temporary protection for refugees is based on the fact that a person may cease to require protection after conditions in their country of origin sufficiently improve. This is recognised by Article 1C of the Refugee Convention, which attempt to define when refugee protection is no longer needed.

3.21 However, contrary to the international requirements of Article 1C, the proposed temporary visa framework would require TPV-holders to repeatedly demonstrate their need for protection, rather than placing the onus on the State to demonstrate that protection is no longer needed. By discriminating against refugees who are UMAs on the basis of their mode arrival, the framework is also inconsistent with Article 31 of the Refugee Convention.

### *Administrative inefficiency*

3.22 Temporary protection is predicated on repeated or ongoing assessment of a person's claims for protection by the Department. This necessitates an inefficient duplication of administrative costs for the Department that is difficult to reconcile with the Explanatory Memorandum's stated emphasis on the efficient processing of applications.<sup>20</sup>

3.23 For applicants in circumstances such as those outlined below in example case studies 2, 3 and 4 below at 3.26, the proposed policy may require an applicant to apply for a new visa and have their protection needs reassessed many times throughout their lifetime, creating a substantial and unnecessary administrative burden for the Government.

3.24 The experience with temporary visas for refugees in the period between 1999 and 2007 is instructive. Very few of those who were recognised as engaging Australia's protection obligations in the first instance (and therefore granted TPVs) were subsequently (upon reassessment of their protection needs at the expiry of their first TPV) found to no longer require that protection. As such, any gains that might be perceived to flow from removing asylum seekers from Australia as their protection needs diminish are likely to be marginal.

### *Perverse outcomes: those with no prospect of change or return*

3.25 The proposed temporary visa framework operates especially unfairly on those refugees whose refugee status is unlikely to change in any meaningful way in the foreseeable future. Obvious examples are stateless persons who have no prospect of return to any country.

3.26 The case studies below set out some examples of the types of situations which are typical of RACS' client base. They also illustrate the circumstances faced by many people who have been caught up in the successive series of changes to the rules for asylum seekers who arrived by boat that have occurred since August 2012.

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<sup>20</sup> Explanatory Memorandum, 2.

**Example case study 2: Withdrawal of family reunion pathways**

Maung, a stateless Rohingya man from Myanmar, came to Australia in 2012. He was found to be a refugee as part of the protection visa application process but the visa was not granted before September 2013 and the Minister declined to finalise the grant the visa thereafter. Other Rohingya asylum seekers who arrived on the same boat have now been granted permanent protection visas, but for administrative reasons, it took longer for Maung's interview to be scheduled by the Department.

Maung has no prospect of returning to Myanmar, which does not recognise him as a citizen and whose agents subjected him and his family to grave human rights abuses. With the passage of the Bill, he will have no realistic pathway to any other status in Australia, nor can he be returned to any country. Maung's wife and young son and daughter continue to be persecuted in Myanmar. Under the temporary visa arrangements, he will never be able to see his family again

**Example case study 3: Different outcomes for family groups in Australia**

A Sri Lankan family, Subramaniam, Suganthini came to Australia in 2011 with their teenage son Ravindran, their 19 year old daughter Kamelswari, and her 19 year old husband Selvam.

They were civilians trapped in the civil conflict in Northern Sri Lanka in 2009 and lost their close family members who were targeted for their involvement in political activity. The parents and Ravindran have been granted permanent protection visas. However, Kamelswari, who has also been recognised as a refugee, is still undergoing security checks. Unlike her other family members, she and Selvam will now only be eligible for TPVs, with no certainty about their future in Australia.

**Example case study 4: Separation from spouses and children overseas**

Asad, a Hazara man from Afghanistan arrived in Australia in early 2012. He was recognised as a refugee by the RRT, but has been waiting for checks with external agencies to be completed since early 2013. His family and children are living as refugees in an extremely dangerous area in northern Pakistan.

Now that he will only receive a TPV or SHEV, he has no certainty as to whether he will be sent back to Afghanistan, or whether he will ever see his family again.

***Retroactive effect***

- 3.27 The proposals contained in the Bill will have retrospective application due to the introduction of the conversion provisions described above at 3.1 – 3.6. As result, a valid protection visa application made several years ago will be taken to have been invalid from the time of application, and instead be taken to have been, and always have been, an application for a TPV. This is the case even where the applicant currently meets all the relevant statutory and regulatory criteria for the grant of that permanent protection visa.

- 3.28 Public confidence in our humanitarian program demands fair, transparent and efficient refugee status determination procedures, including rules that are clear and are followed. Many of RACS' clients have been waiting in a holding pattern for lengthy periods of time – some over three years – to have their applications processed and a decision made on their status. RACS considers that amending the Act to deny these visa applicants the visa that they applied for and are currently entitled to, despite the fact that they have met all the relevant requirements, represents a cruel undermining of the rule of the law that would not be tolerated in other sections of society.

#### ***Discriminatory impact of the proposed amendments***

As noted above, the proposed laws penalise asylum seekers on the basis of their unauthorised mode of arrival in Australia which is not in line with international law. Article 31(1) of the Refugee Convention clearly states that asylum seekers should not be penalised because of their unauthorised mode of arrival in a country where they seek asylum. This is important because the reality of displacement is that there are many different journeys that people need to make in order to find durable safety from persecution. Article 31(1) recognises that asylum seekers are often not able to engage in formal migration pathways due to the country conditions and the risk of persecution they are facing, and this is consistent with the experiences of many of RACS' clients who will be affected by TPVs.

- 3.29 In addition to those we advise and assist, RACS currently represents over 600 asylum seekers, 480 of whom came to Australia by boat. RACS has heard many of their stories and have extensive knowledge of the kinds of choices that have led to them making the difficult decision to make a dangerous sea journey to Australia. In RACS experience those who do come by boat to Australia are likely to have had few other options in terms of real or permanent protection in any other country, including en route to Australia.

#### **Example case study 5: Discriminatory treatment of UMAs**

Ali is an Afghan citizen of Hazara ethnicity and Shi'a religion. In Afghanistan was a target for the Taliban and other groups. Ali arrived by boat in Australia in late 2012. It had not been possible for Ali to apply for a visa to come to Australia from Afghanistan, or to any refugee signatory country from Afghanistan. From Afghanistan, Ali travelled to Pakistan then to Indonesia by air via Thailand, then by boat from Indonesia to Australia.

None of the countries Ali travelled through were signatories to the Refugee Convention or obligated to recognise his refugee status, and allow him to stay remain either temporarily or permanently, or to provide him with any form of protection. Although it was possible to apply for refugee status with the UNHCR in the countries Ali travelled through Ali told RACS that he had been recognised as a refugee by the UNHCR in Indonesia, but had continued to Australia, because in Indonesia he was repeatedly arrested by police was not permitted not work in order to support himself.

He sought asylum in Australia upon arrival, but has not been permitted to apply for a protection visa or otherwise have his status assessed. He has now been living in Australia for two years, with no right to work.

### *Safe Haven Enterprise Visas*

#### *No certainty provided by the Bill*

- 3.30 Despite the creation of the SHEV as a statutory visa, the Bill also introduces provisions that:
- provide that an application for visas of certain classes, including SHEVs, is not valid until there are regulations that prescribe criteria for the validity and grant of those visas;<sup>21</sup>
  - do not require criteria to be prescribed in relation to certain visas, including SHEVs;<sup>22</sup>
  - would allow the Minister to cap the number of SHEVs at zero (as discussed below at 7 in relation to Schedule 7).
- 3.31 As such, while the Bill creates an explicit power to implement arrangements to grant SHEVs, but gives absolute discretion to do so to the Minister.

#### *Problems with the SHEV in principle*

- 3.32 RACS endorses any framework under which UMAs are permitted to apply for skilled and other onshore visas. This could be achieved by the repeal of the bar on visa applications by UMAs in section 46A of the Act. However, the proposed introduction of the SHEV confuses Australia's humanitarian visa program with its skilled migration program and distracts attention from the legitimate requirement for durable solutions on the basis of protection needs alone.
- 3.33 While the details essential to the practical implications of the proposed SHEV arrangements will rely on the provisions in the regulations and the exercise of Ministerial powers, according to the Minister's second reading speech, the SHEV:
- will be valid for five years; and
  - will, like TPVs:
    - not allow for family reunion or a right; and
    - not allow re-entry into Australia after departure.
- 3.34 The Minister has stated that where a SHEV-holder meets the following conditions during the period of the SHEV, they may be permitted to make a valid application for an onshore visa (such as a skilled visa), but not a permanent protection visa:
- residence or employment in a designated regional area (which are yet to be defined); and
  - no reliance on income support for three and a half years.<sup>23</sup>
- 3.35 Importantly, even where a SHEV-holder meets these requirements and makes a valid application for another class of onshore visa, they will still need to meet the requirements for that particular visa in order to avoid the temporary visa cycle. Like TPVs, it is proposed that a SHEV prohibits an application for permanent protection visas.

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<sup>21</sup> Schedule 3, Part 1, Item 7: proposed section 46AA of the Act.

<sup>22</sup> Schedule 3, Part 1, Item 7: proposed paragraph 46(5) of the Act.

<sup>23</sup> Parliament of Australia, Second Reading speech, 25 September 2014, Scott Morrison MP (Minister for Citizenship and Border Protection).

- 3.36 In RACS' experience, while some UMAs who may be granted a SHEV clearly possess the necessary skills to qualify for a skilled visa, it is unclear how many refugees would be in a position to move from a SHEV to other onshore visas. Foreseeable obstacles for many SHEV-holders include their non-English speaking backgrounds, the lack of family or other social support structures in Australia, and the effects of trauma as a result of experiences in their countries of origin.<sup>24</sup> These disadvantages are likely to be compounded by the uncertainty of their status in Australia.
- 3.37 As such, the problems associated with the uncertainty created by temporary visas for refugees described above at 3.7 – 3.31 are not mitigated by the creation of the SHEV, and offer benefit only to those refugees who are also eligible for other types of visas.
- 3.38 Other identifiable problems with the SHEV scheme as it has been described, include the following:
- The proportion of those who may be eligible for a SHEV who arrived after 13 August 2012 will have been either in immigration detention or in the community without work rights for several years before being given the permission to work that comes with the SHEV. Predictably, in RACS' experience the effect of these conditions on the mental health, self-esteem and skills of those affected is visible and profound. In light of the restrictions on work that have denied the asylum seekers the ability to be self-sufficient during traumatic periods of their lives, the introduction of the SHEV on the basis of the Government's stated belief in "rewarding enterprise" and "earning and learning" is vexing.<sup>25</sup>
  - Many regional areas may lack both employment opportunities and access to appropriate support services, such as torture and trauma counselling.
  - It is unclear what will happen to a SHEV-holder working in good faith in a local government area that opts out (after previously self-nominating as a designated area) before the asylum seeker can complete the period required for eligibility to apply for other onshore visas.
  - The scheme is dependent on state or local governments or employers "opting in", and none may do so.
- 3.39 Australia's humanitarian visa program should be based on humanitarian principles as envisaged by the Refugee Convention, and should not discriminate between refugees on the basis of mode of arrival, and avenues for permanency in Australia should not be based on the capacity of refugees to engage in skilled migration or be confined to designated areas of the country.

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<sup>24</sup> UNHCR, Comments on New Zealand Legal Aid Quality Framework (14 October 2010) <<http://unhcr.org.au/unhcr/images/UNHCR%20Final%20Submission%20Legal%20Aid%20Quality%20Framework%2019%20Oct.pdf>>;

Refugee Council of Australia, 'Denial of Legal Advice Would Put Asylum Seekers' Lives at Risk' (Media Release, 1 September 2013) <<http://www.refugeecouncil.org.au/n/mr/130901-Legal-aid.pdf>> (accessed 24 October 2014).

<sup>25</sup> Parliament of Australia, Second Reading speech, 25 September 2014, Scott Morrison MP (Minister for Immigration and Border Protection).

## 4. Schedule 4: Fast track assessment process

- 4.1 The Bill proposes to establish a new “fast track” assessment process and gives the Minister the power to determine those who are subject to it. The Bill establishes that the scheme will affect asylum seekers who arrived by boat on or after 13 August 2012 and who are permitted to make an application for a visa after the commencement of the Bill (referred to as **fast track applicants**).<sup>26</sup>
- 4.2 Under this system, the visa applications of fast track applicants would be assessed by the Department at the primary stage. While these arrangements do not require amendments to the Act, the Minister stated in his second reading speech that primary assessments will be conducted with “shorter time frames which will be prescribed in the Migration Regulations”.<sup>27</sup> Where the Department’s decision is to refuse the application, there would be no avenue for merits review by the Refugee Review Tribunal (**RRT**). Instead the Bill proposes to establish the IAA, a statutory body that will provide a limited form of merits review for some fast track applicants.
- 4.3 RACS considers that the central difficulties associated with the fast track assessment process are:
- the denial of access to even limited merits review for certain classes of people;
  - deficient standards of procedural fairness that significantly and unjustifiably increase the likelihood of errors in decision-making;
  - the broad Ministerial power to exclude additional classes of people from merits review, without Parliamentary oversight; and
  - its discriminatory application to UMAs, which has no correlation to protection needs given that UMAs have historically been found to engage Australia’s protection obligations at high rates.

### *Limitations on access to the IAA*

#### *Ministerial power over definitions*

- 4.4 The Bill gives the Minister wide powers to personally expand both the definition of “fast track applicant” (that is, those asylum seekers subject to the fast track process) and the definition of “excluded fast track review applicant” (that is, those fast track applicants excluded from any merits review). As such, the Bill would create a Ministerial power that could be used to direct that all asylum seekers are excluded from both the RRT and the IAA.<sup>28</sup>

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<sup>26</sup> Schedule 4, Part 1 Item 1: definition of *fast track applicant*.

<sup>27</sup> Parliament of Australia, Second Reading speech, 25 September 2014, Scott Morrison MP (Minister for Immigration and Border Protection), 8. Previous Departmental policies aimed at streamlined refugee status assessment processes resulted in decision-making that was subject to a high rate of overturn on review. See for example, Australian Government, Expert Panel on Asylum Seekers, *Report of the Expert Panel on Asylum Seekers*, Canberra, August 2012, 98, Table 14.

<sup>28</sup> Schedule 4, Part 1, Item 2: proposed new paragraphs 5(1AA) and (1AB). After the passage of the Bill, the only class of protection visa applicant that could not be deemed a fast track applicant by the Minister is a child born on or after 13 August 2012 whose parent is a UMA who arrived before 13 August 2012: proposed subsection 5(1AC).

4.5 As such the Minister would have the power to decide who else may be subject to the fast track process and will also be able to expand the class of persons that will be excluded from merits review altogether. Both would be by way of a non-disallowable legislative instrument, thereby excluding Parliamentary scrutiny.

#### *No right to review*

4.6 Unlike the RRT process, fast track applicants would not have an automatic right of review, but would be referred to the IAA by the Minister, with broad classes of fast track applicants vulnerable to exclusion from any form of merits review. The proposed amendments contained in the Bill mean that the Minister may also issue a conclusive certificate excluding access to IAA review on the basis of the national interest.<sup>29</sup>

4.7 Although the proposed section 473CA requires the Minister to refer a fast track reviewable decision to the IAA removes the risk, currently upon potential RRT applicants, of failing to make an application within time,<sup>30</sup> the arrangements for referral to the IAA are attendant with risks of their own. Existing arrangements for the transfer of the application of an RRT applicant from the Department to the RRT require the Secretary of the Department to provide the applicant's file within 10 working days of notification of the review application by the RRT.<sup>31</sup> Not only does the proposed section 473CA move control from the applicant and the Secretary to the Minister, it allows the Minister an unspecified period in which to refer.

4.8 The meaning of "excluded fast track review applicant" could be expanded by the Minister by non-disallowable instrument. The Bill also defines the term to include those who in the Minister's opinion:

- are considered to have made manifestly unfounded claims;
- are considered to have provided "bogus documents" in support of their protection visa application without reasonable explanation; and
- are covered by an agreement between Australia and a country prescribed as a "safe third country";
- have a right to "re-enter and reside in" a third country, even where they also fear harm in that country; and
- have previously been refused protection in Australia, in another country or by the UNHCR.

#### *Manifestly unfounded claims*

4.9 Due to the exclusion of applicants considered to have made a "manifestly unfounded claim" RACS holds serious concerns that the Minister would have significant discretion to decide whether the Departmental decision should be subject to merits review, undermining the integrity of the decision-making process. Allowing access to merits review to be denied by the primary decision-maker would represent an alarming procedural inadequacy that would foreseeably lead to serious injustice for some applicants.

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<sup>29</sup> Schedule 4, Part 1, Item 21: proposed section 473BD.

<sup>30</sup> Section 412(1)(b) of the Act and regulation 4.31 of the *Migration Regulations 1994*.

<sup>31</sup> Section 418 of the Act.

- 4.10 The broad variety of claims and the complexity of the legal issues they raise are not easily amenable to rules that exclude certain applications. All Departmental decisions should be reviewable by an independent body even where the Minister is of the opinion that the claims are unmeritorious. In RACS' experience, the RRT often forms a different view to the Department even in cases where the primary decision-maker has found the asylum seekers' claims to be manifestly unfounded. This is represented by the high overturn rates of primary decisions the RRT for applicants who arrive by boat (85.3% in 2011-2012 and 66.4% in 2012-2013).<sup>32</sup>

**Example case study 6: Unreasonable and incorrect credibility findings**

Mohammad is a Yemeni man who arrived in Australia by boat in 2012, having fled Yemen after the discovery of his engagement in a sexual relationship with another man. Yemen maintains the death penalty for consensual same-sex sexual activity between adults. The Departmental decision-maker does not accept his central claim, on the basis that his demeanour and behaviour in Australia is "not consistent with a homosexual lifestyle". It is determined that the claim is manifestly unfounded. He is therefore an "excluded fast track applicant" and not entitled to merits review of the decision by the IAA.

*Bogus documents*

- 4.11 The Migration Amendment (Protection and Other Measures) Bill 2014, currently before the Senate, a protection visa application to be refused where the applicant provides a "bogus document" as evidence of their identity, nationality or citizenship, without a reasonable explanation or without providing or taking reasonable steps to provide other evidence.<sup>33</sup> These provisions would affect all ongoing and future protection visa applicants.
- 4.12 The Explanatory Memorandum states that a person will be assessed to determine whether they are a person in respect of whom Australia has protection obligations even if ultimately they are refused a visa based on these new identity assessments. This means that a person could be found to be a refugee through the existing rigorous process for assessing their identity, documents and credibility, but they could be subsequently refused a protection visa because an explanation they gave about a document or the reason for being unable to obtain a document is not considered to be a "reasonable explanation".

**Example case study 7: Dispute in relation to genuineness of documents**

Baher arrived in Australia from Iraq in 2013. He applies for a protection visa in 2016 and provides several identity documents including his birth certificate, citizenship certificate, Iraqi national identity card, and military service card. The Department assesses the authenticity of the documents and found them all to be genuine except for the national identity card, which is found to be a

<sup>32</sup> Refugee Council of Australia, Statistics on asylum seekers arriving in Australia, available at: <<http://www.refugeecouncil.org.au/r/stat-as.php>>

<sup>33</sup> Migration Amendment (Protection and Other Measures) Bill 2014, proposed section 91WA and amendments to section 91 of the Act.

counterfeit. The personal details in the national identity card are consistent with those in the other documents.

Peter simply responds by saying he doesn't know anything about this. The new section 91WA (introduced by the Migration Amendment (Protection and Other Measures) Bill 2014) would require the refusal his protection visa application, and the definition of "excluded fast track review applicant" would exclude him from review of the decision.

#### *Previous unsuccessful application to UNHCR or in a third country*

- 4.13 The proposed exclusion of applicants who have previously been refused protection in another country or by the UNHCR fails to take into account the implications of changes to country situations over time. Further, no regard is given to the adequacy of the assessment process in the third country or by the UNHCR, the reasons for the refusal or the prevailing conditions in the relevant country. While the assessment of a third country or the UNCHR may be taken into account in the decision-making process, it cannot be considered an appropriate basis for excluding access to merits review.

#### **Example case study 8: Significant change in country situation**

Ashraf, a Syrian man, unsuccessfully applied for refugee status while studying in Germany in 2003, at a time when serious threats were made against his family due to his father's political work. He arrived in Australia by boat in 2013.

If, in 2017 following the passage of the Bill, his application is refused for any reason by the Department, he would not be entitled to review by the IAA.

#### **Example case study 9: Significant change in country situation**

Asma, a Shi'a Iraqi woman, left Iraq in 2009. Later that year she applied for refugee status in Indonesia. Her application was refused on the basis of the increasing stability of her home area in southern Iraq.

If, in 2016 following the passage of the Bill, her application is refused for any reason by the Department, she would not be entitled to review by the IAA.

#### *Safe third country*

- 4.14 Section 91C of the Act supports a system that allows the Minister to prescribe third certain countries to which certain asylum seekers may be sent by Australia, pursuant to an agreement between Australia and the third country. This framework has previously been used to exclude certain groups from the protection visa application process, including Vietnamese refugees who had settled in China<sup>34</sup> and Indochinese asylum seekers who were

<sup>34</sup> Memorandum of Understanding of 25 January 1995 between the Department of Immigration and Ethnic Affairs (now the Department of Immigration and Citizenship) and the Ministry of Civil Affairs relating to unauthorised arrivals in Australia of Vietnamese refugees settled in the People's Republic of China, Beijing, 25 January 1995; regulation 2.12A of the *Migration Regulations 1994*.

covered by the 1989 Comprehensive Plan of Action.<sup>35</sup> The reference to section 91C in the definition of “excluded fast track review applicant” would allow asylum seekers who become subject to similar agreements between Australia and other countries to be excluded from IAA review.

#### *Right to re-enter and reside in a third country*

- 4.15 An applicant would be excluded from merits review if there was a finding at the primary level, that the applicant had the right to re-enter and reside, even temporarily, in a third country in which they have previously resided their for a continuous period of seven days or more.<sup>36</sup> This would affect applicants whose countries are subject to travel arrangements with other countries, those who have a visa to enter another country, and dual nationals, even where the applicant fears persecution in more than one country.
- 4.16 Subsection 36(3) of the Act has the effect that that Australia is taken not to have protection obligations in respect of a non-citizen if they have such a right to enter and reside, even temporarily, in a third country. This can form the basis of the refusal of a protection visa application, unless the applicant can demonstrate that there are also protection obligations in relation to the third country, or that the third country would return the applicant to harm. These exceptions to the operation of subsection 36(3) are contained in subsections (4) and (5).
- 4.17 In cases where an applicant is clearly a refugee in respect of their country of origin, and also claims to fear harm in the third country, the applicant’s eligibility for protection in Australia may rest on the consideration of what might happen if they were to return to the third country. In a situation in which the application is refused because the primary decision-maker is not satisfied that the risk of harm is sufficiently serious in the third country, the exclusion of this decision from review has the potential to cause real injustice to some applicants.
- 4.18 The exclusion of review applicants in this context also fails to recognise the important role of merits review in reviewing the very finding that the applicant has a “right” of the type contemplated by the provision that excludes them from review.

#### *Limited reviews by IAA*

##### *Statutory role*

- 4.19 The Bill sets for the IAA an alarmingly low standard of decision-making and procedural fairness. Under section 420 of the Act, the RRT (the existing mechanism for the merits review of decisions to refuse protection visa applications) is required to “pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick” and to act “according to the substantial justice and merits of the case.”

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<sup>35</sup> Steering Committee of the International Conference on Indo-Chinese Refugees, Comprehensive Plan of Action, Geneva, June 1989.

<sup>36</sup> Section 91N(2) of the Act.

- 4.20 The corresponding provision for the IAA is the proposed section 473FA, which requires, in contrast, that it “pursue the objective of providing a mechanism of limited review that is economical and quick.” Conspicuously, and unlike the RRT, the IAA would not be directed toward fairness or justice in its decision-making, nor would it be required by statute to act according to the substantial justice and merits of the case. This prescription of the IAA’s way of operating effectively lowers the minimum standard required by the IAA to make decisions without falling into error identifiable by a court as the basis for invalidating a decision.<sup>37</sup>
- 4.21 RRT Members hold a statutory office and are independent from the Department. They are appointed by the Governor-General for a fixed term, and may only be removed from office during the period of their appointment in specific circumstances specified by statute, such as “proved misbehaviour or physical or mental incapacity”. These safeguards, which help to support the independence of Tribunal members, will not be enjoyed by IAA reviewers, who instead will be appointed under the *Public Service Act 1999*.<sup>38</sup>
- 4.22 The Bill is directed at achieving the statutory objectives of economy and speed by stripping away vital procedural safeguards. It would radically confine any obligation upon the IAA to observe rules of natural justice. It would achieve this by way of an exhaustive statement of the natural justice hearing rule applicable to the IAA contained in the proposed section 473DA. This would exclude the obligation to invite an applicant to a hearing before a negative decision can be made, and confine the nature of IAA review to the same material that was before the primary decision-maker. As such, it the Bill proposes that the IAA would generally:
- not hold hearings;<sup>39</sup>
  - not allow a fast track review applicant to respond or comment on adverse information raised at the primary stage, or the reasons for the decision to refuse the application;<sup>40</sup>
  - not seek new information from a fast track review applicant;<sup>41</sup> and
  - not be permitted to consider new information provided by the fast track review applicant, other than in what it identifies as exceptional circumstances.<sup>42</sup>
- 4.23 These provisions are of serious concern to RACS. The parameters set for the IAA would permit it to function largely as a rubber stamp for Departmental decisions. In our experience it is common for protection visa applicants to experience significant difficulty in presenting their claims effectively, especially where they are unrepresented. In this context, the procedural fairness obligations that apply to the RRT are fundamental to ensuring that the fairness of the merits review process.

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<sup>37</sup> See for example, *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

<sup>38</sup> Schedule 4, Part 1, Item 21: proposed section 473JE.

<sup>39</sup> Schedule 4, Part 1, Item 21: proposed section 473DB(1)(b).

<sup>40</sup> Schedule 4, Part 1, Item 21: proposed section 473DB(1)(a).

<sup>41</sup> Schedule 4, Part 1, Item 21: proposed section 473DC(2); 473DB(1)(a).

<sup>42</sup> Schedule 4, Part 1, Item 21: proposed section 473DB(1)(a).

### *Exclusion of the natural justice hearing rule*

**Example case study 10: Importance of hearings in merits review of protection visa applications**

Basem's account of events that gave rise to his claims for protection included that he witnessed the torture and killing of his mother and his wife. At the Departmental interview he told this story with a flat affect. He received a decision from the Department in 2013 which stated:

*"The applicant's evidence at interview was unconvincing and implausible and lacked the detail or conviction of a genuine account of personal experiences and appeared to be of a rehearsed nature. His consistently detached affect at interview, is not easily reconciled with that of somebody relating a protracted dramatic and traumatic lived experience which included the torture and death of his mother and wife."*

Basem did not understand from the decision-maker that this was a proposed reason to refuse his application, nor was he given an opportunity to respond to the decision-maker's concern prior to the decision.

After the decision was explained to him, Basem understood that the primary decision-maker had found his flat affect hard to understand. He was able to obtain a supporting report from his psychiatrist, who advised that his lack of emotional reactivity was symptomatic of posttraumatic stress disorder associated with his past trauma. With the opportunity to consider both the Departmental interview and consider Basem's evidence at a hearing, the RRT accepted Basem's account of past events.

If Basem's application had been subject to the fast track assessment process, the IAA would be under no obligation to consider inviting Basem to a hearing.

**Example case study 11: Importance of hearings in merits review of protection visa applications**

Grace contacted RACS in 2013 after her application for a protection visa had been refused by the Department. When we asked her why she did not contact us previously she told us she had no idea that services such as ours existed. In Grace's home country, no such services existed, and her own government was responsible for her persecution.

RACS was able to detail, in clear English and in chronological order, the relevant aspects of her protection claims and provide that information to the RRT. Following a hearing to explore Grace's account of that information, the RRT overturned the primary decision.

If Grace's application had been subject to the fast track assessment process, the IAA would have had no obligation to consider the information that Grace provided to it, nor invite her to a hearing to test the veracity of the information.

**Example case study 12: Unassisted applicant adversely affected by inability to prepare application**

Hasan had prepared his own protection visa application. Despite having no ability to speak or write English, and despite having significant mental health problems, Hasan had managed to lodge a valid application for a protection visa. The statement he submitted describing the events that gave rise to his claims, however, was almost completely unintelligible. He had attempted to write a summary of what he believed to be relevant information in his own language, and had put it through "google translate" before submitting what he understood was an English version to the Department.

There were significant inconsistencies between what was contained in this document, and the answers he gave at his Departmental interview. Hasan's mental health problems meant that at times his responses to questions were defensive, confused and difficult to understand. He was not believed by the decision-maker and his application was refused on credibility grounds.

Hasan applied to the RRT and contacted RACS. RACS met with Hasan a number of times to ensure his claims had been properly understood. We were able to take breaks at any point when it appeared that he was not coping with our questions or was overwhelmed by the process. Hasan was also able to provide to the RRT documents he had received from psychologists over the course of his treatment in Australia, which he had not realised might be relevant to the assessment of his claims. At Hasan's RRT hearing, with the benefit of a statement which had been prepared with legal assistance, Hasan was able to explain his claims to the RRT. His circumstances were understood and his claims were accepted.

If Hasan's application had been subject to the fast track assessment process, the IAA would be under no obligation to consider inviting Hasan to a hearing. The IAA could not consider evidence in relation to his mental health as it could not be satisfied that it could not have been provided before the primary decision was made.

**Example case study 13: Failure to attend Departmental interview**

Khin is invited to a Departmental interview in relation to his protection visa application. He does not receive the invitation and misses the interview. The decision-maker proceeds to refuse Khin's application on the basis that he is not satisfied that Khin is a refugee. Under the fast track assessment process, the Minister refers his application to the IAA.

The IAA would have no obligation to invite Khin to a hearing before proceeding to make a negative decision. The review may be completed before Khin is even aware of the primary decision.

4.24 The importance of a robust system of merits review, including a hearing rule, will become increasingly pronounced upon the passage of the Migration (Protection and Other Measures) Bill 2014. That bill will introduce into the Act a new section 5AAA which expressly provides that Departmental decision-makers have no obligation or responsibility to assist an applicant with a protection visa claim and that the responsibility of specifying all relevant information and providing sufficient evidence falls upon the applicant. This provision allows a low standard for decision-making in protection visa applications, and renders unrepresented applicants especially vulnerable.

*Express exclusion of an obligation to consider new information*

4.25 The IAA would be required to review decisions based only upon the material provided by the Department when decisions are referred to it, and without referring to any “new information”. “New information” is defined as any relevant information that was not before the primary decision-maker.<sup>43</sup>

4.26 The first limitation on the ability of fast track review applicants to provide new and relevant information to the IAA is the real possibility that some applicants will not be aware that their application has been referred. The scheme provides for referral by the Minister without any obligation to notify the applicant, and for a decision by the IAA at any time from referral.<sup>44</sup> Applicants, even if notified, may not grasp the meaning of the notification of the referral to the IAA. This risk in the IAA framework would be substantially mitigated by a hearing requirement.

4.27 In conducting its limited review function, the IAA would only be permitted to consider new information where it is satisfied both that:

- there are “exceptional circumstances” to justify considering it; and
- where the applicant seeks to put forward new information, this information could not have been provided by the applicant prior to the primary decision to refuse the application.<sup>45</sup>

4.28 The restriction on the IAA’s consideration of new information other than in exceptional circumstances renders the review process inadequate and profoundly limits the scope for genuine de novo review of Departmental decisions. It is RACS’ experience that the principal reasons for which further information may arise at the merits review stage include:

- that an applicant has spoken with or been assisted by a lawyer or migration agent, and has become aware of issues that were doubted by the primary decision-maker or the inadequacies of the material previously submitted, or has received assistance in obtaining additional evidence;

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<sup>43</sup> Schedule 4, Part 1, Item 21: proposed section 473DC(1).

<sup>44</sup> Schedule 4, Part 1, Item 21: proposed sections 473CA and 473DB.

<sup>45</sup> Schedule 4, Part 1, Item 21: proposed section 473DD.

- that they were not given procedural fairness in the primary decision-making process, in that the aspects of their claim which were not accepted by the primary decision-maker were not made clear except in the written decision to refuse the application, and only then was the applicant alerted to the need for certain additional evidence or explanation; and
- that there were limitations on the personal capacity of the asylum seeker to provide all relevant information, including limited understanding of the information likely to be relevant to the visa criteria, limited in literacy in English (or in some cases, in any language), and other issues surrounding capacity to understand the application process and present their claims.

**Example case study 14: Additional evidence obtained in response to refusal**

Khaled fears persecution in his country of origin because of his role in an opposition political party. He provided with his application his membership certificate and certain photographs as evidence of his activities in the party. His application was refused at the primary level because the delegate did not believe that he in fact held his claimed role within the party.

After the decision, Khaled approached the party in his country of origin, whose leaders wrote a letter corroborating his stated role in the party. Khaled provides the original copy of the letter to the IAA, which accepts that it is genuine and that there are exceptional circumstances to justify considering it.

Khaled says he did not think it would be necessary to provide this additional evidence until he realised that his claimed profile was in doubt upon receiving the decision to refuse his application. Despite its obvious relevance, under the proposed section 473DD the IAA is not permitted to consider the letter unless it is satisfied that it could not have been provided previously.

4.29 The only statutory obligation upon the IAA to invite a fast track applicant to comment (either in writing or orally) exists where the IAA considers new information in exceptional circumstances and this new information could be used as a reason for refusing the fast track applicant.<sup>46</sup> This limited procedural fairness obligation is not sufficient. Fast track applicants should be given an opportunity to address adverse information that could be used as a reason for making a negative decision regardless of whether the information was before the primary decision-maker or arose at the review stage. This is particularly important as applicants at the primary stage are frequently not provided with any opportunity to address such concerns by the Departmental officer which means that the review stages may be the only opportunity to correct misunderstandings or further explanation. However, under the limited review framework, applicants will be denied such an opportunity (other than in exceptional circumstances determined by the IAA) which will have profoundly negative implications for the quality of the review decisions and the fairness of the process. There is significant potential for errors that have arisen at the primary stage leading to a negative

<sup>46</sup> Schedule 4, Part 1, Item 21: proposed section 473DE.

decision to continue at the review stage without any opportunity for such errors to be addressed.

#### *Withdrawal of appropriate access to legal assistance*

- 4.30 It is foreseeable that the practical injustice and risk of inadequate decision-making demonstrated by the examples above will be exacerbated by the withdrawal of publicly-funded legal assistance for those who would become fast track applicants and cannot afford legal assistance, in March 2014.<sup>47</sup>
- 4.31 As the UNHCR has observed “asylum seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country.”<sup>48</sup> This observation can be contrast with the introduction of a new section 5AAA into the Act,<sup>49</sup> which will expressly provide that decision-makers have no obligation or assist applicants in exploring their claims or specifying relevant information.
- 4.32 RACS has assisted a large number of asylum seekers who arrived by boat in Australia after 13 August 2012 and who will be affected by the Bill. We have reviewed the entry interviews of hundreds of asylum seekers in this position and it is in our opinion that it is uncommon for an asylum seeker to voluntarily and effectively answer the single question directed at them in relation to their claims: “Why did you leave your country of nationality?”. In fact, in our experience, there are some groups of asylum seekers who are unclear as to what their country of nationality is. For example, Afghan citizens who were born in Pakistan but are Afghan nationals, are commonly unaware that their protection claims are being assessed against Afghanistan and not Pakistan.

#### **Example case study 15: Confusion as to country of origin**

Mohammad is an Afghan national of Hazara ethnicity whose parents had fled to Pakistan when he was a baby. Mohammad grew up living unlawfully in Pakistan, before moving to seek a more durable solution – a country where he could live legally safely, and without fear.

RACS met him this year and prepared a written statement addressing his claims for protection. When we reviewed his entry interview, obtained under Freedom of Information legislation, it was clear that Mohammad had answered the question “Why did you leave your country of nationality?” in relation to Pakistan. In fact Mohammad had no rights whatsoever in Pakistan. As an Afghan national, his claims to protection ought properly to be assessed against his country of nationality – Afghanistan. Mohammad knows little of Afghanistan and talks only of his difficulties in Pakistan.

<sup>47</sup> Scott Morrison MP, “End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million”, 31 March 2014, <<http://www.minister.immi.gov.au/media/sm/2014/sm213047.htm>> (accessed 24 October 2014).

<sup>48</sup> UNHCR, Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards (2 September 2005) accessible at: <<http://www.refworld.org/pdfid/432ae9204.pdf>> (accessed 24 October 2014).

<sup>49</sup> Migration (Protection and Other Measures) Bill 2014.

**Example case study 16: Confusion as to the relevance of important information to protection visa application**

Abdullah is of Hazara ethnicity and was abducted and tortured by members of the Taliban while he lived in Afghanistan. If he were to return to Afghanistan today, he would certainly be killed.

RACS met him this year and helped him in preparing a written statement detailing these incidents and providing further information about his claims. When reviewing Abdullah's entry interview, obtained under Freedom of Information legislation, it was clear that Abdullah had not mentioned significant aspects of his claims, including that the Taliban came at night to his village to intimidate Hazaras, including Abdullah and his family, or the incidents of abduction and torture on the roads in and out of his village, of which Abdullah knew of many instances. When we asked Abdullah why he had not mentioned these matters during his entry interview he explained that he had not been asked about them, and that these things seemed quite normal to him.

- 4.33 The statutory scheme in Schedule 4 places excessive emphasis on administrative efficiency at the expense of fair and effective review processes, significantly increasing the risk of poor decision-making that would lead to the breach of Australia's non-refoulement obligations. There is insufficient justification for the derogation from existing procedures for the assessment of protection visa applications of UMAs, including access to de novo merits review without exclusion.

***No safety-net intervention power***

- 4.34 Like Departmental decision-makers and members of the RRT, IAA reviewers would not have the discretion to make a favourable decision where an applicant does not meet the applicable visa criteria, no matter how compelling the person's situation may be.
- 4.35 In the context of the RRT, section 417 is the so-called "safety-net" provision, by which the Parliament gives the Minister the power to grant a visa (substituting a more favourable decision) when all other avenues have been exhausted and where the Minister considers that it is in the public interest to do so. This mechanism was created by amendment to the Migration Act in 1989 in order to balance the inflexibility of visa criteria with a general discretion.<sup>50</sup>
- 4.36 The fast track framework created by the Bill provides no formal mechanism for a person who is unsuccessful at the IAA to request the ministerial consideration of unique and exceptional circumstances. Similarly, there would be no framework for referral of exceptional cases to the Minister by the IAA.<sup>51</sup> Such a mechanism ought to be viewed as more necessary, not

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<sup>50</sup> See for example, Parliament of Australia, Senate Select Committee on Ministerial Discretion in Migration Matters, 31 March 2004.

<sup>51</sup> See for example, Australian Government, Migration Review Tribunal and Refugee Review Tribunal, Tribunal Guideline 15 Referrals for Ministerial Intervention, March 2012.

less necessary, as a result of the limitations that will affect the quality of IAA review decisions.

#### *Less procedural safeguards for those more likely to need protection*

4.37 Currently, the fast track assessment process will apply to UMAs who arrived on or after 13 August 2012 for whom the section 46A bar on visa applications is lifted by the Minister after the commencement of the amendments (with the power of the Minister to expand this definition to other groups under the proposed subsection 5(1AA)).

4.38 The imposition of less rigorous processes solely for UMAs is conceptually flawed in light of the historically high protection needs of asylum seekers who have come to Australia by boat. Despite the Minister's statement that "a 'one size fits all'" approach to protection status assessment is inconsistent with a robust protection system,<sup>52</sup> the Bill would create a system that is less robust than existing procedures and direct it discriminately at a cohort of applicants for whom fewer safeguards are not in any way justified by historical data held by the Department.<sup>53</sup>

#### *Perverse outcomes: increased and inefficient litigation*

4.39 Past attempts to restrict independent merits review have led to a significant increase in judicial review applications,<sup>54</sup> many of which succeeded as a result of poor primary decision-making.

4.40 It is foreseeable that the inadequacies that may be identified in the proposed fast track framework (including the exclusion of some applicants from merits review), will stimulate increased litigation. The increased demands on our courts and flow-on effects (including delays in other jurisdictions) represent an additional reason to maintain the existing merits review framework for all protection visa applications.

4.41 Some applicants who are unfairly excluded from IAA review may seek judicial review of their characterisation as an excluded fast track review applicant. As there is no avenue in the proposed scheme for excluded fast track review applicants to make an application for judicial review of negative Departmental decisions in the Federal Circuit Court,<sup>55</sup> these applications will likely be made to the High Court, creating inefficiencies in the administration of justice.

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<sup>52</sup> Parliament of Australia, Second Reading speech, 25 September 2014, Scott Morrison MP (Minister for Immigration and Border Protection), 6.

<sup>53</sup> For example, 88% of boat arrival applicants were granted visas in 2012-2013, compared to 48.4% of plane arrivals. The proportion of applicants who were boat arrivals in 2011-2012 was 51%.

<sup>54</sup> See for example Mary Crock and Hannah Martin, "Refugee Rights and the Merits of Appeals" 32 *University of Queensland Law Review* 1, 137-155, 27 October 2013 accessible at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2346038](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346038) (accessed 24 October 2014).

<sup>55</sup> Schedule 4, Part 1, Item 21: proposed section 476 and 477.

## 5. Schedule 5: Australia's international law obligations

5.1 Schedule 5 to the Bill would codify an interpretation of elements of Articles 1A and 1F of the Refugee Convention, which describe who is and who is not a refugee. Conspicuously however, the Bill would not codify Article 33(1) of the Refugee Convention – the prohibition on the return of refugees that constitutes the central obligation of signatory states. Rather, the introduction of the proposed section 197C would constitute the reverse: an explicit authorisation of breaches of the prohibition on refoulement.

### *Non-refoulement obligation irrelevant to removal*

5.2 The most potentially serious of the human rights implications of the Bill is the return of people in need of international protection in the course of the exercise of the broadened maritime powers under the MPA and removal non-citizens from Australia under section 198 of the Act.

5.3 In relation to removal, the Bill makes it clear that in observing the obligation to remove a person who does not have a visa from Australia as soon as reasonably practicable, an officer is not bound to consider whether or not a person who is subject to removal engages Australian's non-refoulement obligations before removing that person. This includes non-refoulement obligations that arise from the Refugee Convention, Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).<sup>56</sup>

5.4 The proposed section 197C expressly authorises breaches of Australia's non-refoulement obligations by deeming them "irrelevant" to the exercise of the power to remove an unlawful non-citizen under section 198 of the Act. It not only permits the Australian Government's breach of the central obligation in the Refugees Convention (and other non-refoulement obligations); in many cases it would demand it.

5.5 The prohibitions on refoulement constitute core duties arising under the Refugee Convention, Convention against Torture CAT and the ICCPR. The overriding importance of the obligation to ensure a person is not returned to a situation of harm is recognised by the elevation of this duty to customary international law.

5.6 According to the Explanatory Memorandum to the Bill, the proposed changes are intended to overcome Australian jurisprudence which provides that the removal power is to be read in light of, and subject to, Australia's obligations in the Refugee Convention, CAT and ICCPR.<sup>57</sup> This interpretation of the Act by the Courts has prevented the Government from being able to remove asylum seekers in situations where there has not been an assessment of protection obligations in accordance with Australian law. In RACS' view, this approach affords an appropriate safeguard against people being returned to places in which they are likely to be subject to persecution, torture or other human rights violations. The independence and autonomy of the Judicial arm of Government is an integral component of

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<sup>56</sup> Schedule 5, Item 1, Item 1: definition of *non-refoulement obligations*.

<sup>57</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

Australia's democracy, and the handling of asylum seekers' protection claims should not be immune from the oversight of the Australian Courts.

- 5.7 The Government's claim that it will "continue to meet its non-refoulement obligations"<sup>58</sup> despite this change in law is untenable. The change is premised upon the efficacy of the protection visa application process and the Minister's intervention powers under existing sections 46A, 195A and 417 of the Act. It relies on these provisions as mechanisms to prevent the proposed section 197C from resulting in mandatory, frequent and flagrant breach of non-refoulement obligations.
- 5.8 Not only does this view fundamentally misunderstand international law by supposing that international legal obligations are binding on only the Executive government<sup>59</sup> (rather than upon the state as a whole), but the proposed mechanisms for continuing observance of these obligations are grossly ill-adapted to ensuring non-refoulement obligations are reliably and accountably discharged.
- 5.9 The effective compliance of non-refoulement obligations through these mechanisms is undermined by:
- the exclusion of certain asylum seekers from being able to access the protection visa application process. (Specifically, a UMA is not able to make a valid protection visa application unless the Minister considers that it is in the public interest to allow that person to do so, and the Minister has no duty to consider whether to exercise that power.);<sup>60</sup>
  - legislative limitations on when a person can request the Minister to exercise certain powers – for example, the power under section 417 to substitute a decision of the RRT for a more favourable outcome is only available where the person has had their matter decided by the RRT (and the proposed introduction of the IAA addressed above would remove this option for those who are subject to the fast track assessment process); and
  - the discretionary nature of many of the Minister's broad powers, not being subject to the rule of law or any form of review or oversight.
- 5.10 Together with the separation of the removal power from non-refoulement obligations, these features of the system on which Australia would rely in order to continue to meet its international obligations creates an exceptionally dangerous legal environment in which a UMA's protection from refoulement relies on such vague and opaque mechanisms as:
- the view that it is "not reasonably practicable" to return them to harm;
  - the view that it is in the public interest to allow them to make a protection visa application;
  - the personal decision of the Minister to grant them a visa from detention, despite any competing obligation to remove them as soon as reasonably practicable; or
  - breach of the obligation to remove them as soon as reasonably practicable.

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<sup>58</sup> Explanatory Memorandum, [1142].

<sup>59</sup> Explanatory Memorandum, 10.

5.11 Australia's international non-refoulement obligations are best identified and met by a regulated process for the assessment of protection claims which does not rely on discretionary Ministerial powers. The Minister's discretionary powers do not explicitly incorporate the non-refoulement obligations of these treaties into domestic law and are ill-equipped to ensure that situations that engage these obligations are properly identified and observed. The absolute requirement under international law not to return a person to a country where they are at risk of being significantly harmed would be entirely at odds with the absence of any positive duty on the Minister to exercise (or consider exercising) a power to intervene to prevent removal under the Act. Further, the absence of avenues for the review of the Minister's exercise of power highlights the inappropriateness of relying on it to ensure Australia's compliance with its international obligations. Having no scope for review undermines the transparency of the decision-making process and limits the extent to which compliance with non-refoulement obligations can be properly monitored.

5.12 The dangers of reliance on Ministerial intervention powers is clearly demonstrated by the Full Federal Court decision in *Minister for Immigration v SZQRB* [2013] FCAFC 33, in which the Court found that the Minister had demonstrated a willingness to remove the applicant irrespective of whether there had been an assessment of protection obligations according to law.<sup>61</sup> This Bill would gravely undermine the ability to restrain the Minister in such a situation, and thereby also remove the threat of any such restraint as a consideration in government decision-making.

#### ***Effect on non-refoulement obligations under CAT and the ICCPR***

5.13 The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, currently before the Senate, would remove from the criteria from the grant of a protection visa any protection obligations that Australia may have to an applicant under the CAT and the ICCPR.

5.14 If both the Bill and the Regaining Control Bill become law, the combined effect of the removal of the complementary protection criteria, the absence of any safety-net mechanism for ministerial intervention in the fast track assessment process (described above at 4.34), and the expansion of the removal power to disregard non-refoulement obligations, would be a Migration Act that contains no statutory mechanism for the observation of non-refoulement obligations under these international instruments.

#### ***Removing the Refugee Convention from the operation of Act***

5.15 Schedule 5 would reshape the meaning of *refugee* in Australian law. It would do so firstly by removing an applicant's status as a person "to whom Australia has obligations under the Refugees Convention as amended by the Refugees Protocol" from the criteria for a protection visa, and replacing it with a reference to a new statutory of definition of "refugee" inserted by the proposed section 5H.<sup>62</sup>

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<sup>61</sup> *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, 268 (Lander and Gordon JJ).

<sup>62</sup> Schedule 5, Part 2, Items 10 and 7.

- 5.16 Secondly, the Bill would seek to enforce in Migration Act a narrower interpretation of important aspects of the international protection obligations arising under the Refugee Convention that would exclude from protection certain classes of people that would currently meet the Convention-based definition. The Government's stated intention is to prevent the Act from being interpreted by the Courts as having the purpose of giving effect to obligations arising under the Refugee Convention.<sup>63</sup>
- 5.17 The proposed amendments amount to an isolationist approach, fundamentally at odds with the purpose of international law. Cementing the definition of a refugee into our legislation, threatens alter the definition in a way which may not be consistent with international refugee law. This would increase the risk of violating our obligations under the Refugee Convention over time. As the United Kingdom's House of Lords has observed, while the meaning of the Convention does not change, over time, its application will.<sup>64</sup>
- 5.18 RACS does not support the codification of Australia's obligations under the Refugee Convention and the narrowing of existing law in this way. The proposed statutory framework attempts to supplant Australian and international jurisprudence in key respects and excludes the role of Australian courts in interpreting Australia's obligations under Refugee Convention. In our view, the amendments proposed in this Bill are not consistent with Australia's obligation to interpret the Refugees Convention in good faith and to give the Convention a purposive construction consistent with its humanitarian terms.
- 5.19 The overhaul of Australian refugee law will displace several decades of well-settled legal concepts and principles and create new, less certain ones, including those described below. Despite the Government's intention to reduce the Courts' capacity for interpreting Australia's international obligations, it is not clear that the proposed changes would have this effect. In contrast, it is likely that the new legal definitions are likely to trigger a large volume of litigation in an already heavily litigated area of law.

#### ***Codification of "well-founded fear of persecution"***

- 5.20 Section 5J of the Bill mandates the elements which must be satisfied before a person can be deemed to have a well-founded fear of persecution, which is an element of the proposed definition of refugee set out in the proposed section 5H.
- 5.21 The Bill's codification of what constitutes a well-founded fear of persecution is reductive. It necessitates the isolation of the complex interplay of elements contained in Article 1A which, when taken together, are the circumstances in which a person can be found to be in need of international protection as a refugee. The High Court has explicitly warned that such a reductive approach raises the prospect of returning refugees to persecution.<sup>65</sup>

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<sup>63</sup> See *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41, [27].

<sup>64</sup> UK House of Lords, *Sepe v Secretary of State for the Home Department* [2003] 1 WLR 856, 6.

<sup>65</sup> See *Applicant A v MIEA* (1997) 190 CLR 225, 239-240 per Dawson J, 252 per McHugh J and 277 per Gummow J; and *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCA 41, [27].

5.22 RACS is particularly concerned by the following restrictions placed on the scope and meaning of what constitutes a well-founded fear of persecution:

- the requirement that a real chance of persecution be established in all areas of an applicant's home country, thereby doing away with the relocation principle;<sup>66</sup> and
- the introduction of an expectation that an applicant modify behaviour which could expose them to the risk of persecution.<sup>67</sup>

5.23 Underpinning both these changes as well as the proposed amendment of the definition of particular social group under paragraph 5L(1)(b) (addressed below), is a misguided and troubling approach to refugee law. This relates to the view indicated in the Bill that it should be incumbent on a refugee to take positive actions to avoid or mitigate the risks of persecution they would face in their home country. This expectation runs counter to the aims and underlying values of the Refugee Convention. The notion that individuals have a right to be protected from persecution presupposes that human beings have fundamental rights and freedoms which they are entitled to express as they see fit.

#### *Changes to the "internal relocation" principle*

5.24 The proposed changes in the Bill radically alter the "internal relocation" principle as it is currently applied under Australian law. Section 5J(1)(c) would require an applicant to establish his or her well-founded fear of persecution by proving there is a real chance of experiencing persecution in all areas of the receiving country.

5.25 The proposed changes radically depart from existing refugee law and undermine Australia's capacity to comply with its obligations under the Refugee Convention in key respects, including:

- Mandating that the well-foundedness of a person's fear of persecution be conflated with the consideration of an internal relocation option; and
- Removing the consideration of whether relocation would be reasonable in the individual circumstances of the person seeking protection.

5.26 The Explanatory Memorandum states that "a decision-maker will still be required to take into account whether the person can safely and legally access the area upon returning to the receiving country."<sup>68</sup> This statement is troubling because it is not supported by the terms of subsection 5J(1), which requires no more than the identification of an "area" of the country in which the risk of persecution is something less than a real chance in order to exclude an applicant from the new definition. If Parliament intends for the safety and legality of accessing such an area to be a relevant consideration, it should provide for this in the Act and not merely the Explanatory Memorandum.

5.27 By requiring that the well-foundedness of a person's fear of persecution be conflated with the consideration of an internal relocation option, the proposed section 5J(1)(c) undermines an

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<sup>66</sup> Schedule 5, Item 7, Part 2: proposed paragraph 5J(1)(c).

<sup>67</sup> Schedule 5, Item 7, Part 2: proposed subsection 5J(3).

<sup>68</sup> Explanatory Memorandum, [1181].

accurate and holistic analysis of whether a person is in need of protection. This is because it isolates relocation options as being relevant to the “well-foundedness” clause in Article 1A (“owing to a well-founded fear of being persecuted”), but not to the “protection” clause in Article 1A (“is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”). Although the text of the Refugee Convention does not explicitly refer to the need to consider alternative relocation options, it has generally been accepted that the internal relocation principle gives effect to both of these elements of Article 1A.<sup>69</sup>

5.28 There are negative implications arising from this approach which inflexibly anchors relocation considerations in determinations of well-foundedness. At a conceptual level, it leads to potential absurd and illogical findings. For example, if a proper assessment of an applicant’s case finds that she has a well-founded fear of being persecuted in region A, a finding that she could relocate to region B because there is effective protection in that area would not in fact negate her well-founded fear of persecution in region A. It would therefore constitute a legal fiction to find that the availability of state protection mechanisms in region B means that there is an absence of a well-founded fear of persecution. The correct and logical conclusion should be that the applicant has a well-founded fear of persecution but does fall within Article 1A because she is able to avail herself of protection (in region B).

5.29 At a more practical level, the requirement that well-foundedness relate to all areas of a receiving country places an increased burden on applicants to show that they could not live anywhere else in their country before they are able to satisfy the threshold inquiry of whether their fear is well-founded. It is on this basis that the UNHCR has explicitly criticised assessment processes that expect an applicant to show there was a well-founded fear of persecution in every part of the country:

“An ongoing practice was the restrictive interpretation in some countries of various elements of the refugee definition . . . coupled with the requirement that applicants for refugee status satisfy an excessively stringent burden and standard of proof. For example, a handful of countries rejected asylum-seekers on the grounds that, although they demonstrated a well-founded fear of persecution, they could not prove that said fear extended to the whole of the territory of their country”<sup>70</sup>

5.30 In RACS experience, refugee applicants already often face difficulties establishing the facts, circumstances and country information relevant to their claims. This extremely onerous burden would have the effect of significantly disadvantaging in protection visa application. In this sense, the impact of section 5J(1)(c) would also be inconsistent with the well-established approach to burden of proof adhered to by the RRT<sup>71</sup> and set out by the UNHCR.<sup>72</sup>

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<sup>69</sup> James Hathaway and Michelle Foster, ‘Internal protection/relocation/flight alternative as an aspect of refugee status determination’, *The Law of Refugee Status* available at <<http://www.unhcr.org/419db69d4.pdf>>

<sup>70</sup> UN Doc. E/1991/85, cited in James Hathaway and Michelle Foster, *The Law of Refugee Status*, 368.

<sup>71</sup> Australian Government, Migration Review Tribunal and Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, March 2012.

5.31 A further related criticism of the “country-wide persecution” approach relates to a recognised deterioration in the proper focus of the protection assessment:

“... conceiving the [internal relocation] issue as part of the initial inquiry into the existence of a well-founded fear of being persecuted encourages decision-makers to pre-empt the analysis of well-founded fear in the first region by moving directly to the question of an [internal relocation option]. Although UNHCR emphasizes that it is wrong to use [internal relocation] analysis to deny access to refugee status determination or as an ‘easy answer’ or ‘short-cut’ to bypass refugee status determination, situating the issue as part of the well-founded fear analysis tends to produce precisely this result. There are many examples of decision makers relying upon the existence of an [internal relocation] to dismiss a claim without considering the conditions giving rise to the well-founded fear in the region of origin.”<sup>73</sup>

5.32 The removal of references to reasonableness in considering relocation options is contained in section 5J(1)(c). The Government intention for this amendment stated in the Explanatory Memorandum is that decision-makers will no longer have to consider whether it would be reasonable for a refugee applicant to relocate to another area in the home country. The rationale for this is stated on the basis that factors currently relevant to a finding of a reasonable relocation option are considered irrelevant to the assessment of well-founded fear of persecution.

5.33 Far from being irrelevant, the factors which can currently be considered in determinations regarding the reasonableness of relocation are important in protecting a person from being returned to a country where there is a situation of potential harm. Removing this inquiry increases the risk of non-refoulement obligations being breached.

5.34 The Explanatory Memorandum’s focus on reasonableness involving considerations of whether the applicant would suffer a ‘potential diminishment in quality of life or financial hardship misrepresents the current approach to the question of whether relocation is an option for an applicant.

5.35 The High Court has endorsed the UNHCR’s guidance 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. As Kirby J stated, the supposed possibility of relocation will not detract from a “well-founded fear of persecution” where any such relocation would, in all the circumstances be unreasonable. These factors are far broader than those set out in the Explanatory Memorandum and are intended to provide decision-makers with the tools to assess whether it is in fact realistic or possible that an

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<sup>72</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* 1992.

<sup>73</sup> James Hathaway and Michelle Foster, ‘Internal protection/relocation/flight alternative as an aspect of refugee status determination’, *The Law of Refugee Status* available at <<http://www.unhcr.org/419db69d4.pdf>> (accessed 24 October 2014).

applicant could avoid being persecuted in their country. To this extent, the reasonableness test has also been referred to as a test “undue hardship” or “meaningful protection”.<sup>74</sup>

- 5.36 In RACS experience, examination of the reasonableness of relocation is not a matter of examining personal preferences, but can involve consideration of significant difficulties and dangers, as the case studies below make clear. The failure to have regard to these factors creates the risk that a person would be returned to a situation of harm, thereby breaching Australia’s non-refoulement obligations.

**Example case study 17: Relocation not reasonable for an unaccompanied child**

Abdul-Ali is a Hazara Shi’a Muslim from Afghanistan from the Jaghori District of the Ghazni Province. Before he left Afghanistan his father was killed by the Taliban, and his mother remarried and moved to another family. Abdul-Ali had no continued contact with his mother.

Abdul-Ali came to Australia as an extremely vulnerable unaccompanied child. A decision-maker initially found that while Abdul-Ali would face a real risk of persecution both in Jaghori and on the roads from Jaghori to Kabul, they found that he could live safely in Kabul and it was reasonable in his circumstances to do so.

On review it was found that that as a minor, living without family, it would not be reasonable for him to expect relocation to Kabul, because there was evidence that in Kabul, young boys without adult protection were being recruited as soldiers and sometimes as suicide bombers. There was also evidence of scarce employment opportunities and significant risk of other forms of harm.

**Example case study 18: Family violence**

Ramy is from Punjab in northern India. Ramy came to Australia as a dependant on her husband’s student visa. After living in Australia for three years, Ramy was raped violently in her workplace. She initially attempted to hide the incident from her husband because she was ashamed, but he found out when he found documents in relation to the prosecution of the attacker. Her husband considered her responsible for what happened and began to abuse her physically. An apprehended family violence order was put in place, and Ramy applied for divorce in Australia. Ramy gave birth to a baby boy shortly thereafter.

In Punjab, both Ramy’s family and her husband consider that their separation is her fault. She stated that in her culture it is unacceptable to be a victim of rape and women whose families find out about sexual assault are considered shameful to the name of the family. Both families find out about her rape and her divorce, and make threats to her life. There is evidence that the police in her region would withhold

<sup>74</sup> UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/03/04 23 July 2003, 5.

their protection due to the view that hers was a family issue. Ramy develops post-traumatic stress disorder.

The decision-maker considers “women who are victims of rape in India” constitutes a particular social group for the purposes of the Refugee Convention. The decision-maker considers evidence that honour killings against women constitute as many as 10 per cent of all murders and considers that her fear of persecution is well-founded in relation to her home area.

The decision-maker considers that while relocation will not be unreasonably harsh for most women in India, Ramy’s experience of trauma, circumstances as a single mother, cultural background, mental health, limited employment opportunities, rejection by her community, and the absence of any social network elsewhere in India, cumulatively constitute circumstances in which it is not reasonable to expect her to relocate internally in order to avoid harm.

After the amendments in the Bill, Ramy may not be able to demonstrate a risk of persecution in all areas of the country.

### *Consideration of the reasonableness to modify behaviour*

- 5.37 Section 5J(3) provides that a person will not be deemed to have a well-founded fear of persecution where the person could take reasonable steps to modify his or her behaviour to avoid persecution.
- 5.38 RACS is deeply concerned by these amendments, which we consider fundamentally misunderstand the humanitarian values underpinning the Refugee Convention. It is unacceptable to impose a duty on individuals at risk of persecution to modify or restrain themselves to avoid the real risk of harm. This places an unfair and unrealistic burden on refugee applicants to establish that they could not have mitigated the risk of persecution, where the appropriate focus of the analysis should be on the protection of an individual from that risk of persecution.
- 5.39 Further, the proposed amendments inappropriately shift the focus of the assessment of well-founded fear to what a person *could* do to avoid harm, not what they in reality *would* do in their circumstances. This is at odds with established authority which requires that the assessment of a real risk of harm is a “future looking” test which must take into account the real or likely risk of harm to individual returned to their home country.<sup>75</sup> Section 5J(3) is inconsistent with this approach in that it encourages the decision-maker to speculate about what a person may be capable of rather than what they would realistically be likely to do. This gives rise to the risk that a person would be returned to a real risk of harm on the basis that they theoretically could do something which they would in fact not do. This is in direct conflict with the High Court’s finding in *Appellant S395/2002 v MIMA* [2003] HCA 71 that it is an error for a decision-maker to assess what an applicant could or should do, as opposed to what they will do.<sup>76</sup> Consequently, the proposed section 5J(3) would in some cases render

<sup>75</sup> *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62.

<sup>76</sup> At [80] and [82].

irrelevant the actual gravity or risk of harm to a person, and therefore could give rise to the breach of Australia's non-refoulement obligations by excluding such a person from domestic refugee status

- 5.40 The proposed change also invites an inappropriate inquiry into what characteristics of an applicant can be considered fundamental to their 'identity or conscience' or are 'innate or immutable characteristics'. Apart from giving rise to unnecessary litigation on what these terms mean, section 5J(3) will impose an inappropriate objective assessment of how a person should live their life, which detracts from the central and fundamental inquiry intended by the Refugee Convention: does a person have a well-founded fear of being persecuted because of how they do or have chosen to live their life. An example of the unfair and arbitrary nature of requiring decision-makers to decide what is reasonable for a person to change could include where a person's business or profession places them at risk of harm.
- 5.41 We also note with concern that the Explanatory Memorandum refers to "inborn characteristics, which could be genetic",<sup>77</sup> and the listed examples of what this could include excludes any reference to sexuality or sexual orientation. Many of RACS' clients fear return to their country on the basis of their LGBTIQ status, and it is concerning that the proposed changes to the Act do not take this form of persecution specifically into account.

**Example case study 17: Complexity of LGBTIQ identity issues**

Nasim is a religiously conservative man from a country in which homosexuality is criminalised. He is a religious leader and holds a high profile in this country because of this. Nasim's strong religious views have made him unwilling to engage in a sexual relationship with a man but he acknowledges he has no interest in women and finds himself attracted to men. Prior to leaving his country, he spent a lot of time with another man he knows and has developed intimate feelings for him as a result.

Nasim is struggling with his sexual orientation and how to reconcile his feelings with his religious beliefs. He is afraid to return to his country because he has been accused of being a homosexual by his religious institution and has been threatened with being reported to the police.

RACS met Nasim after he had his application for protection refused by the Department. One of the key grounds for this refusal was the delegate's view that he could return to his country and avoid harm by not fulfilling his homosexual urges. This conclusion was made on the basis of Nasim's comment at the interview that 'I just want to be normal and live my life in a way God and my family can feel proud of me'. Nasim had stated that he would like to try and be a normal man and have a wife and family so that things were easier.

The RRT is currently considering Nasim's application – submissions have been made applying existing legal authority that Nasim should not be expected to act in a

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<sup>77</sup> Explanatory Memorandum, [1193].

manner which conceals or disguises his homosexuality, even if his confusion regarding his sexual orientation means that he currently feels like he wants to disown that aspect of his identity.

Under the proposed changes in section 5J(3), there is a risk the RRT could decide that Nasim could reasonably modify his behaviour to avoid harm because his confused LGBTIQ identity detracts from a finding that he would be persecuted on the basis of a characteristic which is fundamental to his identity or an innate or immutable characteristic. The complexity of the internal identity issues involved in many applicants' fearing harm on the basis of an actual, perceived or changing LGBTIQ identity is not properly accounted for in section 5J.

### *Changes to the meaning of particular social group*

- 5.42 RACS opposes the proposed changes to the meaning of 'particular social group' proposed under section 5L. The codification of this concept of refugee law restricts the definition and limits its capacity to evolve and adapt over time and remain relevant to protection needs which may arise in the future. This is inconsistent with the intention of the Refugee Convention and gives rise to the risk of breach of non-refoulement obligations.
- 5.43 RACS also holds concerns regarding the requirement for decision-makers to determine which characteristics are sufficiently 'innate', 'immutable', or fundamental to a person's identity or conscience' such that they should not be forced to renounce it.<sup>78</sup> As addressed above this inappropriately shifts the focus of a protection assessment to what a refugee applicant *should* do or be rather than what they *would* foreseeably do or be if returned to their home country. As also addressed above, section 5L will mean increased litigation on what these terms mean.
- 5.44 The effect of section 5L will create a risk of refoulement for applicants who face a real risk of harm on the basis of their membership of particular social group which is not considered by a decision-maker to have characteristics which are set out in section 5L(1)(b). An example would include individuals working in a profession or role which may be considered not to amount to being fundamental to that persons' identity or conscience, but that nevertheless give rise to the risk that the person will be persecuted because of that profession or role.

## **6. Schedule 6: Children born in Australia**

- 6.1 Under section 46A of the Act, asylum seekers who enter Australia by boat without a valid visa are unable to make a valid application for any class of visa, including for a protection visa, without the personal intervention of the Minister. Until 1 June 2013, this restriction applied to "offshore entry persons", who were defined by their place of arrival. The *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* amended the Migration Act to expand this restriction to all people that became unlawful non-citizens by "entering Australia by sea".

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<sup>78</sup> Explanatory Memorandum, [1217].

- 6.2 The existing section 5AA(2) of the Act provides that a person “entered Australia by sea” if they entered “except on an aircraft” and the legislation does not explicitly address the status of Australian-born children of who are unlawful from birth. In *Plaintiff B9/2014 v Minister for Immigration* [2014] FCCA 2348, the Federal Circuit Court found that the relevant provisions had the effect that Australian-born children of unlawful non-citizens could also be UMAs under the Act.
- 6.3 In RACS’ view, there are several significant factors supporting the position that babies born in Australia should not properly be regarded as unauthorised maritime arrivals, and ought to be permitted to apply for a visa.
- 6.4 The consequences of a decision that an Australian-born baby is a UMA is the child’s lengthy and arbitrary detention, the inability to make a valid visa application in Australia and transfer to a regional processing country under the removal and transfer powers contained in Part 2 Division 8 of the Act. A baby’s detention in Nauru or Manus Island is likely to be arbitrary and to constitute a violation of an extensive range of human rights instruments and international obligations. In addition to the international legal implications, in light of a child’s health and developmental needs, no child should be held in restrictive detention for an indeterminate period.
- 6.5 The reference to the maintenance of family unity under the ICCPR in the Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum is disingenuous and offensive to the spirit of the ICCPR, not least of all because the Centre for Civil and Political Rights has repeatedly found violations of Articles 9(1) and 9(4) in relation to Australia’s policy of mandatory detention of UMAs.

## 7. Schedule 7: Caseload management

### *Cap on protection visas*

- 7.1 Schedule 7 to the Bill contains amendments that would allow the Minister to place a limit on the number of protection visas that may be granted in a programme year and suspend the processing of protection visa applications by legislative instrument.<sup>79</sup> As such, if the Bill becomes law, it would be lawful for the Minister to set limits that result in the grant of no protection visas of any class at any time.
- 7.2 The amendments in this schedule seek to overcome the outcome in *Plaintiff S297/2013 v MIBP* [2014] HCA 24 whereby the majority of the High Court found that the power to cap visas under section 85 of the Act did not apply to protection visas, due to the competing obligation under section 65A of the Act to decide protection visa applications within 90 days.<sup>80</sup> The case considered not a decision to refuse an application for a protection visa, but rather the Minister’s refusal to make a decision on a protection visa application in circumstances in which the merits of the application were not in dispute.

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<sup>79</sup> Schedule 7, Part 1, Item 4: repeal of section 65A; amendments to section 84 of the Act.

<sup>80</sup> Explanatory Memorandum, 221, [1449].

7.3 The Court resolved that conflict by finding that section 85 could not apply to protection visas. In that case the Court held that the Migration Act in a number of respects “treats applications for protection visas differently from other classes of visas”.<sup>81</sup> This was made clear in *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25<sup>82</sup> where the High Court similarly observed:

“protection visas were not created for purposes relevant to a migration program of the kind amenable to management by the powers covered 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).”<sup>83</sup>

7.4 The legislative origins of the existing section 65A (and the equivalent section 414A for the RRT) also reflect the special purpose of protection visas in the Act. The rule was introduced by the Howard Government in the *Migration and Ombudsman Legislation Amendment Act 2005* in order to improve the speed and transparency of protection visa decision-making by the Department and the RRT.<sup>84</sup> The introduction of the 90-day rule recognised that in the absence of such an obligation, the Minister would have an unchecked power to arbitrarily delay protection visa decisions, with the potential to undermine the intention that the protection visa framework give effect to Australia’s Refugee Convention obligations. It further recognised the importance of timely resolution of requests for refugee status determination.

7.5 While pressures on the capacity and resources of Department may render the 90-day rule difficult to satisfy in certain circumstances, the imperatives that led to its introduction have not changed.

7.6 Contrary to the statement in the Explanatory Memorandum that the 90-day rule is no longer an effective mechanism to achieve the flexible, fair and timely resolution of a protection visa application,<sup>85</sup> RACS is of the firm view that problems flowing from delays in protection visa decision-making will not be improved by placing those delays beyond the view of Parliament or the community and beyond the realm of judicial consideration.

7.7 Further, the Ministerial powers to suspend protection visa processing and cap protection visa grant numbers, as proposed by Schedule 7, is incompatible with a good faith implementation of Australia’s international legal obligations under the Refugee Convention. Australia’s legal obligations to refugees are not amenable to selective observation, yet the establishment of a

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<sup>81</sup> *Plaintiff S297/2013 v MIBP* [2014] HCA 24 at [64].

<sup>82</sup> *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25.

<sup>83</sup> *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25, at [36].

<sup>84</sup> Parliament of Australia, Migration and Ombudsman Legislation Amendment Bill 2005, Second Reading Speech, 2 November 2005, Mr John Cobb (Minister for Citizenship and Multicultural Affairs).

<sup>85</sup> Explanatory Memorandum, [451].

power to suspend protection visa processing would undermine the integrity of the entire protection visa framework by conferring upon the Minister the sweeping power to determine whether any protection visas are granted at all. As such, Schedule 7 would effectively provide the Minister with extraordinary personal control over implementation of Australia's international legal obligations through protection visas, with limited parliamentary or judicial scrutiny. The potential limitation on judicial scrutiny is not least of all because the Bill would allow the Minister, by relying on the Minister's own legislative instruments, to resist an order of mandamus to consider a valid protection visa application according to law (and to make a decision under section 65).

- 7.8 Separately, the existing sections 91Y and 440A of the Act require the Minister to report to Parliament in relation to protection visa applications that are not decided within the 90-day requirement. The Explanatory Memorandum cites the "resource-intensive reporting" requirements as a key driver for the proposed abolition of the 90-day rule.<sup>86</sup>
- 7.9 Breach of the 90-day obligation is currently the rule more often than the exception. Our clients regularly experience delays of more than 300 days between application (or remittal to the Department) and decision. Many of RACS' clients applied for protection visas in mid-2012 and are yet to receive a final decision. Those applicants' frustration and anguish at their uncertain status must be weighed against the inconvenience caused to the Minister by the reporting requirements and the accountability measure that they represent.
- 7.10 Indeed, it is the Minister's intentional and ongoing breach of section 65A that has resulted in the failure to grant a protection visa to any UMA since September 2013, including those whose applications had been ongoing for several years, and who long ago met, and continue to meet, the relevant criteria. This failure to comply with section 65A has resulted in prolonged uncertainty of thousands of protection visa applicants, and the arbitrary and ongoing detention of many others.
- 7.11 This power to suspend processing applications is inconsistent with Article 31 of the Refugee Convention, which prohibits the imposition of penalties on a refugee on the basis of arrival without a visa. The reference in the Minister's second reading speech to the necessity of the capping powers in order to "achieve a more effective and responsive approach to different caseloads" appears to be directed precisely at ensuring that the Migration Act authorises similarly discriminatory actions in the future.
- 7.12 In RACS' view, it may be reasonable for those who consider that there is a compelling argument that the 90-day rule is too onerous on the Minister to support an extension of the 90-day period (to create a 180-day rule, for example). However, the alternative proposed in Schedule 7 is to create a Ministerial power to neither consider nor grant any protection visas whatsoever, irrespective of the number of applicants who meet all relevant criteria.

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<sup>86</sup> Explanatory Memorandum, 13.

## 8. Closing remarks

- 8.1 In RACS' view, this Bill constitutes a significant repudiation of Australia's international non-refoulement obligations and authorises other human rights violations under Australian law, as well as undermining existing processes for assessing protection claims and offering durable protection to refugees in Australia.
- 8.2 RACS does not support any of the amendments proposed in the Bill.

*This submission is an example of how community legal centres utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether. Federal Government changes to Community Legal Services Program funding agreements in mid 2014 restrict policy and law reform that community legal centres can undertake with Federal Government funds. These restrictions have the potential to deprive Government and others from valuable advice and information and reduce efficiency and other improvements in the legal system. For more information please see <http://www.communitylawaustralia.org.au/law-reform-and-legal-policy-restrictions/>*

## **9. Summary of RACS' position**

### **Schedule 1: Amendments relating to maritime powers**

RACS opposes the creation of new Ministerial powers which would not be subject to any scrutiny by Parliament and with very limited possibilities for judicial review.

### **Schedule 2: Protection visas and other measures and Schedule 3: Act based visas**

RACS continues to oppose temporary visas for refugees. We note that:

- The proposed version of the TPV is more punitive than the framework which existed under the Howard Government.
- In the current policy setting, any argument that TPVs might deter people-smuggling ventures or prevent deaths at sea is spurious and should be subject to rigorous examination.
- There is extensive, credible evidence that TPVs have enormous, ongoing costs in terms of human suffering and mental health. These costs will be mainly borne in the Australian community.

The Bill places no obligations upon the Government in relation to the introduction of Safe Haven Enterprise Visas, and what has been proposed confuses skilled migration with humanitarian protection based on international obligations.

### **Schedule 4: Fast track assessment process**

The fast track system would mean that Australia would be at high risk of returning asylum seekers to countries where there is a real chance of persecution due to the inadequacy of the merits review process. This is especially likely given the limited access to legal assistance for financially disadvantaged asylum seekers who are often survivors of torture and trauma and the complexity of Australia's immigration laws.

RACS' experience is that there can be plenty of good reasons why new information should not be excluded from merits review in a refugee status determination process.

### **Schedule 5: Australia's international law obligations**

RACS does not support the codification of Australia's obligations under the Refugee Convention. We believe the proposed statutory framework attempts to supplant Australian and international jurisprudence and amounts to an isolationist approach, fundamentally at odds with the purpose of international law. Consequently, the proposed changes create a risk of Australia breaching its non-refoulement obligations.

### **Schedule 6: Children born in Australia**

Babies born in the Australian migration zone should not be classified unauthorised maritime arrivals and should not be subject to transfer to Australia's offshore detention centres.

RACS opposes the indefinite mandatory detention of children and we oppose offshore detention and resettlement of infants and children in PNG or Nauru. We oppose the use of remote locations of detention for families and children for any length of time.

### **Schedule 7: Caseload management**

RACS believes that capping protection visas is not a good faith implementation of Australia's international legal obligations under the Refugee Convention. RACS supports a refugee status determination process which is just, economical and quick. We support maintaining the requirement that decisions be quickly, namely within 90 days of application.